ONTARIO METAL PRODUCTS COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (DEFENDANT) ..... } RESPONDENT.

1923
*Nov. 13, 14.
*Dec. 4.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Insurance, Life—Application—Statements by insured—Non-disclosure—Materiality—R.S.O. [1914] c. 183, Insurance Act—5 Geo. V, c. 20, s. 19 (O).

The Ontario Insurance Act Co., sec. 156 (5), provides that no inaccuracy in the statements contained in an application for insurance shall avoid the policy unless it is material to the contract. A policy of life insurance declared that "the policy and the application * * * constitute the entire contract between the parties" and that the statements made by the insured should "be deemed representations and not warranties." In his application the insured declared that the statements and answers to the Medical Examiner were true and were offered to induce the company to issue the policy. The Medical Examiner by question 17 asked: What illnesses, diseases, injuries or surgical operations have you had since childhood. Give the number of attacks, dates, duration, severity, etc., of each? 18. State every physician who prescribed for you or treated you or whom you consulted in the preceding five years, and the nature of the complaints with full details under question 17. In reply to questions 19 and 20 the insured declared that he had answered the first two questions fully.

Held, that questions 17 to 20 must be read together; that the insured was only required by Q. 18 to state what physicians had prescribed for or treated him or had been consulted in respect to the illnesses, etc., to be specified under Q. 17 which did not comprise those which could be termed trivial ailments.

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APPEAL from the decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment at the trial in favour of the appellant.

The facts are stated in the above head-note.

R. S. Robertson K.C. and *Lionel Davis* for the appellant.

Hellmuth K.C. and *Arnoldi K.C.* for the respondent.

THE CHIEF JUSTICE.—I would allow this appeal with costs here and in the Division Court, and restore the judgment of the trial judge.

I concur in the reasons stated by my brother Anglin J.

IDINGTON J.—I so, in the main, agree with the reasoning of the learned trial judge and his conclusion of fact in light of the relevant law to be applied thereto,, and so entirely with the reasoning of the learned Chief Justice of the Common Pleas, presiding in the Second Appellate Division of the Supreme Court of Ontario from which this appeal is taken, that I see no useful purpose to be served by repeating same here, but would allow this appeal with costs here and below, and restore the judgment of the said learned trial judge.

On the preliminary objection that the said learned Chief Justice takes (as to dropping the jury) I am, though inclined to think the jury could, by reason of common sense, have reached the same conclusion as the learned trial judge, yet, owing to some rulings of his in the course of the trial admitting, against objection of counsel, evidence respondent's counsel pressed for, it might have led to a new trial, if unfortunately the jury had decided otherwise than he has done. Apart from that minor and perhaps trivial exception I accept without reservation his entire reasoning.

I may be permitted to submit with great respect to each of the members of the majority of the court below, that the conception expressed by them in varying terms that the deceased had consulted, and that his treatment had been prescribed by, Dr. Fierheller, is, I submit, not quite accurate.

The said doctor expressly declares he had made no examination of deceased and seems to me to have merely assented to administering a treatment the deceased desired because his wife had been the better of some such like treatment, using probably the same, but it is not clear

whether exactly the same, elements by way of injection instead of taking them through the mouth.

The deceased evidently thought he was entitled to be his own doctor directing a medical man to do as he (the deceased) desired, and hence the mistaken answer inadvertently given to Dr. McCullough who however says, if known to him, it would not have changed his recommendation to accept respondent's application but would have led him to set forth in different terms the answers he wrote down for deceased to sign and which are the basis of all the trouble.

It is for the court here to decide and not for Dr. Merchant whether or not that is good defence.

DUFF J. (dissenting).—This appeal, in my opinion, should be dismissed. The evidence is, I think, conclusive that any competent medical examiner, if he had been informed of the facts of the treatments of Mr. Schuch by Dr. Fierheller, would have reported those facts to the head office, as it would have been his duty to do, with every probability that the policy would not have issued without a further examination.

Material facts, in the relevant sense, are facts which might influence the mind of a reasonable man in deciding upon the acceptance or rejection of the risk or the rate of premium. In determining the question it is not the state of mind of the particular insurer which is to be considered, but

> the probable effect which the statement might naturally and reasonably be expected to produce on the mind of the underwriter in weighing the risk and considering the premium.

Nova Scotia Marine Ins. Co. v. *Stevenson* (1).

> That is material which a reasonable man would regard as material.

Joel v. *Law Union and Crown Ins. Co.* (2). The mis-statements were consequently mis-statements material to the risk and sufficient to avoid the policy unless there is something in the statutory law through which the appellants can escape that result. The appellants' argument proceeded upon the assumption that we must apply our minds to a consideration of the probable results of a further examination of the applicant; the law, I am quite satisfied,

(1) [1894] 23 Can. S.C.R. 137, at page 141.

(2) [1908] 2 K.B. 863.

