CITATION: Bonilla v. Preszler et al, 2016 ONSC 1411
COURT FILE NO.: CV-08-368490
DATE: 20160229

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
GLENDA BONILLA	)	*Kevin Doan*, for the Plaintiff
	)	
Plaintiff	)	
	)	
	)	
– and –	)	
	)	
ROBERT PHILIP PRESZLER, PRESZLER LAW FIRM and THE PERSONAL INSURANCE COMPANY OF CANADA	)	*Sandi J. Smith*, for the Defendants, Robert Philip, and Preszler Law Firm
	)	
	)	*Eric K. Grossman and Lauren Furukawa*, for the Defendant, The Personal Insurance Company of Canada
Defendants	)	
	)	
	)	
	)	**HEARD: February 24, 2016**

REASONS FOR DECISION

DIAMOND J.:

Overview

[1] The plaintiff was involved in a motor vehicle accident on June 10, 2002, during what is commonly referred to as the *Bill 59* regime. Shortly after the accident, the plaintiff applied for Income Replacement Benefits ("IRBs") from her insurer, the defendant The Personal Insurance Company of Canada ("Personal").

[2] Personal responded to the plaintiff's request and paid her IRBs for several months. On or about February 4, 2003, Personal delivered correspondence and enclosures to the plaintiff advising that, effective February 27, 2003, her IRBs would no longer be paid. At that time, the plaintiff's lawyer was the defendant Robert Philip Preszler ("Preszler").

[3] Personal also denied the plaintiff's request for payment of other accident benefits. On behalf of the plaintiff, Preszler disputed Personal's denial of those other benefits by pursuing

various mediations at the Financial Services Commission of Ontario ("FSCO"). However, at no time did Preszler apparently challenge Personal's denial of the plaintiff's IRBs.

[4] On July 22, 2005, the plaintiff commenced an earlier action against Personal ("the 2005 action") seeking entitlement to various statutory accident benefits. IRBs were not among those benefits sought by the plaintiff in the 2005 action.

[5] In or around 2007, the plaintiff retained new counsel and subsequently commenced this proceeding against Preszler and Personal. In this action, the plaintiff seeks, *inter alia*, (a) entitlement to IRBs from Personal, and (b) damages against Preszler for breach of fiduciary duty and negligence.

[6] Personal now brings a motion for summary judgment, seeking an order dismissing the plaintiff's action "with regards to the issue of IRBs" on the basis that the plaintiff's claim was not commenced within the two year limitation period set out in section 281.1 of the *Insurance Act* R.S.O. 1990 c. I8 ("*Insurance Act*") and section 51 of the *Statutory Accident Benefit Schedule – Accidents on or After November 1, 1996*, O. Reg. 403/96 (the "Schedule"). The plaintiff resists Personal's motion. Preszler does not oppose the relief sought by Personal.

[7] For the reasons which follow, I have granted this relief sought by Personal.

Summary Judgment

[8] Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that the Court shall grant summary judgment if the Court is satisfied that "there is no genuine issue requiring a trial with respect to a claim or defence." As a result of the amendments to Rule 20 introduced in 2010, the powers of the Court to grant summary judgment have been enhanced to include, *inter alia*, weighing the evidence, evaluating the credibility of a deponent and drawing any reasonable inference from the evidence.

[9] In *Hryniak v. Mauldin* 2014 SCC 7, the Supreme Court of Canada established a road map outlining how a motions judge should approach a motion for summary judgment. The Court must first determine whether there is a genuine issue requiring a trial based only upon the evidence filed with the Court and without using the new fact finding powers set out in the 2010 amendments. Summary judgment will thus be available if there is sufficient evidence to justly and fairly adjudicate the dispute, with the motion being an affordable, timely and proportionate procedure.

[10] If the Court finds the presence of a genuine issue requiring a trial, the motions judge must then determine if the need for a trial can be avoided by using the new, enhanced powers under Rules 20.04(2.1) and (2.2).

[11] It is important to remember that the applicable evidentiary principles developed under the previous incarnation of Rule 20.04 continue to apply. The motions judge must still take a "hard look" at the evidence to determine whether it raises a genuine issue requiring a trial, and as a result each party must still put its "best foot forward" and submit cogent and compelling evidence to support or oppose the relief sought. A moving party has both a legal and evidentiary

onus to satisfy the Court that there is no genuine issue requiring a trial. It is the moving party's obligation to present a record that can enable the Court to avail itself of the enhanced powers under Rule 20.04 if the record warrants the exercise of such discretion.

