

**CITATION:** *Baker v. Blue Cross*, 2023 ONSC 1891  
**COURT FILE NO.:** CV-17-577583  
**DATE:** 20230322

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:**

SARA BAKER

Plaintiff

**AND:**

~~MEDAVIE BLUE CROSS~~ BLUE CROSS  
LIFE INSURANCE COMPANY OF CANADA

Defendant

**BEFORE:** VELLA J.

**COUNSEL:** *Stephen Birman, Robert Ben and Lucy Jackson*, for the Plaintiff

*Barry Marta*, for the Defendant

**HEARD IN WRITING:** March 22, 2023

**COSTS ENDORSEMENT**

[1] Sara Baker suffered a sudden subarachnoid hemorrhage (a stroke or “brain bleed”) while exercising in October 2013. She was then enjoying a successful career as a Director at a Toronto hospital.

[2] Ms. Baker had a group disability insurance policy through her employer. The insurer is the defendant, Blue Cross Life Insurance Company of Canada (“Blue Cross”).

[3] Blue Cross initially provided Ms. Baker with long-term disability (“LTD”) insurance benefits. However, it terminated those benefits as Ms. Baker did not, in its assessment, meet the eligibility criteria for “total disability” as defined by its policy.

[4] Ms. Baker commenced this lawsuit in 2017 seeking, *inter alia*, a declaration that she met the definition of total disability, retroactive benefits, aggravated damages and punitive damages.

[5] This matter proceeded by way of a jury trial over the course of five weeks (22 days). The jury returned a verdict in favour of Ms. Baker as follows:

- (a) she was totally disabled within the meaning of the Blue Cross LTD policy;
- (b) retroactive benefits to the date of trial (in the sum of \$220,604.00);
- (c) aggravated damages for mental distress in the sum of \$40,000; and
- (d) punitive damages in the sum of \$1,500,000.00.

[6] The plaintiff seeks full indemnity costs in the amount of \$920,250.73 plus HST of \$119,632.60 and disbursements of \$123,453.50 or an all-inclusive amount of \$1,163,337.03.<sup>1</sup> Alternatively, she seeks partial indemnity to the date of her offer to settle, made on October 12, 2018 and substantial indemnity thereafter, based on r. 49.10, or alternatively under r. 49.13, in the all-inclusive sum of \$1,041,831.01. The plaintiff's partial indemnity amount under her bill of costs is \$651,237.03 plus HST and the same disbursements.

[7] I will first consider the appropriate scale of costs. Thereafter, I will consider the quantum of costs that is fair and reasonable in the circumstances of this case, and having regard to the discretion vested by s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as guided by factors in r. 57.01<sup>2</sup> and the overarching principles of indemnity, fairness, proportionality and reasonable expectations of the unsuccessful party as set out in *Boucher v. Public Accountants Council for the Province of Ontario*, 188 O.A.C. 201 (C.A.).

### **Scale of Costs**

#### *Full Indemnity*

[8] Ms. Baker submits that she is entitled to full indemnity costs on the public policy basis that she should not have her disability insurance benefits, of which she was wrongfully deprived, eroded by costs.

[9] Ms. Baker relies on the rationale stated in case law that, where an insurer wrongfully denies its duty to defend, the insured should be fully indemnified so as not to have that duty to defend benefit eroded by legal costs. In those cases, the subject insurance policy provisions provide that the insured was entitled to a defence without expense to them. See: *E.M. v. Reed*, 171 O.A.C. 145 (C.A.) at paras. 22 – 24. In particular, *E.M.*, at para. 22, makes it clear that “[i]t is the contractual

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<sup>1</sup> The full indemnity amounts reflect a reduction in fees of approximately \$175,500.00.

<sup>2</sup> Rule 57.01 now codifies the principles of indemnity and reasonable expectations of the unsuccessful party.

basis for the claim to solicitor-and-client costs that justifies the award and therefore constitutes an exception to the usual rule that solicitor-and-client costs will not be awarded except in unusual circumstances”.

