

proceeding and order the lawyer to pay the costs of the proceeding.

[2] Sun Life is the plaintiff's long term disability insurer. It has paid her benefits under the relevant policy from the time of her first qualifying to receive the same to date.

[3] A chronology of what I see as the most pertinent facts is set out below:

- January 30th, 1997: The plaintiff is injured in an accident in Mexico wherein she sustains a serious brain injury;
- Date Unknown: The plaintiff's right temporal lobe is surgically removed in Texas before her return to Canada;
- February 4th, 2000: The plaintiff retains her present counsel of record, Mr. Ferro;
- March 7th, 2000: A statement of claim is issued by Mr. Ferro's office in action number 00-521. The plaintiff was named as the plaintiff in that action, and Sun Life was named as one of five defendants. The prayer for relief exceeded \$20,000,000.00;
- March 22nd, 2000: Action 00-521 is discontinued;
- March 22nd, 2000: A statement of claim is issued by Mr. Ferro's office in action number 00-647. The plaintiff was named as the plaintiff in that action. Sun Life is one of five defendants. The prayer for relief exceeded \$1,000,000,000.00;
- June 19th, 2000: Action number 00-647 is discontinued;
- January 19th, 2011: The statement of claim in this action is issued by Mr. Ferro's office. Sun Life is one of two defendants;
- May 24th, 2011: Sun Life sends a formal request, pursuant to *Rule* 15.02 to Mr. Ferro asking that he "deliver a notice declaring whether [he] commenced or authorized the commencement of the proceeding or whether the plaintiff authorized the commencement of the proceeding". The wording is taken from the text of *Rule* 15.02(1);
- February 21st, 2012: A letter was sent to counsel for Sun Life enclosing a statutory declaration by Mr. Ferro, wherein he states, *inter alia*, "I have [*sic*] authority from my Client to commence the proceedings against the Defendants named therein";
- April 4th, 2012: Mr. Ferro produces the plaintiff so that she may be cross-examined upon an affidavit filed in another motion in this action. He has an off the record discussion with counsel for Sun Life. At the commencement of the cross-examination, the following exchange takes place:

“Mr. Ferro: Counsel, for reasons discussed off the record, we are in the process of appointing a litigation guardian.

Mr. McDuff: Do I understand, Mr. Ferro, you are today taking the position that your client is under a legal disability?

Mr. Ferro: Yes.”

[4] The issue is whether Mr. Ferro had the authority of the plaintiff to commence the action on her behalf by issuing the statement of claim on January 19th, 2011.

[5] In the normal course of events, Mr. Ferro’s declaration of February 21st, 2012, notwithstanding the present tense of the verb he used in it, would be sufficient to answer the question. After all, Mr. Ferro is an officer of this court, and I should take him at his word.

[6] What removes this case from the normal course, however, is Mr. Ferro taking the position that by April 4th, 2012, the plaintiff was under a legal disability. There is no evidence before me as to when that disability began. If it began sometime before the statement of claim was issued on January 19th, 2011, it is possible that the plaintiff did not have capacity to instruct Mr. Ferro to commence the action on her behalf.

[7] When faced with a motion to dismiss the plaintiff’s action, it was incumbent upon her or her counsel to squarely address her capacity to instruct counsel relative to the commencement of the action. Without evidence on that point, I am left with nothing beyond minimal medical information from the late 1990s and Mr. Ferro’s confirmation in April of 2012 that the plaintiff was under a legal disability.

[8] I am prepared to draw a negative inference from this informational vacuum and find that the plaintiff lacked the capacity to instruct Mr. Ferro to commence this action. Accordingly, he commenced the action without the plaintiff's authority.

[9] I see no reason not to dismiss the plaintiff's present action and to order that Mr. Ferro is to pay the defendants their costs, on the partial indemnity scale, forthwith after assessment thereof. Order accordingly.

The Honourable Mr. Justice Parayeski

Released: July 5, 2012

COURT FILE NO.: 11-25008

DATE: 2012-07-05

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

GLYNIS SALISBURY

Plaintiff

- and -

SUN LIFE ASSURANCE COMPANY OF
CANADA, SUN LIFE FINANCIAL and
MCMASTER UNIVERSITY

Defendants

REASONS FOR JUDGMENT

Parayeski J.

Released: July 5, 2012