CITATION: H.C. v. SSQ Life Insurance Company Inc., 2024 ONSC 53
COURT FILE NO.: CV-22-89221
DATE: 2024/01/03

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
H.C.	)	David Cutler, Counsel for the Plaintiff
Plaintiff	)	
– and –	)	
SSQ, Life Insurance Company Inc.	)	Tracey Hamilton, Counsel for the Defendant
Defendant	)	
	)	**HEARD:** December 21, 2023 at Ottawa

<u>REASONS FOR DECISION</u>

<u>DOYLE J.</u>

1. The Defendant brings this motion for an Order compelling the Plaintiff to produce the redacted and unredacted notes and records of Dr. Janice Hansen, the Plaintiff's treating psychologist.

2. The Plaintiff brings a cross-motion for a limited sealing order sealing the exhibits containing the clinical notes of Dr. Hansen from the public record and a limited publication order permitting the court to initialize the names of the parties. Service on the media pursuant to the Superior Court of Justice Practice Direction has been effected.

Background

3. The Plaintiff is 55 years old and works in communication.

4. She was unable to work as of November 6, 2019 and her claim for Long Term Disability Payments ("LTD") benefits was approved on March 16, 2020 on the basis that she was

diagnosed with adjustment disorder, major depressive disorder, insomnia, and poor concentration related to personal/interpersonal problems and marital/family life.

5. The triggering event was the separation from her husband after a lengthy marriage.

6. The Defendant terminated the Plaintiff’s LTD benefits in March 2022.

7. The Plaintiff issued a Statement of Claim requesting, among other things, the following:

(a) a declaration that the Plaintiff is Totally Disabled within the meaning of a contract of insurance (“Policy”) provided by the Defendant to the Plaintiff;

(b) payment of monthly LTD benefits in accordance with the terms of the Policy until such time as the Plaintiff may no longer be disabled, including payment of all past benefits wrongfully denied;

(c) payment of premiums for the Plaintiff's LTD benefits with the Defendant, for so long as the Plaintiff is disabled; and

(d) aggravated damages in the amount of $100,000.

8. In its statement of defence, the Defendant pleads that the Plaintiff is not disabled as defined by the Policy and puts the Plaintiff to the strict proof thereof, and that the Defendant dealt with the Plaintiff in good faith at all times.

9. The Defendant also pleads that the Plaintiff has been able to return to work but has chosen not to, and is accordingly not entitled to LTD benefits under the Policy. The Plaintiff has failed to provide satisfactory evidence of her disability when and as required by the Defendant in accordance with the Policy.

10. Dr. Hansen has been the Plaintiff’s treating psychologist since approximately 2007. In her treatment, the Plaintiff discusses all aspects of her personal life, including her children, activities, thoughts, and feelings regarding this litigation as well as her family law litigation.

11. The Plaintiff has disclosed 114 pages of Dr. Hansen’s clinical notes and records without redaction.

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12. She has also produced 11 pages which are partially or wholly redacted. These notes pertain to the time period from September 26, 2022 to January 30, 2023.

13. In her affidavit, the Plaintiff outlines her objections to the disclosure of the redacted portions as being that they include the following:

    - Records of the Plaintiff advising Dr. Hansen of the discussions she had with her family law lawyer and with the lawyer on this matter; and

    - Discussions pertaining to the Plaintiff's attendance at three settlement conference in her family law matter and her attendance at mediation and examination for discovery in this LTD action.

14. At this hearing, the court was provided with a full copy of the unredacted notes for inspection as contemplated under Rule 30.04(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

15. The court has now reviewed the 11 pages with redactions and the court notes that they fall into the following categories:

    - Discussions about the settlement conferences in the family law case, including comments about the judge, the process, and the results;

    - Discussions with her family law lawyer about the general status of the family law file and her "bottom line" on the family law file; and

    - Discussions with the lawyer on this file regarding this litigation, including preparation for the discoveries and the post-mortem meeting after mediation and the discoveries.

