CITATION: Imeri et al v. Laidman et al, 2023 ONSC 5095
COURT FILE NO: 15-54100
DATE: 2023-09-08

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
MERGIM IMERI, ZARIFE IMERI, ABIT IMERI and AFRIM IMERI Plaintiffs	Jeremy Solomon, Julius Ko, and Robert Verta for the Plaintiffs
– and –	
LAURA LYNNE LAIDMAN, KHALIL JRADI, TD GENERAL INSURANCE COMPANY, AVIVA CANADA INC. and TRAFALGAR INSURANCE COMPANY OF CANADA Defendants/Moving Party	Ken Yip and Marco Fantin, for the TD General Insurance Company, Defendant/Moving Party
	HEARD: August 11, 2023

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THE HONOURABLE MR. JUSTICE P. R. SWEENY

Introduction

[1] This is a motion for summary judgment brought by the defendant, TD General insurance company ("TD"). TD was the insurer who initially provided statutory accident benefits ("SABS") to the plaintiff, as a result of a motor vehicle accident which occurred on August 27, 2013. The plaintiff, Mergim Imeri, was thirteen years old at the time of the accident (born July 2, 2000). Imeri was a pedestrian struck by motor vehicle that was insured by TD. Ultimately, it was determined that Aviva insurance company ("Aviva") was the appropriate insurer to provide SABS to the plaintiff. This determination was made as of March 3, 2016 and Aviva was obligated to reimburse TD for the benefits that had been paid. On July 28, 2020, the plaintiff settled his claim for accident benefits and signed a full and final release releasing Aviva for any claims.

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[2] This matter is set for an eight-week trial commencing on October 2, 2023. The remaining two defendants are the driver/owner of the motor vehicle that struck the plaintiff, and TD. The claim against the TD insurance company is for punitive and aggravated damages which are alleged to arise out of the conduct of TD in failing to provide SABS to the plaintiff.

[3] The defendant, TD, brings this motion for summary judgment on three grounds: (1) the plaintiff failed to mediate the issue of punitive and exemplary damages as required under section 280 of the Statutory Accident Benefits Schedule, and mediation is a precondition to commencing an action; (2) the plaintiff has settled his accident benefits claim and there is no independent action for punitive and aggravated damages; and, (3) on the merits, the plaintiff has not established that the conduct of TD rises to the level required to entitle the plaintiff to punitive damages and, further the plaintiff has not led sufficient evidence to establish aggravated damages.

[4] The plaintiffs argue that there is no requirement to mediate punitive and aggravated damages as the mediation is about entitlement to benefits and, further, the form does not allow for those issues to be mediated. The defendant failed to plead in its statement of defence the condition precedent that the claims be mediated. With respect to the settlement, the plaintiffs argue that this settlement does not foreclose him pursuing the claim against Aviva for the manner in which it handled the claim. On the issue of the conduct of the defendant, the plaintiff asserts there is no affidavit from an adjuster or adjusters who handled the claim on behalf of TD so TD has not put its best foot forward. In addition, the plaintiffs assert there are credibility issues respect to the conduct of TD which require a trial. On the issue of aggravated damages, the plaintiff says that he has some evidence in a medical report.

[5] This is a unique case. TD is not liable to pay SABS, Aviva is. TD sought to have the issue determined by a notice to submit to arbitration delivered on August 12, 2014. As of March 2016, the plaintiff elected to receive ongoing accident benefits from Aviva. As a result of a legislative amendment, since 2016, all claims related to a parties' entitlement to SABS are within the exclusive jurisdiction of the License Appeal Tribunal and not the court: *Stegenga v. Economical Mutual Insurance Company*, 2019 ONCA 615. Therefore, this is not an issue that will likely arise in the future.

[6] The motion is characterized as a summary judgment motion. The law with respect to summary judgment motions was thoroughly set out by Roger J. in *Petitpas v. Kingston (City)*, 2021 ONSC 1521 at paras 16-23 as follows:

> [16] A defendant in an action may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment seeking to have all or part of the Statement of Claim dismissed (see r. 20.01(3) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 ("the Rules")).
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> [17] Rule 20.04 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.

[18] In *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, Karakatsanis J., writing for the Court, outlined a two-step procedure for deciding a summary judgment motion (see also *Royal Bank of Canada v. 1643937 Ontario Inc.*, 2021 ONCA 98 at para. 24).

[19] First, the motion judge must determine if there is a genuine issue requiring trial based only on the evidence placed before him or her. There is no genuine issue requiring a trial where the summary judgment process provides the judge with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure: *Hryniak* at para. 66.

