

TABLE OF CONTENTS

PREFACE	iii
DEDICATION	v
GUIDEPOST TO THE THIRD EDITION	vii
ACKNOWLEDGEMENTS	ix
TABLE OF CASES	xxi

CHAPTER 1

INTRODUCTION TO DISABILITY INSURANCE	1
A. Life Insurance versus Accident and Sickness Insurance	1
1. Commencement	2
2. Representations	2
3. Age	3
4. Termination	3
B. Statutory Conditions	4
C. Industry Guidelines	7
D. Agents	8

CHAPTER 2

INDIVIDUAL AND GROUP DISABILITY INSURANCE POLICIES . .	11
A. Parties to the Contract	11
B. No Mandatory Policy Language	13
C. Creditor Disability Insurance	13
D. Group Administration by Insurer	15
E. Administration of Group Creditor Insurance Plans	16
F. Group Certificate	17
G. Providing Group Policy to Insureds	18

CHAPTER 3

EFFECTIVE DATE OF GROUP LTD INSURANCE	21
A. Coverage Commencement	22
1. Effective Date of Insurance	22
2. Change in Insurability	24
3. Interim Coverage	25
4. Conditional Receipts	26

Table of Contents

5. Approval Receipts	26
6. Temporary Binding Receipts	27
B. Coverage Termination	27
1. Via Resignation of Employment	27
2. Via Termination of Employment	31
 CHAPTER 4	
MISREPRESENTATION	35
A. Duty to Disclose	36
1. Facts Which the Insured “Knows”	36
2. Overriding Duty of Good Faith	41
B. Materiality	42
C. Insured Bound by His or Her Signature	47
D. Language Issues	49
E. Fraudulent Misrepresentation	49
F. Refund of Premiums	53
G. Duties of Underwriters	54
1. When An Insurer’s Underwriters Need To Investigate Further	54
2. Underwriters Are Not Detectives	55
H. Insured was Uninsurable	57
 CHAPTER 5	
PREMIUMS AND COVERAGE	59
A. Termination of Coverage	60
B. End Date for LTD Benefits	61
C. Lapse	61
D. Relief from Forfeiture	63
E. Reinstatement	66
F. Group Coverage Termination	67
G. Notice of Termination of Coverage	68
H. Pre-Existing Condition Exclusion Clauses	69
 CHAPTER 6	
CLAIM LIABILITY	73
A. Own Occupation	74
B. Any Occupation	75
C. Availability of Alternate Employment	86
D. Location of Alternate Employment	86
E. Would a Reasonable Employer Hire the Plaintiff?	86
F. Burden of Proof	87

Table of Contents

1. Onus on Insured	88
2. Onus on Insurer	88
i. Reverse Onus Rule	88
ii. Reversal of the Reverse Onus Rule	90
3. Shifting Onus of Proof	91
G. Duty to Mitigate	92
H. Failed Return to Work Attempts	94
I. Duty to Work Through Pain	94
J. Plaintiff Deemed Totally Disabled if All Their Energy is Required to Work	95
K. Exclusions	96
L. Loss of Insurance Coverage	97
 CHAPTER 7	
DEPRESSION AND ANXIETY CLAIMS	99
A. General Facts	100
B. Case Law Involving Psychiatric Conditions	101
C. DSM-V (Diagnostic and Statistical Manual of Mental Disorders)	104
D. Recent Case Law	105
E. Evidence of Treating Psychiatrist	107
F. Archaic Case Law	109
G. Necessary Treatment	109
H. Suicide Risk	111
 CHAPTER 8	
“ACCIDENT” DEFINED	113
A. History of the Law on “Accident”	113
B. <i>Wang v. Metropolitan Life</i>	115
C. <i>Gibbens v. Co-operators Life</i>	115
D. Satisfactory Proof of Accidental Death	119
 CHAPTER 9	
EVIDENTIARY CONSIDERATIONS IN LTD TRIALS	121
A. Evidence of the Plaintiff	122
B. Evidence of Treating Physicians	123
C. Evidence of Alternative Occupations	125
D. Evidence of Treating Psychiatrists	125
E. Evidence of Co-Workers	126
F. Evidence of Internal Medical Consultants	127

