1960
*Nov. 3
Dec. 19

LLOYD LaFONTAINE (*Plaintiff*) ....APPELLANT;

AND

HARTFORD ACCIDENT AND INDEMNITY COMPANY (*Defendant*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Public liability policy placed by employer for employee—Termination of employment—Right of employer to cancel policy.

Courts—Inference of fact drawn by appeal court—Not to be interfered with unless clearly erroneous.

A term of the appellant's employment as a salesman for Hearst Corporation was that he should use his own car. The employer procured an individual insurance policy covering the employee against public liability for a period of one year from March 22, 1954. All that the employee did was to sign an application for the policy. Within a few days after the termination of his employment in May 1954, the appellant received an insurance identification card from the insurer. Shortly afterwards the policy was cancelled at the instance of Hearst, although there was no express term in the agreement of employment that the employer should have the right to cancel the policy before its expiration. The cancellation was made without the appellant's knowledge, and he learned of it only in November 1954 when he made enquiries of the insurer. Upon being so informed he made no protest. He was involved in an accident in February 1955, and then claimed indemnification after judgment went against him. The trial judge held in his favour, but this decision was reversed by a majority in the Court of Appeal. The appellant appealed to this Court.

Held (Cartwright J. dissenting): The appeal should be dismissed.

Per Kerwin C.J. and Abbott, Martland and Judson JJ.: The inference of fact drawn by the Court of Appeal that the employer, as a necessary incident of the right and authority to place the insurance as a term of the contract of employment, had the right to cancel it when the employment came to an end was correct. In any event the inference is one that can only be interfered with if this Court is satisfied that it is clearly erroneous. *Pelletier v. Shykofsky,* [1957] S.C.R. 635, referred to.

Per Cartwright J., *dissenting*: The Court may supply a term which the parties have failed to express in a contract only if satisfied that it is doing merely what the parties would clearly have done themselves had they thought about the matter. Here it was far from clear what the parties would have done under the circumstances. *Reigate v. Union Manufacturing Co. (Ramsbottom),* [1918] 1 K.B. 592, applied.

*PRESENT: Kerwin C.J. and Cartwright, Abbott, Martland and Judson JJ.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Wells J. Appeal dismissed, Cartwright J. dissenting.

R. N. Meakes, for the plaintiff, appellant.

T. N. Phelan, Q.C., for the defendant, respondent.

The judgment of Kerwin C.J. and of Abbott, Martland and Judson JJ. was delivered by

Judson J.:—The appellant, Lloyd LaFontaine, sued the respondent insurance company for indemnification against two judgments given against him as a result of a motor car accident. He succeeded at the trial but failed on appeal and he now seeks to have the judgment at trial restored.

From March 22, 1954, to May 25, 1954, the appellant was employed by Hearst Corporation of New York as a sales agent in its Magazine Division in Toronto. It was a term of his employment that he should use his own car. Since he had no insurance, the Hearst Corporation immediately applied for public liability insurance for him through its own brokers in New York. To comply with s. 194(1) of the Ontario *Insurance Act,* R.S.O. 1950, c. 183, it was necessary to have a signed application from the employee. At the request of the employer, the employee signed the application and an individual policy was eventually issued covering the employee against public liability from March 22, 1954, the date when the employment began, until March 22, 1955, while driving either for business or pleasure. The Hearst Corporation chose the insurance company through its own broker; it decided that there should be insurance as a condition of employment; it decided the extent of the coverage and the monetary limits; it paid the premium and took delivery of the policy. All that the employee did was to sign an application for the policy. The appellant's employment ended on May 25, 1954. On July 15, 1954, the Hearst Corporation surrendered the policy for cancellation and return of the unearned premium. The insurance company acted on this application on July 23, 1954.

Because there had been delays in correspondence between Toronto and New York the policy was not actually issued until May 21, 1954, but the employee had been covered from

[1] [1960] O.W.N. 25, 21 D.L.R. (2d) 403.

1960

LAFONTAINE v. HARTFORD ACCIDENT AND INDEMNITY CO.

Judson J.

March 22, 1954. This explains why the insurance company, within a few days after May 25, when the appellant's employment had already ended, sent to him an identification card, for use in case of an accident, which gave some particulars of the policy which had been issued. This might have led the appellant to conclude at the time that notwithstanding the termination of his employment, his automobile policy was still in force and would remain in force. It was in fact in force at the time of the receipt of the identification card but was cancelled shortly afterwards without his knowledge. He learned of the cancellation only in November 1954 when he made enquiries at the Toronto office of the insurance company and was told that the insurance had been cancelled in June and the unearned premium paid to the Hearst Corporation. He made no protest either to Hearst Corporation or the insurance company against what had been done. He was involved in an accident in February 1955 and then claimed indemnification after judgment went against him. He succeeded at the trial on his claim for indemnity because the learned trial judge held that the Hearst Corporation, while it had authority to take out the policy, had none to surrender it.

