NEW YORK LIFE INSURANCE COMPANY (DEFENDANT) ..... APPELLANT;

AND

DAME JENNIE HANDLER (PLAINTIFF) ..... RESPONDENT.

1936
* Nov. 11, 12.
1937
* Feb. 2.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Insurance, accident—Policy—Disability clauses—Total and permanent disability—Admitted by insurance company—Income payments made for a period of time—Discontinuance of payments on ground of cessation of disability—Payment of premiums under protest—Action for arrears of income payments and return of premiums paid under protest—Jury trial—Verdict—Findings in favour of insured as to disability—Prescription—Applicability of sub-sections 2 and 3 of section 216 of Quebec Insurance Act, R.S.Q., 1925, c. 243.

The appellant company, on March 3, 1927, issued a policy insuring the life of the respondent's husband, in her favour, for $15,000 or for $30,000 in the event of his death by accident, such policy also providing for an indemnity of $150 a month in the event of the insured suffering total and permanent disability. The stipulated premium was $375.90 payable half-yearly of which $34.35 was stated to be for the disability benefits. On the 31st of March, 1927, the insured assigned the policy to his wife, the respondent in this case. On the 17th of February, 1930, the insured met with an accident which so crippled his right hand that he was incapable of doing any manual work. The appellant company then admitted total disability within the meaning of the policy and paid the total disability benefit of $150 a month for a period of nineteen months, namely, until the 17th of October, 1931; it also waived the payment of all premiums falling due during that period under the terms of the policy. On November 12, 1931, the appellant company wrote the insured that, as he was no longer continuously totally disabled, it would discontinue making further disability payments. In 1932, the company appellant demanded payment of the two-yearly premiums of $375.90 falling due respectively on March 3 and September 3, 1932, which were paid under protest with an additional sum of $75.18 as exchange for United States money. On April 3, 1933, the respondent brought the present action to recover from the appellant company seventeen monthly disability benefit payments of $150 each from November 17, 1931, to March 17, 1933, plus $382.40 for excess value in United States over Canadian currency and for the return of the two half-yearly premiums paid under protest, with exchange, in 1932, i.e., $826.98. An incidental demand was made for seven additional monthly disability payments from March 17, 1933, to October 17, 1933, i.e., $1,050, plus $95 for excess value in United States over Canadian currency and also for the recovery of $834.38 being the amount of two additional premiums and exchange paid under protest in March and September, 1933: the total sum claimed being $5,738.76.

* PRESENT:—Rinfret, Crocket, Davis, Kerwin and Hudson JJ.

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The appellant company pleaded generally and, in particular, denied that from and after October 17, 1931, the respondent's husband was continuously and totally disabled within the conditions and terms of the policy. At the trial, the jury found that the insured had been totally disabled from February 17, 1930, up to the date of the verdict. The appellant's counsel, in support of a motion for the dismissal of the action, raised for the first time a point taken in the factum that, under subsections 2 and 3 of section 216 of the Quebec *Insurance Act,* R.S.Q., 1925, c. 243, the respondent's right of action was prescribed, because more than one year had elapsed since "the happening of the event insured against." The trial judge held that the action was so prescribed as far as the disability payments were concerned, but maintained it as to the claim for the return of premiums paid under protest in 1932 and 1933, i.e., the sum of $1,661.36. The appellate court added to the above judgment the sum of $2,066.38, arrears of disability payments which became due within the year of the institution of the action and, under the incidental demand, the sum of $1,145 arrears of disability payments which became due after the institution of the action, April 17 to October 17, 1933, the court holding that the five payments due from November 17, 1931, to March 17, 1932, were barred under the above-mentioned provision of the Quebec *Insurance Act,* thus increasing the amount awarded to the respondent from $1,661.36 to $4,872.74.

