1929
*Oct. 10.
*Nov. 4.

THE DOMINION OF CANADA GUARANTEE AND ACCIDENT INSURANCE COMPANY (DEFENDANT)..... } APPELLANT;

AND

ELLEN A. MAHONEY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Accident insurance—Provision for reduction of insurer's liability if insured injured "while engaged either temporarily, casually or permanently" in more hazardous "occupation"—Isolated act of extra hazard—Exception to risk described by different wording in policy and application—Jury's findings as to circumstances of accident.

Defendant insured M. against accident. In his application for insurance M. warranted that "my occupation and specific duties are fully described as president and general manager of lumber company, office duty only and travelling," and agreed to have his occupation classed as "select," and for reduction of insurer's liability if insured was injured "while engaged in any occupation or exposure to danger" classed as more hazardous than that stated. A term of the policy provided for such reduction of liability if insured was injured "while engaged either temporarily, casually or permanently in an occupation classed as more hazardous" than that stated. M. was crushed between two railway box cars, resulting in his death. Defendant alleged that M. at the time of the accident was trying to engineer the movement of a box car, and therefore, under the contract, plaintiff (beneficiary thereunder) was not entitled to the full amount of the policy, which she claimed. The jury, in answer to questions submitted, found that M. died by accidental injury, that at the time of injury he was not engaged in any occupation other than that of "president and general manager of lumber company, office duty only and travelling," and was not "engaged in any exposure to danger more hazardous than office duty." They expressed inability to find what act M. was

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

doing at the time of the accident. Judgment was given for plaintiff, which was affirmed by the Appeal Division (N.B.).

Held (1) On the evidence, it could not be said that the jury erred in failing to find what M. was doing, or whether or not he was on a box car, at the time of the accident; and that, on the jury's findings, judgment for plaintiff was the only possible outcome of the action.

(2) Even had M. been trying to engineer the movement of a box car at the time of the accident, that fact alone would not warrant judgment for defendant. The doing of that single isolated act, ordinarily forming part of the duties of a more hazardous occupation, would not amount to "engaging in" such occupation "either temporarily, casually or permanently."

(3) If a specific exception to the risk undertaken in an insurance policy be described in the policy itself, as well as in the application therefor (although the latter be incorporated in the former), the insured is ordinarily justified in insisting that, as between him and the insurer, the words of the policy shall, if they differ from those of the application, be taken as evidencing, in that particular, the contract by which both are bound. And where the terms employed in the policy are reasonably susceptible of a construction which does not include in the exception, stipulated by the insurer in its own interest, the doing of an isolated act of extra hazard, that construction must prevail. *Ontario Metal Products Co.* v. *Mutual Life Ins. Co.*, [1924] S.C.R. 35, at p. 41; [1925] A.C. 344; *Victory* v. *Saskatchewan Guarantee & Fidelity Co.*, [1928] S.C.R. 264, at p. 273, cited.

APPEAL by the defendant from the judgment of the Supreme Court of New Brunswick, Appeal Division, affirming the judgment of Byrne J. (on the findings of a jury) for the plaintiff at trial.

The defendant issued a policy of accident insurance to one Frederick B. Mahoney. The plaintiff, his sister, was named in the policy as beneficiary in case of his death by accident under the provisions of the policy. The application for the policy (set out in the policy under the heading "Schedule of Warranties") contained, *inter alia*, the following statements, warranted to be true, by the insured:

7. My occupation and specific duties are fully described as President and General Manager of Lumber Company, office duty only and travelling.

8. I understand the classification of risks and agree to have my occupation classed as Select, and I further agree that for any injury received by me while engaged in any occupation or exposure to danger classed by the Company as more hazardous than that above stated, I shall be entitled to recover only such amount as the premium paid by me would purchase at the rates fixed for such increased hazard.

