S.C.A. No. 02647

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Cite as: Cooperants Mutual Life Insurance Society v. Cameron, 1992 NSCA 18

Hallett, Hart and Matthews, JJ.A.

BETWEEN:

COOPÉRANTS MUTUAL LIFE INSURANCE SOCIETY	)	Jonathan C.K. Stobie and Virve Sandstrom for the Appellant
Appellant	)	
- and -	)	
BRUCE M. CAMERON	)	Scott C. Norton for the Respondent
Respondent	)	Appeal Heard: November 23, 1992
	)	Judgment Delivered: December 9, 1992

THE COURT: Appeal allowed with costs of the trial and costs of the Appeal at 40% of those fixed at trial to the Appellant per reasons for judgment of Hallett, J.A.; Hart and Matthews, JJ.A. concurring

HALLETT, J.A.

This is an appeal from a decision of a Trial Division judge allowing the respondent's claim for payment of the outstanding balance ($200,000.00 plus) of his mortgage held by National Bank of Canada. The claim was made under a group life insurance agreement between the appellant (Coopérants) and the bank. The respondent (Mr. Cameron) claimed that his wife's life was insured under the policy. She died on June 11, 1989. Coopérants refused the claim and the law suit ensued. The facts relevant to this appeal in chronological order are as follows:

(i) The policy under which Mr. Cameron claims is a creditors group insurance agreement dated August 1980 between Coopérants and the bank. Pursuant to the agreement Coopérants agreed with the bank to insure the lives of eligible mortgage borrowers who elected to apply for insurance and further agreed to pay to the bank the outstanding balance of the mortgage in the event of the death of an insured borrower. Section 2.02 of the agreement set out those persons who would be eligible for insurance as follows:

" Eligible for insurance is the borrower who:

- during the three (3) months prior to the date of the signature of his insurance application has not consulted or been treated by a medical doctor or other practitioner for cancer, heart, kidneys, liver or lungs

- During the five (5) years prior to the date of the signature of his insurance application has not submitted a life or health insurance application which was made the subject of a refusal, or for which an extra premium or a restriction has been applied to it or which has been granted for an amount less than that requested."

(ii) The application form for the insurance contains the following declaration to be signed by the applicants.

" **APPLICATION AND DECLARATION OF HEALTH**

I request to be insured in accordance with the provisions of the agreement bearing number 880-A, between The National Bank of Canada and Cooperants Mutual Life Insurance Society.
I declare that, in the past three (3) months, I have not consulted or been treated by a physician or other health practitioner or taken medication prescribed by a physician, for cancer, the heart, the kidneys, the liver or the lungs.
I declare that, in the past five (5) years, I have never been denied life or health insurance by any insurance company.
I also declare that no policy whatsoever has been issued with an extra premium or for a lesser amount. The National Bank of Canada is hereby authorized to include the insurance monthly premium in the mortgage loan payments."

At the foot of these words is a place for the signature of the applicants. The application is forwarded by the borrowers to the bank where it is retained until there is a claim at which time Coopérants carries out its investigation to determine if the borrower was eligible. While the insurance is in effect the bank collects the individual premiums from the insured borrowers and remits them monthly in a lump sum to Coopérants. The evidence disclosed that at any given time there were approximately 50,000 borrowers insured under the plan. The purpose in relying on the declarations and therefore not assessing the applications when received was to keep the costs at a minimum. The learned trial judge found the appellant's procedures were justifiable.

(iii) In late 1984 Mrs. Cameron had a malignant melanoma removed from her chest area.

(iv) On June 13, 1985, Mr. and Mrs. Cameron applied to North America Life for group life insurance coverage through Dalhousie University Alumni. The application was forwarded to North America Life with a letter from Mr. Cameron dated June 11, 1985, in which he stated that his wife had had a malignant melanoma surgically removed without incident in late 1984. He provided the name of the attending physician to the insurance company.

(v) On August 30, 1985, North America Life advised Mr. and Mrs. Cameron, by letter, that after careful consideration they found they were "unable to approve spouse term insurance for Mrs. Cameron". They advised they would be willing to reconsider this decision in three years. The application for life insurance on Mr. Cameron's life was approved.

(vi) In December of 1987 Mr. Cameron, an experienced banker, moved with his wife to Halifax to take up a position as senior manager of the Commercial Banking Centre for the National Bank of Canada; he had been employed with the Royal Bank of Canada. The evidence showed that the Camerons were replacing a Royal Bank mortgage on their house in Toronto with a new mortgage from the National Bank.

