

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Fleet v. Federated Life Insurance Company of Canada, 2008 NSSC 231

Date: 20080725

Docket: SH 247663

Registry: Halifax

Between:

David Richard K. Fleet

Plaintiff

and

Federated Life Insurance Company of Canada
and Paul Bellefontaine

Defendants

DECISION

Revised Judgment: The text of the original judgment has been corrected according to the erratum dated **August 8, 2008**.

Judge: The Honourable Justice Gerald R P Moir

Heard: 21, 22, 23 January 2008 at Halifax

**Final Written
Submissions:** 25 February 2008

Counsel: Mr. David A Grant for the plaintiff
Mr. Scott Norton, QC and Ms. Amy Higgins for the defendant
Federated Life Insurance Company of Canada
Mr. Alexander S Beveridge, QC and Ms. Erin Cain for the
defendant Paul Bellefontaine

Moir, J.:

Introduction

[1] Through its agent, Mr. Paul Bellefontaine, the Federated Life Insurance Company of Canada solicited Ms. Shirleen Lowe to purchase a policy of life insurance. Ms. Lowe purchased a policy, and she died less than two years later. Her beneficiary, Mr. David Fleet, claims the benefit, which is \$150,000.

[2] Federated defends the claim on the basis that Ms. Lowe materially misrepresented her health when she applied for the insurance. The difficulties with this defence are

- Ms. Lowe never saw the application because the agent never showed it to her.
- The signature on the application is not Ms. Lowe's. Mr. Bellefontaine signed Ms. Lowe's name to the application.

[3] The defence turns on what was said in a telephone conversation between Ms. Lowe, who is dead, and Mr. Bellefontaine, who is not credible.

[4] There is also a claim by Mr. Fleet, and a crossclaim by Federated, against Mr. Bellefontaine.

Communications between Bellefontaine and Fleet

[5] Generally, I accept Mr. Fleet's evidence, although I believe he downplayed the knowledge he had, at the time he testified, of his wife's problem with blood pressure.

[6] Mr. Fleet is a carpenter who makes his living at roofing and siding. He is in his mid-fifties. Twenty-seven years ago Mr. Fleet met Mr. Bellefontaine through one of Mr. Fleet's suppliers. Later, Mr. Bellefontaine went into business as a life insurance salesman, and Mr. Fleet became one of his customers. Mr. Fleet bought several policies over the years, starting in 1972.

[7] Mr. Fleet and Ms. Lowe were common law spouses until she died on the fourth of July, 2004. They have one son. Their home is on Main Street in Dartmouth. She was in her early forties when she died.

[8] In 1996, Mr. Fleet bought a policy from Zurich through Mr. Bellefontaine. Seven years later, Mr. Bellefontaine convinced him to replace the Zurich policy with better coverage from Federated.

[9] The Zurich policy insured Mr. Fleet's life for \$100,000 and it contained a rider under which \$50,000 would be paid to Mr. Fleet if Ms. Lowe died and \$10,000 would be paid if their son died. In 2003, Mr. Bellefontaine recommended replacing this with two Federated Life policies, one on Mr. Fleet's life and the other on Ms. Lowe's. He recommended coverage of \$150,000 each.

[10] Mr. Bellefontaine was operating out of his home in Jacksontown, New Brunswick when these recommendations were made. He placed a call to Mr. Fleet, who said he was not interested in changing his insurance at that time.

[11] Mr. Bellefontaine called again on May 15, 2003. The earlier rejection notwithstanding, Mr. Bellefontaine provided more information about the policies he was proposing. Mr. Fleet then understood there would be separate policies for \$150,000 each.

[12] When Mr. Fleet said he was interested, Mr. Bellefontaine asked him if his health was alright. Mr. Fleet said it was. Mr. Bellefontaine then asked about Ms. Lowe's health. Mr. Fleet said it was alright "as far as I know". Mr. Bellefontaine asked if Mr. Fleet smoked. Then he asked about Ms. Lowe. Mr. Fleet said Ms. Lowe had given up smoking about five years earlier.

[13] On cross-examination by Mr. Beveridge, Mr. Fleet was confronted with an answer on discovery that he remembered Mr. Bellefontaine asking him if his health was basically the same. Mr. Fleet acknowledged having answered Mr. Bellefontaine's question positively. Refreshed by that, Mr. Fleet was able to agree that he was similarly asked about Ms. Lowe's health. Mr. Bellefontaine got upset with "as far as I know"; he required a yes or no answer to something along the lines of whether Ms. Lowe's health was basically the same. Finally, Mr. Fleet said "yes".

