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Life and Disability Insurance

A DISEASE CONTRACTED DURING ACTIVITIES OF EVERYDAY LIFE IS NOT AN ACCIDENT!

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ON DECEMBER 18, 2009, THE SUPREME COURT RENDERED JUDGMENT IN THE CASE OF *GIBBENS V. CO-OPERATORS LIFE INSURANCE COMPANY*,[1] CONCLUDING THAT AN INFECTIOUS DISEASE CONTRACTED DURING AN ORDINARY ACTIVITY OF EVERYDAY LIFE IS NOT AN ACCIDENT ACCORDING TO THE DEFINITION IN THE ACCIDENT INSURANCE POLICY, EVEN IF THE INSURED DID NOT INTEND TO CONTRACT THE DISEASE, OR WAS UNABLE TO FORESEE THAT HE WOULD.

FACTS

Mr. Gibbens, the insured, became a paraplegic following an inflammation of his spinal cord. This inflammation was caused by the herpes HSV-2 virus, contracted during unprotected sexual intercourse with three different women in January and February 2003. A diagnosis of viral infection was confirmed on February 17, 2003. Mr. Gibbens's condition deteriorated rapidly and, on February 23, 2003, he became paraplegic. It was admitted that the probable cause of the infection was the sexual intercourse that occurred in the 30 days preceding the start of the illness. It was also admitted that Mr. Gibbens did not intend to contract transverse myelitis, nor could he foresee that he would do so, when he had unprotected sex. It was also admitted that Mr. Gibbens was aware that there was a risk of contracting sexually transmitted diseases during unprotected sexual intercourse.

Mr. Gibbens was insured for accidents pursuant to a group insurance contract which granted him 200% of the principal amount if he became a paraplegic. The definition of *"accidental disease/ dismemberment benefits"* read as follows:

> If the insurance company is furnished with proof that a member sustains one of the following losses, as a direct result of a Critical Disease or <u>resulting directly and independently of all other causes from bodily injuries occasioned solely through external, violent and accidental means,</u> without negligence on the member's part, the insurance company will pay [...] [2]
>
> (our emphasis)

THE TRIAL JUDGMENT

At trial, the judge considered the approach taken by the Supreme Court in the case of *Martin v. American International Assurance Life.*[3] In the *Martin* case, a physician developed an addiction to morphine and Demerol following an orthopaedic injury and succumbed to an overdose of Demerol that he administered to himself intravenously. The clause providing for coverage in case of accidental death was similar to the clause at issue in the *Gibbens* case.

[1] 2009 SCC 59.

[2] *Gibbens v. Co-operators Life Insurance Company*, 2007 BCSC 1076.

[3] 2003 SCC 16, [2003] 1 S.C.R. 158.

To determine whether a cause of death is *"accidental"*, the Supreme Court considered whether the consequences were expected and noted that one cannot usefully separate off the "means" from the rest of the causal chain and ask whether they were deliberate. It was sufficient, in the Court's view, to *"consider whether the insured expected death to be a consequence of his actions and circumstances."*[4] *(...) "Unintentional or unexpected death is seen as accidental (...)"*[5]

The test proposed in the *Martin* case was described as a *"subjective test"*. The critical question was therefore to determine whether the insured expected to die and whether the circumstances surrounding the death, i.e. what the insured said, did or did not do, could be useful in answering this question. However, if the insured's intention was not clear, the court could ask whether a reasonable person in the insured's situation would have expected to die. Having concluded that Dr. Martin neither intended nor wished to die, the Court held that his death was therefore accidental.

Applying this test, the trial judge concluded that Mr. Gibbens had not intended to contract HSV-2, to expose himself thereto, or to develop transverse myelitis, when he had unprotected sexual intercourse,[6] and, while the insured's actions were reckless and he was aware of a risk, there was a significant difference between recognizing the risk and the foreseeability of this risk. Mr. Gibbens's conduct was not sufficiently negligent or reckless to be tantamount to Russian roulette, and there was no admission or evidence regarding the statistical probability of contracting the HSV-2 virus through unprotected sex.

In a second argument, the insurer submitted that the paraplegia was caused by a disease and that a disease is not an accident. The trial judge refused to follow the decision of the Ontario Court of Appeal in the case of *Wang* v. *Metropolitan Life Insurance Co.*[7] in which a young woman died of an embolism due to a complication from a caesarean section. In that case, the court concluded that the death, while unexpected, resulted from natural causes. On the other hand, Mr. Gibbens pleaded the case of *Kolbuc* v. *ACE INA Insurance*[8] in which the insured became a paraplegic after being bitten by a mosquito carrying the West Nile virus. He argued that the paraplegia was found to have resulted from the accidental insect bite.

The trial judge found in favour of the insured and therefore held that his paraplegia was accidental in accordance with the definition in the insurance policy.[9]

COURT OF APPEAL JUDGMENT

Madam Justice Newbury held that the trial judge committed no error in his judgment. The viral infection was a result of unprotected sexual intercourse in the days preceding the diagnosis of the disease and the issue was to determine whether Mr. Gibbens's paraplegia resulted "directly and independently of all other causes from bodily injuries occasioned solely through external, violent and accidental means." She held that the infection was not contracted naturally and that there was an external factor whose consequences were unintended or unexpected.

