DOCUMENTARY AND ORAL DISCOVERY

IN LONG-TERM DISABILITY ACTIONS

INTRODUCTION

The Discovery process in long-term disability ("LTD") actions is a specialized exercise. While the *Rules of Civil Procedure* apply equally to an LTD action as it would to a commercial case, certain rules and judicial rulings are more applicable than others. This article will highlight the *Rules* and some of the recent case law, unique to LTD actions, with which all LTD counsel need to be familiar. While it is beyond the scope of this article to deal with the issue of pleadings, it is still worth mentioning that the Discovery process is entirely set up by and anchored to the underlying pleadings. Give due thought to the particularized complaint to be advanced and ensure your pleadings will permit the full line of Discovery you seek.

RULES OF CIVIL PROCEDURE

All counsel are well served by remaining familiar with the *Rules of Civil Procedure* as they touch upon Discovery issues. A few of the important rules that should be remembered by lawyers involved in LTD actions are summarized below.[i]

Rule 31.03(2)(a) – Choice of LTD Insurance Rep

When the plaintiff conducts an Examination for Discovery of the representative of the LTD insurer, the plaintiff has the choice of examining any officer, director, or employee on behalf of the insurer.[ii] The insurer can bring a motion before the Discovery for an order that the plaintiff examine a different officer, director, or employee, but it remains the defendant's onus to contest the plaintiff's selection.

The identity of the insurance company's proposed representative is revealed early on during the litigation process, by looking at the name that appears on the insurer's Affidavit of Documents. Very often, probably more often than not, the insurer will seek to put forward someone, other than the front-line claims examiner who terminated the LTD claim, as its representative to be examined. Many of the major LTD insurers employ litigation claims handlers, whose function is to become involved in a file only once litigation has commenced. Such individuals have typically not made any of the claims decisions on the file in question and generally do not inform themselves about the particular file that is the subject of litigation, beyond a review of the file documents. Often, the litigation specialist has never even spoken to the actual claims examiner about the specific file in dispute.

Rarely should a plaintiff be content to examine the litigation specialist proposed by the insurer:

- Because the litigation specialist has not been involved on a day-to-day basis, many more undertakings will be required. The undertakings will consist of further documentary review, owing to the witness's lack of familiarity with each and every document in the file, and will also involve multiple requests to speak to the actual claims handler to pose questions that are uniquely within the knowledge of that individual.

- For the same reason that the insurer wants to put forward an articulate, seasoned litigation veteran who has been asked questions at dozens if not hundreds of Examinations for Discovery, most plaintiffs would prefer to examine the actual claims handler, who may never have been involved in litigation before, whose responses are invariably more candid, more relevant, and responsive to the actual issues in the litigation.

- The front-line claims examiner is in a better position to yield helpful admissions, such as the plaintiff's willingness to participate in rehabilitative initiatives, the plaintiff's timely

reply to letters and phone calls, or other similar information personal to the plaintiff. Because the litigation specialist is one step removed, all of this personal connection is lost.

- The claims examiner may have made the actual decision to terminate benefits or not pay in the first place, or was intimately involved in the decision. You want the opportunity to question the decision and hear from the "horse's mouth", not from someone articulating an argument after the fact from his/her review of the paper.

Caution, of course, must be exercised with the choice of the insurer's representative. Where the plaintiff sought to examine the president and CEO of the insurer, an individual who had no actual knowledge of any kind about the matter, the insurer was successful in thwarting that request.[iii] Where the claims examiner was no longer employed by the LTD insurer, owing to her own illness and inability to work, the court declined the plaintiff's motion to compel the claims examiner to attend at an Examination for Discovery.[iv]

Rule 31.06 – Scope of Examination

Mixed Fact and Law

Usually, mixed questions of fact and law are proper at an Examination for Discovery.[v] Consequently, it is appropriate to ask an insurance representative what position the defence takes on a particular legal issue. Unlike the Examination for Discovery of a defendant in a motor vehicle claim, there are a variety of relevant legal issues that merit examination when the LTD insurer is being examined, such as:

- Is it your position that the plaintiff's subjective evidence, and her physician's acceptance of her subjective complaints, is insufficient to meet the test for disability contained in the policy? Where in the contract is the need for objective evidence outlined?

- Do you accept that, as a first party relationship, there is a continuing obligation to adjust the file, as information becomes available, including the reinstatement of benefits previously terminated in error?

- Do you understand what is meant by the "duty of good faith"? Can you describe that obligation in your own words?

The scope of questions is obviously determined on a case-by-case basis, but these few examples illustrate questions that extend beyond a mere factual inquiry that are germane to the LTD litigation process.

Witnesses

Rule 31.06(2) obliges disclosure of the names and addresses of persons who might reasonably expect to have knowledge of transactions or occurrences in issue in the action. Careful plaintiff's counsel will carefully inspect the defendant's productions to identify each and every individual who has touched the file. Many of the people identified in the documentary record are described by first name only, or perhaps a first name and an initial. By the end of the Examination for Discovery, one would hope that the full name of every single person mentioned has been revealed, with enough information about that person's involvement in the file, and his or her place within the corporate hierarchy, to permit the creation of a corporate chart.

