

**Mental Health Disability:
The Claimant's Perspective and Current Trends in the Law**

June 18th, 2007

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There seems to be little doubt that depression and other mental health claims are amongst the fastest growing categories of long-term disability insurance claims. The reason this area is growing is complex. The combination of the fast pace of the modern workplace and an aging population are probably the largest factors in the growth of claims in this area, however, these claims are a reality and they appear to be here to stay, so it is incumbent upon all working in this area to get a better handle on the particular challenges such claims pose.

One study in British Columbia (conducted between 1995-1999) has noted that mental disorders may be surpassing other disorders as the major source of long-term disability among health care workers. Also those individuals with depressive symptoms have increased health care utilization, absenteeism and disability.¹

What follows are some areas for consideration and further research and investigation depending on the case you may be involved with. For clues on trends in this area, reference will be made to decisions in other areas that impact on handling of long-term disability claims, such as the Ontario Workplace Safety & Insurance Board, Human Rights, and Employment law.

¹ **Investigating Trends in Mental Disorders among a Cohort of Health Care Workers**, Dufton, JA, Koehoorn M, Cole DC, Hertzman, C., Ibrahim, So, Ostry, A of Department of Health Care & Epidemiology, University of British Columbia, Institute of Work & Health, Toronto, Department of Public Health Sciences, University of Toronto.

Background from the Claimant's Perspective

Claimants who submit claims that are based on depression or other mental health conditions, such as Post-Traumatic Stress Disorder or Bi-Polar Disorder, are faced with a daunting situation when faced with symptoms so severe that they are unable to function in any sort of effective way. They have trouble concentrating, focusing, their decision-making skills are impaired and their judgment is skewed. They consult with their physicians and are usually put on anti-depressants and/or medication to help them sleep and sometimes they even get a referral to a psychiatrist. In Ontario, within the Greater Toronto area and certainly outside the GTA, it can take many months to obtain a first appointment to see a psychiatrist. The family doctors are left with the difficult task of trying to help their patients. There are also a bevy of psychotherapists trying to assist these claimants. While psychological services are more readily available because they are outside the OHIP system, most extended health plans have significant limits on yearly expenses that will be covered in this area, making access to psychologists too expensive for many people.

They submit their claims for short-term and then long-term disability. Frequently, their STD claims are grudgingly approved, although not always, and when their claims move over into the LTD arena, they receive extensive requests for additional information, with concerns being voiced by the insurers over the lack of medical diagnosis, or an alleged failure to obtain treatment, not to mention those cases where a pre-existing exclusion can be reviewed, which delays matters even further.

By the time they arrive in the plaintiff lawyer's office with a claim being denied, cut-off or still pending, their finances are usually in tatters and their ability to cope is on the edge. They are angry, victimized and feel that they have no place to turn. They are told that they may have a case but it will take time. They may have already tried to get social assistance or some other form of government assistance, however, if they own a home or have any real assets they will be expected to dispose of those first, including RRSP's and savings before they can qualify for any sort of assistance (with the exception of disability benefits under the Canada Pension Plan which are not based on a financial means test).

These claimants pose particular challenges for plaintiff lawyers because while the claimants are not usually incompetent in the legal sense, their social interaction skills may be compromised to the point that day-to-day management of their relationship with other people is greatly diminished.

What they do know is that they feel unable to work in any sort of reasonable capacity. The origin of their symptoms may take root in any number of events, including being part of the sandwich generation i.e., caring for children and aging parents simultaneously, domestic tension, workplace issues regarding a particular difficult superior or co-worker or excessive workloads, not to mention impacts of significant life altering events such as the loss of a loved one. Each claimant is unique and you really cannot reduce this subject to a one-size fits all approach, as they each arrive at this point from different circumstances.

They are mostly hard-working people who never have really considered that they would ever be in such a position. We, who work every day in this area, may consider

the need for protection, but none of us truly accepts that we will ever be in the position that these claimants find themselves in. That is human nature.

When one finds one self in the situation and then you find out that the claim won't be accepted or benefits will be cut-off due to various tests, exclusions and vague references to failure to satisfy the tests and exclusions, most claimants feel betrayed. The betrayal stems from the feeling that disability insurance was either paid for by them, because they have actually paid for it, or because it appears in some way on every pay stub they have ever received as a deduction. If they don't feel that they've paid for it, they feel that the benefits they were provided with by their employer was a significant inducement or perk of their employment that would be there for them in the unlikely event that they would ever need to use it.

