1937
* Oct. 14, 15.
1938
* Mar. 25.

ALICE MAUD PRICE (PLAINTIFF) ..... APPELLANT;

AND

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Insurance (Accident)—Death of insured—Suit by beneficiary to recover under policy—Proximate cause of death—Taking of insulin (for diabetic condition) in too large a dose, alleged as cause—Accident Insurance Act, R.S.N.B., 1927, c. 85, s. 5—Age of insured—Construction of policy—Evidence—Admissibility of statements of deceased persons.

Plaintiff sued to recover, as beneficiary, upon an accident insurance policy upon the life of her deceased husband. The basis of her claim was that his death was caused by his having taken insulin (for his diabetic

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

condition) on the occasion in question in too large a dose. The policy by its terms insured against (*inter alia*) death resulting from "bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means." S. 5 (in force at the time of deceased's death) of the New Brunswick *Accident Insurance Act* provided that "in every contract of accident insurance, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the indirect result of his intentional act * * *." At the trial the following (amongst other) questions were submitted to and answered by the jury: "Did the insured accidentally, and by mistake, take an overdose of insulin?" A. "Yes." "Was [his] death caused solely by taking, accidentally, and by mistake, an overdose of insulin?" A. "Yes, indirectly." "Was [his] death caused by, or contributed to, by diabetes, Bright's disease, hardening of the arteries, or any other diseases?" A. "Diabetes indirectly." "If you answer 'yes' to question [last above preceding], in what way was [his] death so caused or contributed to?" A. "Insulin reaction."

The trial Judge dismissed the action, holding "that, upon the facts as proven and upon the law applicable to the questions at issue, notwithstanding the findings of the jury, the plaintiff is not entitled to recover." The dismissal of the action was affirmed (by a majority) by the Appeal Division of the Supreme Court of New Brunswick (11 M.P.R. 490). Plaintiff appealed.

Held: There should be a new trial. (Crocket J., dissenting, would dismiss the appeal).

In applying said s. 5 of the *Accident Insurance Act* to the case, the essential point was that in law (and upon the proper construction of s. 5) the external force or agency which occasions the bodily injury must be the proximate cause of death. The jury's answers had not determined the vital issue whether or not the taking of the insulin on the occasion in question was the proximate cause of the insured's death.

Two incidental issues were decided (and therefore excepted from the new trial) as follows: (1) As to the allegation of non-disclosure of material facts at the time the last certificate for renewal of the policy was delivered: The New Brunswick statutory law requires, in order to avoid a contract of insurance on the ground of non-disclosure, that there be a "conscious concealment"; and such a concealment was not established by the evidence. (2) As to a provision in the policy that it should "not cover for injuries or be in force upon any person over the age of 65 years"—deceased being under 65 at the date of delivery of the last renewal certificate, but reaching 65 years of age before the date of the alleged taking of the dose of insulin in question: The words in the policy were not sufficiently precise and definite to make the policy inoperative when the insured reached 65 years of age, the last renewal receipt having been issued when he was under that age.

Certain cautionary remarks made with regard to admissibility in evidence of statements of deceased persons.

Per Crocket J., dissenting: The appeal should be dismissed. There was no evidence that the insured's death was caused by accident within the meaning of the policy or of said s. 5 of the Act. There could be no recovery without proof that his death resulted from bodily injury

1938

PRICE v. DOMINION OF CANADA GENERAL INSUR. CO.