Pursuant to Rule 31.06(2), a plaintiff might also seek to determine which of the individuals now identified on the corporate chart still remain employed with the insurer. There is often a surprising degree of turnover within the insurance industry, such that in some files half of the individuals (or more) identified on the corporate chart are no longer employed by the insurer. This information helps identify who the plaintiff might expect to face as a witness at trial, who the plaintiff might seek to contact for information about the insurer's practices (if the former

employee can be found), and, can sometimes speak for itself in terms of the lack of continuity in the claims handling process.

Even when the front-line claims examiner has been produced on behalf of the insurer, that person must still make reasonable inquiries of fellow servants of the corporation, including former employees no longer with the insurer, unless the circumstances make it unreasonable.[vi]

Many insurers have in-house physicians assisting on files. Not only should the identity of the medical professional, along with his or her specialty, be provided, the curriculum vitae for that individual should be produced. A plaintiff should try to elicit as much information as the defence will permit, in terms of the number of claims that the in-house medical person helps to adjudicate, the nature of the adjudicative process itself, and whether the medical person acts simply in an advisory role or has an absolute say on certain medical issues. What is the relationship of the "in-house physician" to the insurer? Is he an employee or on a contract? Does he have his own office at the insurance company office? All of this information is relevant to the potential for bias.

Rule 31.08

Many defence lawyers in LTD actions are in-house counsel or individuals who primarily restrict their practice to LTD claims. Particularly when the front-line claims examiner is being examined, as opposed to the litigation specialist, there can be a tendency for defence counsel to attempt to answer questions on behalf of the witness. A plaintiff lawyer need not automatically object, and indeed should always strive to maintain a cordial working relationship with defence counsel. Often times, defence counsel is the individual best placed to respond to certain inquiries. Remain mindful, however, of the language of Rule 31.08 which states:

> Questions on an oral examination for discovery shall be answered by the person being examined but, where there is no objection, the question may be answered by his or her counsel and the answer shall be deemed to be the answer of the

> person being examined unless, before the conclusion of the examination, the person repudiates, contradicts or qualifies the answer.

There are times when the best answer should come from the witness personally, and not through counsel. Both plaintiff and defence counsel alike should be using this rule to ensure that the answer is received from the witness, when required.

Rule 34.12(2)

This is a seldom used rule that allows for an objectionable question to be answered, notwithstanding the objection. This rule provides:

> A question that is objected to may be answered with the objector's consent, and where the question is answered, a ruling shall be obtained from the court before the evidence is used at a hearing.

Given the high cost of litigation, we should all strive to be practical and efficient. Once a question has been answered, it may be unnecessary to use that evidence at trial in any event. Hearing the evidence, however, might satisfy a concern and may eliminate the need to bring a motion compelling answers to refusals. You do not set up the effective use of Rule 34.12(2) by being obstreperous, belligerent, and sneaky.[vii] Through cooperation, you may well persuade the opposing party to permit the question to be answered, notwithstanding the objection, as per Rule 34.12(2). There is no harm in trying and you likely get points, should there be a motion for refusals, from the Master or Judge who hears that motion, if you suggested this procedure and your opponent declined the invitation.

SOLICITOR AND CLIENT PRIVILEGE[viii]

Because of the first party relationship that exists in LTD actions, the mutual duty of good faith, and the possibility for aggravated damages or punitive damages claims, the potential always exists for an examination of documents or information over which claims of privilege are asserted.

Solicitor client privilege is a substantive protection separate and apart from any evidentiary rule. There will be instances where it applies to productions sought from the plaintiff, and where it applies to productions sought from the defendant in an LTD action. The scope of privilege is wide and encompasses all information passed between the lawyer and client. However, not all communications between a lawyer and client are privileged – just those where the client has in fact sought legal advice.[ix]

Look very carefully at the Schedule "B" of an Affidavit of Documents to get a sense for the kinds of documents over which privilege is being claimed. If there is a boilerplate Schedule "B", one must insist upon a fully particularized Schedule "B" that clearly identifies the documents and the type of privilege being claimed.

One must distinguish the facts contained within the privileged communications from the communications themselves. The leading decision on the disclosure of solicitor client information remains the 1999 Ontario Court of Appeal decision in *General Accident v. Chrusz*[x], which held that solicitor client privilege extends to communications in whatever their form may be, but it does not extend to the facts which may be referred to in those communications, if those facts are otherwise discoverable and relevant. Thus, where a communication between solicitor and client takes place for the purpose of conveying or receiving information on matters of fact, and not for the purposes of eliciting an opinion, the communication is not privileged and may be obtained on Discovery in civil proceedings.

Also, be aware of the distinction between solicitor client privilege and litigation privilege. The Court of Appeal, in *Chrusz*, noted that there is nothing sacrosanct about litigation privilege. While solicitor client privilege stands against the world, litigation privilege is a protection only against the adversary, and only until termination of the litigation.