[20] Second, if there appears to be a genuine issue requiring a trial, the motions judge should determine if the need for a trial can be avoided by using the fact finding powers under r. 20.04(2.1) of the Rules, which allows the judge to weigh evidence, evaluate the credibility of a deponent and draw inferences from the evidence, and (2.2) which allows the judge to order that oral evidence be presented. Where it would not be against the interests of justice to do so, the judge may exercise his or her discretion to use those powers: *Hryniak* at para. 66; *Royal Bank of Canada* at para. 24.

[21] However, the onus on a motion for summary judgment is a moving onus; the onus is initially on the moving party which is key to the disposition of this motion.

[22] In *Sanzone v. Schechter*, 2016 ONCA 566, 402 D.L.R. (4th) 135, at paras. 24 and 30, Justice Brown indicates:

> Rule 20.01(3) requires a defendant to "move with supporting affidavit material or other evidence" on a summary judgment motion. The respondent dentists, as the moving parties, bore the burden of persuading the court, through evidence, that no genuine issue requiring a trial existed: *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 1998 CanLII 4831 (ON CA), 111 O.A.C. 201 (Ont. C.A.), at para. 16; *Connerty v. Coles*, 2012 ONSC 5218, [2012] O.J. No. 4313 (Ont. S.C.J.), at para. 9. They were not entitled to rely merely on the allegations in their statement of defence; the respondents were required to put their best evidentiary foot forward.
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> …
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> … First, the evidentiary burden on a moving party defendant on a motion for summary judgment is that set out in rule 20.01(3) — "a defendant may . . . move with supporting affidavit material or other evidence." As explained in *Connerty,* at para. 9, only after the moving party defendant has discharged its evidentiary burden of proving there is no genuine issue requiring a trial for its resolution does the burden shift to the responding party to prove that its claim has a real chance of success.

[23] Indeed, at a summary judgment motion, the moving party bears the evidentiary burden of demonstrating that there is no genuine issue requiring a trial; it must put its best foot forward by adducing evidence on the merits: *Aga v. Ethiopian Orthodox*

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Tewahedo Church of Canada, 2020 ONCA 10, at para. 61 citing *Sanzone v. Schechter*, 2016 ONCA 566, 402 D.L.R. (4th) 135, at paras. 30-32, leave to appeal refused [2016] S.C.C.A. No. 443. It is only after that the onus shifts to the responding party to show that the claim has a real chance of success and that there are genuine issues requiring a trial: *Rescon Financial Corporation v. New Era Development* (2011) Inc., 2018 ONCA 530, at para. 2 and *Mayers v. Khan*, 2017 ONCA 524, at para. 4.

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[7] In my view, there are only 2 issues which need to be addressed:

(1) Should the claim be dismissed because the plaintiff failed to mediate the issue of punitive and aggravated damages?

(2) Is the plaintiff precluded from pursuing this claim against TD as a result of his settlement of his claim for SABS and extra contractual damages with Aviva?

[8] I do not need to consider that last issue raised by the defendant. I can properly determine the issues as set out above on this motion.

Issue 1: Should the claim be dismissed because the plaintiff failed to mediate the issue of punitive and aggravated damages?

[9] I am satisfied that on this issue that there is no genuine issue requiring a trial.

[10] The plaintiff submitted two applications for mediation: one dated October 10, 2014, and one dated August 13, 2015. The applications did not list aggravated and punitive damages as an issue in dispute. The application form does not refer to a claim for extracontractual damages. It focuses instead on the denial of benefits.

[11] Given that the claim for punitive and aggravated damages arises directly out of the circumstances surrounding the denial of benefits, it is understandable that there is no specific provision for those issues to be addressed in the request for mediation. However, the fact that the plaintiff is claiming those damages would seem to be an important issue to address at a mediation. The insurer should be aware that such a claim is contemplated.

[12] In this case, the issue of punitive and aggravated damage was not listed as an issue to be mediated, and it ought to have been. However, this claim was issued well within the limitation period to commence a claim or arbitration. I accept the plaintiff's argument that the defendant failed to raise that specific issue in the statement of defence. If that issue had been raised, the plaintiff could have considered and sought mediation on that issue and if the issue did not resolve, commence a new action. The requirement to provide notice is an important aspect of pleadings and specifically addressed 25.06 (3).

[13] In *Mader v. South Easthope Mutual Insurance Company*, 2014ONCA 714, the plaintiff applied for and received income replacement benefits. She subsequently signed a release which released the defendant from any obligation to pay accident benefits in exchange for

a payment. The plaintiff later sued for a declaration that the release was a nullity, damages for mental distress, aggravated, and punitive damages; as well as, an order reinstating her income replacement benefits. In that case, the court of appeal affirmed the decision of the motion judge requiring that the plaintiff mediate the issues before she commenced an action. In particular, the plaintiff had not mediated the issue of income replacement benefits or any of the other issues: no mediation had been held.

