SUPREME COURT OF NOVA SCOTIA

Citation: The Estate of David Peters v. Great-West Life Assurance Company, 2022 NSSC 193

Date: 20220706
Docket: 457848
Registry: Halifax

Between:

The Estate of David Peters and Susan Peters

Plaintiffs

v.

Great-West Life Assurance Company, Sun Life Assurance Company of Canada and London Life Insurance Company

Defendants

Decision

Judge:	The Honourable Justice Peter Rosinski
Heard:	June 16, 2022, in Halifax, Nova Scotia
Counsel:	Stephen Johnston and David Parker, for the Plaintiffs Scott McTaggart, for the Defendants

By the Court:

Introduction

[1] The plaintiffs seek an order that the court compel the defendants to pay prejudgment interest at the rate of 5% per year (per *CPR* 70.07 - "liquidated damages") on the total policy amount of $375,000 from September 20, 2016 (denial of claim) to the date that the plaintiff received the policy payout monies (December 7, 2021).[1]

[2] Two issues in particular arise: what is the appropriate duration over which, and rate of prejudgment interest that, the defendants are required to pay to the plaintiff?

Background

[3] Mr. Peters died when he was hit by the door of a commercial vehicle, which coincided with a "hypertensive type hemorrhagic stroke" on November 23, 2015.

[4] The Nova Scotia **medical examiners report of post-mortem examination**, dated **December 3, 2015,** concluded: "although there was a small injury in the left

[1] I will for convenience refer to the plaintiff parties in the singular.

orbit, the location and characteristics of the brain hemorrhage are not suggestive of traumatic hemorrhage, but are more consistent [with] hypertensive type hemorrhage stroke."

[5] This report was received by the defendants in **June and July 2016**. On July 4, 2016, London Life wrote to the medical examiner, Dr. Mont, in part as follows:

> "The medical examiner certificate of death indicates the cause of death as nontraumatic… hemorrhage, hypertensive type, with the manner of death listed as natural.
>
> Would you please advise if you were aware of the incident she describes, and if the hit to his head contributed in any way to Mr. Peter's death."

[6] Dr. Mont responded by fax the same day and indicated that "the autopsy report provided should answer your question."

[7] Mr. Peters had accidental death insurance benefits with both London Life and Great-West Life.

[8] His beneficiary and wife, Susan Peters made claims under both policies on December 15, 2015, and January 6, 2016. The accidental death benefit claims were rejected by the defendants on August 17 and September 20, 2016.

[9] The defendants relied upon the medical examiners report which cited the cause of death as "nontraumatic cerebral parenchymal hemorrhage, hypertensive type" and then the means of death were "natural".

[10] On November 23, 2016, the plaintiff filed her statement of claim [the defendants were advised of this by letter July 20, 2017, and were formally served on October 30, 2017].

[11] Between June and November 2018, the defendants filed their statements of defence.

[12] **In June/July 2017 the plaintiff advised the defendants that she is contesting their rejection of her claims** for the payment of accidental death benefits.

[13] **The plaintiff continued to investigate, and received reports from**:

1. a **peer review** of the original medical examiners report by **Dr. Matthew Bowes, Chief Medical Examiner** dated **August 22, 2018**, in which he concluded that the original opinion is "reasonable and defensible" and went on to say regarding "the issue": "the close temporal proximity between injury and death suggest that the injury has caused death, but the pathology here suggests a natural illness as the cause of this man's brain hemorrhage."

Dr. Bowes continued:

"My view of the foregoing is **it is not impossible that Mr. Peters injury played some non-trivial role in his death… I would not be critical of Dr. Mont [the original medical examiner] if he chose to add head injury to Part two of this death certificate** (acknowledging that the threshold for including entities [*sic* "entries"?] in Part two of the death certificate is low), **but he would be acting reasonably if he did not**."

(This report/peer review was first disclosed to the defendants in a **July 9, 2020, supplemental ADD**.)