alone (effected as stipulated in the policy). Plaintiff's allegation, upon which her whole case rested, that deceased "accidentally and by mistake" took an overdose of insulin, "as a result whereof and not otherwise" he came to his death, constituted the decisive issue at the trial, and the questions aforesaid left to the jury covered that issue. A fair summary of their answers was that they thought that, but for the diabetes, deceased would not have died. Whether or not they intended so to find, it was the clear effect of the whole evidence. Therefore plaintiff was disentitled to recover, under the explicit terms of the policy and upon a proper construction of said s. 5 of the *Accident Insurance Act*. S. 5 does not exclude the maxim *causa proxima*. There can be no recovery under a contract of accident insurance, for bodily injury or death resulting therefrom, unless external force or agency was the proximate cause of that injury. The admission, against objection, of evidence of a statement by deceased to plaintiff that he had taken too much insulin was improper as contravening the rule against hearsay evidence; in any event the statement could add nothing to plaintiff's case, it being as consistent with deceased having intentionally taken more insulin than he usually took as with his having taken it accidentally and by mistake; in no case, in view of the fact that he took it in the course of his treatment for his disease, as he had been regularly doing, could the objectionable evidence have any bearing upon the issue as to whether his death was directly caused by external force or agency within the meaning either of the policy or of said s. 5 of the Act.

APPEAL by the plaintiff from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), dismissing (Harrison J. dissenting) her appeal from the judgment of Barry, C.J., K.B.D., dismissing her action.

Plaintiff sued to recover, as beneficiary, upon an accident insurance policy by which the defendant insured the plaintiff's husband against (*inter alia*) loss of life resulting ("from such injuries alone within 90 days from the date of accident") from "bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means," for 12 months from March 1, 1924. The policy was renewed from year to year, the last renewal certificate being dated March 1, 1932, and renewing the policy up to noon of March 1, 1933. The insured became very ill in the afternoon of February 26, 1933, and died on March 1, 1933. The basis of the plaintiff's claim under the policy was that the insured's death was caused by his having taken (at a time during the morning of February 26, 1933) insulin for his diabetic condition in too large a dose.

(1) 11 M.P.R. 490; [1937] 2 D.L.R. 369.

Section 5 of the *Accident Insurance Act*, R.S.N.B., 1927, c. 85 (which section was in force at the time of deceased's death, but has since been repealed) read as follows:

In every contract of accident insurance, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the indirect result of his intentional act, and no term, condition, stipulation, warranty or proviso of the contract, varying the obligation or liability of the insurer shall, as against the insured, have any force or validity, but the contract may provide for the exclusion from the risks insured against of accidents arising from any hazard or class of hazard expressly stated in the policy.

The policy provided that it

shall not cover for injuries or be in force upon any person over the age of 65 years, or cover for sickness or be in force upon any person over the age of 60 years, and shall not be renewed after the insured has reached the specified ages. Any premiums paid for any person over the specified ages shall be returned upon request.

The insured (according to a finding at the trial) reached the age of 65 years on February 14, 1933.

The case was tried by Barry, C.J., K.B.D., with a jury. Questions were submitted to and answered by the jury. Entry of verdict was reserved until after argument of questions involved. The argument was later heard, and subsequently the trial Judge delivered reasons, concluding as follows:

After a careful consideration of the evidence in the case, I have come to the conclusion, that upon the facts as proven and upon the law applicable to the questions at issue, notwithstanding the findings of the jury, the plaintiff is not entitled to recover in the action. A verdict is therefore entered for the defendant: the plaintiff's action is dismissed with costs.

An appeal by the plaintiff to the Appeal Division of the Supreme Court of New Brunswick was dismissed with costs (Harrison J. dissenting) (1). The plaintiff appealed to this Court.

O. M. Biggar K.C. and *J. F. H. Teed K.C.* for the appellant.

P. J. Hughes K.C. and *J. E. Friel* for the respondent.

The judgment of the majority of the Court (The Chief Justice and Davis, Kerwin and Hudson JJ.) was delivered by

DAVIS J.—The appellant seeks in this action to recover against the respondent as the beneficiary of an accident insurance policy upon the life of her deceased husband.

(1) 11 M.P.R. 490; [1937] 2 D.L.R. 369.

1938

PRICE v. DOMINION OF CANADA GENERAL INSUR. CO.

Davis J.

