

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Mahoney v. Cumis Life Insurance Company, 2010 NSSC 307

Date: 20100326

Docket: Ant No. 265133

Registry: Antigonish

Between:

Mary Isobel Mahoney

Plaintiff

v.

Cumis Life Insurance Company

Defendant

DECISION ON APPLICATION

Judge: The Honourable Justice Glen McDougall

Heard: March 8th & 26th, 2010, in Antigonish, Nova Scotia

Decision Rendered

Orally on: March 26, 2010

Written Decision: August 6, 2010

(edited for grammatical purposes)

Counsel: Daniel J. MacIsaac, for the plaintiff
Karen Bennett-Clayton, for the defendant

By the Court:

[1] This motion is brought under *Civil Procedure Rule 12* which states in part:

“**12.01** (1) A party may, in limited circumstances, seek the determination of a question of law before the rest of the issues in a proceeding are determined, even though the parties disagree about facts relevant to the question.”

[2] Subparagraph (2) of that Rule states:

“A party may seek to have a question of law determined before the trial of an action or the hearing of an application, in accordance with this Rule.”

[3] The defendant moves for an order determining that the death of Anthony Thomas Mahoney was not an accidental death as defined in Cumis Credit Union Group Accidental Death Insurance Policy #0527278-1 issued by Cumis Life Insurance Company to Anthony Thomas Mahoney and Amy Mary Isobel Mahoney as beneficiary. Or, in the alternative, that coverage under Cumis Credit Union Group Accidental Death Insurance Policy #0527278-1 is excluded by the express terms of said policy issued by Cumis Life Insurance Company to Anthony Thomas Mahoney.

[4] In support of the motion I have the affidavit of Karen Bennett-Clayton. There are a number of exhibits attached to this affidavit including a copy of the enrollment form signed by Anthony Thomas Mahoney and his wife, Mary Mahoney, on November 3rd, 1996; a copy of a letter dated March 29th, 2004, from Christina Chobot of Cumis Life Insurance Company to Anthony Thomas Mahoney outlining the basic terms of the accidental death in insurance policy #0527278-1; a copy of the pathology final autopsy results for Anthony Thomas Mahoney from the office of the Chief Coroner of the Province of New Brunswick; a copy of the Coroner’s Declaration of Blake Whiteway declared to on the 22nd day of November, 2005; a transcript of a discovery of the plaintiff, Mary Isobel Mahoney, which took place on the 8th day of May, 2008; a copy of medical records pertaining to Michael Thomas Mahoney provided by his family doctor, Dr. John Chiasson, and the Yarmouth Regional Hospital where Mr. Mahoney was admitted and treated after suffering an acute myocardial infarction on the 13th of June, 2002; a copy of a letter addressed to whom it may concern from Dr. Camilla Tooley, dated December 5, 2005; a copy of a Cumis Death Claim Claimant’s Statement signed by Mary Isobel Mahoney and dated the 15th day of August, 2005; a copy of a letter from Verna Livingstone of Cumis Life

Insurance Company to Mary Mahoney, dated December 15, 2005, denying payment of the accidental death benefit for Mr. Mahoney; and, a copy of the complete file of the River Valley Health Upper River Valley Hospital with respect to the medical records pertaining to Anthony Thomas Mahoney who presented to the facility with chest pains shortly after being involved in a motor vehicle accident resulting from a collision with a moose on July 20th, 2005.

[5] Counsel for the plaintiff chose not to file a response affidavit, relying instead on the discovery transcript of his client, a copy of which is attached to the affidavit of Karen Bennett-Clayton which was referred to earlier.

[6] Mr. MacIsaac did however file a notice of contest requesting that the motion be dismissed on the grounds that: (1) the *Civil Procedure Rules* is an inappropriate forum to decide the issues of the case; (2) the death of Anthony Thomas Mahoney was an accident within the meaning of the policy; and, (3) any applicable exclusions of the policy do not apply having regard to all existing circumstances.

[7] Counsel for the moving party frames the issues to be determined as matters of law. They are: (1) Do the circumstances of the deceased's death satisfy the definition of accidental death contained in the policy? If the answer to this question is yes, then, (2) Is recovery under the policy precluded by operation of the express exclusion in the policy for accidental death resulting directly or indirectly from any bodily or mental infirmity, illness, disease or bacterial/viral infection?

[8] I have already referred to the operative provisions of Rule 12.01. Unlike the old Rule 25.01 there is no requirement to file an agreed statement of facts. Furthermore, Rule 12.02 states, and I quote:

“A judge may separate a question of law from other issues in a proceeding and provide for its determination before the trial or hearing of the proceeding, if all of the following apply:

- (a) the facts necessary to determine the question can be found without the trial or hearing;
- (b) the determination will reduce the length of the proceeding, duration of the trial or hearing, or expense of the proceeding;

- (c) no facts to be found in order to answer the question will remain in issue after the determination.”

