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ERIC'S LTD UPDATE

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Eric Schjerning is a mediator with over 14 years of mediating LTD and other insurance disputes, a former litigator with over 3 decades of LTD trial work, and the author of 3 editions of the book **Disability Insurance Law in Canada**.

To look for available mediation dates or to book a mediation with Eric, visit **Schjerning Mediations** or simply email Eric at: **eric@schjerningmediations.com.**

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What's New at Schjerning Mediations?

Three cases to report on to start off the new year together with the latest on the proposed changes to the Ontario Rules of Civil Procedure. As usual this update will be posted on my website, where it will join other updates containing all case law since the Third Edition of my book was published. To access the 850 odd cases in *Disability Insurance Law In Canada, Third Edition,* click here.

My mediation booking calendar is that used by members of the Canadian Academy of Distinguished Neutrals. You may book a mediation via my website or simply email me at eric@schjerningmediations.com.

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A. Update on changes to the Ontario Rules of Civil Procedure

The latest proposal would see lawsuits split between Summary stream matters where the value claimed is less than 500K and where no oral examinations for discovery would be allowed; and Trial stream matters involving lawsuits seeking over 500K in damages and where "focused examinations for discovery" of up to 90 minutes would be allowed.

Query where a lawsuit claiming for example only 200K in punitive and aggravated damages but where the monthly LTD benefit is 10K would fall. At the date the lawsuit is served the value claimed would be well under 500K but by the date of trial LTD arrears plus extracontractual damages would put it over 500K. Would a motion be required to determine under which stream this lawsuit would fall? If so this would be highly ironic since the driving force behind these proposed changes to the Rules was apparently judges complaining about the high volume of discovery motions coming before them.

Seemingly now forgotten in these Rule changes is the proposal that mediators would be required to file a mediator report setting out which party was to blame for a mediation failing. This proposal seems to have gone the way of the Dodo bird, the Woolly Mammoth and discovery plans.

B. Scope of Release: *Czernewcan v. Blue Cross Life Insurance Company of Canada and John Doe Corporation*, 2025 SKKD 76

The plaintiff was previously employed by two companies that carried on joint trucking operations. When his employment was terminated in 2016, the plaintiff filed complaints to challenge his termination under the Canadian Human Rights Act and the Canada Labour Code.

He subsequently brought action for LTD benefits versus Blue Cross which provided Group LTD insurance for one of the joint employers. The Court held in part: *"The claim against Blue Cross was based partly on the Plaintiff's successful request for LTD benefits prior to losing his job… Blue Cross now contends that the Release signed to settle the Human Rights and Labour Code complaints extends to it as well and that the plaintiff's action should be struck as an abuse of process."*

HELD: For the plaintiff. After extensive analysis of the doctrine of privity and how this impacts third parties (i.e. Blue Cross) to a Release involving an employer, the Court concluded that the word "benefits" was not expressly defined in the Release. The Court opined this: *"begs the question whether it refers only to such benefits as paid vacations or vehicle allowances or whether it also includes benefits covered under an insurance policy wholly paid for by the employer. As the matter was not free from doubt, it necessarily follows that the plaintiff's claim cannot be struck as an abuse of the Court's process."*

C. Punitive Damages: *Fan v. The Canada Life Insurance Company*, 2025 Provincial Court of British Columbia File No. 2373620

The plaintiff sought 35K for the cost of upper and lower dentures and for a bad faith denial causing mental distress and damages. A portion of the plaintiff's claim had been paid although there was an error in which policy provision should be applied to reach the policy maximum. The plaintiff sought to be compensated for psychological upset as per *Mustapha v. Culligan of Canada*. The Court dismissed the plaintiff's claim as Canada Life did not act in a malicious, high-handed or intentional manner to do harm to the plaintiff.

Obviously a Small Claims Court claim dealing with dentures is not precedent setting. But finding no punitive damages even though there was an error in applying a policy provision is somewhat at odds with LTD case law awarding punitive damages for sloppy claims handling and claims going off the rails (see for example *Branco v. American Home*, and *P.C. v. RBC Life* as set out in Chapter 12 of Disability Insurance Law in Canada, Third Edition.

D. Ontario Life Insurance Act sections 180 and 184: *Scott Trebell v. The Canada Life Assurance Company et al.*, 2025 ONSC 2884

Concerned the applicability of s. 180 of the Insurance Act re a policy not taking effect if there was a change in insurability between the application's completion date and the date of delivery of the policy. The life insured had medical attendances for rectal bleeding during this period and was eventually diagnosed with colon cancer.

Canada Life's position was that the beneficiary's summary judgment motion should fail, unless s. 184(2) (the misrepresentation section) precludes reliance on s. 180(1) to argue a change in insurability. Canada Life's medical director testified that had Canada Life been aware of the life insured's symptoms it would have postponed the policy's taking effect until after the plaintiff's cancer diagnosis was revealed and at the very least a triable issue existed.

There is too much detailed analysis by the Court of sections 180 to 189 of the Insurance Act and the legislative intent of such sections to do justice here.

But in granting the motion for summary judgement the court held in part as follows:

> *… the implication in s. 180 (1)c that an insurer can count on a policy's not taking effect if there has been a change in insurability during the brief interval between policy application and policy delivery suffers from the absence of a mechanism for discovering that non-occurrence during the life insured's lifetime. Glancing three and four sections later, the legislature codifies such a mechanism in ss. 183 and 184, by allowing the insurer to void the policy for disclosure breaches….one must strongly question why the legislature would reserve an escape route for the insurer without time limit for innocent non-disclosure or misrepresentation….Consequently, I decline to interpret s. 180(1) as permitting an insurer to refuse to acknowledge that a life insurance contract took effect beyond the immediate aftermath of policy delivery. The fact that no time limit is defined could be a defect in the legislation, but the court's role is to read it and not to rewrite it. In practice, I fail to see how the insurer could contest the coming into effect under s. 180 beyond the two year contestability period for material misrepresentations and non-disclosures under ss. 183 and 184.*

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If you have any questions about LTD law, have a new case you wish to share, or have a mediation you wish to book, please email me at eric@schjerningmediations.com.