IN FACT AND IN LAW

Life and Disability Insurance

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Safeguard Order In Disability Insurance Cases: The Court Of Appeal Rules

By Catherine Dumas

On May 19, 2004, the Court of Appeal issued a judgment allowing the appeal of Provident Life and Accident Insurance Company ("Provident") and setting aside the judgment of the Superior Court, which had, on September 25, 2003, issued a safeguard order under which the appellant had to maintain the payment of benefits to Denys Chabot, the respondent, for a period of 180 days.[1]

The Facts

The respondent is a 46 year old doctor who specializes in plastic surgery with an emphasis on reconstructive surgery of oral cleft defects. He has practised medicine since 1986 at the Saint-François-d'Assise Hospital and at the Centre Hospitalier Courchesne de Québec. In 1990, he took out two disability insurance policies with the appellant.

On May 28, 1993, due to a disk herniation at the neck level, which caused significant pain and partial paralysis of the upper right limb, the respondent was declared totally disabled and had to cease working. His total disability persisted until October 31st, 1994 and during that period he received the total disability benefits as set out in the insurance policies.

Commencing on November 1st, 1994, the respondent resumed some professional activities, declaring to the insurer that he was able to perform 16 to 18 hours of work per week, including consultations and "on average, one day of light surgery per week". To the question "If partially disabled, what are the main tasks of your profession that you are unable to perform?", the respondent replied "General decrease in the capacity to work. I have had to give up micro-surgery, oral cleft defects surgery, as well as any very complex and lengthy surgery". From September 21st, 1994 to November 29, 1996, the appellant paid the respondent the residual disability benefits according to the insurance policies.

At the beginning of December 1996, the respondent was put on complete rest again due to cervical hernia decompression surgery. He received total disability benefits from November 30, 1996 to March 16, 1997.

Beginning on March 17, 1997, the respondent resumed some professional activities, including light surgeries. However, he was not able to perform either micro-surgery or oral cleft defects surgery. He received residual disability benefits for a second time until July 2000.

From July 25, 2000 to January 31st, 2001, the respondent was again unable to work due to the worsening of his physical condition, as well as depression. On January 10, 2001, he resigned from the CHUQ due to his health problems, which prevented him from performing the main tasks of a medical practice within an establishment. During that period, the insurer paid him total disability benefits.

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[1] J.E. 2004-43 (C.A.).

Finally, on February 1st, 2001, the respondent underwent a third partial disability period during which he was deemed to be capable of carrying out part-time work and only performed work in his office, such as consultations, forensic expertises and administrative tasks. From May 2001, one day per month of minor surgery under local anaesthesia, at his office, was added to the administrative tasks. The situation remained unchanged until July 2003.

It is in these circumstances that, on June 23, 2003, the appellant sent to the respondent a notice indicating that, at an unspecified date, it had been informed that the respondent had, on March 28, 1996, performed gender-reassignment (transition from male to female) as well as breast augmentation surgery at the St-François d'Assise Hospital. In the same letter, the appellant informed the respondent that it considered that these "seem to be far from constituting light surgeries". The appellant immediately stopped paying the benefits and demanded repayment of an amount of $828,829 that it considered having unduly paid to the respondent since March 28, 1996.

On September 5, 2003, the respondent filed a motion to institute proceedings, mainly to have himself declared disabled on account of disease. He concurrently requested the issuance of a safeguard order in order that payment of an amount of $12,020.50 in monthly benefits, as well as waiver of premiums, be maintained until final judgment was given on the case.

The Superior Court Judgment

Madame Justice Michèle Lacroix of the Superior Court issued the requested safeguard order and ordered Provident to maintain payment of $12,020.50 in monthly benefits for a period of 180 days.

Reviewing each of the four eligibility requirements of a safeguard order, namely, the colour of right, the risk of serious or irreparable prejudice, the balance of convenience and the urgency of the situation, the Court concluded as follows:

> **[Free translation] "The Court is of the opinion that the defendant's behaviour of nearly 8 years leads to the conclusion that the plaintiff has an apparent right to obtain a safeguard order.**
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> **The balance of convenience clearly favours the plaintiff.**
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> **From the motion, the affidavit and the documentary evidence, one can clearly conclude that a situation of urgency exists, which requires the issuance of a safeguard order. The drastic gesture of the defendant, after more than 8 years of paying disability benefits without ever either requesting a counter-examination or questioning any document submitted by the plaintiff, creates a prejudice that the Court considers to be serious, irreparable, harmful and devastating for the plaintiff.**
>
> **[...]**
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> **The defendant's offhand attitude demonstrates a lack of respect for the insured and is incompatible with the good faith that must govern insurer-insured relationships."**

The Court of Appeal Judgment

In an unanimous judgment written by Mr. Justice Yves-Marie Morissette, the Court of Appeal allowed Provident's appeal and set aside the safeguard order.

The Court, basing itself on the relevant case law, asserted that injunctive relief is not an appropriate remedy to obtain payment of a claim. According to the Court, claiming otherwise would be tantamount to allowing the creditor to obtain payment even before a tribunal has a chance to rule on the assertions of the parties regularly put before it. While a safeguard order may sometimes be appropriate to maintain certain aspects of a business relationship that come under dispute, such an order cannot be used to obtain an early ruling, at the interlocutory stage, on the merits of the case between the parties.

The Court of Appeal quoted the following excerpt from the reasons of Gonthier, J. of the Supreme Court of Canada in the case of *Caisse populaire de Maniwaki* v. *Giroux*[2]:

[2] [1993] 1 S.C.R. 282.

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"The appellant Giroux argues that the insurer must prove the cessation of the disability before the cessation of payments. In other words, she submits that if there is a dispute between the insured and the insurer on the question of disability, the insurer must continue the payments until judgment is given.

This argument has no basis in law.

The insurance contract is a bilateral contract. The insurer and the insured assume mutual obligations. Here, the insurer is required to pay the interest to the Caisse populaire in the event that the insured is disabled and the insured must provide evidence of the continuation of her disability, on the request of the insurer. These two obligations are, as Baudouin, *supra*, states at p. 54, [TRANSLATION] "interdependent and not simply juxtaposed". The insurer's obligation to pay benefits exists only to the extent the appellant Giroux is disabled. If the insured proves that she continues to be disabled, under the terms of the contract, the insurer shall continue to pay the interest owing.

It may be that an insured will reply to the insurer's request concerning the continuation of the disability by providing it with a medical certificate or by submitting to the examination provided for in clause 9 of the contract. This evidence may not be "satisfactory" in the eyes of the insurer, however, and, consequently, it may no longer consider the insured to be disabled. In that case, under the actual terms set out in clause 3 of the contract, it is entitled to cease paying benefits. If there is a dispute between the parties in this regard, it must be resolved by a judgment, which will decide whether the disability has ceased and what benefits may be claimed. If the benefits are insufficient, in light of the court's finding as to the date when the disability ceased, there will be an award accordingly with interest on the arrears, if any. This is the only penalty for delay in meeting a monetary obligation. The right to benefits is dependent on the existence of the disability and not on the date of the judgment resolving a dispute in this regard." (paragraph 42)

The Court ruled that the dispute on the issue of disability must first be resolved on the merits, with the insurer bearing the onus of proving the facts justifying the payment termination. In the event the insurer is wrong, the insured will receive monetary compensation in the form of arrears and interest.

Conclusion

Based on the principle that an injunction is not the appropriate remedy to obtain payment of a claim, the Court of Appeal set aside the safeguard order which required payment of the monthly disability benefits until final judgment is rendered.

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