[10] Some of the cases relied upon by Ms. Baker engage an insurer’s breach of its duty to defend obligation and the contractual covenant that the insured would be indemnified for these costs. See for example, *Godonoaga (Litigation Guardian of) v. Khatambakhsh (Guardian of)* (2000), 50 O.R. (3d) 417 (C.A.); *Loblaw Companies Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2022 ONSC 1897. Those cases create an exception to the common law rule that costs on an elevated basis are, absent a rule 49 offer, awarded only in rare and exceptional circumstances based on egregious or reprehensible conduct during the course of litigation or some special circumstance that warrants a departure from the usual scale of partial indemnity.

[11] However, there is jurisprudence which has extended this special circumstance beyond the breach of the duty to defend cases to cases dealing with the wrongful denial of insurance coverage.

[12] In *Wright v. National Life Assurance Co. of Canada*, 1987 CarswellOnt 708 (Ont. Supreme Court, Hight Court of Justice), the insured was wrongfully deprived by the insurer of long-term disability benefits under the total disability provision. The court found that the plaintiff was entitled to “solicitor-client” costs. In that case, the court found the insurer did not act in bad faith and declined to award punitive damages. However, by forcing the plaintiff to establish her rights to recover benefits that were properly recoverable under the LTD policy, the court concluded that “it should not cost her a single penny to have established it”. The court awarded full indemnity costs, reflecting the full costs payable by the plaintiff insured under her contingency agreement (which exceeded her submission for solicitor and client costs).

[13] In *Hoang v. The Personal Insurance Co.*, 2017 ONSC 4193, the insured plaintiff was represented by a lawyer appointed by his insurer. However, when judgment was rendered against the plaintiff insured, his insurer refused to indemnify the insured in satisfaction of the judgment. This required the insured to bring an action under s. 258(1) of the *Insurance Act*, R.S.O. 1990, c. I.8, to have the insurance money payable under his motor vehicle policy applied towards payment of the judgment. In those circumstances, the court found, at para. 6, that the position of insureds and their insurers are different than the position of ordinary litigants, insofar as insureds pay premiums for coverage and where that coverage is wrongfully denied, it would be “unfair and burdensome to make their customers pay a premium plus legal fees in order to obtain the coverage they bought”. Furthermore, the premium reflects the risk assumed by insurers such that if the insurer “chooses to attempt to reduce that risk by engaging in litigation over its obligation to provide coverage it should be made to fully compensate the successful party if it loses” (*Hoang*, at para. 6). See also *EPCOR Electricity Distribution Ontario Inc. v. Municipal Electric Association Reciprocal Insurance Exchange*, 2021 ONSC 5680.

[14] In *Fernandes v. Penncorp*, 2013 ONSC 2803, aff’d 2014 ONCA 615, the court awarded full indemnity costs in addition to punitive damages in another wrongful deprivation of long-term disability insurance benefits case. The court, at para. 14, relied on *Whiten v. Pilot Insurance Company*, 2002 SCC 18, [2002] 1 S.C.R. 595, for the proposition that an award of punitive

damages does not rule out a substantial indemnity costs award because they have different tests and perform different functions. In that case, the court awarded full indemnity costs to the insured in an amount that reflected the actual fees being charged under a contingency agreement, notwithstanding they far exceeded the “solicitor and client” costs presented in the bill of costs. The court found, at para. 20, that the insured “was faced with harsh and unreasoning opposition from an insurer whose policy he had purchased for peace of mind and protection in the event that he became disabled from working. I concluded that an insurance company which sells peace of mind should not try to exploit a person in need.”

[15] Insurers are entitled to challenge the eligibility of insureds to the requested insurance benefits in court. If their conduct in the course of litigation is reprehensible or outrageous or there are special circumstances, then the elevated scale of substantial indemnity may be warranted. Otherwise, the usual scale of costs of partial indemnity should follow the cause in the normal course (subject to a successful r. 49 offer).