[14] As far as Mr. Fleet is concerned, the information he conveyed was that his own health was the same as it had always been. Mr. Bellefontaine asked a similarly vague question about Ms. Lowe and Mr. Fleet says he gave a truthful answer with the qualification “as far as I know”. He acknowledges that Ms. Lowe sometimes had a bit of a blood pressure problem and she took some pills for that. He acknowledges that he did not communicate those details when he was asked the general question.

[15] When Mr. Fleet spoke to Mr. Bellefontaine about his proposed Federated Life policies, Ms. Lowe had a history of elevated blood pressure of sufficient severity that medication was prescribed. I cannot say whether the full extent of her history and problem were known by her husband. It appeared to me that Mr. Fleet probably diminished his knowledge, as of the time he testified, of Ms. Lowe’s problems with blood pressure. However, the problem extended back before the Zurich application. I am not satisfied that Mr. Fleet made any misrepresentation when he answered positively, but with a qualification, to Mr. Bellefontaine’s general question of whether Ms. Lowe’s health was the same.

[16] I am satisfied that Mr. Fleet did not deliberately conceal information from Mr. Bellefontaine. I find the general question posed by Mr. Bellefontaine to Mr. Fleet about changes in Ms. Lowe’s health did not bring Ms. Lowe’s blood pressure problems to mind.

[17] I find Mr. Fleet was asked whether Ms. Lowe’s health had changed, implicitly whether it had changed since the Zurich application in 1996. I find Mr. Fleet said that it had not changed as far as he knew. That answer would limit both the extent to which Ms. Lowe confided in her husband and the extent to which Mr. Fleet recalled her health in 1996 and developments since. The subsequent, unqualified, “yes” has to be understood in light of the facts that Federated Life’s agent had heard the qualification and, given the very general question and Ms. Lowe’s health in 1996, the answer appears to have been truthful.

Status of Mr. Bellefontaine’s Evidence

[18] At the end of the plaintiff’s case, Mr. Grant sought to tender a transcript of Mr. Bellefontaine’s discovery examination. I asked Mr. Beveridge whether Mr. Bellefontaine would be opening a case and taking the stand. Mr. Beveridge stated that no decision had yet been made on that question.

[19] The transcript was marked. After that, Mr. Bellefontaine was not present in the courtroom. He did not open a case. He did not testify.

[20] Both Mr. Norton and Mr. Beveridge asserted, in closing submissions, that Mr. Grant's tendering the discovery transcript meant that Mr. Fleet made Mr. Bellefontaine his own witness and is bound by the evidence to the extent it is not contradicted by other evidence. As Mr. Norton put it in a post-trial brief: "Where, however, there is no evidence contradicting the testimony of Bellefontaine, the Plaintiff and Your Lordship are bound to accept it."

[21] Mr. Norton goes on to provide these authoritative references:

In Choate, *Discovery in Canada* (2nd) the author states the following:

In putting in parts of an examination, a party need not be affected by any part of the examination other than serves his purpose, but when any portion of the examination is put in evidence, it will tell against the party if it has that effect. He must take the burden, if there is one, with the benefit he receives. The plaintiff in putting in the whole, or any part of the transcript of the examination for discovery, is bound by that evidence, unfavourable though it may be. The entering party is not necessarily bound by the evidence in the examination for discovery, but it is difficult to understand putting in such evidence. (page 2-106)

And further:

The party who desires to use in evidence an admission made by an opposite party, in his examination for discovery, must face the risk that he may be directed to put in something he does not wish to prove, but he is protected to the extent that he can adduce evidence to contradict the statements he put in. The party whose admissions are being used is protected, for the judge may direct other parts of the examination to be put into evidence. (page 2-106)

And finally:

The plaintiff has the right to call other witnesses to give evidence which contradicts the defendant on facts material to the case. The party submitting the evidence is not necessarily bound by it where it favours the opposite party, and may contradict it. (page 2-105)

[22] Mr. Grant pointed out that Rule 18.14(1) permits Mr. Fleet to introduce Mr. Bellefontaine's transcript "for any purpose". He says his purpose was to give the court the full picture.

[23] In his post-trial brief on this subject, Mr. Grant relied on *Burton v. Howlett*, [2001] N.S.J. No. 65 (CA). Justice Saunders discussed, at paragraphs 14 to 19, the "very broad ... scope and application" of Rule 18.14(1)(b). At para. 20 he said, of discovery of an adverse party, "counsel is allowed to file the entire discovery transcript ... for whatever purpose counsel intends". He says that counsel "might well" reserve revelation of counsel's purpose until "final argument". He quotes from the late Justice Grant in *Matheson v. Johnston's Estate* (1984), 66 N.S.R. (2d) 19 (SC, TD) at p. 37:

To lead a party or witness to an extreme position in cross-examination and then in argument show his position on oath at another time may be the most effective attack on the credibility of that person. This may be done by filing his discovery answers and not confronting him on the stand.