[9] I am satisfied that the determinations that must be made in this motion involve issues of law and that all three conditions of Rule 12.02 (a), (b) and (c) exist. As such, I think it is appropriate to allow this motion to be presented. On the basis of the evidence that has been presented it is possible to determine the factual foundations on which the questions of law as set out by the defendant’s counsel must be decided.

[10] With respect to the policy, no one disputes the fact that Anthony Thomas Mahoney was insured under the Cumis Credit Union Group Accidental Death Insurance Policy #0527278-1 at the time of his death on July 20th, 2005. This policy provides coverage for accidental death defined in the policy as, and I quote:

“Accidental death means death occurring within 180 days of the date of the accident which results directly and independently of all other causes (a) solely from a bodily injury caused by external violent and accident means and visible on the surface of the body or disclosed by an autopsy or (b) solely from an accidental drowning.”

[11] Under the heading “Exclusions” the policy states, and I quote:

“Benefits are not payable for accidental death resulting directly or indirectly from any of the following causes ...”

[12] Sub-paragraph (e) includes:

“Any bodily or mental infirmity, illness, disease or bacterial/viral infection.”

[13] The wording of the policy pertaining to exclusions is relevant to the alternative argument advanced by the defendant. This would only come into play if the Court determines that the deceased’s death was accidental as that term is defined in the policy. While the burden of proof is on the plaintiff to prove that Mr. Mahoney’s death was accidental, it is the defendant who bears the burden of establishing that the exclusion applies.

[14] As to the cause of death, the relevant facts of this case are really not in dispute. While travelling through New Brunswick en route to Saskatchewan Anthony Thomas Mahoney, henceforth referred to as Mr. Mahoney, was involved in a motor vehicle accident when the van in which he was a passenger collided with a moose that had

found its way onto the highway. Mr. Mahoney suffered only minor cuts and abrasions from the accident. He did not have to be taken to the hospital for treatment, at least not for any injuries sustained in the crash. Unfortunately, an hour or so after the accident, while being transported in another vehicle driven by an individual who just happened upon the accident scene and had offered assistance, Mr. Mahoney began to experience chest pains and other symptoms of a heart attack.

[15] Mr. Mahoney had suffered a prior heart attack in 2002 which required a stay in a hospital in Yarmouth. Since then he has continued to be monitored for this condition and carried medication with him for hypertension (high blood pressure) and also his heart. With the assistance of his daughter, who had also been a passenger in the van when it collided with the moose, Mr. Mahoney was given some nitroglycerin. He was then driven to the nearest hospital – the Upper River Valley Hospital in Waterville, New Brunswick. According to the hospital’s records Mr. Mahoney was admitted and treated for an anterior myocardial infarction. Unfortunately, efforts to stabilize Mr. Mahoney failed and several hours after being admitted he died.

[16] A coroner concluded that Mr. Mahoney’s death was:

“... as a consequence of natural causes - myocardial infarct recent with severe atherosclerosis coronary arteries and focal intraluminal clot.”

[17] The emergency room doctor who first treated Mr. Mahoney upon being admitted to the Upper River Valley Hospital provided a letter dated December 5, 2005, addressed to whom it may concern. In it she states: “Re: Mr. Anthony Mahoney, DOB: 01/12/1929”:

Anthony Mahoney presented to the emergency room of the Northern Carlton Hospital the night of July 20, ‘05, with anterior chest pain. He had been a passenger in a car which hit a moose about an hour earlier. Examination showed soft tissue injuries. EKG showed a new myocardial infarction. He was treated for the infarction but unfortunately died later that night. Mr. Mahoney had had a myocardial infarction three years before, but had been stable since then and was considered fit for a long car trip. I consider that the stress of the accident triggered the events that led to his death and that without the car accident he would have arrived safely at his destination. Please contact me if you have any questions. Sincerely, C. Tooley, M.D.

[18] While Dr. Tooley's opinion "that the stress of the accident triggered the events that led to his death" might not be seriously challenged, her added assertion "and that without the car accident he would have arrived safely at his destination" might not stand up under serious questioning. It is obviously the result of sheer speculation on her part.

[19] Based on my review of the evidence Mr. Mahoney died of myocardial infarction, or in lay terms, a heart attack. While the motor vehicle accident in which he was involved likely was a factor that contributed to the stresses that eventually led to his heart attack, it did not cause his death. He suffered only minor injuries in the accident. Mr. Mahoney clearly had a pre-existing heart condition. He also suffered from hypertension and was diabetic. In the past he had other ailments for which he had to undergo treatments. Sadly, his time had come.

