

Litigation Matters

November 2022

In this new edition of our *Litigation Matters* publication, we look back at some of this year's Canadian court decisions that may have an impact on our industry. Also, since the Internet is a source of easily accessible public information, we have taken this opportunity to respond to questions and suggest best practices for Internet screening of claimants' activities as an overlooked claim tool.

1 Internet screening of claimants' activities or survivorship

When assessing a multiple payment claim e.g., disability or long-term care, it may be permissible with the right consent to perform Internet and social media screening of an insured's activities to determine whether the insured is carrying out activities that may be inconsistent with the limitations associated with the medical condition for which benefits are claimed. Screening may also be useful for a life insurance to quickly confirm the death of an insured person.

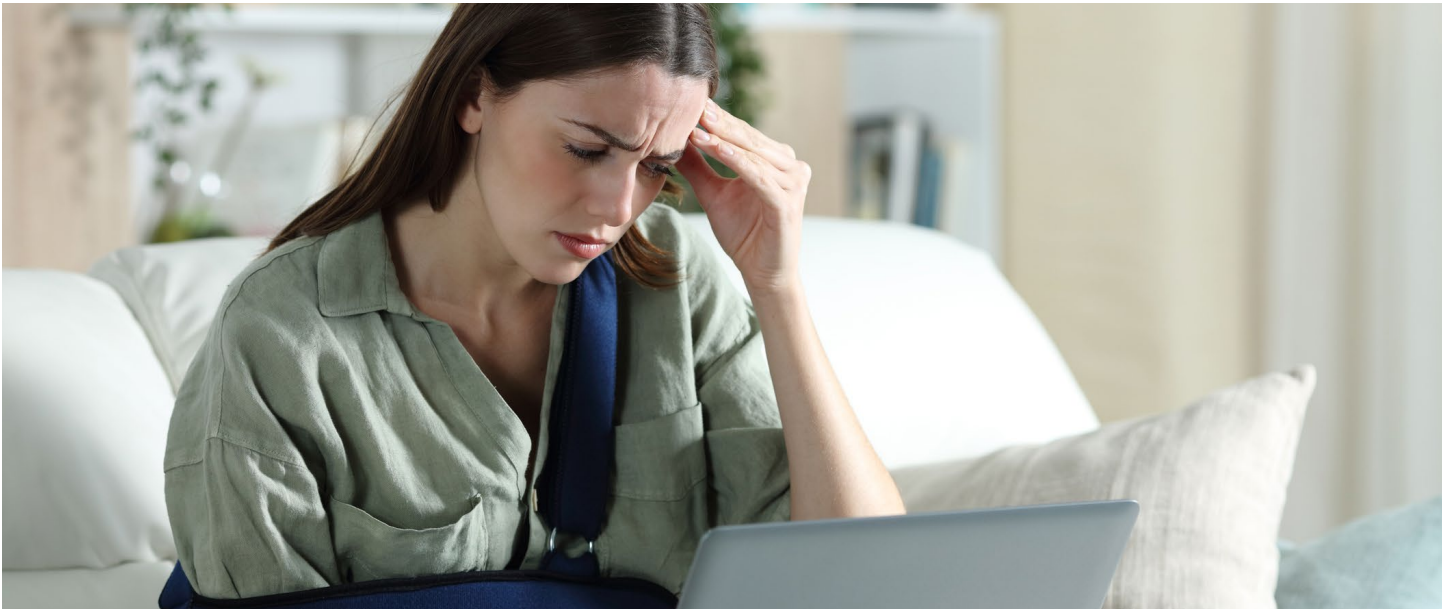


In accordance with the applicable legislation and case law on personal information and privacy protection, the following are best practices to consider when conducting Internet screening in relation to a claim:

- ✓ The search can be done only on information made public on websites and never on sites where information is restricted in any way whatsoever.

- ✓ The insured person's consent, obtained through the initial claim forms, should include an express authorization to conduct a search relevant to the claim assessment on websites and social media that are publicly accessible.
- ✓ Without the insured person's express consent, an Internet search may be conducted if the claim file shows indications of fraud prior to conducting the search. In disability insurance, the criteria permitting to conduct a search is similar to the one required to carry out a surveillance of activities with an investigative firm: indications of activities inconsistent with the insured's alleged limitations.
- ✓ Searching in a newspaper website, such as checking death notices on a funeral home's website, does not usually require the consent of the life insured or of the Estate, since this is essentially public information.

We do not advocate denial of a claim solely based on Internet searches. Instead, we recommend conducting additional investigation permitting to validate any findings which may arise in relation to the claim, both to support ongoing benefits or determine whether further benefits are warranted.



2 Disability insurance: Criteria for awarding moral damages in civil law (Quebec)

An issue that has generated debates among Quebec jurists for many years is the applicability in Quebec law of the principles developed in *Fidler* (*Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3), which originated in British Columbia and was upheld by the Supreme Court of Canada in 2006. *Fidler* affirmed the possibility, in common law, of awarding compensation for non-economic loss or mental distress caused by the unjustified termination of benefits under a disability insurance policy, when such mental distress is demonstrated to the court and is sufficient intense to warrant compensation.