[16] However, insurers must bear the risk if they wrongfully deny coverage in long-term disability policies, forcing an insured, who is economically disadvantaged from challenging the insurer by reason of a wrongful denial of benefits, to pursue costly litigation that can take years to resolve. In the interim, economic hardship is likely to occur as the insured is unable to work and is deprived of the monthly income the insurance she purchased was supposed to provide. See *Tanious v. The Empire Life Insurance Company*, 2017 BCSC 85, aff'd 2019 BCCA 329, for a detailed analysis of the unique character of long-term disability insurance policies justifying, in British Columbia, an award of full indemnity, which I find persuasive.

[17] I do not agree with Blue Cross that the fact that Ms. Baker had a group disability insurance policy as opposed to a personal one makes any difference in terms of the application of this rationale.

[18] Accordingly, I am persuaded that the rationale derived from the duty to defend cases justifying full indemnity costs should extend equally to long-term disability insurance cases, including this one. In these cases, the insured must pursue litigation against her insurer to obtain the contractual monthly benefits she purchased by way of a long-term disability insurance policy to provide for basic living requirements. It would not be fair or reasonable to erode her fixed monthly income replacement benefit by payment of unrecoverable legal fees in these circumstances.

[19] I am therefore exercising my discretion under s. 131 of the *Courts of Justice Act* to award full indemnity costs. I find that the wrongful denial of long-term disability benefits by an insurer, given the unique character of long-term disability insurance policies, constitutes special circumstances justifying this elevated award. By so doing, I am not commenting on the propriety of extending this rationale to other types of insurance contracts as those circumstances were not before me.

[20] In light of this finding, I do not need to consider Ms. Baker’s alternative argument based in r. 49.10 and, in the further alternative, r. 49.13.

[21] Having determined the scale of costs, I will now turn to fixing those costs.

**Factors under R. 57.01**

[22] The court's task is to fix costs that are fair and reasonable in the circumstances of this case. In carrying out this task, the court is not engaged in a line-by-line assessment of each item of costs.

*Rules 57.01(0.a) and 57.01(0.b) The principles of indemnity and the reasonable expectations of the unsuccessful party*

[23] Blue Cross submits that it was unreasonable for the plaintiff to be represented by two senior and one junior lawyers at trial.

[24] Blue Cross further submits its reasonable expectations should be considered as a factor. Its own substantial indemnity fees are listed at \$345,508.11 plus HST of \$44,916.06 for a total of \$390,424.14. Blue Cross was initially represented in the litigation by Beard Winter (one senior counsel, two junior lawyers, an articling student and two law clerks) and then Marta Watson (one senior lawyer, two junior lawyers, and a law clerk). At trial, Blue Cross was represented by a senior lawyer, Mr. Marta, who had a law clerk assist him.

[25] Mr. Marta's year of call is 1983 and his full indemnity hourly rate was \$420.00 at trial. His law clerk's full indemnity hourly rate at trial was \$150.00. In contrast, for Ms. Baker, Mr. Ben is a 2003 call and Mr. Birman is a 2008 call. Their hourly rates at trial were \$750.00 and \$650.00 respectively. The junior lawyers' hourly rates at trial were \$400 and \$375 and years of call were 2018 and 2019, respectively. I have also taken note of the various hourly rates of the lawyers, law clerks and articling students who docketed services rendered prior to trial.

[26] In her original cost outline, Ms. Baker reduced her trial lawyers' time by 15% to reflect duplication translating into a reduction of about \$80,000. In her reply, she further reduced the time of the third trial lawyer (a junior lawyer) and a fourth lawyer (at the cost outline preparation stage) reducing fees to \$920,000 plus HST and disbursements to a total of \$1,041,831.01.

