ALICE MAUD PRICE (PLAINTIFF).....APPELLANT;

AND

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY (DEFENDANT).....RESPONDENT.

1941

* Feb. 25, 26.
* June 24.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK APPEAL DIVISION

Accident insurance—Death of insured—Suit to recover under policy—Proximate cause of death—Insured taking insulin for diabetic condition—Death alleged to have been caused by insulin reaction from taking dose of insulin—Application and effect of s. 5 (in force at time of death) of Accident Insurance Act, R.S.N.B., 1927, c. 85.

Plaintiff sued to recover upon an accident insurance policy upon the life of her deceased husband. The deceased suffered from diabetes and took insulin therefor. One morning he took (as found by inference from the evidence) the usual dose, later in the day became very ill, from, according to evidence given, an "insulin reaction," and died three days later. The policy by its terms insured against (*inter alia*) death resulting from "bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means." Sec. 5 (in force at the time of deceased's death) of the New Brunswick *Accident Insurance Act* provided that "in every contract of accident insurance, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the indirect result of his intentional act * * *"

Held: Plaintiff was entitled to recover. Though deceased's diabetic condition co-acted with the insulin, yet, on the true construction of the policy and said s. 5 of the Act, there was only one cause of death (*Fidelity and Casualty Company of New York* v. *Mitchell*, [1917] A.C. 592, at 597), viz., the bodily injury, sustained as a result of the taking of the insulin. The bodily injury (the event insured against) was occasioned by external agency and happened without deceased's direct intent, within the meaning of said s. 5.

Judgment of the Supreme Court of New Brunswick, Appeal Division, 15 M.P.R. 418, reversed. (Crocket J. dissenting).

Per Crocket J. (dissenting): The effect of the judgment of this Court on the former appeal in this action ([1938] S.C.R. 234, which ordered a new trial) was that, upon the proper construction of s. 5 of the Act, the external force or agency (in this case the injection of the insulin by the insured) which occasions the bodily injury, must be the proximate cause of the insured's death. Under the policy and the Act alike, the "means" or "external force or agency" must be at least accidental as well as external. The suggestion that s. 5 of the Act was intended to include as accidents, circumstances where the means is not accidental but intentional and an unintentional result follows, is contrary to the clear effect of said former judgment

* PRESENT:—Duff C.J. and Crocket, Kerwin, Hudson and Taschereau JJ.

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of this Court; and s. 5 cannot now be regarded as doing away with the fundamental and universally recognized principle of accident insurance, viz., that the accident must be found in the "means" or (as expressed in said s. 5) in the "external force or agency" from which the bodily injury insured against has naturally and directly resulted.

APPEAL by the plaintiff from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), which, reversing the judgment of Richards J. (2), dismissed the action (Harrison J. dissenting).

The plaintiff's claim in the action was as beneficiary under a policy of insurance issued by the defendant insuring the plaintiff's husband against (*inter alia*) death resulting from "bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means."

The insured suffered from diabetes and took insulin therefor. As found by inference from the evidence (there being no direct evidence of the fact), he took insulin on the morning of February 26, 1933. Later on that day he became very ill, and he died on March 1, 1933. Plaintiff's statement of claim alleged that deceased "accidentally and by mistake took a dose [amended to read "an overdose"] of insulin as a result whereof and not otherwise" the deceased came to his death. The trial judge, Richards J., found that there was no evidence that deceased took an overdose, or from which an inference could be drawn that he took an overdose, of insulin; that the only possible inference was that the normal dose or quantity was taken (and was taken intentionally); and this finding was agreed with in the Appeal Division and in this Court. There was evidence given to the effect that deceased, after taking the insulin, suffered an "insulin reaction," which caused conditions resulting in his death.

On the question of defendant's liability, there were involved questions with regard to the construction, application and effect of s. 5 of the *Accident Insurance Act*, R.S.N.B., 1927, c. 85; which section was in force at the time of deceased's death, but has since been repealed. It is set out in the reasons for judgment in this Court now reported.

(1) 15 M.P.R. 418; [1941] 1 D.L.R. 241.
(2) [1940] 3 D.L.R. 244.

By a previous judgment of this Court in the same action (1) a new trial was ordered. The new trial took place before Richards J., who held that the plaintiff was entitled to judgment (2). His judgment was reversed by the Supreme Court of New Brunswick, Appeal Division (3), which (Harrison J. dissenting) dismissed the action. It is from the latter judgment that the present appeal was taken. The appeal to this Court was allowed and the judgment of the trial judge restored, with costs throughout; Crocket J. dissenting.

