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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.**

Eric Schjerning **Schjerning Mediations Ltd.**

What's New at Schjerning Mediations?

At every mediation I have done in the past three weeks, everyone laments how quickly the summer went by and how can it already be September? But mid-September it is, the kids are back to school and work is gearing up, so time for another LTD update. 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 in 2023. 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.

INDEX

A) Change of Insurability s. 180(1)(c) of the *Insurance Act*: *Trebell v. The Canada Life Assurance Company*, 2026 ONCA 481

B) Misrepresentation - Third Party claim versus Insurer based on alleged acts of agent: *Millar v. Rebelo et al. (Beneva and Dynacare Insurance as Third Parties),* 2026 ONSC (Unreported)

C) Deductibility of LTD settlement from tort claim: *The Estate of Ivo Lepan v. Lofranco Chagpar Barristers et al.*, 2026 ONSC 4855

A. Change of Insurability s. 180 (1)(c) of the *Insurance Act*: *Trebell v. The Canada Life Assurance Company*, 2026 ONCA 481

The life insured applied for a policy in July 2014. Between application and policy delivery in late September 2014, the life insured experienced worsening colon-related symptoms, received treatment, and underwent medical investigations, including having a colonoscopy booked for early December 2014. The colonoscopy led to a diagnosis of colon cancer and the life insured died of colon cancer in 2018.

Canada Life denied the claim on the basis that there had been a change of insurability between the application and policy delivery, such that the policy never took effect pursuant to s. 180 (1)(c) of the *Insurance Act*.

A motions judge granted summary judgment in favour of the beneficiary, holding that s. 180 (1)(c) was subject to a two-year contestability period and did not permit an examination of insurability more than 2 years after policy delivery.

The Court of Appeal disagreed. After reviewing the text, purpose, and legislative history of s. 180 (1)(c), it held that this section establishes a condition precedent to contract formation. Where a change in insurability occurs between application and policy delivery, the contract does not take effect, regardless of when the change is discovered. There was no statutory basis to impose a two-year limitation, and by doing so the motions judge engaged in "impermissible judicial redrafting".

The Court of Appeal also rejected the argument that the policy's incontestability clause ousted the application of s. 180 (1)(c).

Canada Life's appeal was allowed with the issue of whether there had been a change of insurability based on the facts of the case open for future determination.

B. Misrepresentation: Third Party claim versus Insurer based on alleged acts of agent - *Millar v. Rebelo et al. (Beneva and Dynacare Insurance as Third Parties)*, 2026 ONSC (Unreported)

The Plaintiff claimed $600,000 against the Defendant "R". The basis of that claim was that R was negligent regarding an alleged material misrepresentation regarding answers contained in a paramedical examination conducted by Beneva's agent Dynacare and that an existing life insurance policy had been cancelled by the life insured only to later find that Beneva rescinded its policy within the contestability period due to material misrepresentations.

R brought third party claims against Beneva and Dynacare which they moved to strike, arguing that R was attempting to rewrite the Statement of Claim due to the inducement and/or advice of the Defendants to switch policies and cancel the prior policy and not in relation to the enforcement of the policy.

Held: Motion dismissed.

The Court held in part:

> *R points out that the Plaintiff explicitly alleges that the Beneva policy was denied, and implicit in that allegation is that denial was due to the alleged material misrepresentation that was made by the Plaintiff's deceased spouse during a Beneva required and organized interview of the Plaintiff and her late spouse by Beneva's agent Dynacare and that the interview was conducted by a French speaking individual, wherein neither the Plaintiff nor her deceased spouse*

understood French. In summary, if the denial of coverage was connected to a potential negligent/defective underwriting and investigatory procedure, Beneva may have contributed towards the loss claimed by the Plaintiff in her main action. …The amended third-party claim discloses a reasonable cause of action for contribution and indemnity in that the Third Parties may have been negligent in their underwriting/paramedical intake….It is not plain or obvious that the third-party claim is certain to fail or that no duty of care exists….for these reasons I dismiss the third-party motion to strike.