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does not require us to enter upon any such speculation. The applicant, stating that he had not only had no illness, disease, injury or surgical operation other than those mentioned, but that no physician or practitioner had prescribed for him or treated him or been consulted by him within the preceding five years, placed before the company a misstatement of the facts which precluded the very line of inquiry which, as I have already said, the evidence, I think quite conclusively, shews would have been pursued.

The next question concerns the effect of section 156 (5) of the Ontario Insurance Act. The policy provides that

> this policy and the application, a copy of which is indorsed hereon or attached hereto, constitute the entire contract between the parties hereto;

and the application so made part of the contract contains the declaration:

> All the following statements and answers and all those I make to the Company's Medical Examiner in continuation of this application are true and are offered to the company as an inducement to issue the proposed policy.

The appellants argue quite cogently that if these provisions stood alone they would, if no statutory enactment intervened, have the effect of making the policy conditional upon the truth of the statements in the application irrespective of their materiality. Then it is said that by force of section 156 (5) this implied condition—implied by law—cannot take effect; that section requires that the condition should be expressly limited in its operation to statements material to the contract. The answer given by Mr. Hellmuth is, I think, conclusive. The same clause which contains the sentence just quoted qualifies it by the stipulation,

> all statements made by the assured shall, in the absence of fraud, be deemed representations and not warranties.

The concluding sentence of the clause shews that "statements" here includes statements in the application.

That stipulation, quite apart from statutory enactment, would clearly have the effect of limiting the implied condition to cases in which the representations are in relation to something material to the contract, and is consequently, in my opinion, a sufficient expression within the meaning of section 156 (5) that the implied condition is so limited.

ANGLIN J.—The plaintiffs sue as beneficiaries under an insurance policy for $50,000 on the life of the late Frederick Joseph Schuch. The sole defence to their claim is based on alleged misrepresentation and suppression in the application for the policy by the insured of material facts in regard to his health and to his medical attendance during the five years immediately preceding the date of the application. This misrepresentation or suppression is charged to have been wilful. Three issues are thus presented: Was there misrepresentation or concealment of facts? If so, was such misrepresentation fraudulent? And: Were such facts material to the risk?

A judge of great experience, and who is always exceedingly painstaking, tried the action and in a carefully considered opinion determined that there had been no misrepresentation or suppression of material facts and accordingly gave judgment for the plaintiffs. In the Appellate Divisional Court the learned Chief Justice of the Common Pleas presiding reached the same conclusion upon an independent examination of the evidence. The contrary view, however, was taken by a majority of the court, who were of the opinion that material facts had been wilfully suppressed and that the insurance was thereby avoided. Under these circumstances, I have thought it my duty to examine the entire record with more than ordinary care in order to make up my own mind upon the issues involved. *Mersey Docks and Harbour Board* v. *Proctor* (1).

The insurance policy contains the following provision:

> This policy and application herefor, copy of which is indorsed hereon, or attached hereto, constitutes the entire contract between the parties hereto. 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 indorsed on or attached to this policy when issued.

The misrepresentations of fact relied upon are found in a portion of the application, thus made part of the contract, under the heading, "Statements to Medical Examiner." This heading is immediately followed by the note:

> These must be recorded in the handwriting of the Medical Examiner, who should satisfy himself that the applicant's statements and answers are full and complete.

(1) [1923] A.C. 253, 258-9; 92 L.J. K.B. 479.

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This portion of the application was subscribed by the applicant, below the words,

I certify that each and all the foregoing statements and answers were read by me and are fully and correctly recorded.

In order to determine whether there was the misrepresentation by the insured charged against him (having regard to the form of the questions, concealment or suppression of material facts would amount to misrepresentation) it is essential, first, to ascertain the effect of the questions put to the insured, to which it is said he gave untrue answers, and then to form a correct appreciation of the evidence in regard to the facts relied on to support the allegation that the answers were untrue. These questions and answers are numbered 17 to 21 inclusive and I think it advisable to set them out in full and in the form in which they are found in the printed application. Their true purport and effect will thus be more readily apparent. The italics are mine and indicate the answers filled in in the handwriting of Dr. McCullough, the Medical Examiner, the rest of the extract consisting of printed matter in the document furnished by the insurance company.

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
Small Pox.....	*one*	*42 years ago*	*unknown*	*unknown*	*unknown*	*unknown.*
Trivial ailments since childhood.	.....	.....	.....	.....	.....	.....
Typhoid? doubtful diagnosis.....	*one*	*10 years ago*	*2 weeks*	*very slight*	.....	*Complete recovery in 2 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 complaint	
None.....	.....	.....	.....	Give full details above under Question 17.

19. Have you stated in answer to question 17 all illnesses, diseases, injuries or surgical operations which you have had since childhood? (Answer yes or no.)
Yes.

20. Have you stated in answer to question 18 every physician and practitioner consulted during the past five years, and dates of consultations? (Answer yes or no.)
Yes.

