Privy Council Appeal No. 45 of 1923.

Lucy Smallfield - - - - - - - *Appellant*

v.

The National Mutual Life Association of Australasia, Limited - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND JULY, 1923.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD PARMOOR.

[*Delivered by* LORD PARMOOR.]

The appellant is the sole executrix under the will of her husband, Cecil Robert Smallfield, deceased, who died at Hamilton, New Zealand, on January 26th, 1921. On February 13th, 1920, Cecil Robert Smallfield signed a proposal form for an insurance on his life for £10,000. This proposal was accepted by the respondents, and a policy was issued to him on March 29th, 1920, insuring his life for £10,000, as from February 28th, 1920. Smallfield met his death on January 26th, 1921, while bathing in the Waikato River at Hamilton. The policy was in full force and effect at this date, and all premiums thereunder had been paid. Two inquests were held on Smallfield, and in each case a verdict of death by heart failure was returned by the coroner, in accordance with medical evidence. The respondents had notice of the first inquest, and the second inquest was held after the respondents had obtained an order from the Minister of Internal Affairs, for the exhumation of the body. After the second inquest the appellant issued a writ against the respondents to claim the amount due under the policy. The only defence set up by the

respondents was that Smallfield had died by his own hand, by administering to himself carbolic acid poison, and, whether such poison took effect or not, by drowning himself in the Waikato River.

The trial of the action took place before a special jury. The respondents having pleaded an affirmative defence called evidence directed to prove that Smallfield died by his own hand. Evidence was given as to the financial position of Smallfield at the time of his death, and by four experts. It is not necessary to refer to the evidence of poisoning by carbolic acid, but it is of importance to note, that the three registered and qualified medical practitioners who gave evidence stated, positively, in support of the case of the respondents that they did not believe that there was any heart failure in the case of Smallfield, and that there was no evidence, which would convince them, that Smallfield had died from heart failure.

On the close of the case of the respondents it was submitted that there was no case for the appellant to answer, but Mr. Justice Stringer declined to direct the jury that there was no evidence before them. Evidence was thereupon called for the appellant. It is upon the construction of this evidence, and the discretion exercised by Mr. Justice Stringer, in not allowing an amendment in the pleadings, that the questions in this appeal depend. Before, however, considering this evidence, and the action of Mr. Justice Stringer, it will be convenient to refer to the policy of insurance. This policy states that the basis of the contract is the proposal and declaration of the assured, and the personal statement made by the life assured to the association or the medical examiner in connection with the proposal. It provides that the policy shall be void if the proposal or any other document upon the faith of which the policy is granted shall contain any untrue statement. The respondents based their claim for an amendment of the pleadings on the ground, that the evidence, adduced by the appellant, did disclose a *prima facie* case, that a statement untrue in fact had been made by the assured, and that if they could establish this defence, the policy would be voided. The personal statement made by the assured was said to be untrue in two particulars. In answer to question No. 2, " What is the present and general state of your health ? " the assured had answered " Good." It was urged that the evidence adduced by the plaintiff gave a sufficient ground for raising the defence that the health of the assured was not good when this assurance was made, and that the answer was untrue in fact. In addition, on question No. 12, " Are there any other circumstances which ought to be communicated to the directors to enable them to form a fair judgment regarding the risk of an assurance on your life ? " the assured had answered " No." This answer was said to be untrue on the ground that the assured had been not passed for effective military service. The fact that the assured had been rejected from military service might have arisen from a variety of sources, which would not in any way affect liability under

the policy. The respondents knew that the assured had been rejected at the time of the inquest. The case on appeal was, in substance, argued on the answer of the assured to question No. 2.

After evidence had been given by the appellant and certain other witnesses, the jury intimated that they were satisfied that there was no proof that the deceased had died by his own hand. Whereupon the learned Judge made a note, the copy of which was supplied to the Court of Appeal, "Jury having intimated that they were satisfied that the defendant had failed to establish the defence that the deceased had died by his own hands, Mr. Neave agrees to accept that finding, all further questions reserved as to amendments of defence or otherwise. Agreed that question of interest reserved for Judge, and also the question as to any amendment caused by the evidence disclosed at the trial, and if such amendment be granted that the determination of the questions raised by such an amendment be left to the Judge." During the hearing of the appeal a question was raised whether, in the event of an amendment being granted, it was agreed by consent of counsel of both parties that the facts in issue should be decided by the Judge alone upon the evidence then before him. Mr. Ostler gave a very frank explanation of the statement, contained in the short statement of facts for the Court of Appeal, and said that if Mr. Neave had been alive no misunderstanding would have arisen. Their Lordships accept without hesitation Mr. Ostler's statement. In any case the matter is settled by the copy of the learned trial Judge's note supplied by him to the Court of Appeal. If the judgment of Mr. Justice Stringer were now being overruled, and the amendment allowed, their Lordships, as at present advised, are of opinion that it would have been necessary to send the case raised by the new plea for trial by a jury, the decision of the jury on the previous trial still standing; but it is unnecessary to pursue this matter, since, for the reasons to be stated, their Lordships are of opinion that there is no reason for disturbing the discretion exercised by Mr. Justice Stringer in refusing the application to amend made on behalf of the defendants.

