

Eric's LTD Update - Fall 2020

Date: Fall 2020

INDEX

[A\) Own Occ/Any Occ. Disability, Commensurate Earnings, Mental Distress Damages](#)

- [Kardaras v. Sun Life](#)

[B\) Jury Trials](#)

- *Belton v. Spence*

[C\) Limitation Periods](#)

A) OWN OCC/ANY OCC. DISABILITY, COMMENSURATE EARNINGS, MENTAL DISTRESS DAMAGES

[Kardaras v. Sun Life \(2020\) ONSC 3935](#)

The plaintiff (“K”) had worked as a Project Leader at Apotex and received LTD benefits for just over 1 year based on major depressive disorder. K made a gradual return to work attempt but maxed out at 3 days per week as her treating psychiatrist felt her symptoms worsened as her hours increased. LTD benefits were terminated as of the date K was originally scheduled to return to work full-time.

Held: LTD benefits were deemed payable to the end of the own occ period but NOT into the any occ period. “K’s continuing to work at her own occupation at reduced hours and pay was sufficient to meet the requirement of an occupation comparable in status and reward to her occupation prior to disability and at 73% of pre-disability earnings met the test set out in Disability Insurance Law in Canada (Second Edition) (hereinafter “DIL”).” The Court further held that \$10,000 in mental distress damages were payable because Sun Life had not assessed the claim in a reasonable and balanced manner. However, no aggravated damages were payable since K was earning income from working 3 days per week and so did not suffer the financial stresses usually encountered by LTD plaintiffs where aggravated damages flow from the denial of benefits.

Eric's Comments:

Any LTD counsel with minimal trial experience can glean 6 key learnings from Justice O'Brien's reasons which experienced LTD trial counsel will know ring true, namely:

- i. An impressive treating psychiatrist will almost invariably trump (query whether Donald has forever ruined the use of the word trump) any other physician or psychologist in psychiatric based claims. See paragraphs 30 and 31 of Justice O'Brien's decision where the judge found Dr. S's evidence compelling, found his 30 years of experience and Chief of Psychiatry credentials impressive and described his testimony as "firm and unshaken." (But note that the treating psychiatrist must be an excellent witness for this rule of thumb to apply. If the treating psychiatrist is not an excellent witness a defence medical psychiatrist can easily win the day. See *Conte v. Canada Life* (page 84) and *Sanders v. Clarica Life* (page 85) in **DIL**.)
- ii. Evidence of an in-house medical consultant rarely finds favour with a trial judge since they "are part of the insurer's claims management team, do not see patients, never met K, and has not worked in a hospital setting in 20 years." (paragraph 42)
- iii. Evidence of co-workers can be quite helpful to plaintiffs. See paragraph 56 "K was not bubbly and happy as before but was generally sad" and paragraph 57 where K's Supervisor testified he no longer gave K many tasks normally given to a Project Leader because they "were too much for K to handle."
- iv. "grocery shopping surveillance" evidence will not win the day for an insurer (unless it directly contradicts plaintiff's evidence that they are housebound, cannot drive, etc.)
- v. K working only 3 days per week was not a lifestyle choice but to maintain work life balance which Justice O'Brien held meant being able to cope with her life and avoid a medical crisis. While not cited in Kardaras, Justice O'Brien's obiter re K needing to be able to maintain a life while simultaneously being able to work at her job was also raised in the case of *Teskey v. Great West Life* which is referred to on page 59 of **DIL**.
- vi. Justice O'Brien provides good summaries of the duty of good faith and mental distress damages and held in part as follows:

I agree with Sun Life that Ms. Kardaras has not proven the type of mental distress that is usually associated with disability contracts. Disability insurance contracts are typically considered to be "peace of mind" contracts. They provide peace of mind by providing the insured with the knowledge of income security in the event of a disability. The Supreme Court of Canada has said that the "intangible benefit provided by such a contract is the prospect of continued financial security when a person's disability makes working, and therefore receiving an income, no longer possible": Fidler v. Sun Life Assurance Co. of Canada, 2006 SCC 30, at para. 57.