2. **Dr. David King, neurologist**, dated **November 8, 2019**, which was disclosed to the defendants on July 9, 2020 – he reported: "on the balance of probabilities, I believe that Mr. Peters sustained a rotational head injury secondary to being struck by the trailer door. This resulted in damage to the penetrating arteries at the base of the brain and the subsequent development of a deep hematoma… It is more likely than not that the original clinical proposition was true: that **this man's problem was related to trauma and not his underlying hypertension… In the absence of microscopic confirmation, this hemorrhage was more likely, based on the best clinical data, a traumatic brain hemorrhage rather than a hypertensive one**."

(This report was first disclosed to the defendants in a **July 9, 2020, supplemental ADD**.)

3. **Dr. Alex Easton, pathologist**, dated **July 30, 2019** - his investigation into examination of **microscopy results** from the autopsy of Mr. Peters was **inconclusive** in all material respects, because the necessary sample material was unavailable.

(This report was first disclosed to the defendants in a **July 9, 2020, supplemental ADD**.)

4. **Dr. Dale Robinson, neurologist**, dated January 15, 2021, wherein he stated: "it does not seem reasonable for me to ignore Mr. Peters' head trauma and its tight temporal relationship to his demise. Respectfully, it is not reasonable to consider the head trauma as completely independent from and coincidental to, Mr. Peters' death… The greatest intervening factor, in my opinion, on the balance of medical probabilities, between Mr. Peters' stable health and dramatic decline in death, was the head trauma of November 22, 2015.… Thus, **it is my strong opinion, on the balance of medical probabilities, that but for the index incident of Mr. Peters' head trauma on November 22, 2015, his ultimately fatal intra-parenchymal hemorrhage would not have occurred**."

(This report was first disclosed to the defendants on **February 22, 2021**.)

5. an amended report of the original medical examiner issued **June 3, 2021**. Therein Dr. Mont stated:

> "**The cause of death in this case was originally certified as 'nontraumatic cerebral parenchymal hemorrhage, hypertensive type', and the manner classified as natural**. After review of external opinions and cited literature, the cause is reclassified as 'cerebral parenchymal hemorrhage"… **the temporal association between the head impact and symptomology suggest that in injury played some role in the initiation of the brain hemorrhage**. Therefore, **the manner of death is reclassified as accident**."
>
> [My bolding throughout]

[14] The defendants argue that the amended report of the Medical Examiner issued June 3, 2021 "did not address whether the accidental death was a direct result of the injury, *independent* of all other causes, or whether it was unrelated to any form of illness, or physical or mental infirmity as both policies required. In particular, he did not specifically address the role of hypertension as a cause of death." [para. 76 Stockford affidavit]

[15] Ms. Stockford's affidavit at paragraph 77 reads:

> "London Life and Great West Life paid the claims as the Medical Examiner [Dr. Mont] had changed his opinion and classified the death as accidental. London life and Great West Life did not dispute the medical evidence provided.… did not seek to examine Dr. Mont… did not seek to ask further questions of Dr. Robinson… did not seek their own independent experts' reports… accepted the applicant's claim for accidental death benefits… paid a further total of $25,000 to the applicant on November 30, 2021… and a further total of $350,000 to the applicant for the accidental death benefit on November 30, 2021… paid

> the applicant $22,790.36 in costs and disbursements… the full amount demanded by her… paid the applicant $3,914.81 in costs and disbursements… the full amount demanded by her."

[16] The chronology reveals that the plaintiff made what I conclude were reasonably diligent and *bona fide* sustained efforts to bolster its case with expert opinion evidence. The balance of the opinion evidence progressed over time to become moreso in the plaintiff's favour.

[17] I also conclude that the evidence does not satisfy me that there was a breach of the duty of good faith by the defendants, nor did the defendants inadequately handle or introduce improper considerations to the claims process- see *Industrial Alliance Insurance and Financial Services Inc.* v. *Brine*, 2015 NSCA 104 and *Fidler v Sunlife Assurance Co. of Canada*, [2006] 2 SCR 3 at paras. 63-78.

[18] I find that the plaintiff did not inordinately delay the advancing of its claims.[2]

[2] It must be borne in mind that although the insurer has a duty of good faith regarding their handling of claims, generally speaking, this is a responsive obligation. The legal burden on the plaintiff is to meet the agreed-to contractual pre-conditions for payment of accidental death benefits. Thus, generally speaking, it is primarily the plaintiff who has a responsibility to advance its own case and satisfy the contractual preconditions it has agreed to.

