



Is Disease Transmission an ‘Accident’?



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The Supreme Court of Canada unanimously confirms that accident insurance is not the same thing as comprehensive health insurance.

In *Co-operators Life Insurance Co. v. Gibbens*, the Supreme Court of Canada unanimously found that the word “accident” in an accident insurance policy excludes bodily infirmity caused by disease acquired in the ordinary course of events.¹

FACTS

Randolph Charles Gibbens, who was insured pursuant to an accident insurance policy issued by Co-operators Life Insurance Co., had unprotected sex with three women and acquired genital herpes. This, in turn, caused transverse myelitis, a rare complication of herpes that resulted in total paralysis from his mid-abdomen down. He claimed compensation under the policy, which provided coverage for losses “resulting

directly and independently of all other causes from bodily injuries occasioned solely through external, violent and accidental means, without negligence...”

THE TRIAL AND APPEAL

B.C. Supreme Court Justice Frank Cole, the trial judge, found that the transverse myelitis did not arise “naturally.” Rather, it arose from an external factor or “unlooked-for mishap,” being the introduction of the HSV-2 virus into the insured’s body by a sexual partner. Citing the decision in *Martin v. American International Assurance Life Co.*, Cole held that becoming a paraplegic as a result of having unprotected sexual intercourse was “unexpected.” As such, it qualified as an “accident.”

In *Martin*, a doctor who was on a program of gradual withdrawal for addiction to morphine and Demerol died from a self-administered Demerol overdose. The evidence showed the concentration of Demerol in Martin’s body was at the low end for an overdose. It was held that his death resulted from miscalculating how much Demerol his body could tolerate. The fact that Martin’s death was

“unexpected” was given significant weight in determining that it qualified as an “accident.”

In the B.C. Court of Appeal, B.C. Appeal Court Justice Mary Newbury rejected the idea that the decision in *Martin* meant the question of whether an event was an “accident” could be determined solely by considering whether it was “unexpected.” According to Newbury, the *Martin* decision said it was equally important that the words “accident” and “accidental” be construed in accordance with their ordinary meaning. While this situation was close to the line, she found the introduction of the virus by a sexual partner was sufficiently “accidental” in the ordinary meaning of that term. She upheld the trial judge’s decision, while stating that if she was wrong in her view of *Martin*, then, in her opinion, it was obvious that the injury was unexpected.

ANALYSIS BY THE SUPREME COURT OF CANADA

Supreme Court of Canada Justice Ian Binnie, in delivering the Supreme Court’s decision, found that the causal chain that led to Gibbens’ paraplegia was sex that transmitted herpes, which led to transverse myelitis. Binnie observed that transverse myelitis is an unexpected consequence of genital herpes that occurs rarely. But it is a normal incident or consequence of the disease and, therefore, proceeded from natural causes.

Citing the definition of “accident” from *The Law Relating to Accident Insurance* (2nd ed. 1932) by A.W. Welford, which has been accepted as authoritative by the Supreme Court of Canada in *Smith v. British Pacific Life Insurance Co.* [1965], the Supreme Court stated:

“The word ‘accident’ involves the idea of something fortuitous and unex-

pected, as opposed to something proceeding from natural causes; and injury caused by accident is to be regarded as the antithesis to bodily infirmity caused by disease in the ordinary course of events.”

At Paragraph 37 of his judgment, Binnie observes that “Welford defines accident as much by what it is not, i.e. ‘bodily infirmity caused by disease in the ordinary course of events,’ as by what it is, i.e. ‘something fortuitous and unexpected.’”

In agreeing with Newbury, Binnie rejected the proposition that *Martin* did away with the need to consider the “accidental” means if the resulting death or disease was “unexpected.” Binnie wrote that although the court in *Martin* was able to infer accidental means from the circumstances of the death, there is no necessary equivalence between

“unexpected” and “accident.” The expectations of the insured, while relevant, must be viewed in the context of the surrounding circumstances. By way of illustration, at Paragraph 45 of his judgment, Binnie gave the following analogies in differentiating between the terms:

“If a man, sitting at a bus station, is hit by a bus that has careened out of control, that is unquestionably an accident — but it is not an accident by virtue of the fact that the man did not expect it.”

Elsewhere, at Paragraph 43 of the judgment, Binnie says: “At the same time, a claimant who can establish that death was unexpected does not thereby, without more, establish a valid accident. Otherwise, every bad happening, natural or unnatural, whether caused by disease in the ordinary course of events or other-

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wise, would be classified as an accident. Take the case of an insured who is sitting on a couch in front of her television set when suddenly she suffers a stroke and dies. The tragedy is totally unexpected. Yet, there is no accident involved in any ordinary manner of speech.”

Binnie distinguished *Martin* on the basis that it was not a disease case; therefore, it was not necessary to address the traditional distinction between “disease” and “accident.”

