Privy Council Appeal No. 21 *of* 1924.

The Mutual Life Insurance Company of New York - - *Appellants*

v.

The Ontario Metal Products Company, Limited - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 11TH DECEMBER, 1924.

Present at the Hearing:

VISCOUNT HALDANE.
LORD DUNEDIN.
LORD ATKINSON.
LORD WRENBURY.
LORD SALVESEN.

[*Delivered by* LORD SALVESEN.]

This is an appeal from a judgment of the Supreme Court of Canada reversing a judgment of the Appellate Division of the Supreme Court of Ontario and restoring the judgment of the Trial Judge. There has been a great diversity of judicial opinion in the Courts below and for this reason, apart from the general importance of some of the points raised in argument and on which the decision of the case, at least, partly depends, it is necessary to deal in some detail with the facts out of which the controversy arises.

The suit was one at the instance of a policy-holder for payment of the sum of $50,000 insured on the life of a Mr. Schuch, a resident in Toronto. The policy is dated 13th December, 1918, and Mr. Schuch died of cancer on 3rd April, 1920. The liability of the appellants is disputed on the ground that the policy had no effect as a valid contract owing to misrepresentation or concealment on the part of the assured in the answers which he gave to certain questions in the application form, a copy of which was endorsed on the policy. The questions and answers founded on are 17

to 20 of the application, but their Lordships think that the answers to questions 19 and 20 add really nothing to the information elicited by Nos. 17 and 18, and that these only need be considered. As they appear in the original application, they are as follows :—

17.

What illnesses, diseases, injuries or surgical operations have you had since childhood ?

Name of Disease, etc.	Number of attacks.	Date of each.	Duration.	Severity.	Results.	Date of Complete recovery.
Smallpox	one	42 years ago	un	known	un	known
Trivial ailments since childhood : Typhoid ? doubtful diagnosis ...	one	10 years ago	2 wks.	very slight	complete in 2	recovery weeks.

18.

State every physician or practitioner who has prescribed for or treated you or whom you have consulted in the past five years.

Name of Physician or Practitioner.	Address.	When Consulted.	Nature of plaint.	Give full Details above under Q. 17.
None	—	—		

The questions themselves are printed. The answers were written by Dr. McCullough, the doctor who examined Mr. Schuch in the interest of the appellants. The information on which the answers proceed and which they, no doubt, correctly summarise, was obtained from the assured. When the application form was completed it was read over to the assured and signed by him.

The facts as ascertained by the evidence are briefly as follows :— During the five years preceding the date of the policy, Mr. Schuch had been in constant attendance at his office and was never for a single day laid aside from work. The company of which he was managing director was occupied largely in the manufacture of munitions from September, 1915, and for some considerable period thereafter. In consequence they were exceptionally busy and additional work was thrown on Mr. Schuch. He took his work very seriously and was absent from home on week days very often from early morning until midnight. In January, 1915, his wife was suffering from bronchitis and was attended by Dr. George Fierheller on several occasions. When she had recovered Dr. Fierheller prescribed for her a tonic, the ingredients of which

were arsenic, strychnine and iron. This prescription is known as Zambelletti's and is commonly used as a pick-me-up for persons who are run down. In Mrs. Schuch's case, Dr. Fierheller advised that it should be administered hypodermically. Her husband was himself somewhat pale and run down at the time and the doctor also prescribed for him similar hypodermic injections. It is not clear whether this treatment was suggested by the doctor to Mr. Schuch, or was suggested by Mr. Schuch to the doctor. In either case the doctor no doubt applied his mind to the question how far it was suitable for use by him. The same tonic is more often taken internally, but Mr. Schuch informed Dr. Fierheller that medicine upset his digestion. Accordingly, during the months of March, April and May, Mr. Schuch received hypodermic injections every three days, these injections being generally made in the doctor's office at which Schuch called for the purpose. In 1916 similar injections were given during part of five months, and again in August, September and October, 1917. The occasion of recommencing these injections in each of the years 1916 and 1917 was a 'phone message from Mr. Schuch that he would like the treatment to be resumed and calling at the doctor's office for the purpose of having the injections made. There were no injections for a period of about 14 months before the policy was issued.