[24] Authorities from provinces that do not have the equivalent of our Rule 18.14 are not helpful. As Justice Saunder's discussion shows, our Rule 18.14(1)(b) is so broad as to permit counsel to define the purpose for which a transcript is introduced and to permit counsel to reveal that purpose as late as closing submissions.

[25] Under Rule 18.14(1)(b), which allows a discovery transcript to be used "for any purpose by an adverse party", Mr. Fleet appears to be entitled to introduce Mr. Bellefontaine's entire transcript without making him Mr. Fleet's witness. However, any doubt about that is resolved by Rule 18.14(5)(b):

the introduction in evidence of the deposition or any part thereof for any purpose, other than under clauses (a) and (b) of paragraph (1) hereof, makes the deponent the witness of the party introducing the deposition.

The specific exclusion of 18.14(1)(b) indicates that introduction for any purpose by an adverse party does not make the deponent the witness of the party introducing the transcript.

[26] I am not bound by uncontradicted discovery evidence given by Mr. Bellefontaine. I must find the facts by assessing his evidence at discovery as a whole and in the context of the whole of the evidence.

Evaluation of Mr. Bellefontaine's Evidence

[27] I approach Mr. Bellefontaine's evidence with caution.

[28] His position on who signed the names of Mr. Fleet and Ms. Lowe to the Federated Life applications changed during the course of Mr. Fleet's claim and suit. When the truth finally came out, Mr. Bellefontaine was shown to be a life insurance agent willing to make an application appear as though it was signed by the insureds, to their possible detriment and contrary to the requirements of his principal. He was also shown to be a person who dodged responsibility for that act until his counsel had no choice but to make an admission.

[29] Further, I was not impressed with his responses on discovery, which often involved digressions designed to justify himself.

Signature of the Federated Life Application

[30] Mr. Fleet denies signing, or ever seeing, an application. He says that, after he signed and returned documents authorizing automatic payment of premiums, he received his policy and his wife received hers. The absence of an application form did not concern him. Ads on television for insurance without medical qualification led him to believe he does not know how the life insurance industry works these days.

[31] After Ms. Lowe died, Mr. Bellefontaine helped Mr. Fleet complete a claim. Just over a month later Federated denied coverage. To Mr. Fleet's surprise, the letter denying coverage stated: "The life insured signed and dated the application on May 28, 2003 to verify that all answers on the electronic application were recorded correctly." The letter said "three of the questions on the application were not answered correctly." These were standard questions 3(e)(iii), 3(e)(viii), and 3(j).

3e) Within the past 10 years, have you suffered from, received treatment, medication, medical advice, care, service or diagnosis for, had known indication of, had a positive test for or consulted a physician about any of the following:

iii). abnormal blood pressure, stroke, any disease or disorder of the heart or circulation (such as chest pain, angina or heart attack)?

viii). any disease or disorder of the stomach (other than flu or minor ailments), intestines or colon, liver, kidney, bladder or reproductive organs?

3j) Within the past 12 months, have you consulted a doctor or health care practitioner, received any treatment or counseling, had any diagnostic tests or been prescribed or taken medication for any reason other than the following:

- regular annual checkup with no further investigations or follow ups
- regular cold and/or flu (with antibiotic treatment or no treatment required)
- Ministry of Transport physical with normal results
- employment medical with normal results
- normal pregnancy
- kidney stones, gall stones
- vasectomy, tubal ligation, appendectomy
- musculoskeletal disorders such as dislocations, fractures, minor injuries, back or muscle strain

The late Ms. Lowe's physician had confirmed that she was treated for "abnormal blood pressure and chronic dyspepsia". Federated denied liability on the basis of "material misrepresentation of facts pertinent to the contract."

[32] Mr. Fleet was given copies of the applications. He did not recognize his signature as that of his deceased wife.

[33] Ms. Dianne McMillan testified for Federated Life. She referred to Mr. Bellefontaine's agency agreement which authorized him to "solicit applications for life insurance" on behalf of Federated.

[34] Ms. McMillan explained how applications are dealt with electronically. The agent receives a password. Once connected, the agent provides the applicant's answers to a series of questions. It takes fifteen to twenty minutes to go through these with the applicant and to fill in the applicant's responses. A "yes" to one of the medical questions prompts an e-mail requiring the agent to refer the application to a "tele-underwriter". Otherwise, the application is submitted and a quote comes back. If the quote is acceptable, the agent prints the application and has the applicant sign it.