“Diseases are transferred from person to person through natural processes such as coughing or sneezing in someone’s presence ‘in the ordinary course of events,’” Binnie wrote. “The viruses thus



transmitted may, in some situations, prove to have calamitous and unexpected consequences. Yet, if such transmissions are viewed with hindsight, to be classified as accidents, then an accident policy becomes a comprehensive health policy.”

Binnie also observed that while a century and a half of insurance litigation has failed to produce a bright line definition of the word “accident,” it should be interpreted based on the ordinary understanding of the average person applying for insurance. While jurisprudence has assigned a generous meaning to the word “accident,” generosity has its limitations as a principle of contractual interpretation.

The court held: “Insurance is written to

protect against certain defined risks. Care should be taken not to convert, for example, an accident policy into a general health, disability or life insurance policy. Accident insurance is relatively cheap compared to the more comprehensive forms of insurance.”

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Supreme Court of Canada’s decision in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, the exercise of interpretation should avoid an unrealistic result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Binnie stated: “In my view, ... the policy here excludes bodily injury from processes that occur naturally within the body in the ordinary course of events and, as well, from diseases that are transmitted in the ordinary way without any associated mishap or trauma except the spread (or inception) of the disease itself.”

Citing the cases of *Sinclair v. Maritime Passengers’ Assurance Co.* and *Wyman v. Dominion of Canada General Insurance Co.*, the court stated that, traditionally, the key to finding liability under an accident policy has been to identify a “mishap or untoward event” to which the disease or

death can be attributed. Unless the bodily injury arose from a mishap of some sort, there can generally be no liability under an accident policy. Citing *Sinclair*, Binnie observed that in determining whether the injury can be considered an “accident,” the entire chain of events must be looked at, and not just the means or the end result, as affirmed in *Martin*.

COMMENT

The distinction between “accident” and “disease” can be difficult to make in practice, because it requires the determination of whether the acquisition of a disease occurred due to an “unlooked for mishap” or “untoward event.” The challenge is to relate the different types of risks and coverages in a way that makes commercial sense in the context of how the insuring agreement is worded and the parties’ reasonable expectations.

Examples of this difficulty can be found in two recent Ontario decisions.

Toronto Professional Firefighters’ Association v. Toronto (City) involved a claim for accident coverage brought on behalf of a firefighter who died of renal failure caused by contact with toxic substances over his 20 years of fighting fires. On appeal to the Ontario Divisional Court, it was found that the firefighter’s renal cancer was caused by “exposure to toxic substances . . . when the dangers were unknown and the safety equipment was unsafe.” As such, this was a case where the “unlooked for mishap or occurrence” caused the disease, as opposed to the disease spreading in the ordinary course of events. Coverage was available.

In the Ontario Court of Appeal’s 2007 decision in *Kolbuc v. ACE INA Insurance*, the insured, a plasterer who contracted the West Nile virus from a mosquito bite, was rendered a paraplegic and recovered compensation under an accident policy. In *Gibbens*, the Supreme Court



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indirectly questioned the correctness of this decision, noting that various forms of bacteria and viruses constantly make their way into our bodies. For example, malaria is transmitted by mosquitoes. One would not say that inhabitants of warm climates are “accident-prone” to contracting malaria and, because of a failure to smack a mosquito, have a valid claim under an accident policy. Binnie wrote: “In my view, . . . such a conclu-

sion would stretch the boundaries of an accident policy beyond the snapping point and convert it into a comprehensive insurance policy for infectious diseases contrary to the expressed intent of the parties and their reasonable expectations.”

Clearly there is a very fine line between certain cases and, as the court observes, value judgements based on the parties’ reasonable expectations must be made.

As a further illustration of what would be a covered versus uncovered accident, Binnie wrote in Paragraphs 49-50 of his judgment that insureds would understand that a heart patient who goes out for a walk and is startled by the sound of a car horn and experiences an incapacitating cardiac arrest would not be covered under an accident policy. But a disease or physical infirmity produced by an event that occurred by accidental means — for example, a heart condition that arises as one of the elements of injuries suffered in a car crash — would be covered.

The effect of *Gibbens* is to re-emphasize that each case will turn on its unique facts and evidence as to whether the injury was caused by an “unlooked-for mishap.” It also re-illustrates the importance of the wording of the policy. Depending on the comprehensiveness of coverage an insured wants, or that an insurer wishes or is prepared to provide, the various alternatives in the marketplace must be canvassed. ≡

1 Unless otherwise provided for under the policy. For example, the diseases enumerated under the “critical diseases” provision of an accident insurance policy.

2 At Paragraph 51, the court also addressed the onus of proof. It found that it always rests with the insured to show that the injury results from an accident. However, once a prima facie case is made, the tactical burden shifts to the insurer to show the disease occurred in the ordinary course of events.