Defendant's Motion for Production of Unredacted Notes of Dr. Hansen

Positions of the Parties

16. The issue is whether the Plaintiff was entitled to redact those portions of the psychologist's clinical records and, if so, under what circumstances?

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17. The Defendant submits that the Plaintiff has failed to discharge its onus in showing that redaction is necessary and needed to protect sensitive issues and that the records speak to matters of a personal nature.

18. Since the Plaintiff is claiming benefits retroactively and on an ongoing basis, the notes for that four-month period which have been redacted are relevant.

19. Turning to the privilege argument, if the redactions are found to be relevant, the Defendant submits that the Plaintiff has failed to satisfy the *Wigmore* criteria, specifically the 4th criteria – that is, there is no evidence that her relationship with her psychologist would be destroyed if unredacted information is produced.

20. In addition, in her statement of claim, the Plaintiff has put her mental health squarely in issue, and she must give up some of her privacy. By commencing this action, she has forfeited her right to confidentiality.

21. The Defendant states that it is entitled to see her thoughts and feelings that will reflect her state of mind and have a bearing on the LTD claim. The Defendant is not interested in information that was given in the family law settlement conference and not intending to offend Rule 17(13) of the *Family Law Rules*, O. Reg. 114/99.

22. In the unredacted letter dated February 24, 2020, from Dr. Hansen to the Plaintiff's family law lawyer, Dr. Hansen stated that the marital dispute is impacting the Plaintiff's psychological well-being. It is clear that her illness and recovery are related to the family law litigation.

23. The Plaintiff submits that only small sections have been redacted, they are not relevant, there is no good reason to disclose those sections, and, further, to do so would embarrass and prejudice the Plaintiff. How the Plaintiff feels about how litigation is proceeding or about the court process or her lawyer is not relevant.

General Legal Principles

24. In *McGee v. London Life Insurance Company Limited*, 2010 ONSC 1408, 86 C.C.L.I. (4th) 86, Justice Strathy (as he then was) set out some general principles relating to the production

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of documents. Firstly, as a general rule, relevant documents must be produced in their entirety and a party may not redact portions on the basis that the portions are not relevant: at para. 8.

25. At para. 9, Justice Strathy stated that the whole of a document must be produced unless it would cause significant harm to the producing party or would infringe public interests deserving of protection. The court referred to *North American Trust Co. v. Mercer International Inc.* (1999), 71 B.C.L.R. (3d) 72 (S.C.), at para. 13:

> Under the rules of this court, a litigant cannot avoid producing a document in its entirety simply because some parts of it may not be relevant. The whole of a document is producible if a part of it relates to a matter in question. But where what is clearly not relevant <u>is by its nature such that there is good reason why it should not be disclosed</u>, a litigant may be excused from having to make a disclosure that will in no way serve to resolve the issues. <u>In controlling its process, the court will not permit one party to take unfair advantage or to create undue embarrassment by requiring another to disclose part of a document that could cause considerable harm but serve no legitimate purpose in resolving the issues</u>. [Emphasis added.]

26. In other words, if the redacted portion is clearly not relevant *and* there is good reason why it should not be disclosed – e.g., it would cause significant harm to the producing party or would not serve to resolve the issues at hand – then it should not be produced. The party resisting disclosure has the onus to show that the redacted portion is irrelevant and the redaction is necessary: see *Dupont v. Bailey et al*, 2013 ONSC 1336, 49 C.P.C. (7th) 166, at para. 16.

27. If the portions are relevant and there is no good reason why they should not be produced, the portions may still be redacted if they are protected by privilege, which includes solicitor/client privilege or a common law privilege within the *Wigmore* criteria: *Dupont*, at para. 16.

28. Master Roger (as he then was) further stated the following in *Dupont*, at para. 20, quoting *McGee*, at para. 20:

> "[T]he court has a duty to ensure that relevant information is produced and also to ensure that the process is not being used for oppressive or collateral purposes" and a motion should then be brought. The function of the court on such a motion is to distinguish between redacted portions of a relevant document that are either: (1) relevant and therefore that should be produced; (2) irrelevant but innocuous and therefore that should be produced; and (3) "… information that is irrelevant and very sensitive – sensitive in the sense that

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> the party resisting production would suffer damage or real embarrassment if the irrelevant information were to be disclosed" which may not be produced. The analysis at paragraph 20 of *McGee* between innocuous and embarrassing irrelevant portions in a relevant document is revealing. [Footnote omitted.]