Table of Contents

G.	Surveillance Evidence	128
1.	Other Cases Helpful to Insurers	128
2.	Other Cases Helpful to Plaintiffs	131
H.	Disclosure of Surveillance Evidence	132
I.	How Much Surveillance Evidence is Too Much?	133
1.	Judge Alone Decisions	134
i.	<i>Fernandes v. Penncorp Life Insurance Co.</i>	134
ii.	<i>Bezanson v. Sun Life Assurance Co. of Canada</i>	134
2.	Jury Decisions	134
i.	<i>Baker v. Blue Cross Life Insurance Company</i>	134
ii.	<i>Doran v. The Canada Life Assurance Company</i>	135
J.	Getting Medical Evidence	135
K.	Requirement of Treatment	138
L.	Disclosure of Financial Records	140
M.	Subjective Medical Conditions	140
N.	CPP as Evidence of Disability	144
O.	Social Media Accounts	145
1.	Ontario Legislation	145
2.	Case Law in the Common Law Provinces	146
i.	When Social Media Is Producing	146
ii.	When Social Media Is Not Producing	148
CHAPTER 10		
OFFSETS/INTEGRATION OF BENEFITS		151
A.	CPP Disability Benefits	151
B.	Healthcare of Ontario Pension Plan (HOOPP)	154
C.	Workers' Compensation/Pension Monies	155
D.	Severance Pay	158
E.	Extension of LTD Coverage During Notice Period	159
F.	Subrogation	162
G.	Offset by Income Replacement Benefits	165
1.	<i>Nardi v. Sun Life of Canada Assurance Co.</i>	166
2.	<i>Ng v. Cole</i>	167
3.	<i>Hamblin v. Standard Life Assurance Co. of Canada</i>	168
H.	Double Recovery with SABS and LTD	170
CHAPTER 11		
LIMITATION PERIODS IN CANADA		171
A.	Provincial Limitations Acts	171
1.	Ontario	172

Table of Contents

2. British Columbia	175
3. Alberta	176
4. Nova Scotia	179
5. New Brunswick	179
6. Newfoundland and Labrador	180
7. Saskatchewan	180
8. Manitoba	180
9. Prince Edward Island	180
B. Limitation Period Defence Rejected (Ontario)	181
C. Limitation Period Defence Accepted (Ontario)	188
D. Limitation Period for Punitive Damages Claims	194
E. Clear and Unequivocal Denial	194
F. Rolling Limitation Periods	198
G. Late Written Notice of Claim	203
H. Late Lawsuit Provisions	206
I. No Duty to Inform Insured	208
J. Failure to Prosecute Action	209
 CHAPTER 12	
LITIGATION PROCESS	211
A. Judge or Jury	212
B. Arbitration/Collective Agreement	215
C. Taxability of LTD Settlements	223
D. Lump Sum Award for Future Benefits	228
E. End Date for LTD Benefits	232
F. Mandatory Interlocutory Injunction	232
G. Clawbacks	234
H. Carveouts	235
I. Release Enforceability	236
J. Privilege	237
K. Suing Claims Staff Personally	239
L. Proper Forum	240
M. Summary Judgment	241
N. Costs	241
1. Trial Costs	241
2. Special Costs Absent a Punitive Damages Award	243
3. Adverse Cost Insurance	243
O. ASO Plans	246
P. Privacy	247
Q. Expedited Trial	249

Table of Contents

R. Prejudice	250
 CHAPTER 13	
EXTRA-CONTRACTUAL DAMAGES	253
A. Aggravated Damages	254
B. Punitive Damages	260
C. Mental Distress Damages	263
D. Recent Developments	266
1. <i>Branco v. American Home and Zurich Life</i>	266
2. <i>Fernandes v. Penncorp Life</i>	268
3. <i>Industrial Alliance Insurance and Financial Services Inc. v. Brine</i>	269
4. <i>P. (C.) v. RBC Life Insurance Co.</i>	271
5. <i>Gascoigne v. Desjardins Financial Security Life Assurance Company</i>	271
6. Other Recent Cases	276
i. <i>Greig v. Desjardins Financial Security Life Assurance Company</i>	276
ii. <i>Godwin v. Desjardins Financial Security Investments Inc.</i>	277
iii. <i>Stewart v. Lloyd's Underwriters</i>	278
iv. <i>Murray v. TD Life Insurance Company and The Canada Life</i> <i>Assurance Company</i>	279
v. <i>Baker v. Blue Cross Life Insurance Company of Canada</i> ...	280
E. Where Are We Now on Extra-Contractual Damages?	280
F. Consequential Damages	282
G. Punitive Damages Against Insureds	285
H. Relevant Examination for Discovery Questions in Punitive Damages Claims	287
I. Bifurcation	288
1. Ontario	290
i. Court's Jurisdiction	291
ii. Factors to Consider on a Motion to Bifurcate	291
2. British Columbia	292
3. Alberta	293
 CHAPTER 14	
CRITICAL ILLNESS INSURANCE	295
A. What is Critical Illness Insurance?	295
B. Difference Between Critical Illness and Long-Term Disability Claims	296