[19] The plaintiff's claims became sufficiently robust such that the defendants paid the full amounts of the accidental death benefits on December 7, 2021 (costs and disbursements were paid on March 8, 2022).

Analysis of the two issues

1-The duration for which prejudgment interest should be ordered

[20] The plaintiff's claims against the defendants are premised upon a contractual breach; namely that the defendants *wrongly denied* accidental death benefits to the plaintiff. The defendants initially refused to pay out benefits on December 15, 2015 and January 6, 2016.

[21] The defendants argue that the plaintiff is only entitled, under the contracts, to be paid once the preconditions for payment have been met. They are correct.

[22] A contract for the payment of accidental death benefits is distinguishable from a contract for the payment of "death" benefits. The former requires proof that there was such an "accident" - which generally requires proof regarding which factors caused/contributed to the individual's death.

[23] Justice Chipman made compelling comments in *Bush v. Air Canada*, [1992] NSJ. No. 17, at paragraph 43 and 56, regarding the purpose of prejudgment interest (cited with approval – *Jorna & Craig Inc. v. Chiasson*, 2020 NSCA 42):

> "The purpose of prejudgment interest is to attempt to place the plaintiff in the same position he or she would have been in had the award been paid on the day the cause of action arose… The purpose of prejudgment interest is to compensate the plaintiff for being without the money represented by the award of damages. It is not designed to penalize the defendant or to deprive the defendant of an undue windfall in being able to enjoy the money during the intervening period."

[24] The plaintiff alleges that the defendants "wrongly denied benefits" (a breach of the contract to pay accidental death benefits) under the insurance contracts on August 17 and September 20, 2016.

[25] I am satisfied that the defendants were legally entitled to deny benefits *at that time*. The cause of action had not yet arisen. The only expert opinion evidence regarding the cause of death at that time arose from the Medical Examiners' report dated December 3, 2015.

[26] The plaintiff had not satisfied the contractual pre-conditions to be entitled to be paid for the claims presented (there being no wrongful denial/breach).

[27] To recover the accidental death benefits claimed, the plaintiff had to provide:

1. under the London Life policy "due proof that the insured's death resulted, directly and independently, of all other causes, from accidental bodily injury." That coverage is also subject to an "exception" that no accidental benefit would be payable if the death

resulted directly or indirectly from bodily or mental infirmity or disease or directly or indirectly from medical or surgical treatment therefor;

2. under the Great-West Life policy, the "loss" (here death) had to be suffered "as a result of an accident" and the loss had to be as a "direct result of the injury, independent of all other causes". Similarly, an exception applies: "no benefits are paid for injury or death resulting from any form of illness or physical or mental infirmity".

[28] These contractual provisions should be read in conjunction with s. 206 of the *Nova Scotia Insurance Act* RSNS. c. 231, which reinforces that only upon the preconditions being met "shall, [the insurer] within 30 days after receiving the evidence, pay the insurance money to the person entitled thereto."

[29] The defendants were entitled to deny benefits until those pre-conditions had been satisfied.

[30] I conclude that those pre-conditions are satisfied once the defendants could be said to have first known, or ought reasonably to have known, (based on the information they themselves had in their possession, and the information provided by other/outside sources including the plaintiff) that they had received "due proof"

(London Life) and "satisfactory proof" (Great-West Life) that the claimed "accidental" death was one covered by the insurance policies.[3]

[31] In the defendants' brief (para. 110) they state:

> "In this case there was no "conflicting evidence" on whether the accidental death benefits were payable until the report of Dr. King was received in July 2020. At the outset there was "compelling" medical evidence from an objective and reliable source… that the death was not accidental."

[32] No such "due proof" evidence was received by the defendants until at least the reports of Doctors Bowes, King and Easton were delivered to the defendants.

[33] By that point in time, July 9, 2020, the Chief Medical Examiner of the Medical Examiner's Office had already opined that the original certificate of death was no longer a reliably accurate statement that Mr. Peters had died due to "natural" causes.