Dr. Fierheller never made any physical examination of Mr. Schuch. He considered that he was simply in the somewhat bloodless condition that very many people get into who have to do their work indoors and do not have adequate open-air exercise. He was never ill in bed during the whole period and Dr. Fierheller deposed that there was never any occasion for him to make a careful examination. The only advice he tendered was that Mr. Schuch was working too hard and taking his business too seriously.

Dr. McCullough, who was employed by the appellants to make the usual medical examination, and appeared to have conducted it with much care and completeness, observed at the time that Mr. Schuch was a tall, slim, sallow-complexioned man, but did not attach importance to this. He found no trace of disease and certified him in his report to be an erect healthy man. The cancer of which he died in 1920, was a supervening disease, which was not present when the policy was taken out.

These being the facts, the respondents contend that there was no inaccuracy in the answers which Mr. Schuch gave to questions 17 and 18. Question 17 relates to " illnesses, diseases, injuries or surgical operations," and it was said that the run-down condition into which he had got through overwork or lack of exercise, and for which he received the hypodermic injections, did not fall under any of these heads. There is great force in this view, which has the support of a majority of the Judges of the Supreme Court. A man who is able to attend his office every day, and all day, and to do exacting work in a competent way,

cannot be described as suffering from illness, even if he is pale and feels overtired at times. Still less can a hypodermic injection be described as the appellants at one time argued as a surgical operation. Their Lordships are, therefore, in agreement with the Judges of the Supreme Court who hold that, in answering this question as he did, and omitting any reference to the condition for which he received the injections except as far as it may be covered by "trivial ailments," Mr. Schuch was not guilty of any inaccuracy.

There is more difficulty as to the answer to question 18. The respondents contended that this question must be read with question 17, and construed as limited to the illnesses, diseases, etc., there referred to. It is, however, not expressly so limited, and their Lordships see good reasons why it must be deemed to have a wider application. Just because a man may truthfully represent that he has had no illness, disease, etc., it may be important to have the means of testing his answer by referring to medical gentlemen who have been consulted or have prescribed for him. There is no reason to doubt Mr. Schuch's good faith in giving the answer he did. The suggestion that he should insure his life came from an agent of the Insurance Company, and it is reasonably certain that Mr. Schuch regarded himself as a perfectly healthy man and might well consider the run-down condition for which he had been treated by hypodermic injections as a trivial ailment. Their Lordships are, notwithstanding, of opinion that this answer to question 18 was, in fact, inaccurate, and that it was his duty to have disclosed Dr. Fierheller's name as a physician who had prescribed for or treated him within the five years preceding the date of the policy.

This finding would have been conclusive against the respondents had the policy been in the same form as that which was considered in the recent case of *Dawsons, Ltd.* [1922], 2 A.C., p. 413, decided in the House of Lords. There the fact that an inaccurate answer was given to a question in the application form, although in itself of no materiality, was held to invalidate the policy of insurance because the accuracy of the assured's answers was made a basic condition of the contract. In other words, the assured warranted the truth of the representations he made. It is not so in the policy now under consideration. It contains a clause in the following terms :—

> " All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties and no such statement of the insured shall avoid or be used in defence to a claim under this policy unless contained in the written application herefor and a copy of the application is endorsed on or attached to this policy when issued."

This clause was inserted with a view to complying with Sec. 156 (5) of the Ontario Insurance Act, R.S.O. (1914), Chap. 183. But the full effect of the Act which governs all policies made in Ontario can only be appreciated by a careful study of its terms.