[27] The burden of preparation on Ms. Baker as the plaintiff with the onus to discharge was heavier than the burden placed on Blue Cross (*Loreto v. Little*, 2010 ONSC 5993, at paras. 32-33; *Tsialtas v. Munroe*, 2022 ONSC 1207, at para. 57). In the circumstances of this case, contrary to Blue Cross' submissions, it is not reasonable to assume that Ms. Baker's costs should be the same as or similar to Blue Cross's costs.

[28] Furthermore, the reality of the law market is that personal injury lawyers who take these types of cases with no guarantee of payment tend to justifiably charge higher hourly rates than insurance defence lawyers who will be paid whether they win or lose (*Rochon v. MacDonald*, 2014 ONSC 591, 118 O.R. (3d) 491). Courts must also exercise caution in second guessing the appropriateness of the respective hourly rates charged by lawyers (*131843 Canada Inc. v. Double "R" (Toronto) Ltd.*, 1992 CarswellOnt 350).

[29] The hourly rates of the lawyers for Ms. Baker appear within the realm of reasonableness for this type of case. I also accept that Ms. Baker's lawyers bore a larger burden of preparation as evidenced by the number of experts they had to call as compared to Blue Cross. That said, it seems to me that the use of three lawyers, two of whom were senior, for the preparation and duration of trial, and a fourth junior lawyer behind the scenes, likely led to duplication of work beyond the reductions voluntarily made by Ms. Baker.

*R. 57.01(1)(a) Amount Claimed and Recovered*

[30] Ms. Baker recovered a sum just in excess of \$1,700,000.00. She seeks \$920,000 in fees plus HST and disbursements. That is about 54% of the amount recovered.

[31] This is not a disproportionate amount in the circumstances of what was at stake in this claim.

*R. 57.01(c) Complexity in the proceeding*

[32] This case featured complexity in the plaintiff's burden to establish what was called "invisible" injuries caused by the stroke leading to total disability that was continuous to the date of trial before a jury. This required calling several expert witnesses: medical and vocational. The importance of this evidence was highlighted by the nature of the surveillance evidence led at trial by Blue Cross. I would characterize this proceeding as moderately complex

*R. 57.01(d) Importance of the issues*

[33] The case was of particular importance to the plaintiff as at issue was recovery of about six years of income replacement benefits. As the plaintiff put it in her written submissions, it was an "all or nothing" proposition. If she had been found to not meet the criteria for total disability under the policy, she would have lost her sole income replacement source.

*R. 57.01(e) Conduct that tended to unnecessarily shorten or lengthen the proceeding*

[34] I have considered the bullet points listed in the plaintiff's submissions, the responding list in Blue Cross' submissions and the reply by the plaintiff.

[35] The various motions to strike the jury initiated by the plaintiff were brought because jury trials had been suspended due to the pandemic, causing adjournments of this trial. This was reasonable. The last motion became unnecessary because civil jury trials resumed in time for the trial to proceed.

[36] The motions at trial were decided in favour of the plaintiff (plaintiff's motion to exclude a witness; defendant's proposal to include a jury question on the issue of mitigation; defendant's motion to exclude the filing of the plaintiff's Canada Pension Plan file; defendant's motion to exclude a portion of the plaintiff's expert medical evidence on the basis it violated the ultimate issue "rule").

[37] Overall, I did not find the complaints by each party to have significantly shortened or lengthened the proceeding.

**Disposition as to Costs**

[38] The plaintiff shall have her costs on a full indemnity basis fixed in the sum of \$850,000 plus HST in the sum of \$110,000. In addition, the plaintiff shall receive her disbursements in the sum requested of \$123,453.50. The total costs awarded are therefore \$1,083,953.50.

[39] In the exercise of my discretion and having regard to the factors in r. 57.01, including in particular a discount for some likely duplication and the reasonable expectations of Blue Cross, this amount is fair and reasonable.

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Justice S. Vella

**Date: March 22, 2023**