Privy Council Appeal No. 1 *of* 1917.

The Fidelity and Casualty Insurance Company of New York - - - - - - *Appellants,*

v.

Frederick W. Mitchell - - - - *Respondent,*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1917.

Present at the Hearing:

VISCOUNT HALDANE.
LORD DUNEDIN.
LORD SHAW.
SIR ARTHUR CHANNELL.

[*Delivered by* LORD DUNEDIN.]

The plaintiff in this case sues on an accident policy date the 10th February, 1913. The policy is in the following terms, omitting such parts of the document as are immaterial to the questions raised:—

$15,000—$30,000 Full Life-Indemnity Disability Policy providing indemnity for

(1) Bodily injury sustained through accidental means and resulting in Disability, Dismemberment, Loss of Sight, or Death;

(2) Illness from any disease resulting in Disability: to the extent herein provided.

No. 2460756

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK.

THE INSURING CLAUSE.

The Fidelity and Casualty Company of New York (herein called the Company) does hereby insure the person (herein called the Assured) named in Statement A of the Schedule of Warranties against—

(1) Bodily injury sustained during the term of one year from noon, standard time, of the day that this policy is dated, through accidental means (excluding suicide, sane or insane, or any attempt thereat, sane

or insane), and resulting directly, independently and exclusively of all other causes, in—

(a) Immediate, continuous, and total disability that prevents the Assured from performing any and every kind of duty pertaining to his occupation.

* * * * * *

ACCIDENT INDEMNITIES.

TOTAL DISABILITY.

Article 5. If the Assured suffers total disability, the Company will pay the Assured so long as he lives and suffers said total disability

Seventy-Five Dollars a week.

* * * * * *

DOUBLE INDEMNITIES.

Article 9. The amounts specified in Articles 5, 6, 7, and 8 shall be double if the bodily injury is sustained by the Assured—

(2) while in or on a public conveyance (including the platform, steps, and running-board thereof) provided by a common carrier for passenger service.

On the 30th May, 1913, being within twelve months of the date of the policy, the plaintiff was travelling in a sleeping-car on the railway, and was thrown out of his berth on to the floor of the car. He was rendered insensible and was afterwards found to have severely sprained his wrist. The wrist did not get better, and it is now in such a condition as entirely to prevent him using his hand so as to perform such operations as are part of the necessary work of a throat, ear, and eye specialist. The defendant Company paid the weekly allowance of 150 dollars down to the 1st March, 1915. After that they refused to pay, and this action is for the quarterly payment due on the 30th May, 1915.

Before the trial Judge the defendants, while admitting the notification of the accident, pled that if the accident had happened there had been complete recovery from its effects, or if there had not been complete recovery, that such non-recovery was due to inattention on the part of the plaintiff and a fraudulent design on his part to prevent the injury healing. These pleas were emphatically negatived by the trial Judge, whose verdict on this matter was unanimously confirmed by the Court of Appeal; and they have not been insisted on before this Board.

The defendants, however, had three other pleas which though repelled by the learned trial Judge and unanimously by the learned Judges of the Court of Appeal, have been argued before their Lordships. They were:—

1. That there was breach of warranty on the part of the plaintiff, who was thereby disentitled to sue on the policy.
2. That the injury sustained by the plaintiff through accidental means did not independently, exclusively of all other causes, result in immediate continuous and total disability.

3. That the disability does not prevent him from performing any and every kind of duty pertaining to his occupation.

This last plea may be at once disposed of. His occupation is that of a specialist in work on eye, ear, nose, and throat. The learned Judges have all held that a man with a totally disabled hand cannot in any fair sense perform any and every kind of duty of that occupation. With that finding of fact their Lordships entirely agree.

As regards pleas one and two, some further explanation is necessary. It is the fact that there is present in the plaintiff a part of the chest where there is dullness on percussion, which indicates that at a previous period, probably some ten or fifteen years before the accident there had been a tubercular affection of a small part of the lung. The lesion in the lung had healed, and there was no active trouble in the chest. There was no positive evidence of an actual tubercular condition of the wrist; but a sprain, however severe, would normally get better in some six months or so, and would not settle down into the chronic condition which was here disclosed.

Upon this evidence, and upon the somewhat conflicting evidence of the doctors examined, the trial Judge and the Judges of the Court of Appeal came to the same conclusion as to findings of fact. These findings were accepted by the counsel for the defendants; and even had they not been so accepted, their Lordships would have been slow to disturb them. They may be summarised thus: There was no active tuberculosis in the arm, but there was present in the plaintiff's system tuberculosis in some form, such tuberculosis—the lesion in the lung having completely healed—was latent, and would have remained harmless had it not been for the accident.

As regards the first plea on the warranty, their Lordships have no hesitation in coming to the same conclusion as the Courts below. The plaintiff has no apparent disease, and would have been passed sound by any doctor who might have examined him, and the statement in the schedule of warranties, that he was in "sound condition, mentally and physically," was true.

The more difficult and delicate part of the case is in relation to the second plea. It was strenuously urged by the appellants that the disability here could not be said to be caused by the accident independently of another cause; the other cause being the tuberculous condition, without which there would not have been continuous disability, as the sprain would have passed away in ordinary course.

The point is narrow and not without difficulty. But their Lordships agree with the result reached in the exceedingly careful and able judgment of Middleton, J., confirmed unani-

mously by the learned Judges of the Court of Appeal. His view is most tersely expressed in a single sentence:—

"This diseased condition is not an independent and outside cause, but it is a consequence and effect of the accident."

Their Lordships agree with the learned counsel for the appellants, who argued that the matter is not concluded by the cases on the Workmen's Compensation Act. What is there sought is a chain of causation starting from the accident without (to use the phrase used in the House of Lords in *Coyle's Case* (1915, A.C. 1)), "any intervening circumstance to break the chain of causation." What has got to be determined here is the construction of this clause.

What is insured against is, first, bodily injury sustained through accidental means. As to that, there is no difficulty. The wrist has been injured by an accidental fall. Then, secondly, this bodily injury must result in immediate continuous and total disability that prevents the assured, &c. This, also, is clear. The wrist was disabled at the moment of the fall, and has been disabled ever since. The point as to preventing the assured from doing work has been already dealt with. But then comes the third condition, which is the critical point. This bodily injury, sustained through accidental means, and resulting in disability, must so result "directly independently and exclusively of all other causes." Now the expression "other" causes postulates a cause already specified. The word "cause" has not, so far, been used in the sentence, and it must therefore be found in the words "accidental means." Therefore there must be independency between cause 1—the accident—and cause 2, whatever that may be. But in this case, on the view of the facts taken by both Courts—with which their Lordships agree, and which in any case they would be slow to disturb—there is no independency between the alleged second cause—the tuberculous state—and the first cause—the accident. Prior to the accident there was only a potestative tuberculous tendency; after it, and owing to it, there was a tuberculous condition. In other words, the accident had a double effect: it sprained the tendons, and it induced the tuberculous condition. These two things acted together, and were the reason of the continuing disability; but while they are both ingredients of the disabled condition, there has been and is, on the true construction of the policy, only one cause, viz., the accident.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal. The respondent, in terms of the order, granting special leave to appeal, will have the costs of the appeal taxed as between solicitor and client.

In the Privy Council.

THE FIDELITY AND CASUALTY INSURANCE COMPANY OF NEW YORK

v.

FREDERICK W. MITCHELL.

DELIVERED BY LORD DUNEDIN.

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1917.