Consequently, the court has ordered production of details of the plaintiff's previous tort settlement,[xi] but has also refused to require an insurer to disgorge a previous claims file arising from an earlier action between the same parties.[xii]

In LTD actions with an existing history of benefits being paid by the insurer, there may be occasions where the decision to terminate benefits was made as a result of a legal opinion on the matter. On these files, a plaintiff will want to seek production of the underlying opinion on which the denial was based. *Samoila v. Prudential*[xiii] stands as an authority for this line of questioning, with the court finding that solicitor and client privilege was waived by the insurer, and with an Order for production of any and all legal opinions obtained by the insurer relating to the denial of coverage. Subsequently, when this argument has been applied, the court has indicated that determining when the investigative door shuts and the defence door opens is a question of fact. If information was being gathered both for the purposes of investigation/assessment, as well as for the purposes of defending a possible claim, in the absence of convincing evidence that the dominant purpose was defence rather than investigation, the claim for litigation privilege fails.[xiv] Also see *Hanna v. Royal & SunAlliance Insurance Company* with respect to the moment in time when the investigative door closes and the defence door opens.[xv]

On the issue of privilege, Master Dash, in *Mamaca v. Coseco*[xvi], has recently offered a caution which all defence counsel ought to bear in mind, indicating:

> The onus is on the defendant as the party asserting privilege to adduce such evidence. No internal documents have been produced, indicating that the responsible claims handlers at the time contemplated litigation, reasonably or not, or that documents were created for such purpose. To the contrary, all the evidence suggests that the ensuing documents were created as part of the normal claims assessment process.

Master Dash further added that, even if he was wrong with respect to the moment in time when litigation privilege began, it would be inappropriate not to disgorge the Schedule "B"

documentation because it "would be wrong to allow the defendant to hide evidence of bad faith behind the cloak of litigation privilege or else…evidence of one's own misconduct can never be exposed to the light of day".[xvii]

CONCLUSION

The Discovery process for both plaintiff and defence counsel alike is a valuable part of the litigator's arsenal when involved in an LTD file. The first party nature of the relationship, the opportunity for claims for aggravated to punitive damages, and the simple fact that the relationship usually results in a lengthy period of contact between the parties, before litigation ever commences, creates occasions where one side or the other wishes to delve into matters of privilege. Knowing the law will be of assistance in either advancing or thwarting requests for production of privileged documents.

On any LTD file, there is no substitute for a thorough review of the file and understanding the specific facts and issues in dispute. Creative questioning is a key to success. Documentary and oral Discovery in LTD actions is often critical for both the plaintiff and defendant. With a thorough knowledge of the *Rules of Civil Procedure*, and the relevant case law, careful litigators are like locksmiths who can make their own keys to open locked doors, discovering the necessary evidence to succeed along the way.

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[i] I'm grateful to my partner, Peter Downs, for proof-reading this article and offering some helpful suggestions to me.

[ii] See Rule 31.03(2)(a)

[iii] *Ward v. Manulife Financial* (2002), 15 C.P.C. (5th) 192

[iv] *Simair v. Manufacturers Life Insurance Company*, 2007 SKQB 477 (CanLii), decision of Justice Wimmer released December 21, 2007

[v] *Law v. Zurich* (2002), 21 C.P.C. (5th) 280, S.C.J.

Six Nations of the Grand River Band v. Canada (AG) (2000), 48 O.R. (3d) 377 (Div. Ct.)

[vi] *Air Canada v. McDonnell Douglas Corp.* (1995), 22 O.R. (3d) 140 (Master) affirmed 22 O.R. (3d) 382 (Gen. Div.)

[vii] For an interesting but unfortunate illustration of this point, see Master MacLeod's decision in *Kobre v. Sun Life Assurance Company of Canada*, 2005 CanLii 36165, which includes a lengthy exchange as it appeared from the Discovery transcript.

[viii] While I don't think it is possible to plagiarize from oneself, I might acknowledge that I have been helped greatly with the preparation of this section of this article by my own paper delivered September 28, 2007 at the OTLA LTD conference, entitled "Breaching Solicitor Client Privilege in LTD Actions".

[ix] *Davies v. American Home Assurance Company* (2002), 60 O.R. (3d) 512, at page 519

[x] (1999), 45 O.R. (3d) 321 (C.A.)

[xi] *Verney v. Great-West Life Assurance Company* (1998), 38 O.R. (3d) 474

Also see *Robichaud v. Clarica Life Insurance Company*, 2007 CanLii 39764

[xii] *Smith v. London Life Insurance Company* (2007), 219 O.A.C. 309 (Div. Ct.)

[xiii] (2000), 50 O.R. (3d) 65

[xiv] *1207301 Ontario Inc. v. Zurich Insurance Company*, 2003 CanLii 5014 Ont.S.C.

[xv] 2004 CanLii 40664

[xvi] 2007 CanLii 9890

[xvii] *Mamaca v. Coseco,* supra, at para. 36