29. If the common law privilege is being asserted, then the *Wigmore* criteria are engaged. These criteria are found at para. 45 in *Pinder v. Sproule*, 2003 ABQB 33, 13 Alta. L.R. (4th) 124:

> As I have noted [*supra*, paras. 9-11] there are three types of privilege commonly encountered in litigation, and the applicable principles are slightly different. The four principles set out in ***Wigmore on Evidence*** (McNaughton ed., 1961, Ch. 81) are the touchstone for determining whether a privilege *over communications* will be recognized:
>
> 1. the communications must originate in a confidence that they will not be disclosed;
>
> 2. this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
>
> 3. the relation must be one which in the opinion of the community ought to be sedulously fostered;
>
> 4. the injury that would enure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.
>
> There are certain classes of communications which are taken to meet these four criteria. Solicitor and client communication is one. Where a privilege *over communications* is asserted in an area where a class privilege has not been recognized by the law, resort must be had to the four-part *Wigmore* test to determine if a privilege should be recognized.

Discussion

30. Firstly, I note that the Plaintiff has produced over 100 pages of unredacted notes from her psychologist. Some discussions in this disclosure are highly personal and irrelevant to the proceedings, e.g., discussions about her children or her own childhood. They have been produced in full without redactions.

31. The court has reviewed the redacted portions and the court finds that they are irrelevant and there is no good reason to produce them as they do not help to resolve the issues in this action

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and they could potentially embarrass and prejudice the Plaintiff. The redacted portions are described below in detail.

32. Largely, the redactions involve discussions of this lawsuit and her family law file and her engagement in the court process with her two lawyers. Her sentiments are of no relevance to these proceedings and would not assist in the resolution of the issues in this matter. In addition, disclosure of her litigation strategy and sentiments expressed to her counsel can only prejudice the Plaintiff in her family law case and in this matter.

33. A summary of the redacted portions is set out below:

- September 26, 2022: The redacted comment deals with the Plaintiff's expression of her feelings as a result of attending mediation in this action and her discussions with her counsel dealing with litigation strategy. The last sentence deals with what her bottom line is in the family law matter.

- October 24, 2022: The redacted text deals with comments on the family law settlement brief and the arguments that impact on her and how she is dealing with the arguments. She is worried that the judge will see her in a certain way and she expresses her feelings regarding the figures used in the settlement conference briefs.

- November 4, 2022: This redacted text is a description of the Plaintiff's experience at the family law settlement conference and what went well and not so well. She comments about her family law lawyer, the court, and the process.

- November 7, 2022: In this redacted section, she describes another day in Family Court and how she felt about it and the lawyers' involvement. The Plaintiff left three entries on this page.

- November 15, 2022: This redacted entry again describes what happened at the family law settlement conference and what was conveyed to her from her family law lawyer. The discussion includes what was successful and what was not helpful at the family settlement conference including the judge's comments.

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She states that the judge made pointed remarks and she and her lawyer responded in an assertive manner.

- November 21, 2022: In this discussion, the Plaintiff explains that she has received communication from her ex-husband's lawyer and describes the impact of this communication on her. There are discussions of how she and her lawyer will respond, which includes strategic responses.

- December 5, 2022: This redacted section includes a discussion of correspondence with the ex-spouse and whether the family law lawyer was taking care of it. The Plaintiff's sentiments about her family law lawyer are expressed as well.

- January 9, 2023: This redacted section deals with court scheduling and discoveries coming up and the impact on the Plaintiff. There is also a strategic discussion with the family law lawyer to search for people to support her.

- January 16, 2023: In this section, there are strategy discussions with her lawyer in this case and her feelings about how the judge dealt with the family law settlement conference.