[12] In my view, summary judgment is a just and proportionate outcome for the parties. On the record before me, I am confident that I can find the necessary facts and apply the relevant law to the evidence, and that it is in the interest of expedient, proportional and affordable justice to proceed as such.

Limitation Period

[13] Section 281(2) of the *Insurance Act* provides as follows:

> "No person may bring a proceeding in any Court, refer to issues in dispute to an arbitrator under s.282 or agree to submit an issue for arbitration in accordance with the *Arbitration Act, 1991* unless mediation was sought, mediation failed and, if the issues in dispute were referred for an evaluation under section 280.1, the report of the person to perform the evaluation has been given to the parties."

[14] Section 281.1(1) of the *Insurance Act* provides as follows:

> "A mediation proceeding or an evaluation under section 280 or 280.1 or a court proceeding or arbitration under s.281 shall be commenced within two years after the insurer's refusal to pay the benefit claimed."

[15] Section 51 of the Schedule states:

> "A mediation and proceeding or evaluation under section 280 or 280.1 of the Insurance Act or a court proceeding or arbitration under clause 281.1(a) or (b) of the Act in respect of a benefit under the Regulation shall be commenced after two years after the insurer's refusal to pay the amount claimed."

[16] The two year limitation period is mandatory, and commences on the date the insurer refuses to pay the amount/benefit claimed. In *Smith v. Co-Operators General Insurance Co.* 2002 SCC 30, the Supreme Court of Canada held that the two year limitation period begins to run once the insured receives a clear and unequivocal denial of benefits from his/her insurer.

[17] In discussing the contents of the notice required from the insurer, the Court stated as follows:

> "At a minimum, this should include a description of the most important points of the process, such as the right to seek mediation, the right to arbitrate or litigate if mediation fails, a mediation must be attempted before resorting to arbitration or litigation and the relevant time limits

> that govern the entire process. Without this basic information, it cannot be said that a valid refusal has been given."

Legal Representation

[18] The parties disagree as to the effect, if any, of the plaintiff being represented by Preszler at all material times (2002-2007). In *Smith*, the Supreme Court of Canada held that as insurance law is geared toward consumer protection, the Court should impose "bright line boundaries between the permissible and the impermissible without the undue solicitude for particular circumstances that might operate against claimants in certain cases." As such, the plaintiff submits that the fact that she was represented by counsel at the material times is not a relevant consideration for this Court.

[19] There have been several post-*Smith* decisions which seemingly take a slightly different view. In *Sietzema v. Economical Mutual Insurance Company* (2014) 118 O.R. (3d) 713 (C.A.), the Court of Appeal for Ontario was asked to consider an appeal from an order granting summary judgment dismissing an insured's claim as statute-barred. In dismissing the appeal, one of the factors taken into consideration by the panel was that the insured's "lawyer would have known that limitation periods were running".

[20] In my view, while the plaintiff's legal representation is certainly not dispositive of the limitation period issue, it is nevertheless a relevant factor to be taken into consideration on a motion for summary judgment. In the case before me, I note that the plaintiff has commenced this proceeding against Preszler for allegedly breaching his duty of care and providing negligent services. It is thus the plaintiff who has placed Preszler's duty and obligations owed to her squarely into issue in this proceeding, and as such, I find that her legal representation ought to be considered in deciding whether or not to grant summary judgment.

Discoverability?

[21] The plaintiff argued that as an insurance contract is a contract of indemnity, the Court must apply the discoverability rule when assessing a limitation period defence, and must thus determine when the plaintiff's actual loss was known or ought to have been known by her.

[22] As I understood the plaintiff's argument, an insurer's refusal to pay the benefit/amount claimed cannot necessarily be engaged until an insured is "entitled to have the amount paid". In other words, since the plaintiff's entitlement to IRBs only arises after the corresponding period of time for those IRBs has lapsed, and there is no provision under the Schedule to "pay future IRBs now", the limitation period seemingly cannot apply to a quantification of benefits into the future.