21. Are you in good health?
Yes.

In the first place in regard to the answer to question No. 21, the finding of the trial judge that the insured was

in good health when he applied for and received the policy is abundantly supported by the evidence. Dr. McCullough, the defendant's examiner, so found him and says that nothing deposed to during the trial by Dr. Fierheller would change his opinion. Dr. Clarkson, a leading expert witness for the defence, when the result of Dr. Fierheller's testimony was stated to him on cross-examination, was prepared so to assume. He admitted that

> it would be fair to assume that he had got well over whatever he had been treated for in those earlier years.

The weight of the medical testimony is that the cancer, of which Schuch died in 1920, probably did not exist in December, 1918, when the insurance was taken, and all the witnesses agree that Schuch would then have been entirely unaware of it if it did exist. As the learned trial judge put it, the death of the insured by cancer

> can be eliminated from the case just as would be a death by railway accident.

The actual truth, and certainly the perfect good faith, of the answer made by the applicant to question no. 21 cannot, upon the evidence before us, admit of any doubt. See *Yorke* v. *Yorkshire Ins. Co.* (1).

The group of questions—17 to 20 inclusive—must be read together and effect given to them in the sense in which a layman so reading them would understand them. It is well established law that the preparation of the form of policy and application being in the hands of the insurers, it is but equitable that the questions to which they demand answers should, if their scope and purview be at all dubious, either in themselves or by reason of context, be construed in favour of the insured, especially after his death when we are deprived of the advantage of his version of what occurred upon the medical examination and of any explanation by him of his understanding of the questions and of his reasons for giving the answers to them recorded by the medical examiner. The insurers put such questions and in such form as they please, but they "are bound so to express them as to leave no room for ambiguity." To such a case the rule *contra proferentem* is eminently applicable. *Thomson* v. *Weems* (2); *Life Association of Scotland* v. *Foster* (3); *Fowkes* v. *Manchester and London Life Assur-*

(1) [1918] 1 K.B. 662, 669.
(2) 9 App. Cas. 671,687.
(3) [1873] 11 C.S.C. (3rd series) 351, 358, 364.

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ance Association (1); *Joel* v. *Law Union and Crown Ins. Co.* (2); In re *Etherington and The Lancashire, etc., Ins. Co.* (3); *Condogianis* v. *Guardian Assurance Co.* (4).

The company put two general questions, nos. 17 and 18, followed in each instance by particulars or details indicative of a limitation on their scope. Thus under no. 17 the "Name of Disease, etc.," is asked, the "Number of Attacks," the "Date of Each," its "Duration," "Severity," "Results," and "Date of Complete Recovery," indicating that the question, notwithstanding the generality of its terms, "diseases, injuries, or surgical operations," was intended to be restricted to what might be regarded as specific diseases or specific injuries of a serious nature or which entailed surgical operations, diseases, etc., in respect of which such particulars as are asked might reasonably be expected to be demanded.

Again under question no. 18 the applicant is asked to state the "Name of the physician or practitioner," "Address," "When consulted," and "Nature of complaint. Give full details above under Q. 17"—thus affording fair ground for the assumption that it is only when the applicant had "consulted" a physician and in regard to a complaint which he was required to specify under question no. 17 that the name and address of such physician need be given under question no. 18. Moreover, in question no. 20 the applicant is asked

> have you stated in answer to question 18 every physician and practitioner *consulted* during the past five years and dates of *consultations*,

thus confirming the impression which the particulars given under question no. 18 were calculated to create and may actually have given to both the examining doctor and the assured, that it was only when he had "*consulted*" a physician that the insured was expected to give his name and address. *Noscuntur a sociis* applies. Beal on Cardinal Rules of Interpretation (2nd ed. p. 162); *Ystradyfodwg Pontypridd Main Sewerage Board* v. *Bensted* (5).

In *Connecticut Mutual Life Assurance Co.* v. *Moore* (6), the trial judge, dealing with general questions in a form of

(1) [1863] 32 L.J. Q.B. 153, 157, 159, 160.
(2) [1908] 2 K.B. 863, 886.
(3) [1909] 1 K.B. 591, 596.
(4) [1921] 2 A.C. 125, 130.
(5) [1907] A.C. 264, 268.
(6) 6 App. Cas. 644.

medical examination somewhat similar to those now before us, said to the jury (p. 650):—

They have stipulated that his answers shall form part of the contract which he is about to enter into. They say to him in effect, "You must answer these questions correctly; if from forgetfulness or inadvertence you answer a question incorrectly, we hold the policy void." They have a right to make that stipulation; but it is, in my judgment, a stipulation that should be construed with great strictness. When they put a very general question under a stipulation of that kind, it is only reasonable and just to put on that general question a fair construction; for instance, take the question they put with reference to any other illness, local disease, or personal injury; I think that question must be read in a fair and common-sense way. If the applicant had had a headache the very day before, and had not stated it in his application, it could not be said that this policy was good for nothing simply because he had not stated that; and yet a doctor would tell you that a headache was an illness, and that it came, strictly speaking, within that term. Subject to that limitation, that the questions are to be read in a fair and common-sense way, having regard to all the circumstances surrounding the man, and all the information that the company may reasonably expect to receive, I tell you that, in my view, the company have required the applicant to give correct answers to the questions they put.