Table of Contents

C.	Denial: Nature of the Claim	296
1.	Not Met the Survival Period	296
2.	No “Covered Condition” or “Covered Critical Illness”	296
3.	Exclusion Clause	298
4.	Date of Diagnosis	301
5.	Misrepresentation or Non-Disclosure in the Application	302
D.	Genetic Testing and Critical Illness	305
 CHAPTER 15		
KEY ISSUES WHEN REPRESENTING THE DISABILITY CLAIMANT		
		307
A.	Meeting with the Disability Claimant	308
1.	Diffuse Anxiety	308
2.	Have an Agenda	310
3.	The Plaintiff Should Have an Understanding of the Disability Litigation Process	310
4.	Capacity	312
B.	Entering into the Lawyer-Client Relationship	316
1.	Contingency Fees Agreements — Meaningful Access to Justice for Disability Claimants	316
2.	Contingency Rates Must be Fair and Reasonable	317
3.	Fair and Reasonable — A Two-Step Test	318
4.	Ontario’s Contingency Fee Reforms — Largest Canadian Contingency Reform to Date	320
5.	Disability Benefit Reinstatement and Contingency Fees	322
C.	Plaintiff Disability Litigation Key Considerations	322
1.	Develop a Case Theme Early	322
2.	Marshall the Evidence Early	324
3.	Manage Client Expectations from the Start	326
4.	Social Media — Ethical Fundamentals	329
5.	Unionized Disability Claimants	332
6.	Common Employment Issues in LTD Litigation	339
i.	Constructive Dismissal	341
ii.	Wrongful Dismissal and Human Rights Discrimination	344
iii.	How is the Notice Period Determined?	349
iv.	Frustration of Contract	354
7.	Where to Sue — Jurisdictions Across Canada	358
i.	Ontario: Small Claims	360
ii.	Ontario: Simplified Procedure	361
iii.	New Brunswick: Small Claims	362

Table of Contents

iv. New Brunswick: Simplified Procedure	363
v. Newfoundland and Labrador	364
vi. Nova Scotia	366
vii. Prince Edward Island	368
viii. Manitoba	370
ix. Saskatchewan	371
x. Alberta	373
xi. British Columbia	375
8. The Fine Line Between Good and Bad Faith — How and When to Plead It	377
9. Should you Hire an Opinion Expert?	380
D. Key Considerations when Settling the LTD Claim	383
1. The Claimant Must Understand the Limited Remedies	383
2. Reinstatement, Valuating Long-Term Disability Benefits and Lump Sum Settlements	384
3. The Plaintiff Must Understand the Implications of Settlement	388
 CHAPTER 16	
TIPS FOR MEDIATING LTD LAWSUITS	391
A. CPP Offset	391
B. Present Value Discount Rate	393
C. Simple But Effective	393
D. Other Mediation Pitfalls	394
1. Clawback Provisions	394
2. Broad Releases	394
E. Nastiness Will Not Help the Settlement Number	395
F. Defence Don'ts	395
 CHAPTER 17	
REGULATION	397
A. CLHIA Guidelines	398
B. <i>Uniform Insurance Act</i>	398
C. The Regulators	399
D. Consumer Protection	401
E. Bankruptcy	401

Table of Contents

APPENDICES

Appendix A:	<i>Insurance Act</i> , Part VII — Accident and Sickness Insurance	403
Appendix B:	Table of Concordance — Accident and Sickness Insurance Legislation Across Canada	433
Appendix C:	Misrepresentation — Case Law	441
Appendix D:	Total Disability — Case Law	463
Appendix E:	Medical Assessments — Case Law	501
INDEX		513

