

Filomena Di Paolo v. Cigna compagnie d'assurance sur la vie: Cigna Life Succeeded in Proving that the Insured Was a Malingerer

By Catherine Dumas

In a recent judgment rendered in the case of *Filomena Di Paolo v. Cigna Compagnie d'assurance sur la vie*¹, the Superior Court dismissed the action of the Plaintiff Ms. Di Paolo, who was claiming \$354,000 under of two disability insurance policies against the Defendant Cigna Compagnie d'assurance sur la vie and allowed the cross-demand of the Cross-Plaintiff Cigna Compagnie d'assurance sur la vie which was seeking the recovery of \$9,000 that it had already paid to Filomena Di Paolo under one of the policies.

Ms. Di Paolo appealed this decision and judgment was rendered by the Court of Appeal on February 24, 2003. The Honorable Baudouin, Lemelin and Dussault, J.C.A., dismissed the appeal according to Article 501 C.C.P. because of its improper and dilatory nature.

The Facts

Ms. Di Paolo was employed in the family company managed by her husband where she performed minor clerical tasks such as answering the telephone, taking and occasionally delivering messages to job sites, filing and going to the bank.



On November 3, 1993, Ms. Di Paolo suffered a workplace accident. She fell backwards off a stepladder while filing some documents. She claimed that immediately after the fall she suffered from pain in her neck, arms, back and ankles, and that she had blurry vision and nausea. Later that day, she went to the Emergency Room at the Jean-Talon Hospital where she underwent skull, dental and spinal column X-rays that were all reported to be normal.

Despite these encouraging results, Ms. Di Paolo started seeing three general practitioners, as well as a psychiatrist, a neurologist, an anaesthetist and an orthopedic surgeon, and also underwent 116 physiotherapy sessions between November 1993 and May 1994. Not only did Ms. Di Paolo complain of neck pain, blurry vision and nausea but she also began, according to her allegations, to suffer from a number of other problems that included very severe headaches, memory loss, fatigue, insomnia and the inability to concentrate. In short, instead of improving, Ms. Di Paolo's condition deteriorated, making her unable to return to work.

The Arguments of the Parties

Ms. Di Paolo claimed \$354,000 under the insurance policies she purchased from Cigna Compagnie d'assurance sur la vie (hereinafter "Cigna"). She alleged that on November 3, 1993 she suffered an "accident" which made her disabled within the meaning of the policies and that, since then, she had been unable to return to work.

¹ (October 23, 2002), Montreal, 500-05-022119-968 (S.C.). This case was joined for hearing to three other actions Ms. Di Paolo brought against other insurers in which judgments were rendered the same day: *Di Paolo v. Financière Manuvie*, 500-05-025434-968 (S.C.); *Di Paolo v. Assurance-vie Desjardins Laurentienne inc.*, 500-05-025439-967 (S.C.) and *Di Paolo v. Assurance-vie Desjardins Laurentienne inc.*, 500-05-042523-983 (S.C.). Appeal dismissed on motion: (February 24, 2003), Montreal, 500-09-012888-020 (C.A.).

Cigna argued, on the other hand, that the circumstances strongly suggested that Ms. Di Paolo's accident and its aftermath were part and parcel of a scheme to generate money from the family business. It also alleged that Ms. Di Paolo was a "malingerer", in other words, that she was feigning her medical condition for financial gain.

Cigna based these allegations on several circumstances. Firstly, Ms. Di Paolo's husband, Mr. Di Paolo, was involved in an automobile accident in 1991, resulting in a sharp drop in business revenue from 1991 to 1993 and then from 1994 to 1998. Then, in early 1993, Mr. Di Paolo registered his wife for employee-accident protection with the *Commission de la santé et de la sécurité du travail*. Moreover, in 1993 and before the alleged accident, Ms. Di Paolo purchased no less than 13 insurance policies and had four existing policies with London Life involving members of the Di Paolo family amended. Finally, that same year, Mr. and Ms. Di Paolo borrowed a total of \$242,500 from five financial institutions, and took out insurance policies for each loan.

The Policies

The following are the definitions in the policies under which Ms. Di Paolo brought her claim against Cigna.

American Express ITT and ITP

8. Par "blessure", on entend toute blessure résultant directement et uniquement d'un accident dont la cause est externe, violente et visible et qui est survenu pendant que votre assurance ou celle de toute autre Personne assurée concernée était en vigueur en vertu de la Police. La blessure doit se produire dans les 365 jours qui suivent l'accident.

