

# Full Indemnity for Costs Award in Disability Insurance Dispute Has Far Reaching Consequences

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*Tanious v The Empire Life Insurance Company*, 2017 BCSC 85

On January 19, 2017, Madam Justice Brown of the British Columbia Supreme Court issued reasons in *Tanious v The Empire Life Insurance Company*, 2017 BCSC 85 ("Tanious"), awarding the plaintiff full indemnity for her costs in a dispute over long term disability benefits, a decision with possible far reaching consequences for insurance coverage disputes.

## Facts and Claim

The underlying action was a claim by the plaintiff against her insurance company after it terminated her long-term disability benefits pursuant to a disability policy that formed part of her employment benefits. The plaintiff was diagnosed with Multiple Sclerosis ("MS") which impaired her ability to continue working and triggered the payment of long-term disability benefits under her policy. To cope with the symptoms of MS, the plaintiff began using crystal methamphetamines ("crystal meth"). The defendant took the position that the plaintiff was not entitled to long term disability benefits on the grounds that disability stemmed from an addiction to crystal meth which was caught under an exclusion clause in the contract. In the trial decision, *Tanious v The Empire Life Insurance Company*, 2016 BCSC 110, the court found that the plaintiff's use of crystal meth was not the proximate cause of her debilitating condition. As a result, the plaintiff was found to be entitled to the benefits under her disability insurance contract.

In this subsequent decision, the plaintiff applied for solicitor client costs (meaning the total legal costs with no tariff) of the proceeding, either as costs or damages. Typically, special costs are not awarded unless reprehensible conduct is found in the circumstances giving rise to the cause of action or in the proceedings that follow. However, a recent British Columbia Supreme Court decision, *Williams v Canales*, 2016 BCSC 1811, affirmed that special costs are not limited to cases involving reprehensible conduct and are available in other circumstances. The plaintiff here does not allege, nor does the court find, reprehensible conduct. The plaintiff claimed that the nature of

disability insurance disputes requires consideration of other factors which may, in some cases, justify an order for full indemnification of the insured's costs.

## **Important Legal Findings**

Madame Justice Brown held that disability insurance claims can be distinguished from personal injury, fire losses or life insurance claims due to the uniqueness in the way disability insurance claims and payouts are structured. With insurance contracts for fire or death, the insured is awarded a one-time lump sum award. With personal injury, a lump sum compensates for the present value of future earning capacity.

The court set out that a disability insurance contract differs in that it compensates for a loss of future income which may continue into the future for an indeterminate amount of time, until the insured reaches the age of retirement or dies. The awards are paid out in instalments over time making them incompatible with a one-time lump sum structure. The distinction is significant because the future payout structure does not allow for an accurate calculation of a contingency fee. The court set out that insureds often rely on contingency fee retainers as the disability impairs their ability to earn income to pay the hourly rate of counsel. The inability to calculate an accurate contingency fee makes retaining counsel much more difficult.

As a result, Madam Justice Brown found that, in this particular case, an award for full indemnification was necessary to put the plaintiff in the position she would have been in had the insurer fulfilled its obligations. In pursuing the benefits she was entitled to under her disability insurance policy, the plaintiff was forced to retain counsel and enforce the contract through litigation and should therefore be indemnified for those costs. An additional factor considered in this case was that the plaintiff, as a result of her disability, was incapable of litigating on her own behalf and had no choice but to retain counsel to pursue the benefits owed to her.

The defendant attempted to argue that awarding special costs when an insurer loses an action on a first-party insurance claim would "revolutionize costs law". Madam Justice Brown disagreed and pointed out that the courts have ordered full indemnity in insurance contract claims related to the duty to defend under the rationale that without a full indemnification the plaintiff would not be receiving the full benefit of their insurance contract and the fundamental purpose of the contract would not be served.

The court was clear that succeeding in a claim for disability benefits does not automatically entitle an insured disability plaintiff to special costs, but rather that the individual circumstances in each case must be considered alongside a balancing of the parties' interests.

## **Practical Implication**

It was raised by the defendant that allowing full indemnity costs would simultaneously encourage a flood of insured litigants bringing cases, while creating a chilling effect that would deter insurers from pursuing a legitimate defence. Further, insurers are often unable to predict the cost consequences of a full indemnity award.

Madam Justice Brown rejected this line of reasoning and held that these concerns should not persuade the court against making a full indemnity costs award in this case. She stated that risk assessment is an essential tool of both parties in litigation and awards of this type are not as novel or revolutionary as the defendant perceives them to be.

This decision establishes that where an insured is found to be entitled to disability benefits under a disability insurance contract, special costs may be awarded to fully indemnify the insured. This is a significant shift in the law of costs and the interpretation of disability insurance contracts. While the court set out that such an award is still discretionary and context specific, it can be expected that all plaintiffs will begin to demand full indemnity in claims for disability insurance and to use it as a negotiating tactic for settlement. The now very real risk of full cost indemnity will have to be incorporated into the risk assessment of taking a legitimate defence to trial and may prevent legitimate defences from being heard in court.

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