Held, that the prescriptions of subsections 2 and 3 of section 216 of the Quebec *Insurance Act* are not applicable to the state of facts as found in this case and cannot be held to bar any part of the respondent's action; and that the respondent is entitled to recover a further indemnity for the five months from November, 1931, to March, 1932, as well as for the nineteen months from April, 1932, to October, 1933, allowed by the Appellate Court. Therefore the respondent's action should be maintained for the full amount claimed therein, i.e., $5,738.76—The appellant company could only invoke the prescription contained in the Quebec *Insurance Act* by disproving the claim which was the subject of the respondent's action; this it has completely failed to do. On the contrary, the respondent has obtained from the trial court a verdict which has not been challenged in this Court, that the insured was totally disabled, within the meaning of the insurance policy sued on, at the time of the trial and had been continuously so totally disabled from February 17, 1930. This verdict was the outcome of the trial of the whole merits of the action. It must be taken as conclusively negativing the appellant's contention that the total disability, which the appellant company, the insurer, had recognized as continuing uninterruptedly and for which it had paid up to October 17, 1931, had ceased at any time thereafter, and, therefore, as negativing also its submission that the action was barred by the provisions of s. 216 (2) (3) of the Quebec *Insurance Act* on the assumption that the prescription there enacted might be treated as beginning to run against the plaintiff from the cessation of the total disability insured against. Upon the true construction of this insurance policy, in so far as it relates to the total disability benefits sued for, the risk insured against was the continuance of a condition of total and presumably permanent disability on the part of the insured, resulting from bodily injury or disease, and the statutory prescription relied on could have no application to the respondent's claim so long as the insured, once found to have been totally dis-

abled within the meaning of the policy, continued in that condition without interruption; the happening of the accident was not the event insured against, either within the meaning of this insurance contract or within the intendment of s. 216 (2) (3) of the Quebec *Insurance Act*.

Per Rinfret J.—The effect of the prescription resulting from subsections 2 and 3 of section 216 of the Quebec *Insurance Act* in respect to similar insurance policies has been dealt with by the appellate court in Quebec in three other cases besides the present one: *North American Life Insurance Co.* v. *Hudon* (Q.R. 55 K.B. 273), *Gagné* v. *New York Life Insurance Co.* (Q.R. 57 K.B. 60), and *Canada Life Insurance Co.* v. *Poulin* (Q.R. 57 K.B. 78). In the *Hudon* and the *Poulin* cases, the facts were different, as there the insurance company had not acknowledged the existence of the conditions of invalidity which entitled the insured to the benefits accruing under the policy and had not made a single payment of the monthly income to the insured; (the decision on the points raised in those cases should be reserved for future consideration)—In the *Gagné* case, the insurance company had admitted, as in this case, the "happening of the event insured against" and had acted upon the proof thereof submitted by the plaintiff and had made several monthly income payments, and the prescriptions of section 216 (2 and 3) of the *Insurance Act* are not, in that case as in the present one, applicable to such a state of facts. Moreover, the circumstances in the present case are more favourable to the claimant than in the *Gagné* case.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec, maintaining the judgment of the trial judge for $1,661.36 representing the return of premiums paid on an insurance policy during the period of the insured's disability and maintaining a cross-appeal by the respondent and ordering the appellant to pay the respondent a further sum of $3,211.38 for arrears of total and permanent disability payments. Cross-appeal by the respondent claiming a further sum of $866.02, as demanded by her action, for another period of total and permanent disability.

The material facts of the case and the questions at issue are stated in the above headnote and in the judgments now reported.

W. B. Scott K.C. and *J. F. Chisholm* for the appellant.

Brooke Claxton and *N. L. Rappaport* for the respondent.

The judgment of the court was delivered by

CROCKET J.—The appellant by its insurance policy under date of March 3, 1927, insured the life of the respondent Dame Jennie Handler's husband, a silk manufacturer, then resident in New Jersey, in the United States, in favour of

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his wife for $15,000 or for $30,000 in the event of his death by accident, and also agreed thereby upon receipt of due proof that the insured was "totally and presumably permanently disabled before age 60" as defined under the Total and Permanent Disability clauses thereof to pay to the insured one hundred and fifty dollars each month and to waive payment of premiums as provided in the said Total and Permanent Disability clauses. The stipulated premium was $375.90, payable half-yearly, of which $34.35 was stated to be for the disability benefits.

The material portions of the Total and Permanent Disability clauses of the policy are as follows:—

Disability shall be considered total whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit, provided such disability occurred after the insurance under this policy took effect and before the anniversary of the policy on which the insured's age at nearest birthday is sixty.

Upon receipt at the company's home office, before default in payment of premium, of due proof that the insured is totally disabled as above defined, and will be continuously so totally disabled for life, or if the proof submitted is not conclusive as to the permanency of such disability, but establishes that the insured is, and for a period of not less than three consecutive months immediately preceding receipt of proof has been, totally disabled as above defined, the following benefits will be granted.

(*a*) Waiver of premium.—The company will waive the payment of any premium falling due during the period of continuous total disability.