In the recent decision of *Hébert c. Desjardins Sécurité Financière*, C.S.Q., EYB 2022-450997, 500-17-095419-167, May 17, 2022, the Superior Court reviewed Quebec case law that examined if awarding compensation for mental suffering caused by the unjustified interruption of disability benefits applies in Quebec.

In this case, the insurer terminated the payment of disability benefits under a group association policy because the claimant no longer met the applicable definition of disability (own occupation). In Mr. Hébert's view, the decision by Desjardins to terminate benefits caused him real distress. He said that he experienced this decision as a betrayal. He had changed insurance companies at some point for greater peace of mind. DSF's denial of his claim poisoned his life (para. 144 of the decision). The court confirmed the insurer failed to demonstrate that the claimant was no longer disabled and found also that the mental suffering caused by the interruption of benefits was sufficiently intense to warrant compensation for moral damages in the amount of \$20,000.

Whether the principles established in *Fidler* apply in Quebec civil law remains a controversial issue. On at least two occasions, the Quebec Court of Appeal has refused to rule specifically on the issue. Nonetheless, more recently, in 2018, in *Tardif c. Succession de Dubé*, 2018 QCCA 1639, the Court of Appeal recalled that an insurer has an obligation to act fairly in its investigation process and any failure to do so may trigger moral damages award.

Although Hébert does not provide a clear answer as to the applicability of *Fidler*, the Superior Court found that the mental suffering generated by the interruption of benefits that was medically unjustified, the opacity of Desjardins' decision-making process and failure to substantiate its decision caused Mr. Hébert high levels of anxiety and stress that warranted the award of moral damages. This decision is being appealed by Desjardins and it will be interesting to follow the outcome in appeal.

Blue Cross Life Insurance Company was ordered to pay punitive damages of \$1.5 million for its handling of an LTD claim, representing the highest amount of damages ever awarded against a Canadian insurer.

The amount of moral damages awarded in Quebec remain well below those awarded in common law provinces. A case in point is the recent ruling in *Baker v. Blue Cross Life Insurance Company of Canada*, (June 24, 2022), unpublished (Ont. S.C.J.), in which Blue Cross Life Insurance Company was ordered to pay punitive damages of \$1.5 million for its handling of an LTD claim, representing the highest amount of damages ever awarded against a Canadian insurer. Following this ruling, Blue Cross filed an appeal to review the quantum of damages. We will also be monitoring the outcome of this case in appeal which will have an impact on our industry.

3 Life insurance

3.1 Evidence needed to establish fraud

In the recent ruling of *Costanza v. Desjardins Financial Security Life Assurance Company, 2022 ONSC 432*, the Ontario Superior Court conducted a useful review of the criteria needed to rescind a life insurance policy when the policy has been in force for more than two years at time of death.

In January 2012, Mr. Costanza applied for life insurance with State Farm, a company later purchased by Desjardins. Mr. Costanza answered “No” to the following question in the insurance application: In the last three years, have you been convicted of or pleaded guilty to any criminal offence or any moving violations or driving under the influence of alcohol or drugs? In light of the answers given in the application, State Farm issued a life insurance policy on February 9, 2012. The policy provided a basic life insurance benefit of \$500,000.

Five years later, on December 3, 2017, Mr. Costanza was found in his car in front of his house, with multiple fatal gunshot wounds. The beneficiary submitted a claim, but Desjardins refused to pay, claiming that the policy was void due to fraud when the policy was issued. Desjardins argued that Mr. Costanza had been convicted of assault causing bodily harm and sentenced to 90 days in prison on March 11, 2009, which is two years and nine months prior to the date on which he submitted the application for insurance.

In this particular case, Desjardins failed to demonstrate that the 90-day prison sentence had occurred within three years preceding the date of the application for insurance. As a result, the court ordered payment of the life insurance benefit. Nonetheless, the judge reviewed the case law with respect to the burden of proof necessary to establish fraud for a policy that has been in force for more than two years. We will see that item (b) below is undoubtedly the most difficult to prove for fraud, whereas (a) and (c) are sufficient for a policy to be rescinded due to material misrepresentation when the policy has been in effect for less than two years:

- (a) the insured made a misrepresentation material to the risk;
- (b) the insured was aware of the falsehood of the representation, whether through knowledge or recklessness;
- (c) had there been no misrepresentation, the policy would not have been issued under the same conditions.

3.2 Death while committing a criminal offence

In the recent summary judgment of *Jantzen Estate v. TD Life Insurance Co., 2022 SKQB 113*, the Saskatchewan Court of Queen’s Bench affirmed the decision of TD Life Insurance to



refuse to pay the life insurance benefit under two policies due to the application of the contractual exclusion for committing a criminal offence at the time of death.

The insured’s death was caused by an overdose of alcohol and cocaine. The insurer’s refusal to pay the claim was based on the fact that the insured died as a result or while committing a criminal offence which is being possession of cocaine, and that both life insurance policies contained an exclusion clause to that effect. The court’s judgment relied primarily on the autopsy report confirming a lethal level of cocaine in the blood and liver as well as the fact that a measurable quantity of cocaine had been found in the insured’s wallet, which was sufficient to demonstrate by balance of probabilities that the insured committed the offence (possession of cocaine) at the time of his death.

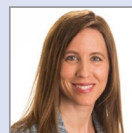
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