[35] In the case of Ms. Lowe, the application was filed electronically by Mr. Bellefontaine on her behalf on May 15, 2003; the signature on the print version is dated May 28, 2003; and the print version was marked as having been received at the Federated Life mail room on June 2, 2003.

[36] The agent prints and sends the policy to the insured.

[37] When the signed print version of the application is received, it is reviewed to see that all medical questions are answered negatively, that no amendments were made by the applicant, that it is signed and dated by the applicant, and that documents for electronic payment are included.

[38] In March of 2005, Mr. Fleet obtained a report from a handwriting expert. The expert concluded there is a strong probability that documents known to have been signed by Ms. Lowe and Mr. Fleet were signed by a person other than whoever wrote "Shirleen Lowe" on her application, or "David Fleet" on his.

[39] Suit was started in June 2005. The statement of claim includes "the application was forwarded by the defendant Bellefontaine to the defendant Federated after ... deceased's signature was illegally affixed to the application." Mr. Bellefontaine's defence "expressly" denies this. The defence was filed in September, 2005.

[40] Four and a half months later, in January of 2006, Mr. Bellefontaine was examined by Mr. Grant at discovery. He said that after the electronic applications

were accepted “I needed to get more documentation, mainly a void cheque, preauthorized chequing form, and a signed application of this E application”. He said that these “obviously” were supplied because Federated Life issued proofs of the policies. He was not present when the applications were signed. He sent the applications to them, they signed each, they returned each to him, and he sent the signed applications to his principal. He was specifically asked whether Ms. Lowe signed her application, and he said that she did. He added that he could not be sure, because he was not present.

[41] The trial went forward on the basis of the pleadings, with Mr. Fleet alleging Mr. Bellefontaine illegally signed Ms. Lowe’s name and Mr. Fleet’s to the applications and Mr. Bellefontaine saying he did not do such a thing. Mr. Norton argued that the court cannot find Mr. Bellefontaine forged the signature, because Mr. Grant had entered the discovery transcript as part of his client’s case. This may have put Mr. Beveridge in an awkward position, because he cannot allow the court to be misled. He made this admission necessarily during closing submissions:

Mr. Bellefontaine, subsequent to discovery ... consulted his records and came to the conclusion that his records did not disclose that he had sent that application out to Mr. Fleet and Ms. Lowe for their signature and return. He had thought he had done that, but ... he can only come to the conclusion that he may well have signed that application on their behalf.

[42] On the basis of the expert opinion, I find that Ms. Lowe did not sign the application. On the basis of that finding, the evidence of Mr. Fleet about what was and was not sent to him, and the admission, I find that Mr. Bellefontaine signed Ms. Lowe’s name to the application. I find that he did so contrary to the requirements of Federated Life.

[43] There is no evidence that Ms. Lowe authorized Mr. Bellefontaine to sign her name to the application. Mr. Fleet’s evidence makes it clear that such a thing was never discussed by Mr. Bellefontaine with him. Ms. McMillan’s evidence makes it clear that Mr. Bellefontaine was not permitted to do so. And, I have no explanation from Mr. Bellefontaine of why he went to this measure. I find he signed Ms. Lowe’s name without her knowing it or ever seeing the form.

[44] Mr. Beveridge argued that this subject is not very important. He said that the real question is whether the agent asked the medical questions, and whether Ms. Lowe's state of health was concealed. That is true, but, in addition to the issue of Mr. Bellefontaine's credibility, his conduct has implications for finding how he went about soliciting for Federated Life. As will be seen, Ms. Lowe was afforded little opportunity to make representations.

Ms. Lowe's Representations

[45] It is suggested by Mr. Norton that, when Mr. Bellefontaine was discovered by Mr. Grant, Mr. Grant failed to ask him whether he questioned Ms. Lowe on the numerous subjects required by the Federated Life application form. The fact is that Mr. Bellefontaine gave very lengthy answers to the simplest of discovery questions, and Mr. Grant obtained Mr. Bellefontaine's version of the conversation he had with Ms. Lowe. The transcript includes the following:

145. Q. No, what would, well, okay, what would you do next, after you typed out, after you inserted this information on the computer screen, what happened next?
- A. Normally, they would, any time there was a no or a yes question, a screen would come up, and you'd have to, they needed to go a little bit deeper into that subject. And if I hadn't given enough information about it, when I go to finish the policy, it goes into what's called, automatic underwriting. And it's either accepted at that point when I put in, or it's rejected. If it's rejected then tele-underwriters will call. It's got nothing to do with, it's taken out of my hands, totally. A tele-underwriter would call, and they would then finish the process. And the reason being, that normally they do take it from me, because I'm glad they did, because you go into a whole range of other questions that are very time consuming, and for some people I would have just allow the telemarketer's to call and make, and ask the questions that they needed to ask, to do the proper underwriting.