O. M. Biggar K.C. and *J. F. H. Teed K.C.* for the appellant.

T. N. Phelan K.C. and *J. E. Friel* for the respondent.

The judgment of the majority of the Court (The Chief Justice and Kerwin, Hudson and Taschereau JJ.) was delivered by

KERWIN J.—Pursuant to the judgment of this Court (4), a new trial was had between the parties before Mr. Justice Richards without the intervention of a jury. The plaintiff succeeded in her claim (5) but the Appeal Division of the Supreme Court of New Brunswick (Mr. Justice Harrison dissenting) set aside the judgment and dismissed the action (6). The plaintiff again appeals.

By the policy issued by the respondent, the deceased was insured against bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means, and

> if any one of the disabilities enumerated below shall result from such injuries alone within ninety days from the date of accident, the Company will pay the sum specified opposite such disability.

Under the schedule of indemnities for loss of life, ten thousand dollars was payable in a certain manner.

It was conceded that the appellant could not succeed under the terms of the policy alone, but she relies on section 5 of the New Brunswick *Accident Insurance Act*, which was in force at all relevant times and which reads as follows:—

(1) [1938] S.C.R. 234.
(2) [1940] 3 D.L.R. 244.
(3) 15 M.P.R. 418; [1941] 1 D.L.R. 241.
(4) [1938] S.C.R. 234.
(5) [1940] 3 D.L.R. 244.
(6) 15 M.P.R. 418; [1941] 1 D.L.R. 241.

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5. In every contract of accident insurance, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the indirect result of his intentional act, and no term, condition, stipulation, warranty or proviso of the contract, varying the obligation or liability of the insurer shall, as against the insured, have any force or validity, but the contract may provide for the exclusion from the risks insured against of accidents arising from any hazard or class of hazard expressly stated in the policy.

Without detailing the evidence, I am satisfied that the deceased suffered a bodily injury occasioned by external agency and that the injury, which was the event insured against, happened without his direct intent. He suffered from diabetes and it was his custom to take eight units of insulin morning and afternoon. There can be really no dispute that on the morning in question he took insulin, and while there is no direct evidence as to the quantity, the proper inference is that he took the usual dose. This finding, coupled with the testimony that he suffered an insulin reaction, means that while he intentionally took the eight units, the bodily injury occasioned thereby happened without his intending it.

What was the proximate cause of death? It is true that the deceased's diabetic condition co-acted with the insulin but, while they were both ingredients, there was, on the true construction of the policy and section, only one cause of death. *Fidelity and Casualty Company of New York* v. *Mitchell* (1). That was the bodily injury sustained as a result of the taking of the insulin.

The appeal should be allowed and the judgment at the trial restored. The appellant is entitled to her costs of the appeals to the Appeal Division and to this Court.

CROCKET J. (dissenting)—This action, which was brought by the appellant as the beneficiary under a policy of accident insurance to recover the indemnity provided for thereby for the death of her husband through alleged accidental injury, was originally tried before Barry, Chief Justice of the King's Bench Division of the Supreme Court of New Brunswick, and a jury.

The statement of claim, as originally framed, alleged that the insured, prior to March 1st, 1933, received bodily injuries effected directly and independently of all other

(1) [1917] A.C. 592, at 597.

causes, through external, violent and accidental means, within the meaning of the said policy of insurance, in that he "accidentally and by mistake took a dose of insulin, as a result whereof and not otherwise [he] came to his death," on March 1st, 1933. During the trial the words "an over-dose of insulin" were substituted for the words "a dose of insulin", and the Chief Justice left two principal questions to the jury directed to that particular issue, viz.: "Did the insured accidentally, and by mistake, take an over-dose of insulin?" and, "Was the insured's death caused solely by taking, accidentally and by mistake, an over-dose of insulin?" To the first of these questions the jury answered "Yes," and to the second "Yes, indirectly." Notwithstanding these two answers and further findings by the jury, in answer to other questions, that the insured's death was caused or contributed to by diabetes indirectly through insulin reaction, His Lordship, upon consideration of a motion for the entry of judgment, dismissed the action on the ground that there was no evidence whatever to justify the finding that the insured accidentally and by mistake took an over-dose of insulin, and that the answer to the second question should have been "No" instead of "Yes, indirectly."