The policy contained the following provision:

(2) If the injury is sustained by (or sickness happens to) the Insured while engaged either temporarily, casually or permanently in an occupation classed as more hazardous than that stated herein (other than as provided for injury in Section G [not material in this case]), liability here-

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under shall be limited to such amount as the premium paid would have purchased for the increased hazard according to the Company's table of rates and classification of risks last filed by the Company, with the Superintendent of Insurance; Provided, that the performance of ordinary duties about his residence or while engaged in recreation shall not be regarded as a change of occupation.

The insured was injured by being crushed between two railway box cars (as found by this Court, and also by the Appeal Division which held that the jury's answer, "Don't know," on this point, was perverse), and died as the result. The defendant alleged that at the time of the accident the insured was trying to engineer the movement of a box car, and that, therefore, under the terms of the application and policy above quoted, the plaintiff was not entitled to recover the full amount named in the policy, for which full amount the plaintiff sued.

On the answers by the jury to questions submitted (which are set out in the judgment now reported), judgment was given for the plaintiff, which was affirmed by the Appeal Division. The defendant appealed to this Court.

Gideon Grant K.C. and *W. H. Harrison K.C.*, for the appellant.

J. F. H. Teed for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—Omitting what is contentious, the following "statement of facts" is taken, practically verbatim, from that given by the appellant in its factum:

"This is an appeal by the defendant from the judgment of the Appeal Division of the Supreme Court of New Brunswick, confirming the judgment of Mr. Justice Byrne and a jury, awarding the plaintiff the sum of Ten Thousand Dollars ($10,000) payable in instalments.

"The action was brought to recover the amount of an accident insurance policy issued by the defendant to Frederick B. Mahoney dated January 4, 1926, and renewed January 4, 1927. The policy was made payable to the plaintiff, Ellen A. Mahoney, a sister of the insured.

"On the 17th day of August, 1927, the insured, Frederick B. Mahoney, was accidentally injured by being caught and crushed between two railway cars at Calhoun's Mills, Westmorland County, New Brunswick, and the injuries sustained by him resulted in his death on August 30, 1927.

"The application for the insurance policy, which is stated to form part of the policy, contains the following warranties:

7. My occupation and specific duties are fully described as President and General Manager of Lumber Company, office duty only and travelling.

8. I understand the classification of risks and agree to have my occupation classed as Select, and I further agree that for any injury received by me while engaged in any occupation or exposure to danger classed by the Company as more hazardous than that above stated, I shall be entitled to recover only such amount as the premium paid by me would purchase at the rates fixed for such increased hazard.

"The policy also contained the following amongst other conditions:

(2) If the injury is sustained by (or sickness happens to) the insured *while engaged either temporarily, casually or permanently in an occupation classed as more hazardous* than that stated herein (other than as provided for injury in Section G), liability hereunder shall be limited to such amount as the premium paid would have purchased for the increased hazard according to the Company's table of rates and classification of risks last filed by the Company, with the Superintendent of Insurance; Provided, that the performance of ordinary duties about his residence or while engaged in recreation shall not be regarded as a change of occupation.

(The qualifications in Section G are not at present material.)

* * * *

"Frederick B. Mahoney was the President and General Manager of P. G. Mahoney, Limited, a lumber company having a mill at Calhoun's Mills, Westmorland County. The accident occurred in the mill yard of P. G. Mahoney, Limited.

"A blue print (in evidence) shows a small railway or trolley track in front and to the east of the mill. Farther to the east is a railway designated on the plan 'Loading Siding,' and between the two is a piling ground for lumber. To the east of the loading siding is the main line of the Canadian National Railway running from Moncton southwesterly to Memramcook and Dorchester.

"The mill was operated by one, Alfie T. LeBlanc, under a contract with the Mahoney Company, whereby he sawed the company's lumber in their mill and piled it out in the mill yard alongside the loading siding. The company sold the lumber, loaded it in cars and delivered it.

"On August 17, 1927, there was a big rush on in the mill yard. It was the last day to get certain cars loaded for a

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steamer in St. John. LeBlanc tried to get men for Mahoney, the General Manager of the company, but could not get enough, so he closed down the mill and turned over his men to Mahoney.

