

# WHETHER SEXUALLY TRANSMITTED DISEASES CONTRACTED DURING UNPROTECTED SEX MEET THE DEFINITION OF ACCIDENT

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## Introduction

When an individual sustains losses from personal injury from illness and then seeks to have their accident insurance policy cover these losses, decisions must be made as to whether these losses are covered by the policy and the specifically, if they fit within the definition of accident. Throughout the jurisprudence, the definition of accident has been the subject of exceedingly complex litigation.

In *Co-operators Life Insurance Company v. Gibbons* (2009) SCC 59 (hereinafter “Co-Operators”), a unanimous Supreme Court of Canada held that paralysis caused by an inflammation of the spinal cord that was the result of transverse myelitis, a complication of genital herpes acquired during unprotected sex, did not fall within the definition of accident and was not covered by the policy.

## Facts

In *Co-operators*, The insured plaintiff, Mr. Gibbons, a 45-year-old male, employed in high pressure water blasting had a group policy of insurance, had unprotected sexual intercourse with three women during January and February 2003. Mr. Gibbons did not know that any of these women had Herpes Simplex Virus Type II. On February 17, 2003, the plaintiff consulted his family physician with respect to headaches, muscular pain and back pain. The doctor diagnosed a viral illness and prescribed symptomatic treatment. On February 21, 2003, Mr. Gibbons’ condition had worsened. He attended at **East Ridge** Hospital complaining of urinary retention for two days, kidney pain, pelvic discomfort and vomiting as well as poor coordination. On February 23, 2003, he was paraplegic.

The insured plaintiff, Randolph Charles Gibbons had a policy of accident insurance issued by the Co-Operators Life Insurance Company. The policy covered certain specified risks. The policy stated that it provided coverage for losses sustained “as a direct result of a critical disease or result directly and independently of all other causes from bodily injuries occasioned solely through external, violent and accidental means, without negligence on the member’s part”. The policy provided a list of diseases that met the definition of “critical disease”. Transverse myelitis and herpes were not included in the definition of critical disease. The policy did not provide definition of the term “accident”.

## History and Issues

The insured plaintiff, Mr. Gibbons, commenced an application to determine whether his paraplegia qualified as a “bodily injury occasioned solely through external, violent and accidental means”. If it was found to be covered under the policy, Co-operators Life was obliged to pay \$200,000. The parties agreed that by the reason of the unprotected sex, Mr. Gibbons had been infected with HSV-2 which caused the inflammation of his spinal cord, transverse myelitis. This resulted in a permanent spinal cord injury and total paralysis from mid-abdomen down. Mr.

Gibbons acknowledged that he was aware of the risk of contracting a sexually transmitted disease while having unprotected sexual intercourse, but stated that he did not intend or expect to contract herpes or to develop transverse myelitis. Justice Cole of the Supreme Court of British Columbia, provided an affirmative response to Mr. Gibbons application and awarded him \$200,000 plus interest in cost. This decision was upheld by Justice Newbury and Franco of the British Columbia of the Court of Appeal.

### **Appeal to The Supreme Court of Canada**

Co-operators Life Insurance Company appealed these decisions to the Supreme Court of Canada. The Supreme Court of Canada disagreed with the lower courts' decision and held that the trial judge and the Court of Appeal had erred. The insured's loss was not covered by the policy and that paraplegia resulting from transverse myelitis, a complication of herpes acquired through unprotected sexual intercourse, did not fall within the definition of accident.

A unanimous Supreme Court of Canada held that the court held that it was evident that the parties did not expect the policy to cover all losses or bodily injury. The concept of accident excluded a bodily infirmity caused by disease in the ordinary course of events and that the word accident involves the idea of something fortuitous and unexpected as opposed to something proceeding from natural causes. Injury caused by accident is to be regarded as the antithesis to bodily infirmity caused by disease in the ordinary course of event.

### **Principals of Interpretation**

The Supreme Court of Canada examined the jurisprudence with respect to what the general principles of interpretation of insurance policies and noted that general interpretive principles reflect concern that customers not suffer from the imbalance of power that often exists between insurers and the insured, on the other hand, that customers obtain no greater coverage than they are prepared to pay for. Interpretations should avoid "an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Consequently, the word "accident" should be given its "ordinary meaning" which is an unlooked for mishap or an untoward event that is not expected or designed. That said, not every unexpected mishap is an accident. Someone who picks up a disease "in the ordinary course of events" would not ordinarily be described as having been in an "accident".

The court also noted that a generous interpretation should be given to the term "accident" unless the policy clearly restricts it but the Supreme Court of Canada noted that generosity has its limitations. Insurance is written to protect against certain defined risks. It is not the place of the court to covert an accident policy into a general health, disability or life insurance policy. Furthermore, the principle that the words of an insurance contract, when ambiguous, should be construed against the drafter must be retrained by the principle that the court should not support a construction which would enable the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

### **Accidents are different from disease**

There is a distinction between accident and disease. Accidents being " unlooked for, mishaps or untoward events which are not expected or designed" are distinct from bodily "infirmities caused

by disease in the ordinary course of events” in the ordinary course of event. In ordinary speech, accident does not include ailments that proceed from natural causes.

Supreme Court of Canada noted that the insurance industry ought not use “disease” to extricate itself from valid accident claims noting that calling the consequence of an accidental injury a disease does not alter the nature of the consequences or the injury that was inflicted but the court noted that viruses and diseases are transferred from one person to another person through natural processes such as coughing or sneezing in someone’s presence “in the ordinary course of event”. The viruses transmitted, in some situations, prove to have unexpected consequences. Yet, if such transmissions are abused, with hindsight, to be classified as accidents, then the accident policy becomes a comprehensive health policy. This is not what was intended. Where disease transfers from one person to another through natural processes, there is no accident.

### **Application of Principals to the facts of the case**

The Supreme Court of Canada applied the above principals to the facts of the case and held that Sexual activity is a natural process just like the other natural processes through which disease might spread such as contact, coughing or shaking hands therefore, diseases transferred from one person to the other through sexual activity ought, and similarly, to be considered to be transferred through natural processes “in the ordinary course of events”.

Genital herpes is a sexually transmitted virus that spreads through sexual intercourse. Transverse myelitis is a consequence, albeit a rare consequence, of genital herpes. Therefore, Mr. Gibbons’ ailment while it was severe and rare, proceeded from natural causes.

Mr. Gibbons argued that his injuries were unexpected and therefore, there was no need to consider whether they were an accident. The court held that a claimant who can establish the death was unexpected does not thereby, without more evidence, establish a valid accident. Otherwise, every bad happening, natural or unnatural, whether caused by disease in the ordinary course of events that otherwise, would be classified as an accident. While the plaintiff’s tragedy is totally unexpected, there was no accident involved in any ordinary manner of speech.

Supreme Court of Canada then considered the scope of the coverage provided to Mr. Gibbons. The general nature of the risk covered by Mr. Gibbons’ policy is consistent with the understanding that a customer would think that the disease element is carved out of the universe of unexpected mishap. The ordinary use of the language in the policy placed well understood limitations on the scope of “accident”.

Finally, the Supreme Court of Canada stated that the burden of proof remains with the plaintiff to establish on a balance of probability that the bodily injury resulted from an accident. If the plaintiff fails to meet that burden, then the claim will fail. Supreme Court noted that plaintiff was unable to establish on a balance of probabilities that his injuries resulted from an accident and therefore his claim would fail. Accordingly, the appeal was allowed and the appellant, Co-operators life was awarded costs.