(vii) On December 3, 1987 Mr. and Mrs. Cameron signed an application for mortgage protection. The form of the application set out the declarations which I have previously recited. The application sets out the applicants' names, their dates of birth and on the back of the application is what is referred to as an insurance certificate which certifies that any person whose name appears on the application "is insured under agreement No. 880-8" between the bank and Coopérants. The certificate also sets out that the rights and obligations of the life insured are defined in the agreement and that if an insured dies while the certificate is in force Coopérants would pay the bank the sum insured, being the balance of the loan. Mr. Cameron forwarded the application signed by both he and his wife together with a covering letter signed by him and addressed to Coopérants to the bank. It was sent to a Mr. Daudi who was the mortgage officer at the Toronto Branch of the National Bank. Mr. Cameron's letter of December 3, 1987, is relevant and states as follows:

" Re: Attached application for Mortgage Protection -
Application and Declaration of Health

> While we apparently meet the criteria of your application as stated, you may wish to follow up the following data:
>
> a) With respect to my wife, Ann-Marie, a malignant melanoma was removed late 1984. The attending and follow-up doctor was Dr. Shibatta (surgeon) of Montreal's Royal Victoria Hospital. She has received the usual routine follow-up checks since the operation without incident and is not under any medication or consultation, save these routine checkups.
>
> We do not recall if there has been occasion where she has requested life insurance these past five years.
>
> b) During 1979 I was successfully treated for Hodgkins' Disease at the Victoria General Hospital, Halifax. My Haematologist/ Radiologist and follow-up physicians were/are Dr. Ormille Hayne (902) 422-4533 and Dr. Oscar Wong (902) 428-4246.
>
> I visit these doctors at least once yearly for routine checkups that are without incident. I have been under no active treatment or medication since the treatment in 1979.
>
> I have successfully obtained additional life insurance approximately two years ago through Dalhousie Alumni Association; this is in addition to other coverage with Great West Life.
>
> As mentioned, we apparently fall within the terms of your declaration, however, felt it prudent to advise this background along with our application."

On December 14, 1987, Mr. Daudi wrote Coopérants requesting them to "kindly advise us if, under the circumstances, Mr. and Mrs. Cameron qualify for insurance".

(viii) In his testimony at trial the respondent acknowledged that he knew from reading the application that the medical histories of himself and his wife were relevant to Coopérants. He testified that he did not discuss with his wife her insurance history. I would note that in his letter to Coopérants of December 3, 1987, he stated "We do not recall if there has been occasion where she has requested life insurance in the past five years".

(ix) The evidence does not disclose whether Coopérants received the letter from Mr. Daudi or not. However, at some time Mr. Cameron who was then an employee of

the bank wrote to Mr. Campbell of the bank an undated note which read as follows:

" Shortly after applying for mortgage insurance I sent along particulars of medical history relative to our application for insurance.

I have heard nothing as yet and wonder if the insurance company has contacted you.

I assume premiums are not included in payments until coverage is confirmed."

(x) On March 14, 1988, the bank forwarded another copy of the Camerons' application and the covering letter of December 3, 1987 to Coopérants.

(xi) On April 13, 1988, Joanne Bourdeau, of Coopérants replied to the bank as follows:

" From what we know now, which is not much, we could not assume that Mr. and Mrs. Cameron meet the requirements in regard of the eligibility for the policy 880 (Mortgage Protection Plan).

We do not suggest that you enroll them actually."

The bank sent a copy of this letter to Mr. Cameron.

(xii) On April 25, 1988, Mr. Cameron wrote to Lise Miron of the bank and in reference to the letter of April 13, 1988, from Coopérants stated to Ms. Miron:

" It appears from the tone of the letter that Coopérants did little, if anything, to assess the application and merely declined it without any investigation."

Mr. Cameron obviously considered the application for mortgage protection to have been declined.

(xiii) On November 8, 1988, Mr. and Mrs. Cameron applied to North America Life for accident insurance under the Dalhousie University Alumni Plan. The application form which they signed stated: "Your spouse must be insured under the Life plan to be eligible for this coverage." Adjacent to this sentence is a handwritten note penned by either Mr. or Mrs. Cameron "Application pending and on file". Mr. Cameron, in

his evidence, admitted that at the time of this application either he or his wife recalled the previous application by Mrs. Cameron for life insurance under the Dalhousie Alumni Plan.

On November 15, 1988, seven days after having applied for the accident insurance, Mrs. Cameron was diagnosed with a fatal brain tumour in the form of a metastatic malignant melanoma.