The plaintiff appealed from that judgment to the Appeal Division, with the result that the trial judgment was sustained by Baxter C.J., and Grimmer J.; Harrison J. dissenting (1).

The appellant then appealed to this Court from that decision, with the result that a new trial of the action, except on the incidental issues of non-disclosure and of age, was ordered in March, 1938 (2). The second trial came on before Richards J., sitting without a jury, in December, 1938. That learned judge, putting to himself the same question which Chief Justice Barry had put to the jury on the former trial, viz.: "Did Dr. Price take an over-dose of insulin accidentally and by mistake?", found that there was only one possible answer to be made thereto, which was "No," and that the only logical finding is that Dr. Price took the normal quantity of eight units intentionally. Later, in addressing himself to the

(1) 11 M.P.R. 490; [1937] 2 D.L.R. 369.

(2) [1938] S.C.R. 234.

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question as to whether the death of Dr. Price was an accident within the terms of the policy itself, His Lordship said:

> There was no mistake about the taking of the insulin, there was no overdose, there was no accident within the ordinary meaning of the term. It seems unnecessary to discuss this feature further.

He decided however that the appellant was entitled to recover for the indemnity provided by the policy on the ground that the case was one which fell under the express terms of s. 5 of the New Brunswick *Accident Insurance Act*, c. 85, R.S.N.B., 1927, as he construed it. That section, though it has since been repealed, was in force at the time of the insured's death. It read:—

> In every contract of accident insurance, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the indirect result of his intentional act, and no term, condition, stipulation, warranty or proviso of the contract, varying the obligation or liability of the insurer shall, as against the insured, have any force or validity, but the contract may provide for the exclusion from the risks insured against of accidents arising from any hazard or class of hazard expressly stated in the policy.

His Lordship said that it seemed abundantly clear to him that the section was intended to provide and did provide for cases where the external force or agency is intentional and something unexpected happens as a result—either (*a*) without the direct intention of the person injured, or (*b*) as the indirect result of his intentional act, and held that the first alternative (*a*) exactly applied to the present case. In support of this view he quoted a dictum of Chief Justice Rose of Ontario, which, he pointed out, was *obiter*, in *Battle* v. *Fidelity & Casualty Company of New York* (1), and dicta of Riddell and Middleton JJ.A., of the Ontario Court of Appeal, in *Lang Shirt Co.'s Trustee* v. *London Life Ins. Co.* (2), as well as dicta from the majority judgment of this Court, written by Mignault J., on appeal in that case (3), dealing with an identical Ontario enactment. From this judgment the present respondent appealed to the Appeal Division, where the appeal was allowed and the action dismissed *per* Baxter C.J. and

(1) (1923) 54 O.L.R. 24. (2) (1928) 62 O.L.R. 83.
(3) *London Life Ins. Co.* v. *Trustee of the Property of Lang Shirt Co. Ltd.*, [1929] S.C.R. 117, at 132, 133.

Grimmer J.; Harrison J. dissenting, so that the case comes to us now a second time by way of appeal on the part of the plaintiff.

The majority judgment suggested, as the Appeal Division had done on the plaintiff's first appeal, that the object of s. 5 of the New Brunswick *Accident Insurance Act* was to prevent advantage being taken of exceptions in policies like those considered in *Cole* v. *Accident Ins. Co.* (1), and in *United London & Scottish Ins. Co.; In re Brown's Claim* (2), and held that it did not *define* the term "accident," as suggested by Rose J. and Middleton J.A., in the dicta quoted by the trial judge, but simply declared that the "event insured against," which must necessarily be the result of an accident, shall include certain things. It quotes s. 2 (*a*) of the Act, which declares that in that chapter "accident insurance" means "insurance against loss arising from accident to the person of the insured," points out that the policy insured the deceased against "*bodily injuries,* effected directly and independently of all other causes, through external, violent and *accidental* means," and takes the ground that the whole subject falls within s. 2 (*a*). The learned Chief Justice quotes the dictum of Lord Adam of the Scottish Court of Sessions in *Clidero* v. *Scottish Accident Ins. Co.* (3) that:

> A person may do certain acts, the result of which acts may produce unforeseen consequences, and may produce what is commonly called accidental death, but the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental.