[34] In light of all the evidence that was available, the reports of Drs. King and Easton compellingly suggest the following conclusion: "… this hemorrhage was **more likely**, based on the best clinical data, a **traumatic brain hemorrhage, rather than a hypertensive one**."

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[3] The language "first knew or ought reasonably to have known" can be found in section 8 of the *Limitation of Actions Act* SNS 2014, c. 35 regarding when "a claim is discovered". As to when a cause of action arises, she also Justice Bodurtha's reasons in *Altschuler v. Bayswater Construction Ltd*., 2019 NSSC 197 citing *Letang v. Cooper*, [1964] 2 All ER 929.

[35] Those reports were delivered to the defendants by **July 9, 2020**.

[36] At this point the defendants were obliged to either forthwith and expeditiously further investigate the cause of death, or accept that sufficient evidence had been provided that the death was caused by the door hitting Mr. Peters' head, and consequently his was an "accidental" death.

[37] The January 15, 2021, report of Dr. Robinson, another neurologist (disclosed to the defendants on February 22, 2021), merely added weight to the November 8, 2019, opinion of Dr. King, which was disclosed to the defendants on July 9, 2020.

[38] The defendants argue that they paid the claims on November 30, 2021 "notwithstanding that the additional medical information did not address fundamental issues including whether the accidental death was a direct result of the injury, independent of all other causes, or whether it was unrelated to any form of illness or physical or mental infirmity as both policies required".

[39] I find that the defendants paid the claims on December 7, 2021 (once received - it is "paid") pursuant to the provisions of the contracts.

[40] They wish the court to draw the inference that their refusal of payment *until December 7, 2021*, was justified based on the evidence and information available

to them, that the claim was not previously supported by sufficient “or “due/satisfactory” proof of it being in accidental death.

[41] Their admission by payment thereof on December 7, 2021, that the claims were properly payable does not bind the court in relation to when the claims were first sufficiently proved to be payable.

[42] The defendants’ argument that the medical expert opinions available on July 9, 2020, were in some manner deficient in satisfying the contractual criteria for payments, when speaking to when prejudgment interest began accruing, is not persuasive.

[43] After July 9, 2020, the only significant additional information arises from Dr Robinson’s report which was (created January 15, 2021) provided to the defendants on February 22, 2021; and the amended Medical Examiners’ certificate of death which was provided to the defendants on July 5, 2021.

[44] Dr. Robinson’s report merely added weight to the similar opinion of Dr. King, which had been disclosed January 9, 2020.

[45] The amended certificate of death, added weight to the opinion of Dr. King.

[46] I am satisfied that as of July 9, 2020, the defendants had "due proof" or "satisfactory proof", that Mr. Peters' death was accidental – no expert medical opinion evidence has since been presented to the contrary.[4]

[47] Thus, prejudgment interest began to accrue 30 days after July 9, 2020,[5] until the claims were paid on December 7, 2021.

What is the proper prejudgment interest rate?[6]

[48] CPR 70.07 reads:

> "The rate and calculation to be used for prejudgment interest on a liquidated claim is 5% a year calculated simply, unless a party satisfies the judge that the rate or calculation should be otherwise."[7]

[49] As the defendants stated in their legal brief:

> "The *Judicature Act* presumes interest will be awarded from the date when the cause of action arose. Rule 70.07 presumes that the rate will be 5%. The party seeking to depart from the presumptions must satisfy the court to exercise its discretion to do otherwise."

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[4] At the late hour of oral argument, the defendants suggested that on July 9, 2020, the court could find it reasonable to conclude that the defendants then had satisfactory proof that Mr. Peters' death was accidental.

[5] Section 206 of the *Insurance Act*, RSNS 1989, c. 231, reads : "Where an insurer receives sufficient evidence of: (a) the happening of the event upon which insurance money becomes payable; (b) the age of the person whose life is insured; (c) the right of the claimant to receive payment; and (d) the name and age of the beneficiary, if there is a beneficiary, it shall, within 30 days after receiving the evidence, pay the insurance money to the person entitled thereto."

[6] There is no reference in the contract to the payment of prejudgment interest.