(xiv) In early 1989 following the diagnosis of his wife's illness, Mr. Cameron began to make further inquiries from the bank concerning the mortgage protection insurance. He called a Ms. Christine Marchildon. He acknowledged in evidence that he did not tell Ms. Marchildon that his wife had been diagnosed with cancer.

(xv) On May 4, 1989, the bank wrote Louise Turcotte of Coopérants asking her to review the Camerons mortgage protection insurance application and the letter of December 3, 1987 to determine whether the Camerons qualified for insurance. Ms. Turcotte was an associate actuary employed with Coopérants.

(xvi) On May 30, 1989, Ms. Turcotte wrote to Mr. Cameron as follows:

> " After studying your letter of December 3, 1987 which was forwarded to us by the head office of the National Bank of Canada at the beginning of this month, we find that this letter does not invalidate your application and declaration of health signed in good faith and that you are covered for Mortgage Protection since December 3, 1987."

Ms. Turcotte testified that she assumed that Mr. Cameron's letter of December 3, 1987 was written in good faith. She did not conduct any investigation beyond reviewing the letter and the application. She was not aware that Ms. Bourdeau had responded a year earlier advising that the Camerons could not be assumed to meet the requirements for coverage. Ms. Turcott was not aware that Mrs. Cameron had

been rejected by North American Life in 1985 or that she had been diagnosed with brain cancer in November of 1988 nor did she know the Camerons had not been paying any premiums. She testified that if she had known these facts she would have advised Mr. Cameron that his wife was not eligible for insurance under the mortgage protection plan.

(xvii) On June 11, 1989, 12 days after the Turcott letter, Mrs. Cameron died as a result of the brain tumour.

(xviii) On June 22, 1989, Mr. Cameron paid the premiums that ought to have been paid had the application been accepted back in December of 1987.

(xix) On July 6, 1989, Mr. Cameron completed and forwarded the claim for benefits; Coopérants began an investigation and in due course learned that Mrs. Cameron had been denied life insurance by North America Life in 1985.

(xx) On February 16, 1990, Coopérants denied benefits.

A number of issues are raised by Coopérants but I need only deal with one of them as I am of the opinion that the appeal ought to be allowed. The reason for allowing the appeal is straight forward. Mrs. Cameron was not eligible for coverage under the plan when she signed the declaration in December of 1987 stating that she had not been refused life insurance in the preceding five years; she had been refused by North America Life in 1985 and was so advised by North America Life.

In reaching his decision that Mrs. Cameron was covered under the plan the trial judge made the following statements and finding:

> " Group insurance usually requires no evidence of insurability because the insurer by insuring the group accepts those in less-than-average health in the hope and expectation they will be compensated for by those in the group who enjoy above-average health.
>
> Conditions of eligibility, however, are permitted in group plans.

In this case two conditions of eligibility further limit the group to be insured. The policy excludes from coverage one, a person who has been under medical treatment for cancer and other diseases in the three months preceding the application and two, a person who has been refused life or health insurance in the preceding five years. The application clearly sets out those two conditions.

It would be obvious to an applicant that the two restrictions are designed to eliminate from eligibility persons who, because of previous health problems, represent a greater risk of claim to the insurer than those without previous health problems.

What is not so obvious is that those conditions are designed to partially screen higher risks without attracting extensive administrative costs. For instance, a person with a history of disease but treatment free for the previous three months who has not applied for insurance in the preceding five years would be eligible for coverage. However, that same person who had applied for and been refused insurance coverage in the past five years would be ineligible. The defendant company, no doubt, was prepared to accept the higher risk of insuring those with more than three months old medical problems but who had not previously applied for insurance. This was done probably to avoid the administrative expense involved in further screening the applicants. Coopérants, in the usual course of their business, determine eligibility only if there is a claim for benefits. The company thus avoids the more expensive administrative machinery which would be necessary to determine eligibility before entering the covered group. If, upon a check after a claim, a violation of the conditions is found, benefits are simply then refused and all premiums refunded.

All of this is perfectly justifiable and one may accept that the insurer should not be obliged to pay benefits if the applicant gave false information at the time of the application.

Did then the plaintiff give the defendant false information which should disentitle him to claim benefits?

The plaintiff at the time of application informed the defendant by letter that he and his wife could not recall her making an application for life insurance in the past five years. He reiterated that position in his testimony at trial.

The plaintiff did not warrant that his wife had been refused coverage in the past five years. He stated that neither he nor his wife recalled making application for coverage in the past five years. We now know that the plaintiff's wife had, in fact, been refused coverage in the past five years. The court would find against the plaintiff if he made that representation knowing at the time that it was untrue.