[23] This argument was admittedly difficult to follow. I see no basis for importing the discoverability rule into the facts of this case. The plaintiff's loss crystallized when Personal ceased paying her IRBs. There is no dispute that this refusal came into effect on February 27, 2003. On that date, the plaintiff knew that Personal would not be remitting payment towards any future IRBs and there was no conduct on the part of Personal which would have caused her to believe otherwise.

[24] The limitation period provisions in the *Insurance Act* and corresponding Schedule are precise and unambiguous. To apply them in the manner suggested by the plaintiff would effectively undermine the entire certainty intended by the legislature in drafting those provisions.

[25] In *Kirkham v. State Farm Mutual Automobile Insurance Co.* 1998 CarswellOnt. 2811 (Div. Ct.), leave to appeal dismissed [1998] O.J. No. 287 (C.A.), the Divisional Court upheld the decision of the Director's Delegate barring an insured's claim for weekly benefits by operation of the limitation period under the *Insurance Act*. In concluding that there is no "rolling/floating limitation period" under the Schedule, the Director's Delegate held as follows:

> "In my opinion, section 281(5) reflects a change in the nature of limitation period. It states that the two year time limit runs from the insurer's refusal to pay the benefits claimed. The refusal is a triggering event, not the insurer's failure to pay or the existence of the cause of action. Not only is this the plain and ordinary meaning of the section, it is consistent with the Act and the Schedule read as a whole."

Shoppers Drug Mart

[26] In a related argument, the plaintiff relies on the fact that she omitted to include her employment at Shoppers Drug Mart ("Shoppers") in her original application for Accident Benefits with Personal which was submitted on or about June 25, 2002. The plaintiff only advised Personal of the existence of her additional employment with Shoppers after retaining new counsel in 2007.

[27] The plaintiff therefore submits that Personal has a duty to re-adjust her claim for IRBs upon being presented with the additional Shoppers information, and as such she should be allowed to pursue a retroactive claim for these additional Shoppers IRBs as there was no true prejudice suffered by Personal in the circumstances.

[28] I reject the plaintiff's argument. Her application form for Accident Benefits has several parts, including Part 8 which states, *inter alia*, as follows:

> "Give details of your employment for the past 52 weeks. Start with your current or most recent employer. If you had accepted a written job offer to start within the next year, list the employer below and include the start date. If you held more than one position with the same employer, use a separate line for each position. Gross income is before taxes and deductions."

[29] Underneath that paragraph is sufficient space to give particulars supporting up to four employers during the previous 52 weeks. The only employer listed on the plaintiff's application form was CIBC Mortgages, and the length of that employment was described as "from 1997 to the present date" (i.e. the date of her application).

[30] There is no adequate evidence explaining why the plaintiff failed to list her employment with Shoppers on the application form. More importantly, I do not find that Personal was

required to re-adjust the plaintiff's claim for IRBs after being furnished with the Shoppers employment information in 2007, as subject to Personal's notice of refusal of IRBs being clear and unequivocal (discussed below), the plaintiff's claim for entitlement to IRBs had already expired. As held by the Court of Appeal for Ontario in *Haldenby v. Dominion of Canada General Insurance Co.* (2001) 55 O.R. (3d) 470 (C.A.):

> "The problem with this submission is that there is no provision in the *Act* or *SABS* which allows the claimant to re-apply for further benefits after an insured person's benefits have been terminated by the insurer. The only remedy for the insured person is to appeal the termination of benefits within the two year period."

[31] The onus was squarely upon the plaintiff to properly complete and submit the application form. She did not do so, and waited approximately five years before advising Personal. She was represented by Preszler for most of those five years.

[32] I therefore find that the February 4, 2003 documents started the limitation period, and it did not restart by reason of the plaintiff unilaterally remembering her Shoppers employment well after the deadline for commencing legal proceedings.

Was the Notice Clear and Unequivocal?

[33] If Personal's refusal to pay any further IRBs to the plaintiff was clear and unequivocal, then the two year limitation period commenced on or about February 4, 2003, and there is no dispute that this proceeding was commenced well after the two year limitation period. It is thus necessary to review both the contents of the documentation prepared and delivered by Personal, and the evidence of the plaintiff and Preszler themselves.

[34] Personal sent two letters, both dated February 4, 2003, to the plaintiff. It is not clear whether the letters were sent together in one package, although there are "enclosures" referenced at the bottom of each letter.