The real question in issue, broadly speaking, is whether or not her husband's death was caused by accident. The deceased husband was a medical practitioner, sixty-five years of age at the time of his death, and the basis of the claim under the policy is that his death was caused by his having taken insulin for his diabetic condition on the morning in question in too large a dose. There is no direct evidence that he took any insulin the morning in question but it is a fair inference, and really not in dispute, that he had taken insulin that morning, as he had been accustomed to do for several months each morning and each evening. Whether on the particular occasion the quantity he took was in excess of the quantity that had been prescribed for him and which he had been taking regularly for some months or whether he took the usual quantity that morning but it was too much for his system at that particular time is not made plain because, of course, no one knows the exact amount he did take. There is no suggestion that, whatever the amount was, there was any indication of suicide.

A real difficulty in the case arises out of a section in the New Brunswick *Accident Insurance Act*, which, while since repealed (as a similar provision in other provincial statutes has been repealed), was in force at the time of the deceased's death and governs the case. The section is as follows:

> 5. In every contract of accident insurance, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the indirect result of his intentional act, and no term, condition, stipulation, warranty or proviso of the contract, varying the obligation or liability of the insurer shall, as against the insured, have any force or validity, but the contract may provide for the exclusion from the risks insured against of accidents arising from any hazard or class of hazard expressly stated in the policy.

The section was obviously intended to put an end to defences by accident insurance companies which had raised technical and confusing issues and the statute therefore created liability in the companies whether the event insured against (i.e., the accident) happened "without the direct intent of the person injured" or "as the indirect result of his intentional act." In applying the section to the circumstances of this case the essential point is that

in law the external force or agency which occasions the bodily injury must be the proximate cause of the death.

Scrutton, J. (as he then was) in *Coxe* v. *Employers' Liability Assurance Corporation, Limited* (1), in construing a condition in an accident insurance policy, said:

> The construction of this condition is not very easy, and it is clear that several questions might arise upon it; but, dealing with the particular matter which is before me, namely, whether I ought to uphold the finding of the arbitrator that the death of the deceased was indirectly traceable to war, I start with the consideration that to all policies of insurance, whether marine or accident, the maxim *causa proxima non remota spectatur* is to be applied if possible. The immediate cause must be looked at, and not one or more of the variety of causes which if traced without limit might be said to go back to the birth of the assured. For that reason, when there are words which at first sight go a little further they are still construed in accordance with that universal maxim. Thus it has been held upon the words "from all consequences of hostilities" that the proximate and direct consequences of hostilities are alone to be looked at: *Ionides* v. *Universal Marine Insurance Co.* (2). Where the words were "damage consequent on collision" it was decided that only the immediate and necessary consequences of the collision were to be looked at, and not what happened at the port of refuge in consequence of the collision: *Pink* v. *Fleming* (3). In *Lawrence* v. *Accidental Insurance Co.* (4), where the assured was killed by a train and was on the line because, just previous to the train passing, he had had a fit, and there was an exception that the policy did not insure in case of death arising from fits or any disease whatsoever arising before or at the time or following such accidental injury, the immediate cause was again looked at, and it was held that the assured's representatives could recover although a fit placed him on the line where the railway engine killed him. I have therefore to ascertain whether the language of this policy goes beyond and excludes the maxim.

The condition to which the policy was subject in that case was that the policy did not insure against death "directly or indirectly caused by, arising from, or traceable to * * * war." Scrutton J. proceeded to say that the words in the condition "caused by" and "arising from" did not give rise to any difficulty. "They are words which always have been construed as relating to the proximate cause. * * *" "But," he went on to say,

> the words which I find it impossible to escape from are "directly or indirectly." There does not appear to be any authority in which those words have been considered, and I find it impossible to reconcile them with the maxim *causa proxima non remota spectatur.*

The learned judge in that case concluded that the only possible effect which could be given to the words "directly

(1) [1916] 2 K.B. 629, at 633.
(2) (1863) 14 C.B. (N.S.) 259.
(3) (1890) 25 Q.B.D. 396.
(4) (1881) 7 Q.B.D. 216.