And again, referring to a question as to medical attendance and the evidence in regard to it, the judge said (p. 651):—

Now the term "attended" in a policy of this kind must be read in a reasonable manner. The mere circumstance that a man had gone to a physician for some trifling ailment, and had received some care or attention from him, would not, it appears to me, render him the attendant of the applicant in such a sense that it would be necessary to state that he had been his last medical man, or that he had last attended him. It appears to me that the attendance meant is an attendance for something that deserves consideration, and might be expected to be present to the mind of a man when he was making an application of this kind. The object of the question, I presume, is to enable the company to communicate with the last medical man of the applicant, so that if he pleases to give them information they may get it. At any rate they would know who he is then, and have an opportunity of seeing him; but they would not require that, if the applicant had got from him a piece of sticking plaster for a cut finger, his name should be in the application.

Their Lordships (p. 654)

after carefully considering the summing-up of the learned judge * * * are unable to say that the jury was in any way misdirected or misled and a new trial was refused.

Reading questions nos. 17 to 20 together and with the particulars and details asked in respect of them, and having regard to the fact that they were prepared by the company, they should, in my opinion, be construed as requiring the assured to state only diseases, illnesses or injuries of a somewhat serious kind and to give the names and addresses

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only of physicians whom he had consulted and who had prescribed for or treated him for some such matters.

Now let us consider briefly the matters the non-disclosure of which is said to establish the untruth of the insured's answers. At intervals during the years 1915, '16 and '17 a physician administered to the late Frederick Joseph Schuch a series of hypodermic injections consisting of a mixture of iron, arsenic and strychnine. Baldly stated, this no doubt looks formidable and would bespeak somewhat important medical treatment, probably warranting an inference that the insured had been suffering from recurrent attacks of a serious disease or illness. But the circumstances must be carefully considered before such a conclusion is reached. For them we must resort to the evidence of Mrs. Schuch, the widow of the insured, and of Dr. Fierheller, who administered the injections and was a witness for the defendants—and the evidence of the latter must be taken as a whole. The learned trial judge in his carefully considered judgment said:—

> The witnesses on both sides gave evidence, as I thought, honestly and with the desire to give their sincere views.

While Dr. Fierheller's use of terms may not at times have been quite precise, the substance of his evidence is clear and I respectfully but emphatically dissent from the animadversion upon his credibility implied, if not expressed, in the judgment of Mr. Justice Latchford and also from the conception of the tenor of his testimony indicated by Mr. Justice Riddell in the Appellate Divisional Court.

In the first place the medicine taken by Schuch was not a specific for any disease. It was a tonic suitable for a person in a nervous run-down condition ascribable to strain from over-work. The medical evidence is practically in accord on that point. It is likewise common ground that in the case of a person who manifests such a decided aversion to taking medicine through the mouth, as Schuch did, hypodermic administration is devoid of any significance indicative of the existence of serious trouble. It is also stated by Dr. Magner and conceded by Dr. Clarkson that the conditions that led to Schuch's taking this tonic in 1915 and again in '16 and '17 were independent one of the other. It was not a continuous condition of which outbreaks were intermittent. He had no chronic trouble.

The only disease for which it is suggested by the defendants that Schuch was treated by Dr. Fierheller was anæmia; and the sole basis for that suggestion is an unfortunately loose use of the phrase "anæmic condition" by Dr. Fierheller. More than once Dr. Fierheller explained that he did not intend to suggest that Schuch had anæmia, either pernicious or secondary—that he was satisfied he had neither—that he meant nothing more than that

> he was a little pale as a man might be from overwork and being tired—purely that he was pale and had not a very robust appearance. He was a spare, sallow-complexioned fellow.

Much of the medical evidence for the defence is based on the assumption that Schuch in fact had anæmia—notably that of Dr. Merchant and to some extent that of Dr. McMahon.

It is undisputed that Schuch took his business very seriously, that he was a hard-working man at all times and very attentive to business. Mrs. Schuch tells us that he "felt he had to do everybody else's work." In 1915, '16 and '17 his factory was engaged in the manufacture of munitions which entailed a great deal of extra work. During that time Schuch was rarely at home, his wife tells us, leaving early in the morning and returning at midnight. She saw him only on Sundays and he was then unusually tired after the week's work. Yet he never missed a day at the factory and he did not think it necessary to have a medical examination. He did not "consult" a physician during this period.

Mrs. Schuch was under the care of Dr. Fierheller for bronchitis in January, 1915, and, as she "did not pick up," the doctor in February prescribed for her as a tonic the mixture of iron, arsenic and strychnine and he administered it hypodermically. Schuch learned of this treatment and its beneficial effect. Mrs. Schuch describes him as "fussy" about his health and disposed to try any medicine that was in the house. "He took all my cough medicines and that sort of thing." He also took any patent medicines that were about. She adds that he had no illness—"nothing beyond coming home very tired."