Because any time there's anything with respect to high blood pressure, or things like that, or on medication, then you got to get into what kind of medication, how many times per day that they're taking, what's the dosage, what's the, you know, who is the doctor involved, and there's a whole range of questions that are very, very time consuming, and if they do not pull the application from me, I

would have asked them to do their own underwriting. Because it's too timely, it's asking questions of people that is intrusive in some way, but that's basically what would have happened. But I always ask, particularly clients who are, I know them, you know, is there, has there been any change in health? Is there any, anything that's happened since the last time we spoke, or the last time I saw you, the last time we had an application to give? That's, I'm trying to dig for some, some information, because, if there's any change in health, I'm there to provide value, not to frig up somebody's life.

146. Q. Okay.

A. I'm very particular about that. If I'm not delivering value to the client, I'm not going to bother him, I'm not going to call him. Had, had I, got a question, answered, with respect to high blood pressure, or, or – it almost runs off my tongue when I'm talking to somebody. The big three; heart attack, cancer, stroke. Have you been on any medication? Have you ever been diagnosed with high blood pressure? You know, I rarely get into family stuff or other things. I'm trying to find out, is there something here that I need to forget or back off of. And I found nothing to back off of.

147. Q. Okay, so...

A. And my questions to Shirleen, which I called at her home, and asked her the same questions. I didn't get into any questions about her family, about her mother, her brother, her sister or anybody else. I just wanted to know, is there any change in your health going forward, and I've heard David say that you stopped smoking. The last time we spoke you were a smoker. Has that changed? Yes, I'm a non-smoker, now. I said, "Well, I've got to change your premium, because I've got you down as a smoker", which I did. I changed her from a smoker to a non-smoker. So even that's why she got so much value out of making the change. And legitimately, whether she was a smoker or not, I have no idea, because I rarely would have saw her. And I can guarantee, 100 percent that I asked the question, because it would be stupid on my part to make a \$100 commission on a size of a policy of \$150,000. To me, you know, after 18 years in the business, I've never had a problem with, with, with this in the number of years I've been in the business, ever. I'm very careful about frigging (sic) around with somebody's life or lifestyle or whatever.

148. Q. So do you recall speaking to Shirleen about it?

A. I certainly do.

149. Q. And do you recall when that was?

A. Do I recall when it was?

150. Q. Yeah.

A. Well, the first person I called was David, and I called him on his cell phone, and I explained to him, what, what I', what I'm thinking about doing, and as always, David was very busy, he works hard. So I explained to him up front, exactly what I was trying to do. I said your policy now was a 10 year term, is now a 7 year term gone, so now you've got 3 years left. Your premium is going to go up, significantly. I told him what it would be and I says, if you want to, you can get a policy, same thing, 10 year term, where both of yous (sic), instead of a \$50,000 rider on the policy with Shirleen, I can get double 100,000. Well, it was 100 until I found out she was a non-smoker, and then it went up to 150, or whatever the value was. So it was like double or triple the amount of coverage. And I said, you know, like I asked David, any change in your health?

And after I was finished with David, the screen would have been there and I would have called her, which I did at her home, and got her and spoke to her. And she told me a couple of things that she was in fact, a non-smoker. She gained a little bit of weight, she said, "I'm doing a little bit of walking, and trying to get my weight down". she never told me – I asked her any changes, because I said, "You've got, that's one change from the Zurich Life policy, that you were now a non-smoker". "So that's good news, congratulations, that's you know, you're going to get, you know, cheaper insurance." I explained to her what the premiums were, what the insurance coverage was for David and herself, and I just needed to know a few questions with regard to her health. Have you ever had a heart attack, cancer or stroke? Have you ever had any indication that you had high blood pressure, or any visit to the doctor that hasn't been, you know, not diagnosed, and are you on any medications, do you take any medications?

Because if you ask the question, do you take medications, it solves a lot of problems. If it's yes, then it means I got to call, I got to either, drop the application and let somebody else do the tele-underwriting, or get into a whole range of questions. When it was diagnosed, where was it diagnosed, who was the doctor, what type of, you know, it's just, it's a complicated and also tricky thing. And that's why I prefer now, the tele-marketers, the tele-underwriters to do their own stuff, because then, I'm out of the equation. Now, I prefer it that way, than the paper, up front paper app-, application. I still have that capability, even with paper now for the tele-underwriters to do it. It's a great service, and I stick by that.