[35] The first letter contains the subject "Denial of A/B Benefit". It advised the plaintiff that Personal had refused to pay "all or part of your claim for accident benefits", with the specific details of that refusal contained in the attached forms. The balance of that letter clearly provides all of the necessary information required by the *Smith* decision. I find this first letter to be clear and unequivocal in both the language chosen and the message delivered.

[36] The plaintiff submits that the second letter (which on its face was copied to Preszler), together with the enclosed forms, "scratched the plaintiff's lenses" in viewing the options available to her in February 2003. This second letter specifically references a then-recent independent medical examination of the plaintiff which concluded that she was not substantially disabled from performing her pre-accident occupational activities (or activities of normal daily living), and as a result the plaintiff's IRBs would cease as of February 27, 2003.

[37] This second letter enclosed a OCF-14/59 form (Permission to Disclose Health Information to the Designated Assessment Centre) and a OCF-17/59 form (Notice of Stoppage of Weekly Benefits and Request for Assessment).

[38] The OCF-14/59 form informed the plaintiff of Personal's decision that she would no longer be eligible for IRBs based on the independent medical examination. I do not find the presence of anything ambiguous or misleading in the OCF-14/59 form.

[39] The plaintiff contends that the contents of the OCF-17/59 form caused sufficient confusion to render Personal's notice ambiguous and misleading. The OCF-17/59 form is a one-page, pre-printed document containing standard form language and allowing for certain areas to be completed by the insured.

[40] At the time, the relevant provisions of the *Insurance Act* mandated insurers to offer insureds the option of requesting a further independent assessment by a Designated Assessment Centre ("DAC"). This was an option available to an insured in addition to proceeding straight to mediation, and if pursued by the insured, then the insurer would have to continue paying the disputed benefits until the release of the DAC's decision.

[41] In Part 3 of the OCF-17/59 form, Personal advised the plaintiff of the reason for the stoppage of the payment of her IRBs. Part 4 contains a pre-printed statement as follows:

> "If you disagree with the stoppage of benefits described above, you have the right to ask for an assessment by a Designated Assessment Centre to determine whether your disability continues. If you ask for an assessment, the Designated Assessment Centre requires your permission to obtain and discuss your medical history and to release its report. Please sign this form and the attached Permission to Disclose Health Information to the Designated Assessment Centre form. Please return both forms within 14 days of receiving this notice. If you do not return this Request for Assessment and Permission to Disclose Health Information to the Designated Assessment form within 14 days, your benefits will be stopped."

[42] If an insured wished to exercise the option of being assessed by a DAC, Part 5 of the OCF-17/59 form provided for a signature under the following paragraph:

> "I disagree with the stoppage of benefits as described. I request an assessment at a Designated Assessment Centre to determine whether my disability continues. I understand that in order for the insurance company to comply with my request to be assessed, I must enclose a signed Permission to Disclose Health Information to the Designated Assessment Centre form."

[43] None of the above contents of the OCF-17/59 form are controversial. However, the following sentence is included (in bold font) in the space between Part 3 and Part 4 of the form:

> "The rest of this form must be completed by the applicant and returned to the insurance company if the applicant disagrees with the stoppage of benefits."

[44] In my view, the insertion of the above sentence does have the potential to confuse the reader. The OCF-17/59 form must be completed if the insured wishes to exercise his/her right to be assessed by a DAC, but that is an insured's right and not an obligation. If the insured merely wished to dispute the stoppage of benefits, he/she would elect to proceed to mediation, etc.

[45] The OCF-17/59 form is merely one of several documents sent to the plaintiff, and must be considered in that context. The message conveyed in the two letters was clear and unequivocal. While it is arguable that the sentence linking Part 3 and Part 4 of the OCF-17/59 form may have the potential to render the overall message ambiguous, I find that the sentence is not engaged on the facts of the case before me.

[46] To begin, if the plaintiff understood the OCF-17/59 form to require her to request an assessment by a DAC as a condition of disputing the stoppage of her IRBs, she never completed the OCF-17//59 form in any event and only proceeded with mediations of the other benefits which were denied by Personal. The evidence is clear that the IRBs never formed any part of the various mediations pursued by the plaintiff. The reason supporting this decision to exclude IRBs from those mediations are found in the discovery transcripts of the plaintiff and Preszler.