The Court of Appeal, Schroeder J.A. dissenting, held that the Hearst Corporation, as employer, in all the circumstances of this case, had authority to do both. The finding of the Court of Appeal was that the clearly understood purpose of this insurance was to cover the appellant while he was an employee and not for the period of one year stated in the policy; that the appellant knew that the employer had no interest in covering him after the termination of the employment, and that his failure to protest after his discovery of the cancellation was significant, not, it is true, in creating an estoppel, but as a tacit acknowledgment that he knew that the company had the right to surrender the policy.

What the Court of Appeal has found was that the scope of the agency was the insurance of the appellant against public liability during the term of the employment and not after its termination. There was express authority to place this insurance in the form of the signed application. The fact that the policy was for a term of one year did not entitle the appellant to this protection if his employment ceased

within the year. The employer, therefore, as a necessary incident of the right and authority to place this insurance as a term of the contract of employment, had the right to cancel it when the employment came to an end. This, of course, is an inference of fact drawn by the Court of Appeal and differing from that of the learned trial judge. It is, in my respectful opinion, the correct inference from the undisputed facts but in any event it is one that can only be interfered with if this Court is satisfied that it is clearly erroneous. (*Pelletier v. Shykofsky*[1])

I would dismiss the appeal with costs.

CARTWRIGHT J. (*dissenting*):—The facts out of which this appeal arises are not in dispute. They are stated in the reasons of my brother Judson. I shall endeavour to refrain from repetition but wish to emphasize certain matters.

By the policy which was admittedly issued by the respondent to the appellant the former agreed to indemnify the latter, and every other person who with the appellant's consent should personally drive the automobile belonging to the appellant and described in the policy, against the liability imposed by law upon the appellant or upon any such person for loss or damage arising from the ownership or operation of the automobile. The purposes for which the automobile was to be chiefly used were stated in the policy to be "business and pleasure".

It will be observed that the policy afforded protection to the appellant with which his employer the Hearst Corporation, hereinafter referred to as "Hearst", was not concerned. Hearst would be exposed to the risk of vicarious liability for injuries inflicted or damage done by the negligent operation of the automobile only if the appellant were at the time of such operation using the automobile on the business of Hearst.

There was no express term in the agreement of employment between the appellant and Hearst that the latter should have the right to cancel the policy before its expiration. The difference of opinion, between the majority in the Court of Appeal on the one hand and the learned trial judge and Schroeder J.A. on the other, is as to whether or not the Court should imply such a term.

[1] [1957] S.C.R. 635.

1960

LAFONTAINE v. HARTFORD ACCIDENT AND INDEMNITY Co.

Cartwright J.

On this question I agree with the conclusion reached by Schroeder J.A. and by the learned trial judge and also with their reasons, which make it unnecessary to refer at length to the authorities with which they deal so fully.

The test to be applied in determining whether or not the Court should imply a term which the parties have not expressed has been stated by several judges in varying language but without difference in substance.

In *Reigate v. Union Manufacturing Co. (Ramsbottom)*[1], Scrutton L.J. said:

> A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case,' they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear.' Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.

Applying the test suggested in this passage to the circumstances of the case at bar, it appears to me that if some one had said to the appellant and the officer of Hearst while they were negotiating the contract of employment, "What will happen in regard to the insurance policy if the employment terminates during its currency?" there is no answer which it can be said would have been given by both of them as a matter of course. There are, I think, a number of answers any one of which might have been made by reasonable business men. I suggest the following examples and doubtless others could be given.

(i) Hearst may surrender the policy for cancellation at any time after the employment terminates, without giving any notice to the appellant and may accept and retain the portion of the premium that is refunded. (This is the term implied by the judgment of the majority in the Court of Appeal.)

(ii) If Hearst terminates the employment for any reason other than the misconduct of the employee, the policy will be handed over to the appellant without obligation on his part.

[1] [1918] 1 K.B. 592 at 605, 87 L.J.K.B. 724.

(iii) Hearst will give the appellant the option of taking delivery of the policy and paying to Hearst the proportionate part of the premium for the unexpired term, or of having it cancelled and allowing Hearst to retain the portion of the premium refunded.

(iv) Hearst may surrender the policy for cancellation at any time after the employment terminates upon giving the appellant two weeks notice of its intention so to do, in order that he may have an opportunity of obtaining other insurance if he so desires.

I find myself quite unable to say that if the suggested question had been raised both parties would have said "Of course the agreement will be that set out in example (i)". Personally, I think it more likely that some discussion would have been necessary and that the parties would have agreed on the term set out in example (iii) which would adequately protect the rights of both Hearst and the appellant and appears to me to be the most reasonable of those I have suggested.

The Court may supply a term which the parties have failed to express in a contract only if satisfied that it is doing merely what the parties would clearly have done themselves had they thought about the matter. In the circumstances of this case I think it far from clear what the parties would have done.

I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the learned trial judge with costs throughout.

Appeal dismissed with costs, CARTWRIGHT J. *dissenting.*

Solicitors for the plaintiff, appellant: Palamar & Hebert, Toronto.

Solicitors for the defendant, respondent: Phelan, O'Brien, Phelan & Rutherford, Toronto.