He also quotes a passage from the judgment of Bray J., in *Scarr* v. *General Accident Assce. Corpn.* (4), to the same effect: that the fact of an intentional physical act producing an unforeseen or unexpected result does not render the act, which induces the result, accidental; and also the dictum of Lord Lindley in the well known Workmen's Compensation case of *Fenton* v. *Thorley* (5), that in an action on a policy the *causa proxima* is alone considered in ascertaining the cause of loss. He says that it was to ascertain the *causa proxima* that the case had been sent back for a new trial, and held that the intentional inser-

(1) (1889) 5 T.L.R. 736.
(2) [1915] 2 Ch. 167.
(3) (1892) 19 R. (Court of Session) 355, at 362.
(4) [1905] 1 K.B. 387, at 393.
(5) [1903] A.C. 443.

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tion of the hypodermic needle could not be considered the proximate cause of the insured's death within the meaning of the section. That enactment only declared what "bodily injuries" shall include, and in his opinion was "directed to the *result* of an accident; not to the accident itself."

Harrison J. in his dissenting judgment said that the clear implication of the judgment of this Court in the former appeal was that, if the taking of insulin on the morning in question was the proximate cause of the death of the insured, the plaintiff was entitled to succeed in her claim upon the accident policy under the provisions of the New Brunswick *Accident Insurance Act* or that otherwise the action would have been dismissed in accordance with the judgment of the dissenting judge; and that death by insulin shock due to the taking of a dose of insulin could be an accident within the meaning of the *Accident Insurance Act* and there was sufficient evidence of such an accident if death was in fact caused by the taking of insulin and that the question was, therefore, *res judicata.* With all respect, I think the judgment of this Court carried no such implication as the learned judge sugggests.

Mr. Justice Davis, who delivered the majority judgment, said that the real question in issue, broadly speaking, was whether or not the insured's death was caused by accident, and that the basis of the claim under the policy was that his death was caused by his having taken insulin for his diabetic condition on the morning in question in too large a dose. "There is no direct evidence," he continued,

> that he took any insulin the morning in question, but it is a fair inference, and really not in dispute, that he had taken insulin that morning, as he had been accustomed to do for several months each morning and each evening. Whether on the particular occasion the quantity he took was in excess of the quantity that had been prescribed for him and which he had been taking regularly for some months or whether he took the usual quantity that morning but it was too much for his system at that particular time is not made plain because, of course, no one knows the exact amount he did take.

Then he went on to discuss s. 5 of the New Brunswick *Accident Insurance Act.* He said the section was obviously intended to put an end to defences by accident insurance companies which had raised technical and confusing issues, and the statute, therefore, created liability in the companies

whether the event insured against (i.e., the accident) happened "without the direct intent of the person injured" or "as the indirect result of his intentional act." In applying the section to the circumstances of this case the essential point is that in law the external force or agency *which occasions the bodily injury* must be the proximate cause of the death.

After a lengthy quotation from the judgment of Scrutton J., as he then was, in *Coxe* v. *Employers' Liability Assce. Corpn. Ltd.* (1), which turned on the construction of a condition in an insurance policy excepting death "*directly or indirectly caused by,* arising from, or traceable to * * * war," and in which it was held that it was impossible to reconcile the last italicized words with the maxim *causa proxima non remota spectatur,* which must be applied to all policies of insurance, whether marine or accident, unless it be excluded by express words or necessary implication, Davis J. said:

> In the section of the statute which governs the case before us, the words are "any bodily injury *occasioned by external force or agency*"—not, occasioned "directly or indirectly" by external force or agency. That being so, upon the proper construction of the section the external force or agency must be the proximate cause of the bodily injury.

Then, having pointed out so clearly the basis of the action, viz., the taking of an over-dose of insulin, and that the question whether he had taken an overdose or had taken the prescribed and normal dose but which was too much for his system at that particular time, had not been made plain, and construed the critical section of the *Accident Insurance Act* in the language I have reproduced, he immediately proceeded to consider the effect of the jury's answers to the questions submitted by Barry C.J.

As to this feature of the case, he said in introducing the subject that "the real question for the jury was whether or not the taking of the insulin on the morning in question directly resulted in the death of the insured," and added that "their answers present a good deal of difficulty to us in ascertaining what their conclusion really was on the vital fact whether or not the insulin was the proximate cause of death." He then set out the answers to questions 1, 2, 8 and 11, and added these words: "It is plain that the jury have not determined the vital issue as to whether or not the taking of the insulin on the morning

(1) [1916] 2 K.B. 629, at 633.

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in question was the proximate cause of death," and for that reason held that the case would have to go back for a new trial.