(*b*) Income payments.—The company will pay to the insured the monthly income stated on the first page hereof for each completed month from the commencement of and during the period of continuous total disability.

Before making any income payment or waiving any premium, the company may demand due proof of the continuance of total disability, but such proof will not be required oftener than once a year after such disability has continued for two full years. Upon failure to furnish such proof, or if the insured performs any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived.

The policy was duly assigned on March 31, 1927, to the insured's wife, the present respondent.

On February 17, 1930, the insured, who had removed to Canada, met with an injury to his right hand in the mill of the Canada Silks Limited at Actonville, Quebec. Proofs of the accident and the resulting disability were filed with the appellant in June after the lapse of three months from the occurrence of the accident. These were accepted as establishing total and presumably permanent disability under the terms of the policy, and the appellant paid the

total disability benefit of $150 a month for a period of nineteen months from February 17, 1930, the date of the accident, until October 17, 1931. It also waived the payment of all premiums falling due during this period under the terms of the policy. On November 12, 1931, it wrote the insured that no further income payments would be made as the insured was no longer continuously totally disabled within the meaning of the Disability Benefit provision of the policy and that the premiums thereafter due would become payable as before in conformity with the terms of the policy. It thereupon discontinued making further disability payments. In 1932 the appellant demanded payment of the two half-yearly premiums of $375.90 falling due respectively on March 3 and September 3 of that year. These two premiums were therefore paid under protest with an additional $75.18 to account for the difference in the existing exchange rates between Canadian and United States money, in which last-mentioned currency the premiums were payable under the terms of the insurance policy.

The action was brought by the present respondent and her husband on April 3, 1933, to recover seventeen monthly disability benefit payments of $150 each, from November 17, 1931, to March 17, 1933, plus $382.40—the aggregate excess value of these monthly benefit payments in United States over Canadian currency at the respective dates when such monthly income payments were alleged to have become due—and for the return of the two half-yearly premiums paid under protest in 1932.

An incidental demand was subsequently served for seven additional monthly disability payments from March 17, 1933, to October 17, 1933, plus $95—the aggregate excess value of these payments in United States over Canadian funds at the respective dates when it was claimed they should have been paid—and for the recovery as well of $834.38—the amount of two additional premiums and exchange thereon paid under protest in March and September, 1933. The total sum claimed in the principal action and the incidental demand was $5,738.76.

The action was tried before Chief Justice Greenshields and a jury on November 13, 1933. In answer to questions submitted by His Lordship the jury found that the insured

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is so disabled by a bodily injury or disease that he is wholly prevented from performing any work, from following any occupation or from engaging in any business for remuneration or profit;

that he was so totally disabled from February 17, 1930, and that he had been totally disabled continuously to the then present date.

The defendant's counsel having moved for the dismissal of the action the point was taken in the defendant's factum in support of this motion for the first time in the case that the action was barred by the provisions of s. 216, s. ss. 2 and 3 of the Quebec *Insurance Act*, R.S.Q., 1925, c. 243. These provisions are as follows:—

2. Any stipulation or agreement to the contrary notwithstanding any action or proceeding against the insurer for the recovery of any claim under or by virtue of a contract of insurance of the person may be commenced at any time within one year next after the happening of the event insured against, or within the further term of six months, by leave of a judge of the Superior Court, granted upon a petition, upon its being shown to his satisfaction that there was a reasonable excuse for not commencing the action or proceeding within the first-mentioned term.

3. But no such action or proceeding shall be commenced after the expiration of the year and additional six months, except in cases where death is presumed from the insured not having been heard of during seven years, in which case any action or proceeding may be commenced within one year and six months from the expiration of such period.

The learned Chief Justice, feeling himself bound by the decision of the Court of King's Bench in *The North American Life Insurance Co.* v. *Hudon* (1), decided that the action was prescribed by the above quoted provisions of the Quebec *Insurance Act*, so far as the disability payments claimed for were concerned, and accordingly dismissed the action for these payments. He maintained the action, however, as regards the claim for the return of the two premiums paid under protest in 1932, and the incidental demand for the two additional premiums paid in 1933, holding that the statutory prescription did not apply to any of these claims, and condemned the defendant to pay the plaintiff the sum of $1,661.36 therefor.