[47] The plaintiff testified at her discovery that she relied upon Preszler in coming to the decision not to include IRBs at the various mediations, but she could not recall any details of her discussions with Preszler as to why the IRBs were never pursued, either at the mediations or in the 2005 action.

[48] At his discovery, Preszler testified that the reason the IRBs were not pursued was due to the fact that the plaintiff enjoyed both short term and long term disability benefits through her employer, and ended up going back to work by 2004 in any event. Accordingly, a request for payment of IRBs became, effectively, moot.

[49] When Personal denied the plaintiff her IRBs, in the face of both letters and both forms, the plaintiff:

a) did not request to be assessed at a DAC;
b) did not pursue a mediation of the denial of her IRBs, and consequently
c) did not sue for payment of her IRBs in the 2005 action.

[50] To the extent that the plaintiff's losses arising from the stoppage of her IRBs may still be a live issue, that is only an issue between the plaintiff and Preszler in this proceeding. The plaintiff's claims with regards to the issue of her IRBs as against Personal are statute barred.

[51] I therefore grant summary judgment in favour of Personal dismissing the plaintiff's action with regards to the issue of IRBs as against Personal. I leave it to the parties to determine whether such a finding disposes of the entire action against Personal, or whether Personal wishes

to proceed with a further motion for summary judgment seeking an order dismissing the balance of the plaintiff's claim against it (if such a balance exists).

Costs

[52] I see no reason why costs should not follow the event. Personal is entitled to its costs of this motion on a partial indemnity basis. As per the Court of Appeal comments in *Boucher v. Public Accountants Council (Ontario)* (2004) 71 O.R. (3d) 291 (C.A.), I am required to consider what is both fair and reasonable "in fixing costs with a view to balance the compensation of the successful party with a goal of fostering access to justice."

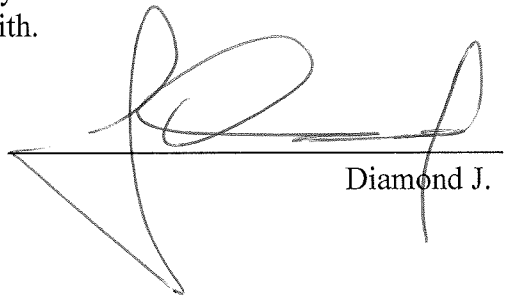
[53] I have reviewed the bills of costs of both the plaintiff and Personal. The plaintiff's bill of costs on a partial indemnity basis totaled $58,220.03. Personal's bill of costs on a partial indemnity basis totaled $38,028.27. Certainly it was within the plaintiff's reasonable expectations to be exposed to a costs award in the same range, or possibly more, than the costs she incurred herself in responding to Personal's summary judgment.

[54] In reviewing Personal's bill of costs, I have no difficulty in awarding the amount it seeks, and order the plaintiff to pay Personal its costs of the motion on a partial indemnity basis in the amount of $38,028.27 forthwith.

[55] The plaintiff submitted that she should be entitled to a "modified Bullock order" permitting her to seek reimbursement of her payment of Personal's costs from Preszler, as it remains her position that it was Preszler who was the effective cause of all her losses in this proceeding. In my view, such a request is without foundation. There is no crossclaim between Preszler and Personal. Preszler did not oppose the relief sought by Personal on this motion. More importantly, on several occasions leading up to the motion, Preszler advised the plaintiff that it would not take the position in this proceeding that a failure on the part of the plaintiff to defend Personal's motion would result in a failure to mitigate.

[56] The decision to oppose Personal's motion was that of the plaintiff, and the plaintiff alone. I find no grounds to support a traditional or "modified" Bullock order in the circumstances.

[57] Finally, Preszler was put to the expense of providing a limited response to Personal's motion for summary judgment in order to prepare and attend to address the plaintiff's request for the "modified Bullock order". Preszler seeks its costs of the motion payable by the plaintiff in the amount of $2,523.90. These costs are quite modest in the circumstances, and should lay at the feet of the plaintiff. I therefore order the plaintiff to pay Preszler its costs of the motion on a partial indemnity basis in the amount of $2,523.90 forthwith.



Diamond J.

Released: February 29, 2016

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Defendants

REASONS FOR DECISION

Diamond J.

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