> It is impossible for the court to determine with certainty if the representation was made by the plaintiff knowing at the time that it was false. What facts in evidence support or raise doubt about the truthfulness of the statement? Cross-examination of the plaintiff reveals that his wife was rejected for life coverage under a North American plan for which the plaintiff himself had been accepted in August, 1985, and to which plan the plaintiff alluded in his letter of December 3, 1987. There is also evidence that in November, 1988, another application was made to North American Life for insurance coverage on the plaintiff's wife at which time the plaintiff or his wife referred to the application which had been denied in 1985. This, of course, means that if the plaintiff and his wife did not on December 3, 1987, recall the North American Life application, one of them did indeed later recall it in November, 1988.
>
> Those facts, however, do not provide absolute proof that the plaintiff's representation made in his letter of December 3, 1987, was knowingly false. The North American application was made more than two years earlier and it is conceivable that it could have been forgotten on December 3, 1987. In the plaintiff's favor he provided the defendant with all relevant medical information, not only for his wife, but also for himself. In my view, that letter can only be interpreted as a request by the plaintiff to determine the eligibility of he and his wife for the group plan. Otherwise, why would he be untruthful about the declined North American application after having given the defendant access to all the facts which prompted North American Life to decline his wife's application? There may be a reason.
>
> But, there is great risk of error when the courts decision must be based on the credibility of one witness, whereas here, only the plaintiff knows for sure. He says he did not at the time of application recall his wife's former refusal of coverage. I have concluded that I should accept that statement as fact upon the following considerations."

As can be seen from a review of the foregoing part of the trial judge's decision, he accepted the evidence of Mr. Cameron that when the application was made in December of 1987 he did not recall his wife being turned down by North American Life in 1985. Of course, there was no evidence before the court that Mrs. Cameron did not recall that she had been turned down. She simply signed the declaration that she had not been refused life insurance in the previous five years; that was not true. There are only two requirements for eligibility; Mrs. Cameron did not meet one of them. The fact that her husband had forgotten that she was refused is no excuse; his forgetfulness does not make her eligible.

Section 185 of the **Insurance Act**, .S.N.S. Chapter 231 requires full disclosure of material facts when applying for life insurance; a failure to do so renders the contract voidable by the insurer. **Section 185** provides:

> " Duty to Disclosure
>
> 185 (1) An applicant for insurance and a person whose life is to be insured shall each disclose to the insurer in the application, on a medical examination, if any, and in any written statements or answers furnished as evidence of insurability, every fact within his knowledge that is material to the insurance and is not so disclosed by the other.
>
> Contract voidable
>
> (2) Subject to Section 186, a failure to disclose, or a misrepresentation of, such a fact renders the contract voidable by the insurer. "

Only **Section 186(3)** is at all relevant in this case; it provides:

> " Group contract not voidable
>
> (3) In the case of a contract of group insurance, a failure to disclose, or a misrepresentation of, such a fact in respect of a person whose life is insured under the contract does not render the contract voidable, but if evidence of insurability is specifically requested by the insurer the insurance in respect of that person is voidable by the insurer unless it has been in effect for two years during the lifetime of that person in which event it is not, in the absence of fraud, voidable."

The section does not assist Mr. Cameron as Mrs. Cameron died 18 months after the application was made. Although the issue was not raised on the appeal, if the coverage was in the nature of "creditors group insurance" as defined in the **Act**, **s. 186(3)** is not applicable.

The law relating to misrepresentations which is analogous to the situation we have under consideration is clear. In Life Insurance Law in Canada (1977) by David Norwood the author states at p. 247 in dealing with innocent misrepresentations:

> " The misrepresentation of the known fact may have been due to negligence on the part of the insured or life insured, where he meant to

> disclose it, but did not actually do so. It may have been due to forgetfulness on his part, where the material fact genuinely escaped his memory. It may have been due to mistake on his part, where he believed that he had disclosed it to the insurer on a previous occasion, or where he believed that the insurer was already in possession of the fact of its own knowledge. It may have been due to misjudgment on his part, where he felt that the fact was not really significant and he did not therefore consider it important to relate it to the insurer.
>
> Regardless of the good faith of the insured or life insured, all such misrepresentations, however innocently made and regardless of the genuine lack of appreciation of materiality, will entitle the insurer to avoid the contract as long as the misrepresentation is of a fact known to the insured or life insured which would be regarded by a reasonable insurer as material to the risk."

