

## WHEN CAN A DISEASE BE AN “ACCIDENT”?

*By Michael Teitelbaum*

The Ontario Court of Appeal in *Kolbuc v. ACE INA Insurance*, 2007 ONCA 364, a decision released on May 7th, 2007, reversed the trial judge’s decision and found that a mosquito bite which transmitted the West Nile virus to the Plaintiff constituted an “accident” under the group accident policy under which the Plaintiff was insured through his union.

### Facts

In the summer of 2002, the Plaintiff, Ryszard Kolbuc, was employed as a plasterer applying stucco to the outside of houses and buildings. His uncontradicted evidence was that the material he used in the course of his employment had a smell that attracted mosquitoes. Prior to that summer, there had been no reported cases of the West Nile virus in Ontario.

In September, 2002, the Plaintiff started experiencing symptoms that he later learned were the result of being bitten by a mosquito carrying the West Nile virus. While Kolbuc did not recall a specific instance of being bitten by a mosquito, given the nature of his employment, both parties agreed that the likely circum-

stances of his infection with the virus was a mosquito bite at work.

Kolbuc was eventually diagnosed with polio-like acute flaccid paralysis caused by the West Nile virus, which rendered him a paraplegic.

The group accident policy provided coverage “against loss resulting directly and independently of all other causes from bodily injuries caused by an accident which arise out of the hazards described in Schedule VI and are sustained by the Insured during the term of this policy ...”. The word “accident” is not defined in the policy. Schedule VI reads: “The company will pay the benefits described in the policy for any accident which happens while an Insured Person is covered by the policy”.

### Issue

At trial, the parties agreed that the only issue to be determined is whether Kolbuc’s injuries were caused by an “accident” within the meaning of the policy. If they were, they agreed that Kolbuc was entitled to coverage in the amount of \$130,000.00.

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## **Trial Decision**

In determining the meaning of the word “accident”, Justice H.E. Sachs considered the two most recent decisions from the Ontario Court of Appeal on this point: *Wang v. Metropolitan Life Insurance Co.* (2004), 72 O.R. (3d) 161; leave to appeal denied [2004] S.C.C.A. No. 580 and *Guillet v. American Home Insurance Co.* (2004), 72 O.R. (3d) 641.

In *Wang*, the insured died as a result of an amniotic fluid embolism that occurred during childbirth, and the Court of Appeal found the death was not accidental. In *Guillet*, the plaintiff suffered a stroke while playing basketball that was caused by trauma to the arterial wall as a result of the insured twisting his neck during the game, and the Court of Appeal held that this injury was accidental.

Sachs J. found that Kolbuc’s case was factually most similar to *Wang* because, like the insured in *Wang*, the Plaintiff “suffered a rare and devastating consequence that came about not as a result of anything he did, but as the result of his body’s reaction to a virus”. Her Honour also held that the fact the virus was transmitted to Kolbuc through a mosquito does not detract from the applicability of the majority’s reasoning in *Wang*.

The Court of Appeal stated in *Wang* that there is a “distinction to be drawn between accidental

injuries and injuries that are the result of natural causes”. The *Wang* court found that the “expectation test” set out in the Supreme Court of Canada’s decision in *Martin v. American International Assurance Life Co.*, [2004] 1 S.C.R. 158, is the appropriate analysis “when the Court is focused on the ‘consequences flowing from the actions or conduct of an insured’, not when the consequence is the result of natural causes”. Accordingly, Sachs J. accepted that the first issue to be addressed is whether Kolbuc’s condition was the result of natural causes. If it was, the question of whether Kolbuc expected to contract the West Nile virus and become paralyzed from the mosquito bite does not arise.

The Court stated that what occurred here was an “unforeseen, unexpected event that was caused by an external source — a mosquito — and falls within the ordinary definition of an accident.”

Further, Her Honour observed that the “rarity of a consequence is not determinative of whether that consequence is ‘accidental’”.

The court noted that in Kolbuc’s case, it cannot be said that there was anything that Kolbuc did that caused his injuries, other than to be outside in the summer in Ontario. Rather, his injuries were caused by the

actions of the mosquito that bit him and the reaction of his body to the virus that that mosquito was carrying. There is nothing unexpected or unnatural about mosquitoes biting. The “question is whether the fact that the mosquito that bit Mr. Kolbuc was carrying the West Nile virus renders what happened to him an ‘accident’, as opposed to something that arose from “natural causes””: In the court’s view, it did not.

Thus, the trial judge found that while what happened to Kolbuc was “certainly tragic, it was not an ‘accident’ as that word has been defined in the case law, most recently by the Court of Appeal in *Wang*”.