A majority of the Court of King's Bench (Rivard and Bond, JJ. dissenting) dismissed an appeal taken by the defendant from the Superior Court judgment, and maintained in part the plaintiff's cross-appeal thereon, adding to the judgment of the trial court a condemnation of the defendant to pay to the plaintiff under the principal action

(1) (1933) Q.R. 55 K.B. 273).

the sum of $2,066.39, arrears of disability payments which became due within the year of the institution of the action with interest from April 3, 1933, and under the incidental demand the sum of $1,145 arrears of disability payments which became due after the institution of the action, April 17 to October 17, 1933, with interest thereon from October 26, 1933.

The effect of the two appeals was to entitle the plaintiff to all the monthly disability payments claimed for in the principal action and incidental demand except those for the five months' period from November 17, 1931, to March 17, 1932, which were held to be barred under the provisions of s. 216, s. ss. 2 and 3 of the Quebec *Insurance Act,* and thus to increase the trial judgment in favour of the plaintiff from $1,661.36 to $4,872.74, with interest on the first twelve disability payments allowed from the date of the commencement of the action, and interest on the other seven payments claimed in the incidental demand from the date of that demand.

The only question involved in the present appeal is that of the construction of the above quoted provisions of the Quebec *Insurance Act* and its application to an action for the recovery of indemnity for such disability as that described in the insurance policy here sued on.

We are of the opinion that, upon the true construction of this insurance policy, in so far as it relates to the total disability benefits sued for, the risk insured against was the continuance of a condition of total and presumably permanent disability on the part of the insured, resulting from bodily injury or disease, and that the statutory prescription relied on could have no application to the plaintiff respondent's claim so long as the insured, once found to have been totally disabled within the meaning of the policy, continued in that condition without interruption. We cannot at all accede to the contention that the happening of the accident was the event insured against, either within the meaning of this insurance contract or within the intendment of s. 216 (2) of the Quebec *Insurance Act.*

Under no possible construction of the policy could any action or proceeding be taken against the insurer until the insured has continued to be totally disabled for a period of not less than three consecutive months. The accident or

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injury itself clearly affords no ground of action against the insurer. Nor do the results of any accident or injury or disease afford any ground for action unless those results totally disable the insured for at least three consecutive months, which continuous disability, though not conclusive as to the permanency thereof, the insurer expressly agrees to accept as *prima facie* proof of such permanency. Accordingly it agrees to

waive the payment of any premium falling due *during the period of continuous total disability,*

and to pay the stipulated monthly income

for each completed month from the commencement of and *during the period of continuous total disability.*

This agreement is subject to the proviso that the insurer before making any income payment or waiving any premium may demand due proof of "the continuance of total disability," but that such proof will not be required more than once a year after such disability has continued for two full years. These provisions and the others above quoted, we think, conclusively show that the existence and uninterrupted continuance of total disability as defined by the insurance policy alone affords a ground of action for the recovery of any of the unpaid indemnity contracted for. How can either the commencement or the cessation of such a condition of continuous total disability be said to be "the happening of the event insured against" by this policy? The legislature must be taken to have contemplated some specific event, which can be definitely fixed in point of time, when it prescribed a period

of one year next after the happening of the event insured against

as a limitation for the bringing of any action against an insurer for the recovery of any claim under or by virtue of a contract of insurance of the person—such, for example, as the death of the insured, whether as the result of accident or disease—not, we think, a continuous condition of total and presumably permanent disability such as is insured against by the provisions of the policy sued on in this action and for which no action or proceeding of any kind could be maintained for the recovery of the unpaid indemnity contracted for without proof that the insured was still totally disabled within the meaning of the definition of total disability set out in the policy and had continuously been so disabled from the initial development of

such disability. If the legislature had so intended it can hardly be supposed that it would have sought to bar such an action as this by limiting the period within which it could be brought to "one year from the happening of the event insured against." The only suggested possibility in the case of total and presumably permanent disability such as that which is the ground of this action is that the prescription might be held to begin to run from the cessation of the alleged disability. It is not, however, the cessation of the disability which is insured against but its continuance without interruption. If it were true that the prescription period began to run on the cessation of the total disability the appellant defendant could avail himself of the statutory prescription only by proving that the total and presumably permanent disability, for which it had paid for nineteen months, had ceased when it stopped its monthly payments in October, 1931, or at some time thereafter and more than one year before the commencement of the action. In other words, it could invoke the prescription only by disproving the claim which was the subject of the plaintiff's action. This it completely failed to do. On the contrary, the respondent plaintiff has obtained from the trial court a verdict, which has not been challenged in this Court, that the insured was totally disabled within the meaning of the insurance policy sued on at the time of the trial and had been continuously so totally disabled from February 17, 1930. This verdict was the outcome of the trial of the whole merits of the action. It must be taken as conclusively negativing the defendant's contention that the total disability, which the insurer had recognized as continuing uninterruptedly and for which it had paid up to October 17, 1931, had ceased at any time thereafter, and, therefore, as negativing also its submission that the action was barred by the provisions of s. 216 (2) of the Quebec *Insurance Act* on the insupportable assumption that the prescription there enacted might be treated as beginning to run against the plaintiff from the cessation of the total disability insured against. Whether or not therefore that enactment applies at all to actions for the recovery of indemnity for total disability under any other form of total disability insurance, we have no doubt for the reasons stated that it cannot rightly be held to bar this action, and that the plaintiff was entitled to recover indemnity for the five months, Novem-