In **Blouin v. Maritime Life Assurance Co.** (1988), 88 N.S.R. (2d) 23 Chief Justice Glube, in dealing with the effect of the failure of an insured to state a material fact and the effect of the same stated at paragraph 34:

> " The onus is on the insurer to demonstrate necessary elements of misrepresentation, namely, whether the matter in dispute is within the knowledge of the insured and the materiality of such facts. Even an innocent misrepresentation made in good faith may become a material fact, as determined by the reasonable insurer. Thus, even with good faith, or negligence, or forgetfulness, or mistake, or misjudgment, if the matter is material, the contract may be avoided."

Forgetfulness, if the matter is material, puts the insurer in a position to avoid the contract. To be eligible for mortgage protection insurance under the Coopérants plan an applicant had only to meet two requirements. It is obvious that meeting the two requirements are material because they are the sole basis upon which any applicant is prevented from obtaining the benefits of the mortgage protection insurance available through the bank.

The argument that the inability to recall that Mrs. Cameron had been turned down was no excuse was put to the trial judge by Coopérants' counsel. The learned trial judge dealt with this argument in his decision as follows:

> " Mr. Stobie submits that there is authority in law that misrepresentation entitles the insurer to avoid the contract whether or not the undisclosed fact was genuinely forgotten by the applicant. As authority he offers the decision in **Blouin v. Maritime Life Assurance Co.** (1988), N.S.R. (2d) 23 at 30; Norwood, **Life Insurance Law in Canada** (1977), p. 247; Turner and Sutton, **The Law Relating to Actionable Non-Disclosure** (1990), pp. 54-55.
>
> The important fact which distinguishes this situation with those dealt with in the authorities cited is that here the insurer was informed by the applicant beforehand that he and his wife had no memory of the fact of other applications for the wife's coverage. Thus, there was no such misrepresentation in this case."

The principle set out in Norwood, to which I have referred, cannot be distinguished as readily as was done by the learned trial judge. The covering letter by Mr. Cameron that neither he nor his wife could recall her having been turned down does not assist Mr. Cameron. He cannot impose duties on Coopérants to review the medical history of Mrs. Cameron or that its failure to do so makes her eligible for coverage. But, more significantly, if the Camerons could not remember whether Mrs. Cameron had been refused life insurance within the preceding five years Mrs. Cameron was not in a position to make the declaration that she signed declaring she had not been refused. She was not eligible for coverage because of this fact and could not become eligible by making a declaration that was not true.

Mr. Cameron was subsequently advised that he could not assume he was covered and he considered that the application of both himself and his wife had been declined. Furthermore, from the time he considered himself to have been declined which was late April 1988 until after his wife had been diagnosed with a brain tumour on November 15, 1988 he did nothing that would indicate the Camerons thought they were covered. The evidence discloses that Mr. Cameron did not rely on the certificate nor did he pay premiums until after Mrs. Cameron's death. The fact that Mr. Cameron could not recall that his wife had been refused life insurance could not make his wife eligible for coverage when the facts show that

she was not eligible. To decide otherwise would put insurers in the impossible position of having to accept risks that they would otherwise have declined simply because the applicant forgot a material fact. I would note however that **s. 186(3)** of the **Act** would appear to prevent an insurer from avoiding the contract other than on proof of fraud if the coverage had been in effect for two years prior to the death of the insured.

In short, there was a misrepresentation; Mrs. Cameron declared that she had not been refused insurance in the preceding five years when, in fact, she had been. The fact that her husband stated that they could not remember does not alter the fact that she was not eligible. The insurance coverage is premised on the truthfulness of the declarations.

Mrs. Cameron was not eligible on December 3, 1987, and was not eligible at any time thereafter and no one at either Coopérants or the bank where Mr. Cameron held a senior position led him to think otherwise except the May 30, 1989, letter from Ms. Turcotte of Coopérants which was written on the assumption that Mrs. Cameron's declaration was true which it was not. Mrs. Cameron was never eligible
for coverage; she did not obtain coverage by signing a false declaration even if she had forgotten about the refusal. I would allow the appeal with costs of the trial to Coopérants and costs of the appeal at 40% of those fixed at trial.

J.A.

Concurred in:

Hart, J.A.

Matthews, J.A.

S.C.A. No. 02647

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BETWEEN:

COOPÉRANTS MUTUAL LIFE INSURANCE SOCIETY	)	
Appellant	)	REASONS FOR JUDGMENT BY:
- and -	)	HALLETT, J.A.
BRUCE M. CAMERON	)	
Respondent	)	