Dr. Fierheller made no examination of Schuch. He had never attended him. He cannot remember whether on the first occasion, in March, 1915, he prescribed for Schuch the treatment of iron, arsenic and strychnine, which his

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wife had been taking, or whether Schuch did not ask for it and he did not merely accede to his request. He says Schuch's condition did not call for any examination. He was "nervous, tired and run-down," and "that was all." The doctor is quite clear, however, that in 1916 and 1917 Schuch simply came back and said something to the effect —"I am feeling a bit run-down and would like some more of those treatments"; and the doctor again acceded to his wish. There was no consultation, no advice and no prescription. Schuch responding to these treatments, the doctor adds, showed that he had no chronic trouble but that it was merely a case of an overworked man tired and run down—so it appeared to him. Dr. Magner thought the improvement devoid of significance. Dr. Fierheller adds:—

> He was the sort of man who fussed about himself a bit when he was not just feeling up to the mark and liked the doctor to give him something as a "pick-me-up"—something as a tonic.

That, I think, is a fair synopsis of the circumstances under which Schuch received the hypodermic tonic injections from Dr. Fierheller in 1915, '16 and 17. On the evidence before us he then had no disease. Dr. Clarkson, a leading expert witness for the defendants, said that there was nothing in Dr. Fierheller's evidence as to Schuch's condition and the treatments given him to indicate that he was sick. Even Dr. McMahon, the most uncompromising of the defendants' medical experts, admits that if on examination he found Schuch a healthy man, as Dr. McCullough did, he might have regarded him as "all right" as an insurance risk although informed that he had been taking a mixture of iron, arsenic and strychnine as a tonic.

In my opinion, Schuch might very well, as a reasonable man, *Joel* v. *Law Union and Crown Insurance Co.* (1) have considered that during these years he had not an illness, *Yorke* v. *Yorkshire Ins. Co.* (2), which the insurance company would expect him to mention in answering question no. 17 and that he had not consulted or been prescribed for or treated by a physician within the meaning of question no. 18. Under the circumstances the hypodermic injections might well have been deemed as of no greater significance than would have been the taking of any well-

(1) [1908] 2 K.B. 863, 884. (2) [1918] 1 K.B. 662, 667-8.

known tonic bought at a pharmacy and self-administered —not "treatments" within the purview of question no. 18. Schuch, I think, almost certainly regarded his condition in each of those three years as due entirely to overwork and at most a "trivial ailment" which he was not required to particularize.

Dr. McCullough was quite unable to recall certain matters that Schuch had mentioned to him which he had covered by the term of his own choosing "trivial ailments." Schuch probably did not mention Dr. Fierheller's name to Dr. McCullough; but it is quite likely that he did allude to having been run down from overwork and, with Meredith, C. J. C. P. (notwithstanding Dr. McCullough's denial), I am not entirely satisfied that he was not told about Schuch's having taken a tonic and that the doctor did not forget that incident. He would, quite properly in my opinion, if fully informed as to the taking of the tonic and the attendant circumstances, have described the conditions for which it was taken as "trivial ailments." Dr. McCullough himself tells us that if he had had before him all that Dr. Fierheller deposed to his examination of Schuch would have been just the same, and he would have sent in his report with a recommendation of acceptance. Drs. Magner, King and Rolph agree that if on examination they had found Schuch to be in good health, as Dr. McCullough did, nothing in Dr. Fierheller's testimony would have affected their judgment that he was a good insurance risk. Upon the whole of Dr. Fierheller's evidence, Schuch, during 1915, '16 and '17, in my opinion, did not have an illness or disease which he was obliged to disclose under question no. 17 and it does not appear that he consulted or was prescribed for by a physician.

I am at a loss to understand how Mr. Justice Middleton received the impression that Schuch

had consulted and had been prescribed for and treated by Dr. George Fierheller on many occasions during the five years.

The only evidence on this aspect of the case is that of Dr. Fierheller. Whatever doubt may exist as to Schuch having been "treated" (I entertain none), there can be no question that neither consultation nor prescription has been shown. Dr. Fierheller distinctly negatives both for 1916 and 1917—and as to 1915, while he at first said that it was

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partly true that he had acted on Schuch's suggestion in giving him the hypodermics, he was not clear whether they began by his prescribing them or by Schuch's asking for them. Yet Mr. Justice Middleton's judgment against the plaintiff is based on "the matter (to him) of moment" that Schuch

had during the five years consulted and been treated by Dr. Fierheller at least seventy times,

because he says

it may well be that the physical condition described by Dr. Fierheller would not amount to "illnesses, diseases, injuries or surgical operations" within the meaning of question No. 17, and if the case depended upon that and that alone, I do not think I should have come to the conclusion at which I have arrived.