It is these three last quoted statements of the judgment, and the fact that the Court ordered a new trial as stated, which have been seized on by the appellant's counsel to support the proposition that the judgment on the former appeal necessarily means that if a diabetic patient, who has for months been regularly taking insulin in the quantity prescribed for him, dies as the direct result of his voluntary and intentional injection into his own body of any insulin—whether it be an over-dose taken accidentally and by mistake or not—and such a patient has an accident insurance policy on his life, the beneficiary named therein is entitled to recover for his death as having been solely occasioned by external force or agency under the provisions of the New Brunswick *Accident Insurance Act* in force at the time of the death of the insured.

I should have thought that the words "*the* taking of *the* insulin" themselves manifestly imply a reference to the taking of an over-dose of insulin accidentally and by mistake, as alleged by the plaintiff in her statement of claim, and as specifically found by the jury in answer to the first and fundamental question, which the Court was considering, and which the judgment had previously so clearly pointed out was the sole basis of the plaintiff's claim in the action. Otherwise we should have to regard this portion of the Court's judgment as a direct and immediate disaffirmance of what the Court had just laid down as to the proper construction of s. 5 of the *Accident Insurance Act*.

So far as my own judgment in the former appeal is concerned, I may say that before writing it I had the advantage of reading and carefully considering a copy of my brother Davis's proposed judgment. I stated in my judgment, as may be seen at pages 242 and 243 of the official reports, that I agreed with him that the section did not exclude the maxim *causa proxima* and that it followed that there could be no recovery under any contract of accident insurance, whether for a bodily injury or for death resulting directly from a bodily injury, unless such bodily injury was directly caused by external force or

agency, or, in other words, unless external force or agency was the proximate cause of such bodily injury. That, as I said, was precisely the construction which the learned Chief Justice of New Brunswick and Grimmer J. placed on the section in their majority judgment, and upon which their decision affirming the dismissal of the action by the trial judge was manifestly based.

So far, then, as the effect of s. 5 of the New Brunswick *Accident Insurance Act* is concerned, as it applies to this case, it is clear that this Court on the former appeal definitely laid it down that upon the proper construction of that enactment the external force or agency, which occasions the bodily injury, *must be the proximate cause* of the insured's death. That surely cannot mean that the section may be interpreted as providing that the essential external force or agency may be merely a contributory cause or one of several causes, whose combined operation brought about the insured's death. Obviously it can only mean that the injection of the insulin by means of the hypodermic needle in the hand of the insured himself, which is the only thing that could conceivably be described as "external force or agency," must be the sole and exclusive cause of the death, or, in other words, that the death must have occurred as the direct and natural consequence of the alleged external force or agency without the intervention of any other cause. Indeed, as already pointed out, that was the entire basis of the appellant's claim, as alleged in para. 8 of her statement of claim, viz., if I may repeat: that the insured "received bodily injuries effected directly and independently of all other causes, through external, violent and accidental means * * *" in that he "accidentally and by mistake took an overdose of insulin [substituted for "a dose of insulin"], as a result whereof and not otherwise" he came to his death. This was the fundamental issue on which the case was first tried, when everybody clearly took it for granted that under the policy and the New Brunswick *Accident Insurance Act* alike the "external force or agency" or "means" —as both the policy and the statement of claim express it—must be at least "accidental," as well as external. Richards J., on the second trial, however, in view of the explicit findings he had made on that basic issue, distinctly

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held that the death of the insured was not an accident within the terms of the policy alone, but was an accident within the terms of s. 5 of the *Accident Insurance Act*. Founding himself upon the dicta in the *Lang* (1), *Battle* (2), and other cases, to which he referred, His Lordship suggested that that section of the statute was intended to include as accidents circumstances where the means is not accidental but intentional and an unintentional result follows. While, no doubt, some of these dicta appear to strongly support the view of the learned trial judge, I am of opinion, with the greatest possible respect, that the clear effect of the unanimous judgment of this Court on the appellant's first appeal, upon that question, is quite to the contrary; and that the section cannot now be regarded as doing away with the fundamental and universally recognized principle of accident insurance, viz.: that the accident must be found in "the means," or, as the section itself expresses it, in the "external force or agency," from which the bodily injury insured against has naturally and directly resulted.

I think the appeal should be dismissed, and with costs, if asked.

Appeal allowed with costs.

Solicitor for the appellant: *E. Albert Reilly.*

Solicitors for the respondent: *Friel & Friel.*