Once in litigation, we, as counsel to the claimants, impress upon them that the process does take time, and although a case that resolves within a year is considered to be an efficient time-frame for resolution because it takes at least 2 years, if not closer to 3-4 years to actually get a matter to trial, for a claimant, a one year wait for resolution can be devastating, particularly where they have virtually no support network to get them through that period.

Barriers to Entitlement

Pre-Existing Exclusions

Almost all group LTD policies contain pre-existing condition exclusions. The claimants rarely understand that they face such exclusions, and they certainly rarely understand how they operate. Because pre-existing condition exclusions do not usually

operate during a STD claim, when it is raised once the claim becomes LTD, it creates a great deal of confusion, disappointment and anger.

The rationale behind the pre-ex clauses seems to be focused on the fact that group LTD policies are very rarely underwritten on an individual employee basis and therefore insurers aren't given the opportunity to assess the risk of new employees who may have a significant health history that could result in them becoming disabled within a short period of time after qualifying to be covered under the group benefit plan. The rationale seems less viable in situations where a medical form has been completed in order to obtain coverage beyond the non-evidence limit. In such cases, employees complete a medical form and once scrutinized are either approved or not for a higher coverage amount. Non-evidence limits are still not all that common-place, but as new group business is being written, this method of limiting exposure is becoming increasingly popular in order to contain the premium cost of such plans. There often seems to be a failure of the agent or broker in completely understanding their obligations in making sure that employees know about the requirements to qualify for coverage beyond the non-evidence limit, but that is properly the subject of a different presentation or paper.

In the context of mental health disability claims, the pre-existing condition exclusion presents some unique challenges. The specific wording of the exclusion will be significant in predicting how effective such clauses are to bar certain claims. It is not unusual for people suffering from depression and other mental health problems to have had similar problems in the past. Mental health conditions are frequently recurring although not always disabling. The key factor in overcoming this exclusion is being able to establish a difference in any pre-disability claim condition to the symptoms that have

now resulted in the disability claim. Of course, this is not always possible from a medical perspective, but in the murky area of mental health conditions, what was before can often be separated from what is now. There is no simplicity in mental health conditions, such as might be the case with other health conditions. For instance, it would arguably be easier to establish the applicability of a pre-existing condition exclusion for someone suffering a recurrent form of cancer or a heart condition than in the mental health area.

“Under Regular & Continuous Care” and “Usual & Customary Treatment”

I alluded to this area of concern earlier. We often see that mental health claims are denied or terminated due to an alleged failure on the part of the claimant to be under the regular and continuous care of a treating physician. In the mental health area, referral to psychiatrists is a significant challenge for claimants, as they often have to wait six or more months for such a referral. Once referred, they are often sent back to their family doctor for further follow-up, only to see the psychiatrist again sporadically. Claims adjudicators and their medical consultants will critique the claimants’ treatment, or lack thereof, as showing inadequate effort to overcome the disability and will fault either the claimant or their treating physician with not pursuing aggressively enough treatment that might so assist an early return to work.

What is the acceptable standard for “regular and continuous care”? If the family doctor can only accommodate an appointment once per month, is that sufficient? Getting independent medical assessments can some times assist in trying to optimize treatment options, however, if such treatment recommendations have no reasonable

prospect of being implemented without the availability of necessary resources, how can a complaint be faulted for that? Of course, an IME doesn't necessarily result in the type of trusted recommendations that a claimant is likely to act upon, unless endorsed by a trusted treating physician. Who knows the claimants better or best? I pose the question not because there is a trite answer to the question, but rather question whether an IME can truly produce an infallible opinion in such cases.

In the area of depression, the treatment choices are connected to the evaluation that is conducted by the health professional, which includes a complete physical examination and medical workup to rule out medical causes. There are illnesses that go hand in hand with depression such as hyperthyroidism and other glandular disturbances, cancer, stroke and heart attack, but of course, depression can appear in the absence of any such underlying medical illnesses. Testing in the absence of a physical medical illness is very difficult, although some psychological tests may be of benefit to provide a baseline.²

² MDA Duration Guidelines, Presley Reed, M.D. – Depression, Major, 2005-2007 Reed Group, Ltd.
<http://www.mdainternet.com>

WORKPLACE STRESS and How it Relates to Disability Claims

A significant number of depression disability claims and their relatives, listed as follows³:

- Adjustment disorder with depressed mood
- Bipolar disorder
- Dementia
- Dysthymic disorder
- Mood disorder due to general condition
- Schizoaffective disorder
- Substance-induced mood disorder

involve issues arising out of situations in the workplace. Very frequently the initial adjudication of these claims may result in a denial based on the suggestion that the policy or plan does not provide benefits due to interpersonal conflict or problems that arise in the workplace; that such situations ought to be handled within the workplace by consultation with human resources or other resources that should address such difficulties. The problem with this approach is that frequently, by the time such situations lead to a claim for disability benefits, sometimes at the suggestion of the employer, it has gone beyond the possibility of salvaging the situation within the workplace and has led to a very real mental health condition for the claimant.

Workplace stress situations, in addition to ending up in the world of disability insurance claims, also may find their way to other areas of legal dispute such as the Workplace Safety & Insurance Board, the Ontario Human Rights Commission or human

³ Ibid, Page 3

rights complaints, and wrongful and/or constructive dismissal claims. The claimant is in search of a remedy and/or support while they try to deal with their symptoms and the multiple streams that such situations can lead to are obviously daunting to the uninitiated.

Mental Health Conditions and the WSIB

The Ontario WSIB's policy regarding disability related to mental stress is stated as follows:

“A worker is entitled to benefits for traumatic mental stress that is an acute reaction to a sudden and traumatic event arising out and in the course of employment.

A worker is not entitled to benefits for traumatic mental stress that is the result of an employer's employment decisions or action.”⁴

Accordingly, a worker that is reacting to friction with co-workers or supervisors at work and develops a major depressive episode or other mental health problems caused or created by the workplace interaction will not result in entitlement to WSIB benefits. For workplace accidents, mental health problems that are secondary to an injury arising from such an accident or event would be compensable.

In order for mental stress to be compensable in the workers' compensation arena, there must have been a sudden and unexpected traumatic event, such as a criminal act, harassment, or a horrific accident which may involve an actual threat of death or serious

⁴ Workplace Safety and Insurance Board, Operational Policy, “In the Course of and Arising Out Of...”, Section: Traumatic Mental Stress, 15-02-02.

harm to the worker, co-worker or family member. A copy of the Operational Policy is appended to the end of this paper.

While policies may differ from one provincial agency to the other, on the whole, the Ontario WSIB policy is fairly typical of the approach presently being taken by the various workers' compensation boards.

A review of cases in 2007 dealing with workplace stress provides an example of the current approach at the Nova Scotia Workers' Compensation Appeal Tribunal. In *Logan v. Nova Scotia (WCAT)*⁵, an employee was wrongfully dismissed and claimed that the trauma of the dismissal constituted an accident entitling her to WCB benefits. The board denied her claim and on an application for judicial review, the Court ruled that wrongful dismissal does not constitute a traumatic event entitling an employee to WCB benefits. They ruled that the drafters of the legislation did not intend to allow recovery for wrongful dismissal and that recovery of compensation for mental stress caused by wrongful dismissal would normally be addressed through *Wallace* damages.

The *Logan* decision differs markedly from situations in which a claimant is suffering with significant psychological issues that are secondary to an injury that occurs as a result of an accident in the workplace. There is a separate Operational Policy Manual that specifically deals with "Psychotraumatic Disability", which is discussed extensively in the recent case cited as Workplace Safety And Insurance Appeals Tribunal Decision No. 1984/06⁶.

The relevant portions of the Operational Policy Manual are excerpted below:

⁵ 2006 NSCA 88, 50 C.C.E.L. (3d) 155, 780 A.P.R. 147, 246 N.S.R. (2d) 147, 271 D.L.R. (4th) 120

⁶ 2007 ONWSIAT 12 (CanLII)

General Rule

If it is evident that a diagnosis of a psychotraumatic disability/impairment is attributable to a work-related injury or a condition resulting from a work-related injury, entitlement is granted providing the psychotraumatic disability/impairment became manifest within 5 years of the injury, or within 5 years of the last surgical procedure.

Psychotraumatic disability/impairment is considered to be a temporary condition. Only in exceptional circumstances is this type of disability/impairment accepted as a permanent condition.

Psychotraumatic disability/impairment resulting from organic brain damage is assessed as a permanent disability/impairment.