C. Deductibility of LTD settlement from tort claim: *The Estate of Ivo Lepan v. Lofranco Chagpar Barristers et al.*, 2026 ONSC 4855

The late insured "L" was injured in a m.v.a. in 2008. He retained the Defendants to pursue AB, tort and LTD claims.

The LTD claim was settled in 2009 for a lump sum of $40,000. The Plaintiff alleges the settlement was only for own occ benefits although a full and final release including future benefits was signed.

In 2011 the SABS claim settled.

In 2012 L changed counsel and retained "A".

In 2013 the tort action settled.

The present solicitor's action was commenced in 2014 alleging loss of future LTD benefits resulting from the Manulife Release.

In 2017 L died from causes unrelated to the m.v.a. and the action continued by his wife as Estate Trustee.

In 2025 a partial settlement was reached between the Plaintiff and "P" (a paralegal employed by the Defendants).

4 issues were raised on the subject motion:

(a) Was the Manulife LTD settlement a deductible collateral benefit in the underlying tort action?

(b) Should A be removed as counsel?

(c) Should the summons to A be set aside?

(d) Was further disclosure of the partial settlement required?

Held*:* The LTD settlement was a deductible collateral benefit; the motion to remove A as counsel was dismissed; the summons to A set aside; and no further disclosure of the partial settlement was required.

The Court held in part:

Section 267.8 of the Insurance Act reduces damages arising from a m.v.a. by all payments the plaintiff has received for income loss under an income continuation benefit plan…In 2018 in Cadieux v. Cloutier 2018 ONCA 902, leave to appeal refused (2019) S.C.C.A. No.63, the Court of Appeal endorsed what has become known as the "silo approach", rejecting overly technical matching exercises and emphasizing the broader statutory objective of preventing double recovery.

…In Cadieux the Court created three silos- income loss, health care expenses, and "other pecuniary loss" and concluded that SABS paid prior to the settlement should be deducted from the jury award for corresponding past and future damages "within the relevant silos." Further, it decided that collateral benefit deductions should be made on a gross basis and not net of legal fees.

More recently in A.B. v. Waite and in Diehold v. Economical Mutual Insurance Company (2022) ONSC 5592, LTD settlements have been treated, in substance, as income replacement benefits and therefore deductible within the income loss silo….Here, like McCurdy et al. v. Maille (2023) ONSC 6857 the Manulife policy was plainly an income continuation plan….benefits were available only to employed persons, were monthly "periodic payments," and were tied to employment income…I am therefore satisfied that the settlement proceeds paid by Manulife fall within the income-loss silo contemplated by s. 267.8.

….The court possesses inherent jurisdiction to remove counsel to protect the integrity of the administration of justice. However, the right of a litigant to counsel is fundamental and removal orders are granted sparingly….it was not "plain and obvious" that A would be a witness at trial and there was no obvious reason A should be disqualified from continuing to act….the motion ultimately asks me to conclude, before trial, that the plaintiff cannot establish damages without A's testimony. That issue goes directly to the negligence claim and (should be) addressed by the trial judge…

It is impossible to determine in the abstract what evidence may be necessary (to determine any alleged wage loss shortfall resulting from litigation choices made during the tort action) after the full evidentiary record unfolds…the summons to A was issued prematurely.

The plaintiff disclosed the terms required by Rule 49.14. The monetary value of the partial settlement is specifically exempt from mandatory disclosure.

ACKNOWLEDGEMENTS:

This update depends on my receiving case law from counsel and industry claims consultants. For this issue many thanks to Tracey Hamilton (Beneva), Michael Jordan (Jordan Honickman) and Rebecca Grima (Canada Life) who not only sent me the *Trebell* decision but also provided the above synopsis of it.

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. The timing of my next update will depend on what new case law I am sent so please keep the cases coming.