By (3) it is provided—"The proposals or application of the assured "shall not as against him be deemed a part of or considered with the "contract of insurance except in so far as the Court may determine "that it contains a material misrepresentation by which the insurer "was induced to enter into the contract." Again by (4) it is *inter alia* provided "No contract shall be avoided by reason of the inaccuracy "of any such statement (*i.e.*, in an application for a policy) unless it "is material to the contract," and finally (6) provides "The question "of materiality in any contract of insurance shall be a question of "fact for the jury or for the Court if there is no jury." These provisions, read together, may be taken to lay down in unmistakable language (1) of that no policy shall be avoided by reason merely of any misrepresentation or inaccuracy in a statement made by the insured in the application form, whatever the terms of the policy might otherwise import, and (2) that any misrepresentation which may avoid the contract must be misrepresentation of a fact and must be material to the contract. The main difference of judicial opinion centres round the question what is the test of materiality? Mr. Justice Mignault thought that the test is not what the insurers would have done but for the misrepresentation or concealment but "what any reasonable man would have "considered material to tell them when the questions were put to "the insured." Their Lordships are unable to assent to this definition. It is the insurers who propound the questions stated in the application form, and the materiality or otherwise of a misrepresentation or concealment must be considered in relation to their acceptance of the risk. On the other hand, it was argued that the test of materiality is to be determined by reference to the questions; that the Insurance Company had by putting the question shewn that it was important for them to know whether the proposer had been in the hands of a medical man within five years of his application, and, if so, to have had the opportunity of interviewing such medical man before accepting the risk. The question was therefore, they contended, a material one, and the failure to answer it truthfully avoids the contract. Now if this were the true test to be applied there would be no appreciable difference between a policy of insurance subject to sec. 156 of the Ontario Insurance Act, and one in the form hitherto usual in the United Kingdom. All of the questions may be presumed to be of importance to the insurer who causes them to be put, and any inaccuracy, however unimportant in the answers, would, in this view, avoid the policy. Suppose, for example, that the insured had consulted a doctor for a head-ache or a cold on a single occasion and had concealed or forgotten the fact, could such a concealment be regarded as material to the contract? Faced with a difficulty of this kind, the appellants' counsel frankly conceded that materiality must always be a question of degree, and therefore to be determined by the Court, and suggested that the test was whether, if the

fact concealed had been disclosed, the insurers would have acted differently, either by declining the risk at the proposed premium or at least by delaying consideration of its acceptance until they had consulted Dr. Fierheller. If the former proposition were established in the sense that a reasonable insurer would have so acted, materiality would, their Lordships think, be established, but not in the latter if the difference of action would have been delay and delay alone. In their view, it is a question of fact in each case whether if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.

Applying this test, the evidence which has impressed their Lordships most is that of Dr. McCullough — a witness adduced by the appellants and who, as their medical examiner in Toronto, was the person by whom they would naturally be guided in accepting or declining the risk. Now Dr. McCullough states that if Dr. Fierheller's name had been mentioned, he would have noted it in the answer to question 18, but he also emphatically states that if he had known at the time all that Dr. Fierheller deposed to in evidence, he would still have sent up the case with a recommendation for acceptance. In other words, having, as the result of his own examination, passed Mr. Schuch as a healthy man, his opinion would not have been altered by his prior medical history as now ascertained in great detail. Dealing with the evidence as a whole the learned Trial Judge came to the conclusion that "if the facts as stated in the evidence of Dr. Fierheller with "relation to the condition of Schuch and his treatment had been "known to the defendant company, it was not at all probable that "they would have refused the premium and the issue of the policy, "nor do I think they would even have required the examination "which the officials now think they would have required." In this finding their Lordships substantially concur, although they would have expressed the finding somewhat differently and would have preferred to say that had the facts concealed been disclosed, they would not have influenced a reasonable insurer so as to induce him to refuse the risk or alter the premium. Their Lordships, therefore, concur in the conclusion of the Trial Judge that the non-disclosure or mis-statement was not material to the contract and therefore, under the law of Ontario, is not a ground for avoiding it.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

One minor matter requires to be dealt with. The appellants on 29th January, 1924, obtained an order, granting them leave to appeal against the judgment of the Supreme Court of Canada, on a petition at their instance for special leave to appeal to His Majesty in Council. Subsequently, the respondents lodged a petition to rescind the order granting special leave to appeal on the ground that the appellants' petition contained substantial

mis-statements and inaccuracies. Counsel for the respondents was heard on this petition at the same time as on the merits of the appeal, but as their Lordships thought that the great diversity of judicial opinion in the Courts below and the importance of the questions raised constituted sufficient ground for granting leave to appeal, the special allegations were not gone into. Now that their Lordships have heard the whole case, they are in a position to judge of the validity of the charges made and have come to the conclusion that some, at least, of the alleged mis-statements were not justified by the record and ought not to have been made. In these circumstances they will humbly advise His Majesty that the petition to rescind the leave granted should be dismissed but without costs to either party.

In the Privy Council.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

v.

THE ONTARIO METAL PRODUCTS COMPANY, LIMITED.

DELIVERED BY LORD SALVESEN.

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