[7] There was no dispute that this is a liquidated claim.

[50] If the defendants do persuade the court that the presumed rate should not be applied, then s. 41 of the *Judicature Act*, RSNS 1989, c. 240 becomes applicable. The relevant sections thereof were referenced by Justice Farrar in *Jeffrie v. Hendriksen*, 2018 NSCA 77:

> *Analysis*
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> 109 Section 41 of the *Judicature Act*, R.S.N.S. 1989, c. 240 governs the award of pre-judgment interest:
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> 41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
> . . .
> (i) in any proceeding for the recovery of any debt or damages, the Court shall include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal;
> . . .
> (k) the Court in its discretion may decline to award interest under clause (i) or may reduce the rate of interest or the period for which it is awarded if
>
> (i) interest is payable as of right by virtue of an agreement or otherwise by law,
>
> (ii) the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded, or
>
> (iii) the claimant has been responsible for undue delay in the litigation.
>
> [Emphasis added]
>
> …
>
> 113 The judge's conclusion was that Mr. Jeffrie was entitled to receive $500,000 for his shares on September 16, 2010. At the time of the March 2017 hearing, he had not yet been paid and, therefore, had been deprived of the use of the money. On that basis, the judge awarded pre-judgment interest in accordance with the *Judicature Act*. Not only was it appropriate for him to do so, the *Judicature Act* mandates that he do so unless he was satisfied that there is some reason that it should be eliminated or reduced. Obviously, he was not. Therefore, he did not err.

[51] The defendants argue that this court should depart from the 5% interest rate. Instead, they say that the interest rate should reflect what are average annual rates over the time period in question based upon evidence from Statistics Canada.

[52] More specifically, the defendants say that the rate should be 1%, as that reflects an average of those that prevailed for:

1. 1 to 3 year Government of Canada bonds [.4%] – the "average rate" between **January and November 2021**];
2. Chartered Bank - administered interest rates - Prime rate [2.45%] – the "average rate" which rate prevailed between **January and November 2021**]; and
3. 6 month Treasury bills [.16%] – the "average rate" between **January and November 2021**].

[53] These interest rates are referred to in the evidence of the affidavit of Wendy Stockford sworn June 8, 2022. She is the "Director, Individual Customer, Wealth and Life claims for the Canada Life Assurance Co. based in London, Ontario… have been the person responsible for overseeing the payment of individual life [including accidental death] claims [for the defendants]… since November 2014, for Canadian operations."

[54] At paragraph 84 she states:

> "I am advised by Bruce Nobre, Senior Data and Reporting Analyst with Canada Life, and do verily believe, that he reviewed and exported Bank of Canada financial market statistics from the Statistics Canada website at [hyperlink omitted], including the historical rates for the Prime Rate, Treasury Bills and Government of Canada bonds. The chart he prepared containing and summarizing the information he exported is attached hereto and marked as Exhibit "KK".

[55] Specifically, I note that during July 2020 onward and until December 2021, those charts suggest the following:

1. 1-3 year GoC bonds - started at .26% and ended at 1.04%
2. Chartered Bank - administered interest rates - Prime Rate - started at 2.45% and ended at 2.45%
3. 6 month Treasury bills - started at .18% and ended at .32%

[56] Are the defendants' proposed rates meaningful, when examining the question of what rate would be available to a plaintiff who would have had the opportunity to temporarily invest these monies, had they received rather than been deprived of the money during the relevant times? Have the defendants provided sufficient evidence to persuasively support their position that I should depart from the presumed rate? They have not.

[57] The defendants have argued that the court should depart from the presumptive 5% interest rate and order a 1% interest rate applicable. While the

defendants presented some bare data from Statistics Canada in support of their position that the court should look to "the financial markets" in such circumstances, I conclude that the presumed 5% simple interest rate remains appropriate for various reasons, but notably, also because:

1. there is no sufficient evidentiary and legal basis to depart from the 5% presumptive rate; and
2. the defendants' proposed rates are in any event not persuasively supported by the evidence and law.