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ber, 1931, to March, 1932, as well as for the nineteen months, April, 1932, to October, 1933, allowed by the Court of King's Bench.

The appeal will therefore be dismissed and the respondent's cross-appeal allowed so as to vary the judgment of the Court of King's Bench, by allowing the plaintiff an additional sum of $866.02, in the principal action and thus to maintain both the principal action and incidental demand in full with interest, the respondent to have her costs on both the appeal and cross-appeal in this court and throughout.

RINFRET J.—I fully concur with the judgment of my brother Crocket.

Within the last three years, the Court of King's Bench in Quebec has had occasion to examine, in no less than four cases and in respect to similar insurance policies, the effect of the prescription resulting from subsections 2 and 3 of section 216 of the Quebec *Insurance Act* (R.S.Q., 1925, c. 243). Those cases, in addition to the present one, were *North American Life Insurance Co.* v. *Hudon* (1), *Gagné* v. *New York Life Insurance Co.* (2), and *Canada Life Insurance Co.* v. *Poulin* (3). In the *Hudon* and the *Poulin* cases the facts were different and gave a somewhat different aspect to the legal problem arising out of the application of the statutory prescription. I mean that in both those cases—so far, at least, as appears from the reports—the insurance company had not acknowledged the existence of the conditions of invalidity which entitled the insured to the benefits accruing under the policy. In neither of those two cases had the insurance company ever made a single payment of the monthly income to the insured, before the action was brought; so that it could be said, as to each of those cases, that "*le droit* découlant du *fait*" (to use the words of Mr. Justice Létourneau in the *Poulin* case—p. 186) and that is to say: the right to the monthly income resulting from the fact of the continuous total disability, had yet to be ascertained. I see the strength of the argument that the prescription applies in such a case. It may be contended that, by force of the statute, the question

(1) (1933) Q.R. 55 K.B. 273. (2) (1934) Q.R. 57 K.B. 60.
(3) (1934) Q.R. 57 K.B. 78.

whether "the event insured against" has happened must be established within one year (or "the further term of six months") by agreement or by judgment resulting from an action instituted and served within that delay.

That is not the point which we have to decide in the present case; and it should be understood that the decision of such a point is reserved for future consideration.

Here as in the *Gagné* case, the company had admitted the "happening of the event insured against." It had acted upon the proof thereof submitted by the plaintiff and it had made several monthly income payments. As expressed by Sir Mathias Tellier, C.J., in the *Gagné* case (p. 68): the company "était liée par sa convention." And I think it must be agreed that, in those circumstances, the conclusion reached by my brother Crocket is the correct one; the prescriptions of section 216 (2 and 3) are not applicable to that state of facts.

There was however a distinction between the *Gagné* case and the present one. In the former case, the company had ceased the monthly payments "parce qu'il (Gagné) l'avait informée que son invalidité avait cessé d'être totale" (1). There was nothing of the kind here and the jury found that the condition of total disability had been continuous to the present date. I would share the view of Chief Justice Tellier (2) that, under those circumstances,

après avoir reconnu cette invalidité comme totale et permanente * * * la compagnie n'avait pas le droit, si ce n'est après l'accomplissement des formalités indiquées dans la police N.B.

(and which are referred to by my brother Crocket)

d'enlever au demandeur son revenu mensuel et l'exonération des primes.

Appeal dismissed with costs.

Cross-appeal allowed with costs.

Solicitors for the appellant: *MacDougall, Macfarlane, Scott & Hugessen.*

Solicitor for the respondent: *N. L. Rappaport.*

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(1) (1934) Q.R. 57 K.B. 60, at 66.

(2) (1934) Q.R. 57 K.B. 60, at 66 and 67.