For reasons already fully stated question no. 18, in my opinion, does not cover the "treatments" which Dr. Fierheller administered. The burden of proving the untruth of the answers made by Schuch rested upon the defendants who alleged it. Taylor on Evidence (11th ed.) Vol. 1, par. 367; *Joel* v. *Law Union and Crown Ins. Co.* (1); *Dillon* v. *Mutual Reserve Fund Life Association* (2); *Elkin* v. *Janson* (3). That burden they have not discharged.

Whether if the answers should be regarded as untrue in the sense that they were inaccurate, the facts not disclosed should be held to be material is perhaps not quite so clear. With the trial judge I strongly incline to think that

if the facts as stated in the evidence by Dr. Fierheller with relation to the condition of Schuch and his treatment had been known to the defendant company it is not at all probable that they would have refused the premium and the issue of the policy, nor do I think that they would even have required the examination which the officials now think they would have required.

The evidence of Drs. McCullough, Magner, King and Rolph, to which allusion has been made, goes far to support these views. If in order to find materiality the court or jury should be satisfied that the matter not disclosed *would,* if disclosed, have led to the risk being declined, I would be disposed to find against materiality. If, on the other hand, it is sufficient that it *might* have led to that result (*Brownlie* v. *Campbell* (4); but see *Smith* v. *Chadwick* (5)), non-materiality is not so obvious. In *Nova*

(1) [1908] 2 K.B. 863, 880.
(2) [1904] 4 Ont. W.R. 351, 354.
(3) [1845] 14 L.J. Ex. 201.
(4) 5 App. Cas. 925, 954.
(5) 9 App. Cas. 187, 196.

Scotia Marine Is. Co. v. *Stephenson* (1), Mr. Justice King delivering the judgment of this court said:

> The test of materiality is the probable effect which the statements might naturally and reasonably be expected to produce on the mind of the underwriter in weighing the risk and considering the premium.

In 17 Halsbury's Laws of Eng. at p. 550, the question is stated to be

> whether the matter represented or concealed was such as would influence the mind of a reasonable and prudent insurer in accepting or declining the risk.

See 6 Edw. VII (Imp.) ch. 41, s. 18, s.s. 2.

What a reasonable man would regard as material is not necessarily what the assured so regarded, *Joel* v. *Law Union and Crown Ins. Co.* (2). See also *Pickersgill, etc.* v. *London and Provincial, etc. Ins. Co.* (3); *Traill* v. *Baring* (4). In the view I have taken, however, that by its requisitions for information the company elected to relieve the insured from any duty to disclose matters in regard to his past health which its questions did not cover (having by an express provision of its policy agreed that only the statements contained in the written application should avail it as matter of defence; *Joel* v. *Union and Crown Ins. Co.* (2); *Ayrey* v. *British Legal and United Provident Ass. Co.* (5)), and that there was in fact no misrepresentation or concealment of anything required to be disclosed by questions nos. 17, 18, 19 and 20 it would seem to be unnecessary to pass upon the question of materiality.

But, whatever should be held on that issue, I agree with the learned Chief Justice of the Common Pleas that the evidence did not warrant the finding of the majority in the Appellate Divisional Court that there had been fraudulent misrepresentation or suppression by the insured. The trial judge, who saw and heard Dr. Fierheller and Dr. McCullough give evidence and was in the best position to pass upon that issue, distinctly held that Schuch had

> " effected the insurance in good faith."

That finding in my opinion should not have been disturbed. *Nocton* v. *Lord Ashburton* (6).

(1) 23 Can. S.C.R. 137, 141.
(2) [1908] 2 K.B. 863, 884.
(3) [1912] 3 K.B. 614, 619.
(4) 4 DeG., J. & S., 318, 330.
(5) [1918] 1 K.B. 136, 141.
(6) [1914] A.C. 932, 945.

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I would for these reasons allow this appeal with costs here and in the Divisional Court and restore the judgment of the trial judge.

MIGNAULT J.—Much turns in this case on the proper construction to be placed on the questions and answers contained in the medical examination of the insured, the late Frederick Joseph Schuch, on December 3, 1918. The questions are on a printed form and the answers, as they were required to be, are in the handwriting of the medical examiner, who was Dr. J. S. McCullough of Toronto where the contract of insurance was made. At the end of the examination paper, the insured certified that his answers to the questions were fully and correctly recorded by the medical examiner.

The questions and answers on which the respondent relies to dispute liability are the following. (See statement by Mr. Justice Anglin at page 40.)

These answers were written by Dr. McCullough. Schuch had told him of a surgical operation he had had eight years before for hernia, as appears by the answer to question 28, but the medical examiner did not note it under question 17. Dr. McCullough is unable to tell what statement Schuch made that he described as "trivial ailments since childhood," which were Dr. McCullough's own words.

The respondent contests its liability under the insurance policy on the ground that these answers were untrue, and it also alleges fraud on the part of Schuch. The insurance was effected in December, 1918. Schuch died in the beginning of April, 1920, after an operation for intestinal cancer. It is not pretended that this cancer existed, or if it did that it could have been discovered, at the time of the medical examination. But it is said that in 1915, 1916 and 1917 Schuch consulted, and was treated by, Dr. George Fierheller, of Toronto, for a nervous, run-down and somewhat anaemic condition which fact he should have disclosed, and that consequently the policy is void.