"The men were divided into three crews of about five each, one crew to a car. Three box cars were being loaded on the loading siding in the afternoon. This loading siding runs from Calhoun's Station on the main line through the piling ground to the south, past the warehouse marked on the plan and thence by a fairly steep grade across the highway road, and then in front of the mill to the end of the piling ground, where the siding ended.

"It was customary when a car was loaded to move it down the siding by gravity. The movement of the car was controlled altogether by a hand brake operated by a wheel on the end of the car. There is a brakeman's platform three feet or more below the top of the car on which the brakeman stands to handle the wheel. When the brake is released, the car can be started and when loaded it requires careful braking to check the speed. Stewart Smith, one of the millmen, who was accustomed to handling cars, said it was necessary to be very careful to prevent injury to another car as there was quite a lot of grade.

"On the day in question, one loaded car had been stopped about one car length south of the highway on the loading siding. Three other cars were being loaded above the highway on the loading siding. The one nearest the highway was in charge of George Mahoney, brother of Fred B. Mahoney. Shortly before four o'clock this car started to move down the siding, got out of control and crashed into the car on the south side of the highway.

"Fred Mahoney had been talking to Paul Bourque, his foreman, who was in charge of loading the car farthest to the north of the highway, about twenty or thirty minutes before the accident.

"Leon Bourque was at the bunk house behind the mill and saw the car moving down the grade with a man on the brakeman's platform trying to put the brake on.

"Philias Richard heard the crash when he was in the mill and looking out, saw Mr. Mahoney on the ground with no one near him. He went out to pick up Mr. Mahoney

and later told someone to blow the fire whistle. He asked Mahoney where he was hurt and Mahoney said, 'I got jammed between the cars.'

"Alfie LeBlanc came up later while Mahoney was still lying on the ground near the junction of the cars, and, speaking to LeBlanc, Mahoney said,—'How near do the two boards come together?' and LeBlanc answered Mahoney's question,—'About eighteen inches.' When the cars come together, the evidence shows that the draw bars or springs in the couplings compressed to the extent of 4 or 5 inches on each car, which would bring the boards within 8 or 10 inches of each other when two cars came together.

"Mahoney's pelvic bones were crushed and broken on both sides—an injury which could only be accounted for by being crushed between two heavy bodies. The medical evidence did state that the injuries could be produced by a fall from a great height, but could not be sustained by a fall from the top of a box car.

* * * *

"As to classification of risks,—these are found in the Company's Rate Book (Exhibit "G") at pages 47 and 65. On page 47 the following classifications are found:—

Lumber Dealer or Salesman not in yards or woods, office duties and travelling only is classed as Select.

"It was under this classification that the insured was placed by the company.

"By reference to page VI of the Rate Book, the premiums for the different classifications are found. Thus the premium for a 'Select' risk is $4. The premium for an 'Ordinary' risk is $7.50. The premium for a 'Special' risk is $12.50 and the premium for an 'Extra-Hazardous' risk is $20.

"Other classifications on page 47 are,—'Lumber Dealer, Loading, Piling or Delivering,' classified as 'Special.'

"Also, 'Lumber Mill Proprietor or Manager, superintending only,' classified as, 'Ordinary.'

"On page 65 of the Rate Book is found the classification of a railway brakeman, where the railway is operated by gravity:—'Brakeman, freight or mixed train,' classified as 'Extra-Hazardous.'

"The amount recoverable under this policy if the insured came under the classification 'Ordinary' would be

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$5,333.33. If his classification was 'Special,' the amount recoverable would be $3,200, and if 'Extra-Hazardous,' the amount recoverable would be $2,000.

"All these amounts would be payable by instalments, consisting of an immediate payment of 10% and the balance in fifteen equal annual payments.

"The questions to, and answers by, the jury are as follows:

"*Questions by the Court.—*

'Q. Did the deceased Fred. Mahoney die by accidental injury?