But yes, I am a hundred percent convinced, under oath of whatever, that I spoke to her, and asked the questions that I ask to anybody that I don't know about their health. I asked that question, and I asked her very clearly, particularly about heart, or any kind of problems on medication. And the answer was what I put down. I had no indication that she had, if I had any indication that she had any problems with respect to that, particularly high blood pressure, I just would have mentioned it. You know, it's not the end of the world, if you have high blood pressure. But they're going to search a little further and find out. That was never given to me, any information about any change of health. That's the truth, and that's the way I saw it, I see it.

151. Q. So do you remember when this occurred?
- A. It would have been, I would say before 5:00 in the day time, and it would have been the next day after speaking with David, or the same day. I don't remember. But it would have been 24, 48 hours.
152. Q. Is there any way you can tell from the applications that were submitted?
- A. Yes, if I had the applic-, if I have the application for, for, because it's electronically, it electronically tells me when the application was, was done. And, because this, this would have been – you asked me a question, when does the application, when was the question asked?
153. Q. Is there, I'm sorry, I thought that you indicated you were on the machine?

- A. Yes, correct, telephone.
154. Q. And that you did...
- A. Talked to her.
155. Q. ...and that you did somebody. I was going to ask you who you did first. I thought you said David?
- A. I did.
156. Q. Okay. And David was straight one, no, on everything?
- A. I asked David questions pertaining to any changes in his health. I never, I never asked him with respect to, you know, things about his, his, his mother or his brother or his sister, or whatever. I just wanted to know, from him, was there any changes in his health. And I asked him that question, he said that I asked him. David said that I asked him. And I didn't, I didn't, you know, it would have been the exact same day that I spoke to David. And I called Shirleen up...
157. Q. Okay, well...
- A. ...or the next morning, I'm not sure. It would have been in, within 24 hours of me talk-, speaking with, with David.

[46] Two notes made by Mr. Bellefontaine are in evidence. They concern Ms. Lowe's weight and the fact that she had given up smoking. There is also an email from Mr. Bellefontaine to inform Mr. Norton that the agent asked the required questions.

[47] In my assessment, his long answer on discovery contradicts Mr. Bellefontaine's assertion that he asked all the required questions. As I read the transcript, he testified that he asks some general questions and some specific ones. A negative answer to a general question somehow leads him to insert negative answers to numerous of the required questions. Even the specific questions he claims to have asked about heart attack, cancer, stroke, "any indication that you had high blood pressure", "any visit to the doctor", and medications do not match

the application form. Even on his discovery testimony alone, it is clear to me that the agent did not put the required questions to the insured.

[48] The Fleet or Lowe telephone records show no calls to Mr. Bellefontaine in New Brunswick. Mr. Bellefontaine's records show long distance calls consistent with Mr. Fleet's testimony about the initial solicitations and the subsequent provision of a document required for automatic payment of premiums. Only two entries show calls to Fleet or Lowe on May 15, 2003, the day Mr. Bellefontaine submitted the applications electronically to Federated Life. The first is a seven-minute call to Mr. Fleet's cell number. It is followed, a few minutes later, by a call to the house line. That call lasted one minute or less.

[49] It is suggested that Mr. Bellefontaine could have placed another call from a different line. That is possible, but there is no evidence to support it. It is suggested the call may have been placed from a different line outside the forty-eight hour maximum referred to in the excerpt from the discovery set out above. However, Ms. Lowe's application appears to have been submitted by Mr. Bellefontaine to Federated Life electronically on May 15, 2003. I find he took the information from her for the application in one minute or less.

[50] The timing of the phone call fits with Mr. Bellefontaine's evidence: "...after I finished with David ... I would have called her, which I did at her home, and got her and spoke to her." So is the placement of the call from his line: "the screen would have been there". However, it is impossible for him to have covered all the subjects he claims to have discussed in one minute or less. I reject his testimony about the subjects discussed.

[51] Even on his own evidence, Mr. Bellefontaine did not ask either Mr. Fleet or Ms. Lowe the questions on the electronic application. To accept anything of what he says of representations given by the deceased Ms. Lowe, I would want to understand why Mr. Bellefontaine did not simply ask Mr. Fleet and Ms. Lowe the questions and why he signed their names to the printed version. Without answers to those questions, one is inclined to believe that Mr. Bellefontaine was intent on ticking off "no" to each medical question. In any event, I reject his evidence on the subject of representations by Ms. Lowe.

[52] I do not have enough confidence in Mr. Bellefontaine's evidence even to find that Ms. Lowe did not mention her problems with blood pressure or dyspepsia.