[20] The nature of Mr. Mahoney's ultimate demise does not fit the definition of accidental death contained in the Cumis Credit Union Group Accidental Death Insurance Policy #0527278-1. This conclusion is based on a plain and simple interpretation of the wording of the insurance policy. The plaintiff has failed to satisfy the burden of establishing a causal relationship between the accident and the deceased's death.

[21] Although I do not have to decide if the alternative argument advanced by counsel for the defendant succeeds or fails (since I have concluded that Mr. Mahoney's death was not an accidental death as defined under the policy), I will nonetheless offer these comments. Mr. Mahoney's death resulted, directly or indirectly, from a pre-existing heart condition which was further compromised by hypertension or high blood pressure. The exclusion clause which the Courts strictly enforce makes it clear that even if an accidental death occurs benefits will not be paid if it results directly or indirectly from any bodily or mental infirmity, illness, disease or bacterial/viral infection.

[22] The defendant would likely succeed in satisfying the burden of establishing that the deceased's pre-existing conditions were operating factors that directly or indirectly resulted in his death. I would have ruled in favour of the defendants on this issue if I had found that an accidental death as defined in the policy had occurred. The motion therefore is granted and I will ask counsel if they wish to make submissions now on cost or, if you would prefer more time, I will entertain submissions later in writing.

COURT: I guess, under the circumstances, Mr. Pierce, what I would urge you and ask that you to pass on my comments to Ms. Bennett-Clayton, which I am sure you will, that the defendants seriously consider whether or not they really wish to seek costs under the circumstances that prevail in this particular case. I am not saying don't, but ...

MR. PIERCE: Well, My Lord, I ... I had come prepared to ... to ask for costs. Normally, if ... if this was just an interlocutory motion it wouldn't ... wouldn't be an issue, but I ... I would point out under Tariff C that where ... where a motion effectively determines the entire proceeding, which I would submit is the case here, that you could ask for a multiplier of those costs. I ... I was going to ask for \$1,000.00 in costs. If Your Lordship isn't prepared to rule on that today then we can certainly deal with that in written submissions, but I'll leave that in ... in your hands.

THE COURT: Well, let's hear from Mr. MacIsaac as to what he wishes to say.

MR. MACISAAC: Well, My Lord, this lady I ... I ... I ... if this motion was unsuccess ... it was successful and she was unsuccessful I was going to apply that she be exempt from costs because of her income. And I understand the case law has developed around that point, that you don't make such application until after the determination of the event. I have received a letter from Nova Scotia Legal Aid indicating that she is in fact because of her income exempt from ... the ... the judge may direct that she be exempt from costs. So if it goes to ... any further I would ... I would ask on written submission to exempt her from costs pursuant to the rule ... that rule.

THE COURT: Okay. And, Mr. Pierce, do you want to add anything to that?

MR. PIERCE: Well, perhaps it may make sense then to ... to do this in writing. I ... I will ... I don't think this is going to be a huge issue for my client, particularly in light of what Mr. MacIsaac said today, but I did have

instructions to ask for costs so I ... I think we'll perhaps have to go back to ... to my client and see how they wish to proceed.

THE COURT: Okay. I guess I'll leave it with you but if ... if you ... your client is going to pursue costs perhaps we could set a deadline for the filing of further written submissions I guess or further indication in writing that ... that you want me to consider ordering costs.

MR. PIERCE: I ... I anticipate that we could advise Your Lordship within a week. It should not be an issue if ... if that satisfies you.

THE COURT: Okay. And then depending on ... I guess on what's filed, and of course you'll provide a copy to Mr. MacIsaac, if it requires any kind of a response Mr. MacIsaac perhaps within a week of that date. Would that give you enough time do you think?

MR. MACISAAC: Yes, My Lord.

THE COURT: Okay. So we're ... we're talking about ... of course Friday of next week I think is a holiday too. And Monday probably ... Easter Monday's a holiday. So why ... why don't we say Tuesday, April the 3rd.

MR. PIERCE: That's fine.

THE COURT: Okay.

MR. PIERCE: Thank you.

THE COURT: And then if ... if it does require some kind of a response or reply, Mr. MacIsaac, perhaps a week following, which would be Tuesday, April the 10th and then I'll ... if called upon to ... to rule on it I'll try to get you my ruling by the end of that week.

MR. PIERCE: Thank you, My Lord.

THE COURT: Okay. Any questions then, gentlemen? Again, I want to thank you both for being so

patient with me. I ... I kind of got jammed up with that very first motion, which I thought was not going to take any more than half an hour, but obviously it did. Yeah. If there's nothing else then we can ... Thank you.

J.