

SUPERIOR COURT OF JUSTICE
CIVIL COURT

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B E T W E E N :

SARA BAKER

Plaintiff

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- v. -

BLUE CROSS LIFE INSURANCE COMPANY

Defendant

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R U L I N G

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BEFORE THE HONOURABLE JUSTICE S. VELLA with a Jury
on May 27, 2022 at 330 University Avenue, Toronto, Ontario

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APPEARANCES:

S. Birman Counsel for Sara Baker

R. Ben Counsel for Sara Baker

A. Williams Counsel for Sara Baker

30 L. Jackson Counsel for Sara Baker

B. Marta Counsel for Blue Cross Life Insurance Company

A. Belloso Counsel for Blue Cross Life Insurance Company

FRIDAY, MAY 27, 2022

R U L I N G O N C P P F I L E

5 VELLA, J. (Orally):

10 The defendant objects to the filing of the plaintiff's CPP file as an exhibit on the basis that it is not relevant, or alternatively, its limited probative value is outweighed by the significant prejudice his client would suffer if this goes before the jury.

15 The first bar to reach for the admissibility of evidence is a determination of relevance to the material issues in this trial. The material issues are in turn defined with reference to the pleadings *Girao v. Cunningham*, 2020 ONCA 260 and the *Law of Evidence in Canada 5th Edition*, 2018, p. 54-55.

20 Once relevance is established, the trial judge has a residual discretion to exclude the offered evidence if the prejudice that will be realized substantially outweighs the probative value of the evidence.

25 After considering the written submissions and oral submissions of both parties, the defendant's motion is denied.

30 In my view, the issue of the CPP is a question of fact and it is relevant to the plaintiff's mental

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Vella, J. (Orally)

distress claim and her associated request for aggravated damages. The amended statement of claim pleads mental distress and seeks aggravated damages.

Furthermore, the statement of defense pleads that the plaintiff either failed to apply for collateral benefits, or applied late for collateral benefits. The CPP is a collateral benefit referenced in the subject insurance policy. Accordingly, I find that the CPP file is relevant to the material issues in this trial.

Furthermore, the probative value of the CPP file outweighs any potential prejudice. If there is any prejudice arising from the purpose for which the jury may rely on the CPP file, it can be dealt with through the appropriate jury instruction in my charge at the conclusion of this trial.

I am alert to the concern that the jury not make the assumption that just because the plaintiff received CPP, it does not mean that she met the criteria for disability beyond the initial 24-month period under the subject Blue Cross long-term disability insurance policy.

However, this ruling is without prejudice to the defendant's right to challenge the admissibility of the contents of the CPP file on the basis of s. 35 of the *Evidence Act* or any other provision of the *Evidence Act*. This ruling relates to the

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relevance and the residual discretion of the court to exclude evidence under the probative value/prejudice analysis.

In making this ruling, I accept Mr. Marta's proposition that as per *Basandra v. Sforza*, 2016 ONCA 251 at para. 20, the trial judge has the sole responsibility to reduce the jury's award to account for a plaintiff's receipt of collateral benefits, and that this task is performed after the jury's verdict is rendered.

R U L I N G O N J U R Y Q U E S T I O N

The parties are unable to agree with respect to the wording of the jury questions, or even the areas of questions to go to the jury. Both parties have requested that I make a ruling with respect to the jury questions and to determine the questions that will go before the jury.

In addition to not being able to agree on the wording of any of the jury questions, the parties cannot agree to whether any questions relating to whether or not the plaintiff had a duty to mitigate, should go forward to this jury. The defendant urges that these questions be put to the jury whereas the plaintiff opposes that any mitigation-related questions be put to the jury.

I heard submissions from both parties and have reviewed the statements of law each party

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Vella, J. (Orally)

prepared. On the issue of questions relating to mitigation, I am guided by the recent decision of M. Edwards, RSJ rendered in *Agha v. Munroe* 2022, ONSC 2508, and in particular, the passage set out in that decision at para. 58 from *M.B. v. 2014052 Ontario Ltd.*, (*Deluxe Windows of Canada*) quoting paragraph 37 of *Deluxe Windows*.

I have some preliminary concerns about the legal tenability about the apparent defense position that Mrs. Baker had a duty to mitigate in the context of a claim for long-term disability benefits governed by the terms of the subject long-term disability insurance at issue in this matter.

Furthermore, and in any event, it is premature to make a ruling on this discrete issue pending hearing evidence on behalf of the plaintiff to determine whether the mitigation-related jury questions proposed by the defendant ought to be permitted to go before the jury. See *Agha* at paragraph 38.

Accordingly, I will defer rendering a decision regarding the proposed jury questions relating to mitigation until the plaintiff's case is closed. At that time, I will invite further brief submissions with the benefit of having the plaintiff's evidence completed.

As counsel have been unable to agree on the jury

questions, having been canvassed at the trial management conference and despite requests from the court, I have determined the questions that will go before the jury. I have considered the respective versions of the proposed jury questions submitted by the plaintiff and defendant, and their written and oral submissions. I will now hand out the jury questions to counsel. As stated, I will hear further submissions regarding the mitigation-related questions later in the trial.

That concludes my second ruling and I will now ask the registrar to hand out the jury questions.

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