1938

PRICE v. DOMINION OF CANADA GENERAL INSUR. CO.

Davis J.

or indirectly" was that the maxim *causa proxima* was excluded.

In the section of the statute which governs the case before us, the words are "any bodily injury occasioned by external force or agency"—not, occasioned "directly or indirectly" by external force or agency. That being so, upon the proper construction of the section the external force or agency must be the proximate cause of the bodily injury insured against.

The case was tried with a jury and the real question for the jury was whether or not the taking of the insulin on the morning in question directly resulted in the death of the insured. There were twenty-one questions submitted to the jury and it is not at all surprising that their answers present a good deal of difficulty to us in ascertaining what their conclusion really was on the vital fact whether or not the insulin was the proximate cause of death. Four questions and answers may be mentioned:

1. Q. Did the insured accidentally, and by mistake, take an overdose of insulin?

A. Yes.

2. Q. Was the insured's death caused solely by taking, accidentally, and by mistake, an overdose of insulin?

A. Yes, indirectly.

8. Q. Was the insured's death caused by, or contributed to, by diabetes, Bright's disease, hardening of the arteries, or any other diseases?

A. Diabetes indirectly.

11. Q. If you answer "yes" to question No. 8 by the Court, in what way was the death of the insured so caused or contributed to?

A. Insulin reaction.

It is plain that the jury have not determined the vital issue as to whether or not the taking of the insulin on the morning in question was the proximate cause of death.

It is unfortunate that the case has to go back for a new trial but it seems to be inevitable. Two incidental issues must therefore be disposed of.

First, the allegation of non-disclosure of material facts at the time the last renewal receipt was delivered. The New Brunswick statute requires, in order to avoid a contract of insurance upon the ground of non-disclosure, that there should be a "conscious concealment." The evidence does not establish that there was any such concealment. The very serious change in the deceased's physical condition occurred after, and not before, the time of the delivery of the renewal receipt.

Then there is the question of age. The deceased was under sixty-five at the date of the delivery of the renewal receipt but was sixty-five before his death. The words in the policy are not sufficiently precise and definite to make the policy inoperative when the insured reaches sixty-five years of age, the last renewal receipt having been issued to the insured when he was under that age.

In the event of a new trial being had, it may be necessary for the trial judge to deal specifically with the question of the admissibility of an alleged statement of the deceased that he had "taken too much of the damn stuff." It is inadvisable that we should discuss the matter other than to observe that statements of a deceased person should never be admitted except where their admissibility as a matter of law has been clearly established. The person who is said to have spoken is dead; he cannot be put on oath nor can he be cross-examined as to the exact words of his statement. There is always the danger of mistake that cannot be corrected; and there is inherent frailty in the repetition of such statements, however much good faith there may be. The rules of law as to the admissibility of statements of deceased persons are now well settled and it will be for the trial judge, if the question is raised, to apply whatever may be the proper rule to the given facts. Reference might be had to *Garner* v. *Township of Stamford* (1) and *Amys* v. *Barton* (2).

We would allow the appeal and direct a new trial except on the incidental issues of non-disclosure and of age. The respondent should pay the costs of this appeal and of the appeal to the Court of Appeal of New Brunswick. The costs of the abortive trial shall abide the event of the new trial.

CROCKET J. (dissenting).—I think this appeal should be dismissed with costs for the reason that the record discloses no evidence that the death of the insured was caused by accident within the meaning either of the policy sued on or of s. 5 of the New Brunswick *Accident Insurance Act* which, though since repealed, was in force at the time of the insured's death. The policy itself insured the deceased against death resulting from "bodily injuries, effected

(1) (1903) 7 Ont. L.R. 50. (2) [1912] 1 K.B. 40.

1938

PRICE v. DOMINION OF CANADA GENERAL INSUR. CO.