9. Par "Accident", on entend un événement soudain, inattendu et fortuit.

10. Par "invalidité totale permanente" et "invalidité de façon totale et permanente", on entend une invalidité totale temporaire qui s'est prolongée de façon continue pendant au moins 12 mois consécutifs. De plus, vous ou la Personne assurée concernée devez être incapable, en raison de cette invalidité, de vous livrer à toute occupation ou à tout travail que vous êtes raisonnablement apte à effectuer en raison de votre éducation, de votre formation ou de votre expérience.

11. Par "invalidité totale temporaire" et "invalidité de façon totale mais temporaire", on entend une invalidité temporaire résultant de blessures causées par un accident et survenue dans les soixante (60) jours qui ont suivi l'accident. De plus, vous ou, le cas échéant, votre Conjoint assuré, devez être incapable, de façon totale et continue, de remplir toutes les fonctions de votre occupation à plein temps ou, si vous ou votre Conjoint assuré n'avez pas d'occupation à plein temps, toutes les fonctions de votre occupation à temps partiel.

La Baie

5. Par "accident", on entend un événement soudain, inattendu et fortuit.

6. Par "blessure", on entend toute blessure résultant directement et uniquement d'un accident dont la cause est externe, violente et visible et qui est survenu pendant que vous étiez assuré en vertu de la Police collective. La blessure doit se produire dans les 365 jours qui suivent l'accident.

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7. Par “invalidité totale et permanente”, on entend une invalidité qui résulte de blessures qui se sont produites au cours des 365 jours suivant un accident et qui dure au moins 52 semaines consécutives. De plus, cette invalidité doit vous rendre incapable, pour le restant de votre vie, d’effectuer toutes les fonctions de toute occupation que vous êtes, ou pourriez devenir, apte à effectuer en raison de votre éducation, de votre formation ou de votre expérience.

The Judgment

The Superior Court held that what occurred on November 3, 1993 was an “accident” as defined by the insurance policies. Ms. Di Paolo did have certain physical symptoms that were consistent with a fall from a stepladder when she went to the Jean-Talon Hospital. The Court did not believe that Ms. Di Paolo had faked the accident and its immediate aftermath, nor that the accident was part and parcel of a scheme to generate income from the family business. The Court also did not believe that the highly unusual extent of borrowing or the investment in deposit certificates in 1993, as well as the purchase of several insurance policies and amendments to others, was sufficient proof to conclude that there was a scheme to defraud the insurer.

Ms. Di Paolo’s claim was nonetheless dismissed. The Court considered that Ms. Di Paolo had not been the victim of a temporary or permanent physical disability that prevented her from performing her clerical duties in the family business. Rather, she was, as Defendant Cigna had alleged, a malingerer, that is, she was feigning her medical condition for financial gain. That conduct resulted in a series of inconsistent circumstances, such as the deterioration of Ms. Di Paolo’s condition instead of its improvement; moreover, her repetition, as if from a textbook, of various symptoms, but her inability to give details when asked to do so was held to be an indication of such simulation.

The Superior Court found that, after the accident, Ms. Di Paolo decided to maximize the potential for collecting money from all available sources, both from the Defendant insurers and from those that are publicly funded. Indeed, two administrative decisions, one rendered in 1998 by the *Commission d’appel en matière de lésions professionnelles* and another rendered by the *Régie des rentes du Québec* in 1996, had recognized Ms. Di Paolo as being incapable of performing the duties of the job she had at the time of the accident.

Thus, the Court dismissed Ms. Di Paolo’s action against Defendant Cigna and allowed the cross-demand of Cigna, ordering the Plaintiff to repay the sum of \$9,000 that Cigna had paid to Ms. Di Paolo under one of the policies for a period of twelve months.

Conclusion

Filomena Di Paolo v. Cigna Compagnie d’assurance sur la vie is a good example of a case in which the solution was essentially determined by the expert evidence and the credibility of witnesses. In this case, the testimony of the Plaintiff, who grossly exaggerated her symptoms, was not retained by the Court in assessing her condition. Rather, the Court based its position on the 13 experts, neurosurgeons, orthopaedic surgeons, neuroradiologists, psychiatrists, psychologists and neuropsychologists, who testified to evaluate Ms. Di Paolo’s physical and psychological health. The Superior Court held that Cigna had skillfully discharged its evidentiary burden and had shown that Ms. Di Paolo’s condition disentitled her to the payments she was claiming under the relevant terms of the insurance policies.

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