[53] There is no proof of a misrepresentation by Ms. Lowe and no proof she failed to disclose material information about blood pressure or dyspepsia to the agent.

Ms. Lowe's State of Health and the Zurich Application

[54] Mr. Norton helpfully provided a chart of the information to be extracted from Ms. Lowe's medical records. With a couple of small changes, it is as follows:

SUMMARY OF MEDICAL HISTORY - SHIRLEEN LOWE

Year	Month/day	Reason for Consult	References
1995	January 11	Dartmouth General Hospital - ECG re history of left arm pain; chest pain last pm; past history of irregular heartbeat.	Exhibit 5
1996	January 23	BP 180/90 - pulse 107 with irregular heartbeat. Wore a Holter monitor with findings of sinus tachycardia.	Exhibit 5
1996	May 26 or 27	Mr. Fleet signed application for \$100,000 life insurance from Zurich. Ms. Lowe signed as "second proposed insured for \$50,000".	
1998	June 23	BP 160/105.	Exhibit 1
2000	January 7	BP 170/88 - Physician states she is not on any medication. Dr. Zilbert again requested her to follow-up with Dr. Holland regarding her elevated blood pressure. 231 lbs.	Joint Exhibit Book, p. 320
	May 26	BP 140/80. Shirleen wants BP checked as this had been quite elevated in the past, she had systolic's of 188, for instance.	Joint Exhibit Book, p. 322
	October 3	BP 150/98. Shirleen states she terminated pregnancy four months ago. 224 lbs.	Joint Exhibit Book, p. 319
2001	January 11	Shirleen reported that BP in Dr. Lawton's office was 190/100. BP on exam: 210/110 Rx: Adalat	Joint Exhibit Book, p. 322

	January 12	BP follow-up: 160/95; 170/85 added. Rx: Altace to Adalat.	Joint Exhibit Book, p. 322
	January 15	BP follow-up: 160/90; 140/85.	Joint Exhibit Book, p. 322
2002	August 12	BP follow-up: 200/110 (ran out of pills).	Joint Exhibit Book, p. 317
	August 13	BP follow-up: Shirleen states her BP was 210/105 - had been out of meds for a couple of months. BP on exam: 188/110; 188/92. Started back on Rx Altace.	Joint Exhibit Book, p. 317
	August 14	BP follow-up: 152/88; 152/90. Started back on Rx Adalat.	Joint Exhibit Book, p. 316
	August 19	BP follow-up: 160/95.	Joint Exhibit Book, p. 316
	August 27	BP follow-up: 160/90. D/C Rx Adalt started Rx Diovan.	Joint Exhibit Book, p. 316
	October 1	BP follow-up: 140/80. Continue Rx Diovan.	Joint Exhibit Book, p. 316
	October 23	BP follow-up: 140/90.	Joint Exhibit Book, p. 316
2003	April 28	BP follow-up: 140/90. Continue Rx Diovan. Chronic dyspepsia. Rx Nexium.	Joint Exhibit Book, p. 316
	May 2	BP follow-up: 120/80. Started on a diuretic HCTZ 25 mgs.	Joint Exhibit Book, p. 316
	May 15	Federated Life applications.	Joint Exhibit Book, p. 238
	August 6	Shirleen stated she ran out of pills – she is getting a lot of PVC and was in ED with them. Rx: Tiazac and fluid pill (Tiazac is Rx for anti-hypertensive and anti-angina symptoms).	Joint Exhibit Book, p. 315

[55] This shows that Ms. Lowe was being followed for high blood pressure and received medications, on and off, over about eight years before she applied for the Federated Life policy. I am satisfied that that fact was material to the risk

undertaken by Federated Life. It also shows that she was treated for chronic dyspepsia in the same month as the application.

[56] The chart also shows that, before the application was made to Zurich, Ms. Lowe had experienced left arm pain, irregular heartbeat, and a chest pain on January 10, 1995 that led to an ECG. It also shows that she had been followed for high blood pressure before the Zurich policy. The Zurich application appears to contain false answers amounting to misrepresentations capable of avoiding the policy in its first two years.

[57] I have been mindful of this information, especially when assessing Mr. Fleet's testimony. However, this does not amount to similar fact evidence and, even if it could establish a propensity to mislead life insurers, I am in no position to assess what was said between Mr. Bellefontaine and Ms. Lowe about the Zurich application thirteen years ago and what Ms. Lowe's understanding was when the Zurich application was taken.

[58] Ms. Lowe is dead. Mr. Bellefontaine is not credible. There is no credible evidence about whatever disclosure or representations were made by Ms. Lowe when the Federated policy was contracted in 2003.