I also agree with Sun Life that in the context of a disability insurance contract, in which the duty of good faith is an implied term, a breach of the duty of good faith does not ground an award of aggravated damages. However, contrary to Sun Life's position, it can ground a claim for mental distress damages. According to Fidler, at para. 52, "true aggravated damages" are not awarded under the general principle of Hadley v. Baxendale, but rest on a separate cause of action, usually in tort. However, mental distress damages arise out of the contractual breach itself. They are awarded under the principles of Hadley v. Baxendale and are based on the parties' expectations at the time of contract formation. As set out in Industrial Alliance v. Brine, in the context of a contract for insurance, the insurer's duty of good faith is an implied term of the contract. It is within the reasonable contemplation of the parties at the time of contract formation that a breach of this implied term may cause mental distress. Further, mental distress arising from a breach of the duty of good faith may be considered reasonably foreseeable. Although not in the insurance context, the Ontario Court of Appeal applied this approach in Tim Ludwig Professional Corporation v. BDO Canada LLP, 2017 ONCA 292, at paras. 60-61, 69.

While many of the trial tips from Kardaras were beneficial to the plaintiff, the irony of the decision likely rests in the fact that the total award was a modest \$12,000 in own occ benefits plus \$10,000 in mental distress damages.

B) JURY TRIALS

Belton v. Spence (2020) ONSC 5327

While jury trials in LTD cases are rare they are allowed. (see Chapter 12 in **DIL**). While *Belton v. Spence* is not an LTD case it did see a defendant's jury notice struck since the prejudicial effect to the plaintiff to a further delay in trial outweighed the defendant's right to a trial by jury.

"The parties are ready for trial. But for the pandemic, the trial would have proceeded in October 2020. The events that gave rise to the action are already a decade old. The defendant's right to a trial by jury, is outweighed by the need to provide the plaintiff with more timely access to justice."

In any event will civil jury trials soon be a thing of the past?

See the opinion column by Laura Hillyer (President of the Ontario Trial Lawyers Association) in the September 15, 2020 edition of *The Globe and Mail*.

In her article titled *It's Time to Get Rid of Civil Juries* Ms. Hillyer writes in part:

...the civil jury system in Ontario is broken. There was a significant backlog in civil cases even before COVID-19. ... Criminal and family cases receive priority for court time. As a result civil matters have become bogged down by delay. The length of time it takes to have a jury trial has led to an even greater backlog England has not had civil juries for 30 years This situation led Justice F.L. Myers of the Ontario Superior Court to comment in a 2016 decision that "jury trials in civil cases seem to exist in Ontario solely to keep damages awards low in the interest of insurance companies ...".

The right to a jury trial should be reserved for a small subset of cases, such as those that trigger the public interest or where community values are at stake...”

C) LIMITATION PERIODS

A reminder to all counsel. Due to COVID-19 the Government of Ontario suspended the operation of limitation periods effective March 16, 2020. The Regulation has been revoked effective September 14, 2020. This would suggest that any limitation period that was running on March 16, 2020 or commenced to run on March 16, 2020 through September 14, 2020 has been extended by 182 days. The phrase “revoked” in the new Regulation has been read by at least one of Eric’s law firm litigation partners as possibly meaning that the March 16, 2020 Regulation no longer has any effect. Most lawyers, however, feel that limitation periods have all been extended by 182 days but that the grace period is now over. To be completely free from doubt plaintiff counsel may decide not to include these 182 days when calculating limitation periods.

ACKNOWLEDGEMENTS

Eric would like to thank Rob Konduros and Tim Alexander who forwarded case law included in this update.

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.

*Eric Schjerning is a mediator with 8 years of experience mediating LTD and other insurance disputes, a former litigator with 3 decades of LTD trial work, and the author of 2 editions of the book *Disability Insurance Law in Canada*.*

To look for available mediation dates or to book a mediation with Eric, visit: <https://www.blaney.com/schjerning-mediation> or simply email Eric at: 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.