Psychotraumatic Disability Entitlement

Entitlement for psychotraumatic disability may be established when the following circumstances exist or develop:

- Organic brain syndrome secondary to
 - Traumatic head injury
 - Toxic chemicals including gases
 - Hypoxic conditions, or
 - Conditions related to decompression sickness

- As an indirect result of a physical injury
 - Emotional reaction to the accident or injury
 - Severe physical disability, or
 - Reaction to the treatment process

- The psychotraumatic disability is shown to be related to extended disablement and to non-medical, socio-economic factors, the majority of which can be directly and clearly related to the work related injury.

Other Factors

The following relevant points are evaluated in assessing the extent of psychiatric disability entitlement:

Prior History

In all cases where history of a prior psychiatric condition is shown to exist, the question of allowance on an aggravation basis is considered, having regard for the emotional effect of the occupational occurrence and a condition resulting from the compensable injury.

Unrelated Psychiatric Disability

In some cases, psychiatric disability/impairment may become apparent in an otherwise uneventful case, and enquiry establishes its origins to other factors (such as family crisis), having no relationship whatsoever to the accident.⁷

The key concept in considering whether WSIB is the appropriate forum to address a person suffering disability as a result of depression or other mental health conditions must focus on the underlying cause of the disabling condition. To date, workplace stress on its' own without a clear “accident”, “event”, or “incident” within the workplace will not be compensable under the WCB legislation in Canada. It is possible that review decisions and appeals will further develop in this area over time, as changing societal norms have certainly broadened WCB entitlement over the years and have caused further policies and procedures to be put in place to respond to changing circumstances in Canadian workplaces.

⁷ Ibid, page 9.

Human Rights and Mental Health

The Ontario Human Rights Code outlines numerous rights and responsibilities for the manner in which Ontarians interact with each other in various settings. For the purposes of this paper, the focus must be on Employment and human rights, and in particular the consideration of disabilities in hiring an individual and also in the handling of a disability that may arise while an individual is employed.

The Ontario Human Rights Act states as follows:

5.-(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or **handicap** [emphasis added].⁸

While I have put the emphasis on the word “handicap” above, there is no doubt that discrimination in the workplace due to race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, or family status can also lead to the development of mental health conditions or a “handicap” that might result in disability. Whether or not systemic discrimination in the workplace may be covered by workers’ compensation is yet another potential developing area to be explored as discussed in the previous section of this paper.

⁸ Guide to Human Rights Code, Ontario Human Rights Commission, Prepared by the Policy and Education Branch
Approved by the Commission: May 26, 1999

A “handicap” has been defined as follows:

1. Is the condition permanent or ongoing? A temporary condition is not a disability unless it recurs as part of a medical condition.
2. Is the condition so serious that it restricts life’s important functions, such as the ability to do a job, basic mobility or family life?
3. The Commission may consider whether the condition is common to the broader public.

For example, the common cold, no matter how severe, is not a disability. A condition may be considered a disability based on these three factors. For example, serious allergies, environmental sensitivities or **clinical depression [emphasis added]** may be considered disabilities after consideration of the three factors.⁹

A review of material from the Ontario Human Rights Commission reveals that approximately 75% of human rights complaints arise out of situations in the workplace. A significant portion of such complaints revolve perceived discrimination regarding a person’s “handicap”.

With the growing number of human rights cases, and the anticipated changes in the legislation that will expand the potential for recovery of damages through the courts, the leakage of employment, human rights and disability insurance claims will probably be significant.

A Recent Employment Law Case and Depression

As noted above, human rights legislation in Ontario is on the verge of expanding the potential exposure to employers and recognition of disabilities even where an absence from work may be related to substance abuse issues will often trigger entitlement to substantial damages, even where the employer may feel that there was just cause to

⁹ Ibid, page 18.

dismiss the employee. The recent Alberta case of *Whitford v. Agrium Inc.*¹⁰, demonstrates this. In *Whitford*, the plaintiff had worked for the defendant for 22.5 years, all but 21.5 of which as a union member. In the last year, he became a supervisor. His employer recognized that he had developed an addiction to alcohol along with pre-existing depression. Due to these conditions he missed a lot of time from work over a period of some six months. His last week of absence was allegedly without leave of the employer and he was dismissed for cause. The Alberta Court of Queen's Bench ruled that his dismissal was wrongful and awarded him damages. They were of the view that many of his absences were not accompanied by warnings and he was granted approval for prior periods of absence. The attitude of the Court to the plaintiff's alcoholism and depression is as follows:

At the time of his dismissal Whitford was a 22-year-plus employee with Agrium with a previously good service record; before October of 2002 he had no record of significant absenteeism. In October of 2002, he began treatment for alcoholism and continued to be treated by a psychiatrist for previously diagnosed depression. Thus, the absences which commenced in October of 2002 were based on two diagnosed medical conditions and he requested leave on two occasions for the express purpose of seeking treatment for his alcoholism. Moreover, his absences for illness and treatment were, by and large, approved by the employer until approximately April of 2003.¹¹

The case is silent with respect to whether Whitford had any disability benefits available to him, however, the message is clear with respect to the duty to accommodate. The case itself is not ground-breaking, however, it does demonstrate the trend in employment litigation which favours compassion and responsibility towards people suffering with depression and substance abuse problems.

¹⁰ 2006 ABQB 726, [2006] A.W.L.D. 3245, [2006] A.W.L.D. 3244, [2006] A.W.L.D. 3242, 53 C.C.E.L. (3d) 272, 65 Alta. L.R. (4th) 374, [2007] 1 W.W.R. 621

¹¹ Ibid, paragraph 40.

Comment on CIBC Class Action re Overtime

In the last few days, news has come out that a class action has been filed on behalf of CIBC employees with respect to allegations of unpaid overtime. While, this case will take some time to work its way through the courts, it is yet another indicator of the growing assertiveness of Canada's workforce. While the case clearly seeks monetary compensation, all indicators suggest that the motivation for this case, in addition to the financial considerations, stems largely from the growing desire of employees to have their employers value their personal lives and time and that there be recognition that if employees will be required to work extra hours that they be fairly compensated for same, or employers should consider hiring sufficient staff so that no employees will have to work hours that will severely interfere with their personal lives. I have thrown this comment in as it strikes me that such a case also is indicative of the growing concern about work-related stress. Is the workplace more stressful these days? Maybe yes and maybe no, however, our society seems to be giving this problem much greater thought and attention than has historically been the case.

Mental Health Disability Claims and Settlement

Practical considerations regarding settlement of disability cases where mental health issues are involved include the following list (by no means, meant to be an exhaustive one):

- The mental capacity and competency of the claimant to enter into a settlement agreement;

- The ability of the claimant to manage or handle a lump sum settlement award;
- Whether LTD insurers should start to consider the use of structured settlements in certain cases;
- The structure of settlement agreements and releases bearing in mind the possibility of the future potential for disability claims if and when the claimant returns to the labour marketplace;

In *Rowe v. UNUM*¹², the plaintiff settled his LTD claim and the Minutes of Settlement contained a clause disentitling him from receiving LTD benefits for any disabling condition arising prior to May 1, 1998 that was caused or contributed to by any illness related to insured's period of disability, unless illness was caused solely by physical illness, trauma, or injury that first occurred after May 1, 1997 -- In March 1998, insured was diagnosed with Hepatitis C. His claim for LTD benefits was allowed as the diagnosis of Hepatitis C was considered distinct from any illness related to his prior disability claim, notwithstanding that the diagnosis did result in the re-occurrence of his depression. The case is lengthy and there is extensive discussion about numerous legal issues, however, the approach to the prior depression versus the depression that developed after the hepatitis C diagnosis can be seen as follows:

¹² 2006 C.E.B. & P.G.R. 8199, 37 C.C.L.I. (4th) 32, 2006 CarswellOnt 2975

It seems to me that both Dr. Quan and Dr. Gow's findings accord with the totality of the evidence before the Court. I find, on the evidence as a whole, that what Mr. Rowe suffered after the commencement of Interferon was significantly different both qualitatively and quantitatively from his episode of major depression 1996. Further, the opinions of Dr. Gow and Dr. Quan find support in the medical literature.¹³

On reading this Judgment, it is clear that the medical issues in this case were complex and perhaps many disability cases would not approach the degree of complexity and the difficulty in coming to terms with those medical issues that the court noted in this case. However, the case is instructive of the potential pitfalls faced in settling LTD cases and drives home the point that such settlements should be crafted with precision and care.

Concluding Remarks

I started by saying that his paper is meant more as the ruminations of someone dealing with these issues on a day-to-day basis, with what I hope are some practical and perhaps useful observations that may help frame the subject, rather than providing a step-by-step guide. The law continues to evolve in this challenging area and we are all privileged to participate in its evolution.

¹³ Ibid, par. 344.