CITATION: Kolbuc v. ACE INA Insurance, 2007 ONCA 364
DATE: 20070514
DOCKET: C44824

COURT OF APPEAL FOR ONTARIO

WEILER, FELDMAN and LAFORME JJ.A.

BETWEEN:

RYSZARD KOLBUC

(Plaintiff/Appellant)

and

ACE INA INSURANCE

(Defendant/Respondent)

Chris G. Paliare and Greg Neinstein, for the appellant

Lloyd Hoffer and L. Nicole Connolly, for the respondent

Heard: May 7, 2007

On appeal from the judgment of Justice Harriet E. Sachs of the Superior Court of Justice dated January 9, 2006.

ENDORSEMENT

[1] In dismissing the appellant's action the trial judge relied upon the decision of this court in *Wang v. Metropolitan Life Insurance Co.* (2004), 72 O.R. (3d) 161 (C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 580. In *Wang* this court held that the death of an expectant mother as a result of an amniotic fluid embolism that occurred during childbirth was not an accident because death resulted from natural causes. We are of the opinion that *Wang* is distinguishable and does not apply to this case.

[2] Here the appellant, a plasterer, was bitten by a mosquito carrying the West Nile virus in 2002 and was rendered a paraplegic. At that time, while mosquito bites were common to a person in this occupation, there had been no reported cases of the West Nile virus in Ontario. It was an unforeseen, unexpected event that was caused by an external source – a mosquito – and falls within the ordinary definition of an accident. The cause of the illness was an accidental event. Unlike in *Wang*, the appellant's paraplegia was not the result of natural causes. The decision of the Supreme Court of Canada in *Martin v. American International Assurance Life Co.*, [2003] 1 S.C.R. 158, is applicable. The plasterer had no reasonable expectation that he would get West Nile virus from the activity in which he was engaged.

[3] The respondent submits that a disease is not an accident. That proposition standing alone is obviously correct. 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.

[4] Further, there need not always be an external source that triggers the disease or illness. In *Voison v. Royal Insurance Co. of Canada* (1988), 66 O.R. (2d) 45 (C.A.), the plaintiff, while engaged in the remodeling of his house, suffered an occlusion of the anterior spinal artery as a result of a trauma sustained when he assumed an awkward position and extended his neck. There was an immediate interplay between the action and the accident itself but no external triggering event. The court 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. We are of the opinion that the appellant's case is similar to the *Voison* decision in that the appellant was engaged in work, without intending to cause himself harm, and the harm that did result could not reasonably have been foreseen or expected.

[5] Accordingly, we would allow the appeal, set aside the decision of the trial judge dismissing the action and in its place hold that the appellant suffered an accident and is entitled to coverage under the policy.

[6] The trial judge awarded no costs to the successful insurer. However, as the insured should have been the successful party, he should get his costs of the trial in the amount of $20,000. The costs of the appeal are awarded to the appellant fixed in the amount of $22,226.37 all inclusive.

"Karen M. Weiler J.A."
"K. Feldman J.A."
"H. S. LaForme J.A."