## **Court of Appeal Decision**

The Court of Appeal noted that, in *Wang*, it had held that the death of the expectant mother as a result of an amniotic fluid embolism was not an accident because death resulted from natural causes. In the opinion of the three-judge panel in *Kolbuc*, *Wang* is distinguishable and does not apply to the case at hand.

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The cause of the illness was an accidental event. Unlike *Wang*,

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the appellant's paraplegia was not the result of "natural causes". The Court held that the Supreme Court of Canada's *Martin* decision was applicable as Kolbuc had "no reasonable expectation that he would get West Nile virus from the activity in which he was engaged".

In addressing ACE INA's submission that a disease is not an accident, the Court noted that this proposition "standing alone is obviously correct", and then continued:

*However, an accident can cause a disease. For example, if a sailor is shipwrecked at sea and develops an illness from exposure to the elements, his injury is caused by an accident. A shipwreck is a foreseeable but unexpected event and an external source that can trigger an illness.*

The Court also goes on to note, however, that there does not always need to be an external

source that triggers the disease or illness. The Court referred to its earlier decision in *Voison v. Royal Insurance Co. of Canada* (1998), 66 O.R. (2d) 45, where it was held that "an injury may be regarded as accidental where an insured engages in a voluntary act without intending to cause himself harm and the consequent harm could not reasonably have been foreseen or expected". In the Court's opinion, the instant case is similar to *Voison* in that Kolbuc was "engaged in work, without intending to cause himself harm, and the harm that did result could not reasonably have been foreseen or expected".

In the result, the trial judge's decision dismissing the action was set aside and in its place the Court held that the insured suffered an accident and is entitled to coverage under the policy.

### Comment

Defining the word "accident" has proven to be vexing in many contexts and particularly

in circumstances such as these. As noted by Justice Sachs in her reasons, the *Wang* and *Guillet* decisions both contained vigorous dissents.

While the law has recognized a distinction between accident and disease, and disease has been historically recognized as a subset of "natural causes" which are, by definition, antithetical to the occurrence of an "accident", in the present circumstances, the Court of Appeal was of the view that the severely infectious mosquito bite constituted the "accident" and the necessary precursor to engage coverage under the policy.

However, the Court also concluded that whether or not there is an external source that triggers the disease or illness, as long as the insured engages in a voluntary act without intending to cause himself harm and the consequent harm could not reasonably have been foreseen or expected, then there can be an "accident" as required under the wording of this type of policy.

## THE ULTIMATE LIMITATION PERIOD – A WAITING GAME

by Richard Horak

As a result of the recent decision of the Ontario Court of Appeal in *York Condominium Corporation No. 382 v. Jay-M Holdings Ltd.* [2007] O.J. No. 246, one aspect of the transition provisions in the new *Limitations Act* has now been clarified.

The Plaintiff condominium building had been constructed in 1978. However, it was not until 2004 that the Plaintiff discovered alleged deficiencies with respect to the Building Code. The action was instituted by the Plaintiff in 2005 against both the condominium developer and the City of To-

ronto.

The issue of the limitation period was raised on Motion by the City of Toronto. Under the new *Act* the ultimate limitation period is fifteen years from the day on which the act or omission on which the claim was

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based took place. The City argued that pursuant to the transitional provision, the action was statute-barred, as the City's alleged negligence had occurred 27 years prior to the action being commenced.

Section 24(5) of the *Act* provided as follows:

*“If the former limitation period did not expire before the effective date (January 1, 2004) and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, the following rules apply:*

*1. If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date.*

*2. If the claim was discovered before the effective date, the former limitation period applies.”*

The Motion Court Judge determined that it was unclear as to whether Section 24(5) applied to the ultimate limitation period as set out in Section 15 of the *Act*. In his view the application of Section 24(5) would produce “an absurd result” in that no actions would be barred until January 1, 2019, no matter when the act or omission

took place.

The Court of Appeal reversed this decision and found that the wording of Section 24(5) was clear and that the Section did apply to the ultimate limitation period. Given the state of the law prior to the passing of the new *Limitations Act*, the court did not consider this to be an absurd result.

The ultimate message: Don't be too hasty in concluding that those “old” claims will be statute-barred. If the act or omission which constituted the negligence took place prior to January 1, 2004 but was not discovered prior to that date, the actions will not be barred until January 1, 2019.

## FIRM NEWS

On June 28, Wendell Wigle celebrates the 50th anniversary of his call to the Ontario Bar. Everyone at Hughes Amys joins in congratulating and thanking him for his leadership and example to the firm for all of those 50 years.

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