Liability of Federated Life

[59] Subsection 185(1) of the *Insurance Act*, R.S.N.S. 1989, c. 231 requires an applicant for insurance to:

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 ...

Under subsection 185(2) a policy is voidable for a failure to disclose or for a misrepresentation. Under subsection 186(2) the policy is voidable for two years after an innocent misrepresentation and without limit for a fraudulent misrepresentation.

[60] In this case, there is evidence of medical conditions that require disclosure. However, the evidence does not establish misrepresentation or failure to make disclosure.

[61] In his pretrial brief, Mr. Norton writes:

Federated Life submits that any action by Bellefontaine in forging the signature of the Insured as alleged does not affect its denial for misrepresentation because there is no allegation that the Insured was not asked the questions, or that Bellefontaine recorded her answers with respect to her prior medical history incorrectly.

However, the insurer bears the onus of proving the misrepresentation, or material non-disclosure, and the evidence does not establish that its agent asked a material question, got an incorrect response, or otherwise did not receive material disclosure from Ms. Lowe.

[62] Therefore, Mr. Fleet will have judgment against Federated Life for \$150,000 plus prejudgment interest.

Interest

[63] Mr. Fleet's finances were tight before his wife died. He had plans to renovate his home and refinance his high interest, credit card debt through a mortgage. However, the death of his wife was unexpected and devastating for him and his son. As a result, his plan fell through. He has been paying twenty-eight percent interest on debts totalling \$65,000 and seeks that in addition to the face value of the policy.

[64] Mr. Norton attacks this as a claim for business losses, which cannot be related to damages for breach of contract for insurance of this kind. I agree that twenty-eight percent interest is not recoverable on that basis. With great respect, the claim confuses a loss resulting from Ms. Lowe's death with damages for breach of an insurance contract.

[65] The *Judicature Act* gives the court discretion in setting a rate for prejudgment interest. Clause 41(i) provides for the court to grant prejudgment interest "at such rate as it thinks fit". I am disallowing the claim, but the parties may make submissions on prejudgment interest and costs.

Claim of Fleet against Bellefontaine

[66] Mr. Grant refers me to authorities under which an agent for an insurer is held to a duty of care towards the insured. He refers specifically to duties arising in some circumstances to warn an insured against cancelling a policy when a replacement is not assured and more generally to provide advice.

[67] These duties do not arise on the findings in this case. Ms. Lowe received better coverage under the Federated Life policy than she had under the Zurich policy. Other than litigation expenses and the loss of use of money, Mr. Bellefontaine's failures cause loss exclusively to Federated Life.

[68] I will dismiss this claim.

Claim of Federated Life against Bellefontaine

[69] Mr. Bellefontaine's authority was "to solicit applications for life insurance" on behalf of Federated Life. The agreement does not prescribe the contents of the application.

[70] This kind of insurance contract is formed by the insurer issuing the policy as an offer and the insured accepting the offer by paying the first premium. Mr. Bellefontaine had actual authority to accept the first premium if

- a. the face amount is not over \$100,000;
- b. the proposed insured is not over 64 years of age; and
- c. the answers to all questions in the application under "APPLICATION FOR TEMPORARY INSURANCE" is "NO".

The insured is not privy to these arrangements. Whether the agent had actual authority to cash the first payment would, on basic principles, not matter to the insured. The payment was made and the contract was formed.

[71] The application contained all the necessary negative answers but only because of the defalcation of the agent. In my assessment, the submission of the application breached both the duty of care and the fiduciary duties owed by Mr.

Bellefontaine to Federated Life. I accept the evidence of Ms. McMillan and find that, without the breach, the policy would not have been issued.

[72] Therefore, Federated Life will have judgment against Mr. Bellefontaine for the \$150,000, and prejudgment interest, to be paid by Federated Life to Mr. Fleet.

Conclusion

[73] I will grant an order for judgment in the amount of \$150,000 against Federated Life in favour of Mr. Fleet and a similar judgment against Mr. Bellefontaine in favour of Federated Life. The claim by Mr. Fleet against Mr. Bellefontaine will be dismissed, as will the claim for interest except as prejudgment interest under the *Judicature Act*.

[74] The parties may make submissions on prejudgment interest and costs. I request submissions in writing no later than August 29, 2008 with brief replies no later than September 12, 2008.

[75] The submissions on prejudgment interest may deal with the point I raised about the discretion to fix a rate.

[76] I must say that Mr. Bellefontaine appears to have put the other parties to a great deal of unnecessary expense by not revealing, until the last minute, that he probably signed Ms. Lowe's name to the application. I am open to a submission for costs additional to the usual party and party costs.

J.