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Risky business is no accident

Contributed by **Lang Michener LLP**

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A recent Supreme Court of Canada ruling provides assistance and context to those interpreting accident insurance policies. This ruling will help insureds, insurers and courts to determine when coverage should be provided under these policies.

Background

In early 2003 Randolph Charles Gibbens had unprotected sex with three women and as a result acquired genital herpes. While genital herpes is usually at worst a minor irritant, one rare but known complication of this disease is transverse myelitis (inflammation of the spinal cord), which struck Gibbens and resulted in total paralysis below his mid-abdomen. Gibbens claimed compensation under his group insurance policy, which provided compensation for losses:

"*as a direct result of a Critical Disease [defined in the Policy, but not including herpes or transverse myelitis], or resulting directly and independently of all other causes from bodily injuries occasioned solely through external, violent and accidental means, without negligence.*"

A successful claim under the policy would have obliged the insurer, Co-operators Life Insurance Company, to pay Gibbens C$200,000. Co-operators denied coverage under the policy.

At trial, the Supreme Court of British Columbia found that the key issue was whether Gibbens expected to become a paraplegic as a result of having unprotected sexual intercourse, and that the answer to this question was no. The fact that his sexual conduct was "foolish and risky" did not mean that the result was not an accident under the terms of the policy. In the court's view, an 'accident' is generally something that is not expected as a result of a certain action.

The British Columbia Court of Appeal agreed with the lower court that the paralysis did not arise naturally as an expected result of the sexual activity, but that it arose from an external factor - the introduction of the herpes virus into Gibbens' body by a sexual partner. In this view, under the ordinary understanding of the words 'accident' and 'accidental', Gibbens' claim should therefore be successful. One judge noted that it was up to the insurance industry to adapt and clarify the wording of its insurance policies in light of previous jurisprudence.

Supreme Court of Canada view

The Supreme Court of Canada noted that insurers have declined to attempt to define 'accident' in their insurance policies. However, prior case law has held that while something may not have been intended, to qualify as an 'accident' it should be fortuitous and unexpected, as opposed to something that results from natural causes. An injury caused as a result of an accident is not the same as a "bodily infirmity caused by disease in the ordinary course of events".

However, the policy offered additional coverage to coverage simply for damages that resulted from an 'accident'. As noted above, the policy confined the risk to losses that resulted directly from injuries "occasioned solely through external, violent and accidental means" or from a list of enumerated "critical diseases". The Supreme Court interpreted "external, violent" essentially to mean 'unnatural and unusual'. It was evident to the court that the policy was not intended to cover all losses or bodily injuries.

However, the effect of the lower court decisions would make insurers with policy-type wording liable for all diseases (including sexually transmitted diseases) where the insurer does not allege that the insured acted negligently or deliberately. This would mean that victims of bacterial or viral infections that resulted from mosquito bites (eg, West Nile disease) or errant coughs or handshakes (eg, the H1N1 'swine flu' strain of influenza) would have a similar claim under their insurance policies. Allowing these claims would convert the accident insurance policy into a comprehensive health insurance policy or a disability insurance policy.

As a result, the Supreme Court determined that the policy excluded "bodily injury from processes that occur naturally within the body in the ordinary course of events", as well as "diseases that are transmitted in the ordinary way without any associated mishap or trauma except the spread (or inception) of the disease itself". This determination follows a strain of law in which damages resulting from mishaps that are associated with voluntary everyday activities are not insurable, such as sunstroke resulting from spending too much time in the sun while on vacation. By contrast, if someone is shipwrecked and then develops sunstroke and incurs damages, this claim is more likely to be successful under the terms of an accident policy.

In Gibbens' case, the Supreme Court found that as sex is an ordinary everyday act which also happens to be the means by which herpes replicates, the plaintiff could not shelter under the policy.

While Gibbens' paralysis surely inspires sympathy, the court observed that diseases and their microbes are transferred from person to person via natural means every day and very much "in the ordinary course of events". If this distinction were not respected and clearly demarcated in law, cases such as this could potentially open the floodgates to litigation by introducing all categories of disease into the category of 'accident'. Unfortunate consequences may result, but this does not change the nature of the transmission from 'routine' to 'accidental'. A comprehensive health insurance policy would cover Gibbens' disease; an accident insurance policy would not.

Implications

The Supreme Court made a special effort to differentiate between 'unexpected events' and 'accidents'. The latter would be covered under the terms of the policy, but the former might not. This is not a clear distinction, but the court made it clear that 'accident' is not the opposite of 'intended'.

Similarly, the court observed that there have been many cases in which a miscalculation or misjudgement of an event has led to the death of an insured, such as administering the wrong dose of a potentially lethal drug. The distinction was that this case dealt with a disease acquired through normal activity, while the other cases were about medical treatments rather than diseases.

While Co-operators did not claim that Gibbens' refusal to use protection against sexually transmitted diseases was meaningful, the court left open the possibility that, had the sexual act not been consensual, the transmission of disease may have qualified as an 'accident' under the policy. As the court made it clear that a loss caused by a disease can be covered under an accident insurance policy if the disease is contracted as a result of "accidental means" through the entire chain of events, an insured may have good grounds for a claim.

Recommendations

As a result of the Supreme Court decision in *Co-operators Life Insurance Co v Gibbens*, insurers and insureds are advised to:

- review their insurance policies carefully to ensure that the wording reflects the intended coverage and scope of coverage;
- review the insured's practices to consider whether incidents that result from these practices would be considered an 'accident' under the terms of the policies;
- discuss coverages required based on business practices and risk tolerance; and
- consult with a lawyer if in doubt about their rights.

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