- January 24, 2023: There is a discussion of the independent assessor and the Plaintiff preparing for discoveries with her lawyer and what was said with her lawyer and what the assessor said.

- January 30, 2023: The redacted portion is a post-mortem discovery briefing with the lawyer in this matter.

34. Considering my conclusion, there is no need for the court to consider whether the communications are privileged under the Wigmore criteria.

35. The Defendant's motion is dismissed.

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Plaintiff's Motion

36. The Plaintiff's motion requests an order anonymizing the parties' names and a sealing order with respect to Dr. Hansen's redacted and unredacted notes (except her letter of February 24, 2020 to the Plaintiff's family law lawyer). This request is grounded in the highly personal and detailed nature of Dr. Hanson's notes, including comments on the Plaintiff's childhood, her parents, her sentiments, and details dealing with her emotional and psychological well-being.

37. The Plaintiff submits that these entries go to her "biographical core" – a requirement set out by the Ontario Court of Appeal in *S.E.C. v. M.P.*, 2023 ONCA 821, at para. 75 – as they describe intimate details of her life and the notes reflect the Plaintiff's deepest and darkest secrets.

38. The Defendant does not take a position on this motion. The media was served in accordance with the Superior Court of Justice Practice Direction. The media did not attend this motion.

Legal Principles

39. Pursuant to s. 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (*CJA*) the "court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record". The *CJA* does not set out criteria to be met for a sealing order to be made.

40. The relevant test is set out in the Supreme Court of Canada's decision in *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361.

41. Recently, in *S.E.C. v. M.P.*, the Ontario Court of Appeal set out the development of the jurisprudence of the open court principle commencing at para. 53:

> [53] In *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 SCR 835; and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 SCR 442, the Supreme Court developed a balancing test for when ordering a publication ban of a court decision would be justified. The Court stated that a publication ban should be ordered only when:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice: *Mentuck*, at para. 32.

[54] In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522, the Supreme Court reformulated the test for a confidentiality order holding that it should be granted where, at para. 53:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[55] The test in *Sherman* further refined the *Sierra Club* approach as to when the open court principle can be curtailed, particularly in the context of civil proceedings. Under this test, the party seeking a sealing order or publication ban must show that, as outlined at para. 38:

> (a) Court openness poses a serious risk to an important public interest;
>
> (b) The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (c) As a matter of proportionality, the benefits of the order outweighs its negative effects. The first prong of this test requires an applicant to show that the open court principle poses a serious risk to an important public interest in the context of the case.

Discussion

Anonymization of the parties' names

42. For the reasons that follow, the court orders the anonymization of the parties' names in this action.

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43. In *A. v. Laurent Amyot and Conseil Scolaire Catholique Franco-Nord*, 2019 ONSC 5166, Master Kaufman (as he then was) applied the *Dagenais/Mentuck* test when ordering the anonymization of names and found the following at para. 6:

> I reach this conclusion on the strength of the plaintiff's therapist's recommendation, because the defendants and the media did not contest the evidence or oppose the motion, and because the relief sought is the least disruptive to the open court principle. The defendants know the plaintiff's identity and will be able to fully respond to the allegations. The salutary effects of granting this order in this case outweigh the deleterious effects associated with a publication ban.

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44. In *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100, Justice Favreau (as she then was) permitted the anonymization of affidavits to be sworn by strippers in a case dealing with the operation of strip clubs during the COVID-19 pandemic to protect their identities given the nature of their work.

45. As discussed in further detail below, in ordering a sealing order, I have considered the principles set out in *Sherman*. In addition, the Defendant did not take a position, the media did not attend, and anonymization is the relief that is least disruptive to the open court principle. The Defendant knows the Plaintiff's identity and this will not affect the litigation. In addition, the salutary effects of granting this order outweigh the deleterious effects associated with this publication ban.

Sealing order

46. For reasons set out below, the court orders a sealing order with respect to all of the redacted and unredacted clinical records of Dr. Hansen (except her letter to the Plaintiff's family law lawyer dated February 24, 2020).

47. The court will apply the test in *Sherman*.

Question #1: Does the court openness pose a serious risk to an important public interest?