The evidence is almost exclusively of a medical character. Dr. Fierheller described the condition of Schuch at the time of the alleged treatments. Dr. McCullough spoke of his examination of the insured, and then each side called the regulation number of medical experts who testified on the

basis of the evidence given by Dr. Fierheller. There were only three lay witnesses, the agent who solicited the insurance, Schuch's widow, and an employee of the assured.

Schuch, during the years 1915, 1916, 1917 and 1918, was a very busy man engaged in a large business and making out of it more than $25,000 the year previous to the insurance, according to information secured by the respondent's inspector. During a part of this time he manufactured munitions for the government. He never took a holiday. In appearance, he was a rather tall, thin man, with a pale or sallow complexion and had been so for years. His exact weight, at the time of the insurance, was 148 pounds and his height 5 feet and 10½ inches.

Dr. Fierheller states that in the spring of 1915 he was in attendance on Schuch's wife for bronchitis. He prescribed a tonic for her, consisting of a mixture of arsenic, iron and strychnine, known as Zambellatti's preparation, which is a well recognized tonic medicine, and it was administered to her hypodermically. Whether at the doctor's or Schuch's suggestion the witness is unable to say, but at the same time as Mrs. Schuch received these injections they were given to the insured. He received this tonic during March, April and May, about very third day. In 1916 there were four similar treatments in April, three in May, six in August, seven in September and ten in October, the insured going to the physician's office for these injections. In 1917, from August 29th to October 28th, Schuch received an injection of this tonic about every three days. From October 28th, 1917, until August, 1919, there were no more treatments. It is to be observed that Schuch had these tonic injections administered to him entirely at his own request and without having consulted Dr. Fierheller, as the latter expressly says.

Dr. Fierheller, in his examination in chief, described Schuch's condition at the time he received this tonic as "very nervous, run-down and somewhat anaemic." But in his cross-examination he says he used the word anaemic loosely, as signifying that Schuch was a little pale. He did not suggest for an instant that he had anaemia, either secondary or pernicious, or of any kind whatever. Nor is there a word of evidence pointing to Schuch ever having

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had anaemia in any shape or form. He was very nervous and run-down, which can be explained by the fact that he was a very hard working man, and his worries would be increased during the war because he was by birth an Austrian although a Canadian citizen. And these treatments did him good.

Before going further, it should be stated that, according to the medical evidence on both sides, no significance is to be attached to the fact that this tonic mixture was taken by means of hypodermic injections instead of by the mouth.

The effect of Dr. Fierheller's evidence, to my mind, is correctly summed up by Dr. Edmund King, when he said:

> Well, after taking all Dr. Fierheller's evidence into consideration, I simply came to the conclusion that this was an overworked man, and after so much hard work he became exhausted and run-down, as we all do and want our holidays, and that he took his holidays in this particular manner by going and getting a boost-up, if I use that expression properly, a boost or a tonic, and whether he had it by the stomach or had it hypodermically, it is of no importance whatever.

The question now is whether, the onus being on it to make out a sufficient case of non-disclosure to avoid the policy, the respondent has discharged this onus. The trial judge thought that it had not; the members of the Appellate Divisional Court, with the exception of the Chief Justice of the Common Pleas who agreed with the trial judge, were of the contrary opinion. To answer it, I have read every word of the evidence most carefully, and I cannot help feeling that the incidents referred to by Dr. Fierheller have been somewhat grossly exaggerated. I think we are entitled, inasmuch as in a case of this nature the judge discharges the duty of a jury, to look at the whole matter in a common-sense way and as a reasonable juryman would, using our knowledge of the world and of men, for it would be news to me that a man who had occasionally taken a tonic, when he felt tired or run-down from overwork, should, when examined for insurance, state this fact to the medical examiner. Certainly a reasonable man would not consider it material to tell the medical examiner that he had taken a tonic from time to time as many thousands do without any reference whatever to their physician.

Moreover the true meaning of the questions submitted by the medical examiner must be considered, especially as they would impress the person examined, assuming him to

be a reasonable man, before coming to the conclusion, as the Appellate Court did, that the answers were untrue and fraudulent.

In my opinion, questions 17 and 18 must be read together. The insured is, by the latter question, asked to state every physician or practitioner who has prescribed for or treated him or whom he has consulted in the past five years. Obviously what is meant here—and any reasonable man would so understand it—is prescription, treatment or consultation in connection with the illnesses, diseases, injuries or surgical operations which the insured was asked to mention by question 17, the more so as the last words of question 18 refer back to question 17. Then consultations are emphasized by the heading "When consulted" under question 18, as they are emphasized in question 20, and here there is no evidence that Schuch ever consulted about any illness Dr. Fierheller, who cannot say that he did. Clearly if a man consulted a physician to find out whether he could safely drink the city water, he would not be required to state that under any reasonable construction of question 18. It must be consultation in connection with the illnesses, etc., enumerated in question 17, and there is no evidence that Schuch was ill, or what is more material, that he knew he was ill.