It is not questioned that Mr. Justice Stringer had jurisdiction to make the amendment if in his discretion he thought it right to make it. Stout, C.J., in his judgment in the Appeal Court, refers to Rules 144–151 in the code of civil procedure. These rules deal with amendments of statement of claim and defence, and the learned Chief Justice states that in none of them is there an explicit provision that there may be a new statement of defence filed at the trial, unless the defence has arisen since the action was commenced. The Chief Justice further states that the respondent relied on Rules 270 and 271, and that there was no doubt that, under these rules, the Court had power to make amendments, although whether this power had ever been exercised in such a case as the present was open for consideration. The evidence relied on by the defendants in support of the application for amendment

consists of evidence given by the plaintiff, by three friends, who knew the assured, Pocock, Bryant and Walsh, and by Dr. MacKenzie, a duly qualified and registered practitioner, practising in Auckland. Undoubtedly the most important evidence is that given by the plaintiff. Commenting on this evidence Mr. Justice Stringer says :—

> " I am not disposed to place a very great deal of reliance on the words used by the deceased's wife in the witness box ; she was obviously in a nervous condition. It was difficult to catch exactly what she said, and I myself do not think that I would attribute to her words any greater meaning than that he (the assured) was not as well after the epidemic as before, and yet he might reasonably be in what might be termed good health."

The value of the evidence given by the plaintiff could only be properly weighed by consideration of the circumstances under which it was given, and the condition in which the plaintiff was at the time she gave it. The evidence followed that which had been given at the two inquests, to which reference was allowed to be made by consent, and that which had been given by numerous witnesses for the defendants, attributing the death of the assured to suicide, either by drowning or by carbolic acid poisoning. Every avenue of inquiry as to the cause of the death of the assured had obviously been carefully weighed on behalf of the defendants, after taking the advice of fully qualified medical opinion. The effect of this evidence was to suggest that the death of the assured could not be attributed to the fact that he was at the date of the policy not in what might reasonably be termed good health. Taking this evidence into consideration, and accepting the summary of Mr. Justice Stringer as to the effect on him of the evidence of the appellant, their Lordships find no reason in this evidence for interfering with the discretion which the learned trial Judge exercised in refusing an amendment, or for differing from the judgment of the Chief Justice in the Court of Appeal.

The three friends of the assured give no evidence of attacks to which the assured was liable, prior to the date of the issue of the policy, and although if the evidence of the plaintiff had been accepted in its full meaning, the evidence given by these witnesses would have had a corroborative value, there is nothing to show that there were any similar attacks before the proposal for assurance was made. This evidence is therefore of little weight for the purpose of showing that, at the date of the proposal, the assured had made a statement untrue in fact in regard to the state of his health. Dr. MacKenzie carries the matter no further. He thinks that death was due to excessive exertion, and that any excessive exertion may constitute a shock, just as an injury may constitute a shock, and adds that the assured must have had a careful examination for insurance purposes, yet it was possible he might have had a weak heart. Taking the evidence as a whole given on behalf of the plaintiff at the trial, their Lordships

are unable to find any ground for interfering with the discretion of Mr. Justice Stringer. In the Court of Appeal Chief Justice Stout expressed his opinion that the appellants in the Court of Appeal had failed to show that the judgment was erroneous in fact or in law, and in this opinion their Lordships concur. Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs, and that the judgment of Stringer, J., in the Supreme Court should be restored, and that in the Court of Appeal costs should be allowed to the appellant on the highest scale, as from a distance.

The appellant's petition for the admission of further evidence will be dismissed, and no charges relating to it will be allowed in her bill of costs.

In the Privy Council.

LUCY SMALLFIELD

v.

THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA, LIMITED.

DELIVERED BY LORD PARMOOR.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1923.