[58] To support their position that a calculation pursuant to the *Judicature Act* would render a just result, whereas the presumptive 5% interest rate would not, they refer to paragraph 84 of the Stockford affidavit. Therein, Ms. Stockford introduces Mr. Nobre's charts, which are merely a recitation of Statistics Canada data.

[59] Mr. Nobre did not file an affidavit, did not elaborate upon, and was therefore unavailable for questioning regarding, the significance of these various data.

[60] There is insufficient evidence about whether, and if so how, these freestanding data are *relevant* (are they both logically relevant and legally relevant?) to the question of what level of "prejudgment interest" could Mrs. Peters

reasonably have achieved during the time she was deprived of the $375,000, had she had the monies to invest during the time interval, 30 days after July 9, 2020 until December 7, 2021.

[61] Nevertheless, let me presume for a moment, that they are a basis upon which I indirectly could infer a rate of return that Mrs. Peters reasonably would have achieved.

[62] How *reliable* is the defendants' evidence in support of its suggested outcomes – i.e. that a 1% rate of return is appropriate?

[63] In my view it is appropriate to presume Mrs. Peters is a reasonably financially prudent plaintiff.

[64] That being the case, I am unconvinced that blending into an overall average rate, the rates of each of the three proposed kinds of investments is appropriate. Blending them necessarily diminishes the value to be derived from the maximum interest rate available of the three choices suggested by the defendants.

[65] Government of Canada 1-3 year Bonds and 6 month Treasury Bills are arguably among the most risk-free of investments.

[66] Generally speaking, where there is less risk-there is less return.

[67] These investments carried rates of return of between .19 and 1.04% at the relevant times.

[68] The Chartered Bank administered interest rates – Prime Rate, carried rates of return of 2.45% for the entire time interval.

[69] Commercial Banks' Prime rate is generally a starting-point rate. Banks lend money to people (who pay interest to the bank) and also solicit money from people (to whom the bank pays interest).

[70] Mrs. Peters notionally had $375,000 to invest. Could she therefore have obtained a higher rate of interest as a result? I am unable to answer that question.

[71] However, if the defendants hold out that a relevant interest rate for present purposes is the 2.45% rate, then it makes no sense that Mrs. Peters would invest her money in anything less than an investment that would pay the rate of 2.45%.

[72] I also observe that had Mrs. Peters invested at that rate, the interest would compound (interest on interest) over time, in contrast to the application of a simple rate of 5% interest as under *CPR* 70.07, so that the effective rate of interest would be higher than the nominal rate. This means the 2.45% is under representative of the actual rate of return that Mrs. Peters would have achieved.

[73] The competing concern is that the plaintiff should not receive an "undue windfall" when a prejudgment interest rate is assigned by a court in such circumstances.

[74] The drafters of our wholly revised present *Civil Procedure Rules*, (made effective in January 2009), deliberately chose a presumptive rate of 5% simple interest only for "liquidated damages" per *CPR* 70.07.[8]

[75] The defendants suggest that a rate of 2.45% is within the "market range" of available rates for the relevant time periods.

[76] *CPR* 70.07 recognizes that there is a discretion, in proper circumstances, to deviate from the presumptive 5% simple interest rate.

[77] In present circumstances, the defendants have not satisfied the burden on them that I should deviate from the presumptive 5% simple interest rate.

[78] Therefore, I need not turn to a consideration under the *Judicature Act*.

Conclusion

[8] "The rate and calculation to be used for pre-judgment interest on a liquidated claim is 5% a year calculated simply, unless a party satisfies the judge that the rate or calculation should be otherwise.". Regarding post-judgment interest, the rate is *5%* and *fixed* by s. 2 of the *Interest on Judgments Act*, R.S.N.S. 1989, c. 233 as amended.

[79] Pursuant to *CPR* 70.07, I conclude that a proper interest rate in the circumstances is 5%, and I so order.

[80] I am satisfied that the plaintiff should receive 5% prejudgment interest from 30 days after July 9, 2020, until December 7, 2021, upon the amounts of accidental death benefits which were not paid until December 7, 2021 ($350,000 and $25,000).

[81] I will receive costs submissions in writing, to a maximum of five pages, within 30 days after the release of this decision if the parties are unable to agree on costs.

Rosinski, J.