Justice Newbury also considered the notion of *"external and violent means"*. Reviewing the case law interpreting this expression in England, the United States and Canada since 1893, she concluded that the only applicable rule was that insurance contracts must be interpreted in a manner that gives effect to the parties' intentions at the time they concluded the contract. However, in the instant case, the contract was prepared by the insurer and was signed without negotiation by the other party who was the simple beneficiary of a group insurance policy negotiated by his union. In such a case, the notion of the insured's intention is no more than a fiction.[10] In these circumstances, the court must consider whether the proposed interpretation leads to an unrealistic conclusion in the commercial climate in which the insurance was contracted, and it must assume that the author of the contract was aware of the judicial authority when he wrote it. In the present case, since there were few decisions interpreting the word *"violent"*, the judge concluded that the most prudent course of action was to follow the case law which had held that *"violent"* refers to *"unusual or unnatural or extreme"* circumstances, and that what had happened to Mr. Gibbens was of this nature. Consequently, his paraplegia qualified as an injury occasioned *"'solely through ... violent ... means' as well as 'accidental'* and *'external' means"* within the meaning of the policy.[11]

4 *Landress* v. *Phoenix Mutual Life Insurance Co.*, 291 U.S. 491 (1934), p. 501.

5 Par. [20].

6 Par. [6].

7 [2004] O.J. No 3525 (C.A.).

8 [2007] O.J. No. 1862 (C.A.).

9 *Gibbens* v. *Co-operators Life Insurance Co.*, 2008 BCCA 153.

10 Par. [31].

11 Par. [32].

Madam Justice Saunders concurred with Justice Newbury on the outcome of the appeal. However, she expressed some caution with respect to pathogenic diseases which may be contracted in every day life, noting that it may be *"difficult to perceive a principled difference between the unintended and unexpected contraction of a common ailment from the events before the court,"* or even ultimately from? uncommon conditions such as the contraction of the West Nile virus, hantavirus associated with deer mice, or lime disease associated with ticks. However, she found that *"the more prudent course is "to follow the view that has already been judiciously taken", and leave it to the insurance industry to adapt policies relying upon the long trail of jurisprudence to guide it."*[12]

THE SUPREME COURT'S JUDGMENT

The judgment considered all the arguments presented by the parties, as well as the doctrine and landmark decisions on the notion of accident dating back more than 100 years. Justice Binnie, for the Court, remarked as follows: *"A century and a half of insurance litigation has failed to produce a bright line definition of the word "accident"*!

The notion of accident excludes *"bodily infirmity caused by disease in the ordinary course of events"*. Accident insurance is not the same as life insurance or disability insurance, and it must be interpreted in its context. In the context of accident insurance, the parties do not expect every loss or bodily injury to be covered by the policy.

Justice Binnie noted that the decision of the Court of Appeal would have considerable impact on liability *"for infectious diseases generally, which are spread in the usual course of events by viruses and bacteria passed from person to person, whether by sneezing in a bus, an unprotected cough in a crowded elevator, or a simple handshake."*[13]

According to him, the word *"accident"* is an ordinary word which should be given its ordinary meaning, namely *"any unlooked for mishap or occurrence"* or act the result of which was not designed. He writes: *"Someone who picks up a disease "in the ordinary course of events" would not ordinarily be described as having been in 'an accident'."*[14]

The true test is the link between the accident and the disease. There must be an accidental triggering event to which the death or disease is attributable. Although a disease occurring in the ordinary course of events would generally be excluded, where an accident causes a physical injury taking the form of a disease, this does not make the cause less accidental. Such situations will be covered by the insurance.

In fact, Justice Binnie acknowledged that the pathological origin of Mr. Gibbens's disease is not in itself a bar to his claim for compensation. The issue one must determine is whether Mr. Gibbens contracted this disease *"in the ordinary course of events."*[15] He rejected the proposition that, since the *Martin* case, it is no longer necessary to consider the issue of the *"accidental means"* if the resulting death or disease was *"unexpected"*. In his view, that case did not address the distinction between *"disease"* and *"accident"* and was restricted to proposing a test for determining whether a *"miscalculation"* could constitute an accident. It is not sufficient simply to show that the death was unexpected to validly establish that there was an accident.

Justice Binnie then considered the notion of *"disease in the ordinary course of events"* and concluded:

> "[52] (...) The disease element is carved out of the universe of unexpected mishaps. The ordinary use of language has placed well-understood (if not well defined) limitations on the scope of "accident" in the jurisprudence.
> The jurisprudence has informed the practice in the insurance industry and no compelling reason has been advanced to disturb it.

Finally, as for the alternative argument concerning the notion of *"external"* or *"violent"*, Justice Binnie found that these adjectives have long since been subsumed into the concept of accident and add nothing significant. He also rejected attempts by insurers to complicate the debate, noting that *"[t]he courts do not favour the self-serving isolation of a particular element in a chain of events that should be considered in its entirety."*

In the instant case, genital herpes was transmitted through sex and, like any infectious disease, requires an outsider's participation. However, this is not outside the ordinary course of events. Bodily malfunctions can sometimes be considered to be accidents where they are totally unrelated to the transmission of the disease in the ordinary and natural course of events. To extend an accident insurance policy beyond its limits would effectively convert it into a general insurance policy against infectious diseases, contrary to the parties' expressed intention and reasonable expectations.

[12] Par. [38].

[13] Par. [19].

[14] Par. [22].

[15] Par. [35].

COMMENTS

This decision brings to an end the automatic application of the subjective test used in the *Martin* case. The Court clearly established that where a disease is contracted in the ordinary course of events, it cannot be considered an accident. However, it left open the issue of whether a *"'bodily malfunction' [...] not in the ordinary course of events"* may qualify as an accident.[16] This will depend on the particular fact situation during which the malfunction occurs, and relevant events that follow must be considered in their entirety.

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[16] Par. [60] and [61].

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