48. First, with a view to the context of the case, the court must identify whether there is an important interest and the seriousness of the risk to that interest.

49. In *Sherman*, the Supreme Court stated that the court must first consider not only whether there is a valid important public interest, but whether it is "at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle": at para. 42.

50. With respect to the first consideration, "[d]etermining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute": *Sherman*, at para. 42. In doing so, the court must be "alive to the fundamental importance of the open court rule": *Sherman*, at para. 42, quoting *Sierra Club*, at para. 56.

51. Whether the interest is at "serious risk" is a fact-specific inquiry. This inquiry must be grounded in the context of the case: *Sherman*, at para. 52. A serious risk can be established through direct evidence or through logical inferences, but these inferences must be "grounded in objective circumstantial facts that reasonably allow the finding to be made": *Sherman*, at para. 97. Both the probability of the harm and its gravity are relevant to the assessment: *Sherman*, at para. 98.

52. In this case, the court finds that the documents the Plaintiff wishes to be sealed contain confidential discussions with her psychologist that touch upon her biographical core. The details set out childhood issues, feelings of self, and perception of her relationships with close family members and friends.

53. Despite the importance of the open court principle, the public has a strong interest in protecting those with mental health issues, as alleged by the Plaintiff. She should not be forced to make available to the general public confidential discussions she has had with her psychologist whom she has seen for over 15 years.

54. There exists a strong public interest that individuals with mental health issues who are involved in litigation have remedies to ensure that their private lives that have been opened up for the purposes of litigation are not available to the general public who should have no interest or need to view these personal and private discussions.

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55. The core public interest is the public's need to ensure the non-publication of private and confidential information dealing with one's self-worth and innermost feelings which could jeopardize their healing and therapy.

56. The serious risk with the publication of private discussions between a psychologist and her patient is that it could put a damper on and curtail open and frank discussion by other patients with mental health issues who would be concerned that the discussions could be made public. Clearly, the public interest demands that individuals who seek help with mental health issues are doing so with an assurance that their discussions will not be made public. The important public interest requires that individuals seek help if they so choose, and in doing so they can confidentially discuss the issues with their therapist and not feel there is a risk that all of their secrets and personal feelings about their life will find their way into a public record.

57. Here, the psychologist's notes reflect deep and personal information about the Plaintiff that go to her biographical core and would affect her dignity. The information provided to her psychologist digs deep into her psyche, her life, her experiences, and her thoughts.

Question #2: Is the order sought necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk?

58. The anonymization of the parties' names will assist but this is not enough. The documents with the information dealing with the Plaintiff's biographical core would still be in the public eye. A sealing order is necessary to ensure that her reflections remain confidential. Sealing the psychologist's notes (redacted and unredacted) will prevent the risk of exposing the Plaintiff's most innermost feelings.

Question #3: As a matter of proportionality, do the benefits of the order outweigh its negative effects?

59. In my view, the benefits of ensuring that the public interest of protecting therapist/patient relationships which assist individuals with mental health issues outweigh any negative effects. The Defendant is not prejudiced by this order.

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60. As stated by the Ontario Court of Appeal in *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, at para. 33, freedom of expression protects the media's access to and ability to report on court proceedings. The media has not opposed this order.

61. There is no reason why the public should see what the Plaintiff discussed with her therapist.

62. Accordingly, the Plaintiff's motion is granted.

Costs

63. The parties have filed their respective bills of costs. The successful party is presumptively entitled to costs. Generally, the costs are payable forthwith on a partial indemnity basis and I see no reason to depart from this general rule. The Plaintiff requests $10,000 and the Defendant requests $5,000, both on a partial indemnity basis.

64. The court notes that extensive materials were filed, including facta and books of authorities, and the motions took up almost a half day. A fair and reasonable amount of costs is $7,500 all-inclusive of HST and disbursements to be paid by the Defendant to the Plaintiff forthwith.

Justice A. Doyle

Date: January 3, 2024

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REASONS FOR DECISION

Doyle J.

Released: January 3, 2024

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