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[14] In this case, there were two mediations held.

[15] In *Younis v. State Farm Mutual Automobile Insurance Company*, 2012 ONCA 836 the court of appeal held that the failure of the plaintiff to wait for mediation, which was requested, was in breach of section 281 of the SABS, and the action was a nullity. The insurers motion to stay the proceedings which was dismissed by the motion judge was allowed by the Court of Appeal. In that case, there was a motion to stay brought in a timely fashion. In this case, no motion was brought in a timely fashion.

[16] The failure to mediate the issues of punitive or aggravated damages does not preclude the plaintiff from pursuing his claim for punitive and aggravated damages against TD.

Issue 2: Is the plaintiff precluded from pursuing this claim against TD as a result of his settlement of his claim for SABS and extra contractual damages with Aviva?

[17] I am satisfied there is no genuine issue for trial with respect to this issue.

[18] The plaintiff sets out his specific claims for accident benefits in paragraphs 2(a) to (k) of the Statement of Claim. In the statement of claim at paragraph 2 (l) the plaintiff claims aggravated and punitive damages.

[19] At paragraph 25 of the claim, the plaintiff asserts the conduct of TD which is alleged to give rise to aggravated and punitive damages as follows:

> The TD General Insurance Company failed to attend to the claims made by Mergim in a timely manner. It has denied, terminated or refused to pay benefits without valid reason or excuse. Its conduct has been high- handed, arbitrary and unfair. TD General Insurance Company has treated Mergim with reckless disregard for his injuries and treatment and has wilfully caused him financial stress. The defendant, TD General Insurance Companies actions are contemptuous and ought to result in an award of punitive, aggravated or exemplary damages.

[20] The plaintiff’s claim against TD arises out of the provision of benefits. It depends upon the plaintiff establishing entitlement to benefits which were wrongfully withheld by the insurer. This is a necessary but not sufficient condition for the awarding of punitive and aggravated damages.

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[21] The arbitrator's letter of March 7, 2016, which addressed which insurer was responsible for the SABS, specifically refers to "the plaintiff's decision as to whether to continue a claim against TD for extra contractual damages." There is no evidence before me as to what steps were taken by the plaintiff to pursue the claim against TD. There was a request by the lawyer for TD to the lawyer for the plaintiff to release TD from the action. The plaintiff refused to do that on the basis that there was a claim for aggravated and punitive damages. This correspondence was exchanged in October 2016. The plaintiff did not examine a representative of TD for discovery.

[22] The evidence before me is that the benefits claim was settled for payment of $180,000 characterized as non earner benefit and $275,000 as all past and future medical benefits and $40,000 for other. The release contained a no admission of liability clause.

[23] In *Mader*, the Court of Appeal upheld the motion judges finding the plaintiffs claim for damages for mental distress or bad faith flowed from the respondents alleged breach of the policy.

> [45] In some instances, breach of an insurer's duty of good faith or intentional infliction of mental distress can constitute an independent cause of action: *Whiten v. Pilot Inusrance Co.*, [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, 2002 SCC 18, at para. 82; *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 2002 CanLII 45005 (ON CA), 60 O.R. (3d) 474, [2002] O.J. No. 2712 (C.A.), at paras. 37-39, 64. However, neither is a separate actionable wrong in this case.
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> [46] The reasoning of this court in *Arsenault v. Dumfries Mutual Insurance Co.* (2002), 2002 CanLII 23580 (ON CA), 57 O.R. (3d) 625, [2002] O.J. No. 4 (C.A.) is instructive on this point. The issue in that case was whether a claim for bad faith damages arising out of an insurer's termination of no-fault accident benefits was subject to the two-year limitation period set out in s. 281(5) of the *Insurance Act.* Answering this question necessitated a determination of whether bad faith claims were caught by s. 279(1) of the *Act*.
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> [47] Justice Abella noted that in s. 279, the legislature mandated that disputes "in respect of" any claim to no-fault benefits must be resolved in accordance with ss. 280 to 283 of the Act. [page129] Relying on the Supreme Court of Canada's decision in *R. v. Nowegijick*, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29, [1983] S.C.J. No. 5, Abella J.A. commented, at para. 16, that the use of the phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. She determined, at para. 17, that "any and all disputes about an insurer's refusal to pay no-fault benefits, including disputes which allege the insurer's bad faith in connection with that refusal" were caught by the scheme in ss. 280 to 283.
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> [48] Abella J.A. went on to conclude, at paras. 19 and 21:

