

CITATION: Vanderkop v. Personal Insurance Company of Canada, 2009 ONCA 511
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COURT OF APPEAL FOR ONTARIO

Cronk, Gillese and Armstrong JJ.A.

BETWEEN

Jokelee Vanderkop

Plaintiff (Respondent)

and

The Personal Insurance Company of Canada
La Personnelle Compagnie D'Assurance Du Canada

Defendant (Appellant)

Robert H. Rogers, for the appellant

Gary L. Petker, for the respondent

Heard: June 19, 2009

On appeal from the judgment of Justice Thomas R. Lofchik of the Superior Court of Justice dated May 16 and September 5, 2008.

By the Court:

[1] This is an appeal from the judgment of Lofchik J. dated May 16, 2008 and September 5, 2008 (the “Judgment”). In the Judgment, The Personal Insurance Company of Canada/La Personnelle Compagnie D’Assurance Du Canada (“Personal”) was ordered to pay the plaintiff, Jokelee Vanderkop, income replacement benefits (“IRBs”) pursuant to the *Statutory Accident Benefits Schedule* (“SABS”), without reduction for possible long term disability benefits (“LTD”).

BACKGROUND

[2] The facts in this case are not in dispute. They are set out both in an agreed statement of fact and in the reasons for decision below. There is no need to recite them here save in summary form.

[3] Ms. Vanderkop was seriously injured in a car accident on February 17, 1997. At that time, she was 44 years old and worked for the Wellington County Board of Education as a secondary school teacher.

[4] Personal insured Ms. Vanderkop under a motor vehicle policy. The policy included the standard accident benefits afforded accident victims pursuant to SABS.

[5] Ms. Vanderkop was also insured under a group policy in effect between her employer and the Manufacturers Life Insurance Company (“Manulife Policy”).

[6] The Manulife Policy included provision for LTD, which obligated Manulife to pay a monthly loss of income benefits provided eligibility and entitlement requirements were met.

[7] Ms. Vanderkop initially returned to work but had to use sick credits to complete the school term. In July 1997, believing that she qualified for LTD, she applied to Manulife for LTD but her application was denied.

[8] Ms. Vanderkop attempted to return to work in February 1998. With the assistance of her principal and others, she made it to the end of that term but was unable to ever return to work again. She used her remaining sick leave credits to November 17, 1998.

[9] Personal paid no IRBs for the ensuing 112 weeks based on its position that Ms. Vanderkop did not qualify for them. Eventually, it admitted that Ms. Vanderkop met the *SABS* test for payment of IRBs from, at least, the 104 week mark.

[10] On June 28, 1999, Ms. Vanderkop issued a statement of claim against Manulife in which she sought to recover LTD from September 1997.

[11] On November 27, 2002, Ms. Vanderkop attended a private mediation with Manulife, Personal and the defendant in her tort action arising from the accident. At the mediation, Ms. Vanderkop entered into a settlement with Manulife in which she released all entitlement to past, present and future benefits under the Manulife Policy for \$57,500.

[12] During negotiations at the mediation, the issue of co-ordination of benefits was at the forefront. Personal did nothing at the mediation to encourage or induce Ms. Vanderkop to enter into the Manulife settlement or that could be reasonably interpreted by Ms. Vanderkop to mean that it approved the Manulife settlement. However, nor did it tell Ms. Vanderkop that it would take the position that it was entitled to reduce future payment of IRBs, to the point of extinguishment, by virtue of the fact of her settlement with Manulife.

[13] Pursuant to s. 7 of *SABS*, Personal is entitled to deduct Manulife LTD payments from IRBs otherwise payable by it only if:

- (a) Ms. Vanderkop had been paid LTD, or
- (b) she failed to apply for LTD.

[14] Section 7 (1) 1 reads as follows:

7. (1) Despite subsection 6(1) but subject to subsections 6(2) to (6), the weekly amount of an income replacement benefit payable to a person shall be the lesser of the following amounts:

- 1. The amount determined under subsection 6(1), reduced by,
 - i. net weekly payments for loss of income that are being received by the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, and

ii. net weekly payments for loss of income that are not being received by the person but are available to the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, unless the person has applied to receive the payments for loss of income.