Crocket J.

directly and independently of all other causes, through external, violent and accidental means" within 90 days from the date of accident. That there could be no recovery thereon without proof that the insured's death resulted from such a bodily injury alone is, I think, too clear for argument. The appellant's whole case rested upon the allegation that her husband "accidentally and by mistake took an overdose of insulin, as a result whereof and not otherwise [he] came to his death." This allegation constituted the decisive issue on the trial before Barry, C.J., K.B.D., and a jury, and His Lordship left to the jury two questions bearing upon and completely, as I think, covering that issue, i.e.,

1. Did the insured accidentally, and by mistake, take an overdose of insulin?

2. Was the insured's death caused solely by taking, accidentally, and by mistake, an overdose of insulin?

To the first of these questions the jury answered "Yes" and to the second "Yes, indirectly." His Lordship, however, also left to the jury another question, No. 8, bearing upon the same issue, "Was the insured's death caused by, or contributed to, by diabetes, Bright's disease, hardening of the arteries, or any other diseases?" to which the jury answered "Diabetes, indirectly." To still another question, which was placed before the jury at the request of the plaintiff's counsel, as required by the *Judicature Act*, viz.: "If you answer 'yes' to question No. 8 by the court, in what way was the death of the insured so caused or contributed to?" the jury answered "Insulin reaction."

Notwithstanding these answers, the learned trial Judge, after hearing argument upon a motion for the entry of judgment, dismissed the action, holding that there was not to be found in the whole record a particle of evidence to justify the jury's finding that the insured accidentally and by mistake took an overdose of insulin and that the answer to question No. 2 (which was really not responsive to the question put) was erroneous, and should have been "no" instead of "yes, indirectly."

I fully concur in the view expressed by the learned Chief Justice of New Brunswick in the majority judgment in the Appeal Court that a fair summary of the jury's answers to questions 2 and 8 by the court and question 11 by the plaintiff's counsel is that the jury thought that, but for the

diabetes, the man would not have died. Whether or not, however, that is what the jury really intended to find, that, in my judgment, is the clear and indisputable effect of the whole evidence and disentitles the plaintiff to recover under the explicit terms of the policy and upon a proper construction of the now repealed section of the New Brunswick *Accident Insurance Act* relied on.

I agree with my brother Davis that this section did not exclude the maxim *causa proxima* and that it follows that there can be no recovery under any contract of accident insurance, whether for a bodily injury, or for death directly resulting from a bodily injury, unless such bodily injury was directly caused by external force or agency, or, in other words, unless external force or agency was the proximate cause of such bodily injury. This is precisely the construction which the learned Chief Justice of New Brunswick and Grimmer, J., placed on the section in their majority judgment in the Appeal Court and upon which their decision affirming the dismissal of the action by the trial Judge was manifestly based. I should add, I also agree with Baxter, C.J.N.B., that the admission, against objection, of the testimony of the conversation between the appellant and the insured as to his having taken too much insulin was improper as contravening the rule against hearsay evidence, and that, in any event, the statement attributed by the appellant to her husband subsequently to the taking of the insulin, could add nothing to the appellant's case, as it is quite as consistent with his having intentionally taken more insulin than it was usual for him to take as with his having taken it accidentally and by mistake. In no case, in view of the undisputed fact that the insured had for many months previously been suffering from the disease of diabetes and took the insulin in the course of his treatment for that long pre-existing disease, as he had been doing twice a day regularly during that period for the purpose of reducing his blood sugar by its action, could the objectionable evidence have any bearing upon the issue as to whether his death was directly caused by external force or agency within the meaning, either of the policy or of s. 5 of the New Brunswick *Accident Insurance Act*.

1938

PRICE
v.
DOMINION OF CANADA GENERAL INSUR. CO.

Crocket J.

I can see, therefore, no justifiable ground upon which the case should be sent back for a new trial.

Appeal allowed with costs; new trial ordered.

Solicitor for the appellant: *E. Albert Reilly.*

Solicitors for the respondent: *Friel & Friel.*