Dealing now with the duty of disclosure incumbent on the insured under a contract of life insurance at common law, I may refer to the often quoted dictum of Lord Blackburn in *Brownlie* v. *Campbell* (1).

> In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is *uberrima fides* (sic.), that if you know of any circumstance at all that may influence the underwriters' opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge if he does take it, you will state what you know. There is an obligation there to disclose what you know; and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy.

The dictum of Lord Blackburn may be further supplemented by what Fletcher Moulton L.J., said after quoting it in *Joel* v. *Law Union and Crown Insurance Co.* (2).

> There is, therefore, something more than an obligation to treat the insurer honestly and frankly, and freely to tell him what the applicant thinks it is material he should know. That duty, no doubt, must be performed, but it does not suffice that the applicant should *bona fide* have

(1) 5 App. Cas. 925, at p. 954. (2) [1908] 2 K.B. 863, at p. 883.

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performed it to the best of his understanding. There is the further duty that he should do it to the extent that a reasonable man would have done it; and if he has fallen short of that by reason of his *bona fide* considering the matter not material, whereas the jury, as representing what a reasonable man would think, hold that it was material, he has failed in his duty, and the policy is avoided.

And at page 884, Fletcher Moulton L.J. adds:—

The question always is: Was the knowledge you possessed such that you ought to have disclosed it? Let me take an example. I will suppose that a man has, as is the case with most of us, occasionally had a headache. It may be that a particular one of these headaches would have told a brain specialist of hidden mischief. But to the man it was an ordinary headache undistinguishable from the rest. Now no reasonable man would deem it material to tell an insurance company of all the casual headaches he had had in his life, and, if he knew no more as to this particular headache than that it was an ordinary casual headache, there would be no breach of his duty towards the insurance company in not disclosing it. He possessed no knowledge that it was incumbent on him to disclose, because he knew of nothing which a reasonable man would deem material or of a character to influence the insurers in their action. It was what he did not know which would have been of this character, but he cannot be held liable for non-disclosure in respect of facts which he did not know.

Both the Dominion Parliament and the Ontario Legislature have enacted statutes (7-8 Geo. V (Can.), 1917, ch. 29; R.S.O., 1914, ch. 183, as amended by 5 Geo. V (Ont.), ch. 20, sect. 19) concerning the contract of insurance.

Subsections 5 and 6 of section 156 of the Ontario Act are as follows:—

(5) No contract of insurance shall contain or have indorsed upon it, or be made subject to any term, condition, stipulation, warranty or proviso, providing that such contract shall be avoided by reason of any statement in the application therefor, or inducing the entering into the contract by the corporation, unless such term, condition, stipulation, warranty or proviso is and is expressed to be limited to cases in which such statement is material to the contract, and no contract shall be avoided by reason of the inaccuracy of any such statement unless it is material to the contract.

(6) 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; and no admission, term, condition, stipulation, warranty or proviso to the contrary contained in the application or proposal for insurance, or in the instrument of contract, or in any agreement, or document relating thereto shall have any force or validity.

By the policy issued to Schuch, it is stipulated (reproducing paragraph (*d*) of section 91 of the federal Act) that this policy and the application herefor, copy of which is indorsed hereon or attached hereto, constitute the entire contract between the parties hereto. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such state-

ment 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 indorsed on or attached to this policy when issued.

Whether or not this condition and the enactments I have mentioned add anything to the common law, it appears clear that if the insured performed his duty of full disclosure to the extent that a reasonable man would have performed it, if he knew of nothing which a reasonable man would have deemed material or of a character to influence the insurers in their action, the insurance policy cannot be avoided for non-disclosure. Measured by this test, the answer made by Schuch to the question (question 21) whether he was in good health cannot be attacked, because Dr. McCullough, after a careful examination, came to the same conclusion. And the failure to mention that he had taken this tonic at different intervals when he felt tired or run down, does not, if no reasonable man would have deemed it material to tell an insurer of the tonics he had taken under such circumstances, amount to sufficient non-disclosure to avoid the policy.

I do not attach any importance to the *ex post facto* statement of the medical officers of the respondent that, if they had known that Schuch had had this tonic administered to him as stated by Dr. Fierheller, they would have refused to accept the risk. The test is not what they now say they would have done, but what any reasonable man would have considered material to tell them when these questions were put to the insured.

My conclusion is that Schuch disclosed everything which a reasonable man would have deemed material, and even more when he mentioned the small-pox he had had in infancy, and consequently I entirely share the opinion which the learned trial judge formed after hearing all the evidence.

I would therefore allow the appeal and restore the judgment of the learned trial judge with costs here and in the Appellate Court.

Appeal allowed with costs.

Solicitor for the appellant: *Lionel Davis.*

Solicitors for the respondent: *Arnoldi, Grierson & Parry.*