> If I am wrong in concluding that bad faith claims in connection with no-fault benefits refusals are subject to the procedures and time limits set out in ss. 280 to 283 of the Insurance Act, I am nonetheless of the view, based on the pleadings, that this appellant's claim is not an independent, actionable wrong, but is in fact exactly the kind of dispute over no-fault benefits entitlements contemplated by the dispute resolution scheme in the Insurance Act . . . Moreover, had the dispute been arbitrated, it was open to the arbitrator under s. 282(10), if it was found that the insurer had "unreasonably withheld or delayed payments", to award an additional lump sum.
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> . . . . .
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> Ms. Arsenault's characterization of the insurer's refusal as bad faith conduct is merely an attempt to circumvent the mandatory requirements of the dispute resolution scheme in the Insurance Act through the guise of linguistic reformulation. Her allegations, distilled, are that the refusal was inappropriate in the circumstances, the very issue contemplated for resolution under the scheme, and a claim that is clearly subject to the two year limitation period set out in s. 281(5).

> [49] This analysis applies in the present case. The claims asserted by the appellant all flow from the denial of benefits. At their essence, they amount to nothing more than a claim that the appellant was wrongly denied benefits to which she believes that she is entitled to receive. This is precisely the type of claim contemplated for resolution by the procedure in ss. 280 to 283 of the Insurance Act.

[24] In addition to the failure to mediate the issue, the motion judge in *Mader,* 2013 ONSC 2821 held at paras 71 and 72:

> [71] Secondly, because the Plaintiff's action for payment for accident benefits which she says were wrongfully refused in breach of the insurance policy has now been dismissed, how can the Plaintiff's claim for damages for mental distress and bad faith even proceed when there is now no basis for it? By reason of the dismissal of the Plaintiff's action for benefits, effectively the Plaintiff is not entitled to claim statutory accident benefits from the Defendant.
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> [72] If the Plaintiff has no such claims against the Defendant at this time, there cannot be any finding that the Defendant has been in breach of its obligation to pay those benefits under the SABS or the Insurance Act. Without any breach of its obligations, there cannot be any claims for damages for bad faith or for mental distress.

[25] This analysis applies in this case because the plaintiff has settled the obligation to pay accident benefits. His claim for accident benefits has been resolved.

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[26] I note that the SABS specifically addresses the remedy for the failure of the insurer to provide notice with respect to a accident benefit claim in a timely fashion in section 38. The settlement of the accident benefits claim means this is no longer in issue.

[27] As a result of the arbitration and the operation of the *Insurance Act*, the plaintiff's claim for accident benefits rests with Aviva and not with TD. There is a settlement in exchange for a full and final release. The issue of entitlement to accident benefits has been resolved. Aviva is the party responsible for the payment of benefits to the plaintiff. TD is not responsible. The plaintiff has given up any right to litigate that dispute. The release is all encompassing.

[28] The claim for punitive and aggravated damages arises out of the denial of benefits. Since that issue has been resolved, the plaintiff has no claim against TD because there is no other basis for the claim.

[29] In *Fidler*, the court has held that mental distress or aggravated damages may be awarded in a case where there is a piece of mind insurance contract. It does not rest on an independent actionable wrong. There must be a breach of the contract.

[30] The plaintiff, by settling his accident benefits claim can no longer pursue TD. The claim is dismissed against TD.

Costs

[31] TD was successful and is entitled to its costs. It seeks costs of the motion and the action.

[32] In exercising my discretion under s. 131 of the Courts of Justice Act, R.S.O. 1990, c. C.43, I take into account the factors enumerated under Rule 57, including the result achieved, any offers to settle, the principle of indemnity, the amount the unsuccessful party could reasonably expect to pay, and the complexity of the matter. In addition, I have also taken into account the principles set forth by the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario (2004)*, 71 O.R. (3rd) 291 (C.A.), specifically that the overall objective of fixing costs is to fix an amount that is fair and reasonable for an unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant.

[33] The total amount claimed for the action on a partial indemnity basis is $27,636.60. The amount claimed for the motion is about $6,700 as compared to the plaintiff's costs claimed of $52,000.

[34] The total amount claimed for the action is as follows: pleadings - about $4,000; discoveries and mediations - about $11,500; time after discoveries and mediation - preparation for trial about $5000. The hourly rates seem reasonable, and the time spent is reasonable. I not there was some modest duplication of work with various counsel involved.

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[35] In considering all the relevant factors, I fix the defendants costs of the action including the motion at $25,000 all inclusive to be paid forthwith by the plaintiff.

P. R. Sweeny J.

Released: September 8, 2023

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Plaintiffs

– and –

LAURA LYNNE LAIDMAN, KHALIL JRADI, TD GENERAL INSURANCE COMPANY, AVIVA CANADA INC. and TRAFALGAR INSURANCE COMPANY OF CANADA

Defendants/Moving Party

REASONS FOR JUDGMENT

P.R. Sweeny, J.

Released: September 8, 2023