[15] After the mediation, Personal refused to pay IRBs to Ms. Vanderkop even though she met the test for entitlement because of the settlement that she made with Manulife. It contended that it could deduct any LTD payments that *might* have been payable had Ms. Vanderkop successfully litigated with Manulife (the “hypothetical payments”).

[16] Ms. Vanderkop sued Personal for the IRBs.

[17] Manulife was not present at trial. No witness from Manulife was called to testify.

[18] Personal called no witnesses at trial.

[19] The trial judge found in favour of Ms. Vanderkop and ordered Personal to pay IRBs to her. He held that Personal had the onus to prove that settlement of the LTD benefits claim against Manulife was unreasonable in all the circumstances. He found that Personal had failed to establish “beyond dispute” that Ms. Vanderkop was entitled to the hypothetical payments and to the quantum of those hypothetical payments had the settlement not been entered into. He held that Personal’s failure to lead evidence to demonstrate that, if the settlement with Manulife could be set aside, Ms. Vanderkop would be entitled to LTD was fatal to a claim to deductibility of those benefits. He rejected the submission that the legislature would, without clear wording, oblige an

injured party caught between two insurance companies to pursue litigation where the only benefit of the litigation would accrue to the automobile insurer.

[20] Personal appeals.

THE ISSUE

[21] Personal's appeal is based on its submission that the trial judge erred in finding that it was not entitled to a reduction for LTD from the quantum of IRBs otherwise payable to Ms. Vanderkop. Specifically, it argues that the trial judge erred in finding that LTD was not available to Ms. Vanderkop and that she had applied for such benefits within the meaning of s. 7 (1) 1 (ii) of the *SABS*.

ANALYSIS

[22] We accept neither submission.

[23] There are two issues of interpretation raised on appeal. First, the appellant argues that by entering into a settlement with Manulife regarding her LTD claim, Ms. Vanderkop should be treated as, in effect, voluntarily withdrawing her application for LTD benefits. As a result, the appellant says, from the date of settlement forward she cannot be taken to have "applied" for LTD benefits within the meaning of s. 7(1) 1(ii).

[24] We disagree. Ms. Vanderkop applied for LTD benefits and they were denied. Thereafter, Manulife persisted in that denial of benefits by resisting and defending her

action against it. In these circumstances, Ms. Vanderkop did not abandon or withdraw her application for LTD benefits. She merely compromised her claim as a result of mediation.

[25] Second, the appellant argues LTD benefits were “available” to Ms. Vanderkop within the meaning of s. 7(1) 1 (ii) of *SABS*. Again, we disagree.

[26] IRBs are to be reduced by LTD being received as a result of the accident. The legislation does not entitle Personal to set off hypothetical benefits applied for but refused. Ms. Vanderkop was not in receipt of LTD. As Manulife had denied her claim, she cannot be described as entitled to the payment of LTD. That is, LTD was not “available” to her. To treat LTD as being available would effectively oblige an insured to litigate with their collateral benefits insurer, at their own risk and expense, for the benefit and at the discretion of, their accident benefits insurer. In our view, *SABS* places no such obligation on an insured.

[27] Having said that, we wish to note Ms. Vanderkop’s concession that Personal could have recouped the \$57,500 paid to her by Manulife, had it followed the necessary statutory procedures. That is, she has conceded that after the mediation, had Personal paid Ms. Vanderkop the IRBs to which she was entitled, it could have deducted the \$57,500 from those ongoing payments in the manner permitted by the legislation. It chose not to.

DISPOSITION

[28] Accordingly, the appeal is dismissed with costs to the respondent fixed at \$15,000, inclusive of disbursements and GST.

RELEASED: June 24, 2009 (“E.E.G.”)

“E.A. Cronk J.A.”

“E.E. Gillese J.A.”

“Robert P. Armstrong J.A.”