A. Yes.

Q. If so, was the deceased at, or immediately before, the time he received the injuries which caused his death, engaged in any occupation other than that which is stated in the policy, namely, President and General Manager of Lumber Company, office duty only and travelling?

A. No.

Q. If you answer "Yes", to number 2, then state what was such other occupation? A. (No answer).

Q. What act or thing was deceased doing at the time he received the injury which caused his death?

A. Not disclosed in evidence.'

"*Questions by Defendant's Counsel.—*

'Q. Was the insured injured by being crushed between two box cars?

A. Don't know.

Q. Was the insured trying to engineer the movement of a box car at the time of the accident?

A. Don't know.

Q. Was the insured on a box car at the time of the accident?

A. Don't know.

Q. Was the insured at the time of the accident engaged in any exposure to danger more hazardous than office duty?

A. No.'

"Upon these answers judgment was given for the plaintiff (respondent) on the 9th day of November, 1928, for the sum of $1,048.47, and a declaration that the defendant (appellant) is liable to pay to the plaintiff (respondent) the further sum of $600 on the 20th day of November in each of the years 1928 to 1942 inclusive.

"The defendant (appellant) appealed from the judgment to the Appeal Division of the Supreme Court which said appeal was on the 14th day of June, 1929, dismissed with costs.

"The reasons for judgment of the Appeal Division were delivered by Grimmer, J. for the Court."

* * * *

The Appeal Division affirmed the conclusions of the jury as to the effect of the evidence upon all the questions of fact submitted to them except the first of the "Questions by Defendant' Counsel", to which they considered the answer, "Don't know", perverse. We are agreed that that answer should have been "Yes"; but, after a careful study, we are satisfied that it is not possible to say that the jury erred in deeming the evidence insufficient to justify its answering the fourth question put by the Court and the second and third questions of the defendant's counsel otherwise than as they did, i.e., "Not disclosed in evidence"; and, "Don't know."

Their answers in the negative to the second question of the Court and to the last question of defendant's counsel may be read as meaning that the defendant had failed to prove that these questions should be answered in the affirmative.

The plaintiff having obtained a finding (not now challenged) that the assured had died "by accidental injury", and the defendant having failed to establish the facts necessary to support its defence, that, when injured, the assured was "*engaged*, either temporarily, casually or permanently, in an occupation classed as more hazardous than that stated herein", i.e., in the application incorporated in the policy, to be his occupation, viz., "President and General Manager of Lumber Company, office duty only and travelling", it follows that judgment for the plaintiff, was the only possible outcome of the action.

But we think we should add, that had the jury been able to make an affirmative finding in answer to the second question of the defendant"s counsel, the consequence would not be that there should have been judgment for the defendant. On the contrary, we are of the opinion that the doing of the single isolated act, which is all that such an answer would imply,—it may have been in an emergency—and which ordinarily forms part of the duties of a more

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hazardous occupation, cannot be said to amount to "engaging in" such more hazardous occupation "either temporarily, casually or permanently". If the defendant company had meant so to provide, it easily could, and certainly should, have used terms which would have made that intention unmistakably clear.

If a specific exception to the risk undertaken in an insurance policy be described in the policy itself, as well as in the application therefor (although the latter be incorporated in the former), the assured is, we think, ordinarily justified in insisting, that, as between him and the Insurance Company, the words of the policy shall, if they differ from those of the application, be taken as evidencing, in that particular, the contract by which both are bound. And, where, as here, the terms employed in the policy are reasonably susceptible of a construction which does not include in the exception, stipulated by the Insurance Company in its own interest, the doing of an isolated act of extra hazard, such as we shall assume the evidence here, viewed most favourably for the defendant, might have been found to establish, that construction must prevail. *Ontario Metal Products Co.* vs. *Mutual Life Insurance Co.* (1); *Victory (R.M. of)* vs. *Saskatchewan Guarantee & Fidelity Co.* (2).

The appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Sanford, Harrison & Anglin.*
Solicitor for the respondent: *E. A. Reilly.*