

Eric's LTD Update - Summer 2020

Date: Summer 2020

I hope that everyone reading this is healthy and has coped relatively well during this pandemic. I know many of you have been heavily impacted: childcare issues, cancelled dream vacations, weddings (including in one case a lawyer's own!) and other big social events, lost school graduation ceremonies for your children...the list is endless. I feel badly for everyone who has been impacted and only wish it had not happened. My family has been quite fortunate as both sons in University have kept their very good summer jobs and my wife and I had a very light travel/social calendar in 2020. COVID-19, with the closure of most courts for extended periods, has also impacted this update as there are very few cases to report. The cases I can comment on in this update relate to misrepresentation and date of diagnosis. While not LTD specific, they do have applicability to certain LTD situations. While I know of some LTD specific cases in the Court pipeline, they remain stuck there.

Hopefully by the time of my next update our Courts, and our lives, are more or less back to normal. Until then, stay well and I look forward to seeing you (via Zoom or Webex, or maybe even in person!)

Please keep sending me case law as this allows me to fulfill the purpose of this update: to present you with all decided cases so that you can either pound the counsel table with cases supportive of your position, or think up ingenious ways of distinguishing cases which are unfavourable to you.

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A) Date of Diagnosis

Manley v. Manulife 2020 ONSC 399 (CanLII) (O.S.C.J.)

Approximately 2 months after writing Manulife to cancel his critical illness policy, the insured (“M”) was diagnosed with kidney cancer. M argued that as his condition (the tumour) had been slowly growing inside him for years, it “arose” before the policy had been cancelled and the benefit was payable. Manulife countered that the condition was not diagnosed until after the policy cancellation and brought a motion for summary judgment.

Held: For Manulife. The policy terms specified that the benefit was payable when an insured suffers a diagnosis, and the motions judge did not find this term ambiguous. (Eric’s note: Query whether this reasoning of when a condition arose cannot be applied to other areas of LTD insurance, such as pre-existing condition exclusions).

B) MISREPRESENTATION

Kulp v. Cumis Life Insurance 2019 313 A.C.W.S. (3d) 828 (O.S.C.J.)

The insured, in response to a supplemental health question posed during a telephone interview by a CUMIS Life tele-underwriter regarding an application for life insurance, advised that he thought his A.I.C. reading, a key indicator of diabetes control in a patient, was 7.5 or 7.7 (which indicated good control). After the insured’s death it was discovered that the A.I.C. reading was actually 10.5 (which indicated poor control). Cumis Life brought a motion for summary judgement that the policy be declared void due to material misrepresentation and that there was no genuine issue requiring a trial.

Held: Motion dismissed. Nothing in the evidence challenged the fact that the deceased told the truth as he understood it. The fact that the tele-underwriter phone call was conducted with the insured while the insured was driving did not impress the judge, who also found the question ambiguous. In the circumstances (which included the insured advising that he used Metformin and had had a previous application for life insurance denied due to his diabetes), the judge found that the insurer should have made further inquiries, including obtaining its own blood sugar test of the insured, and that there was a triable issue for trial. (Eric’s note: the consequences of an insurer not taking further steps to satisfy any underwriting concerns is consistent with the case of Fidei Estate v. Sun Life, which is commented upon at page 252 of Disability Insurance Law in Canada Second Edition.)

Mohammad v. Manulife 2020 ONCA 57 (CANLII), on appeal from 2019 ONSC 3386

A motion for summary judgment had determined the plaintiff entitled to the proceeds of a life insurance policy where the deceased (“M”) did not disclose his past life as a Palestinian terrorist who had been involved in a hostage taking which had resulted in the death of an Israeli citizen. M came to Canada using a fraudulent alias which was how he obtained his social insurance number. The motions judge held for the plaintiff since the application form did not ask about either M’s criminal history or his immigration status/citizenship and since there were no such questions M had not misrepresented and Manulife had “signaled that these issues were not material.” Manulife appealed.

Held: For Manulife. The Court of Appeal found that s. 183 of the Insurance Act requires the disclosure of every material fact within an applicant's knowledge. The absence of specific questions on the application form did not discharge M from his common law obligation to disclose every material fact (*Carter v. Boehm*; *Vrbancic v. London Life*). Given that M withheld this information intentionally, the test for fraudulent misrepresentation had been established by Manulife. M knew that his life would be in danger if he were to be deported back to the Middle East.

ACKNOWLEDGEMENTS

Eric would like to thank Gordon Jermane of Manulife Financial who forwarded case law included in this update.

To look for available mediation dates or to book a mediation with Eric, visit:

*<https://www.blaney.com/schjerning-mediation>, or simply e-mail Eric at:
eschjerning@blaney.com*

For any questions on these, or other LTD case law, or if you have a case you wish to share, please e-mail eschjerning@blaney.com.

The information contained in this article is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.