

Evidence--Privilege--Application to Warranties in Life Insurance Policies

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NOTES AND COMMENT

Editor—ROBERT D. FLEMING

EVIDENCE—PRIVILEGE—APPLICATION TO WARRANTIES IN LIFE INSURANCE POLICIES.

Privilege, the exception of a person from the common law rule, has become an abuse. Useless suppression of truth can have but one result in actions at law. Incomplete truths are more insidious than falsity.

In the precedents of early English law, as soon as the secrecy of confidential communication in general was settled, those between physician and patient were seen to be on a par with all others.¹ That no restraint existed as to the disclosure of information peculiar to a physician, was recognized by the English courts.² This doctrine probably would have been adopted by the American courts,³ had it not been for the statutory innovation of privilege, first enacted by the New York Legislature,⁴ to wit: "No person duly authorized to practice physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon." This remained substantially as drafted through its various re-enactments,⁵ until we now have it as set forth in the present Civil Practice Act.⁶ From the early cases,⁷ it has been the tendency of the courts to construe this section strictly. Very little has been said in support of such rule of privilege.⁸

¹Duchess of Kingston's Trial, 20 How. St. Tr. 573 (1776).

²Wilson v. Rastall, 4 T. R. 753 (1792); Falmouth v. Mass., 11 Price 455 (Mass. 1822).

³Sherman v. Sherman, 1 Root Conn. 486 (1793).

⁴NEW YORK REV. STAT. 1828, II, 406 (pt. III, c. VII, art. 9, §73).

⁵Laws of 1876, §834; CODE OF CIV. PROC. §834.

⁶N. Y. CIVIL PRACTICE ACT §352.

⁷Edington v. Aetna Life Ins. Co., 67 N. Y. 564 (1871). "It is a just and useful enactment introduced to give protection to those who were in charge of physicians from the secrets disclosed to enable them properly to prescribe for diseases of the patient. To open the door to the disclosure of secrets revealed on the sick-bed, or when consulting a physician, would destroy confidence between the physician and the patient, and, it is easy to see, might tend very much to prevent the advantages and benefits which flow from this confidential relationship." Gratton v. Met. Life Ins. Co., 77 N. Y. 564 (1879); see also Hutchins, *The Physician as an Expert* (1904) 2 MICH. L. REV. 687.

⁸Commission on Revision of the Statutes of New York, III, 737 (1836): "The ground on which communications to counsel are privileged, is the supposed necessity of a full knowledge of the facts, to advise correctly, and to prepare for the proper defense or prosecution of a suit. But surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger. And unless such consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art, * * *." Edington v. Aetna Life Ins. Co., *supra* note 7.

In litigation such as the ordinary negligence action, the patient does not seek to prevent his physician's testimony by claiming privilege, but to the contrary. However, in an action such as one by the beneficiary of a life insurance policy, we find the statute often invoked, once the relationship of physician and patient has been established.⁹ And this because frequently the validity of the policy contested depends, directly or indirectly, upon the health of the insured at the time of the making of the application therefor.¹⁰

By legislative enactment an application for a life insurance policy becomes a part of the contract only when annexed thereto.¹¹ Also, in the absence of fraud all statements by the applicant, although material, are deemed representations rather than warranties, and do not necessarily defeat the policy.¹² So it appears that the insurer, in order to successfully resist payment, must establish the fact that the insured, at the inception of the contract, was guilty of fraud.¹³ This leads to the adducing of evidence showing that statements made by the applicant as to his health were material and untrue.¹⁴ It can readily be seen that in most cases this is impossible, and consequently the advancement of fraudulent claims increases.

An insurance company is entitled to truthful answers to the questions in the application, as to the insured's health—whether he has or has had illnesses or injuries about which it deems important to inquire, and whether he has undergone any operation, or has received hospital treatment. These affect the risk which the company is called upon to assume.¹⁵ To permit the beneficiary to hide behind the privilege statute, preventing the insurer from learning the true condition of the insured's health, is to encourage fraud and impose upon the insurer conditions impossible to perform.

The courts, in their efforts to protect the insured or his representatives, have been slow in realizing the growing abuse of the privilege rule, and have repeatedly given judgment against the in-

⁹ Cushman v. U. S. Life Ins. Co., 70 N. Y. 72 (1877).

¹⁰ Meyers v. Met. Life Ins. Co., 128 Misc. 703, 234 N. Y. Supp. 441 (1921); Eastern Dist. Piece Dye Works v. Travelers Ins. Co., 234 N. Y. 441, 138 N. E. 401 (1921).

¹¹ Laws of 1909, c. 33, §58. "Every policy of insurance issued or delivered within the state * * * shall contain the entire contract between the parties and nothing shall be incorporated therein * * * unless * * * indorsed upon or attached to the policy when issued."

¹² *Supra* note 11, " * * * and all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties."

¹³ Krauz v. Golden Seal Assurance Society, 247 N. Y. 536, 161 N. E. 172 (1928).

¹⁴ Thomson v. Met. Life Ins. Co., 128 App. Div. 420, 113 N. Y. Supp. 225 (4th Dept. 1908); Eastern Dist. Piece Dye Works v. Travelers Ins. Co., *supra* note 10.

¹⁵ Saad v. New York Life Ins. Co., 201 App. Div. 544, 546, 194 N. Y. Supp. 445, 447, *aff'd*, 235 N. Y. 550, 139 N. E. 730 (1923). "Whether or not the consultation was in reference to a material matter was for the defendant to judge, and not for the insured. * * *"

surer when it failed to prove false and fraudulent representation.¹⁶ Nor is there any indication that the Legislature, in whose province the correction of this abuse rightly lies, has given the question any consideration.

Our first departure from the established attitude of the courts appears in the *Travelers Ins. Co. v. Pomerantz*.¹⁷ There the company sought to cancel a policy obtained by misrepresentation. Although the insured had denied that he had received medical attention within five years, it appeared that he had been treated by some five different physicians on twelve different occasions. The defendant hid behind the privilege rule, and the company was unable to prove that these attendances had been for any serious ailment. Thus, while it proved falsity, it could not prove that the false representation was material. The court in its opinion by O'Brien, J., said, "He (the insured) may insist upon this privilege but he cannot be heard to say that no *prima facie* case has been made out. * * * He neither denied nor explained the untrue statement in his application, and gave no information concerning the state of his health at the time of his medical attendance, or on the dates of his application or of his payment of the first premium. To hold that the proof under such circumstances is less than *prima facie* would be to condone and encourage misrepresentations and to impose upon a litigant conditions impossible of fulfillment. Plaintiff proceeded as far as the law allows, and far enough, in the absence of denial, to require a finding of material representation. *All evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted.*"^{17a} (Italics ours.) This was in direct contradiction to the opinion of the Appellate Division,¹⁸ which held that not even unfavorable inferences could be drawn from the insured's invoking of the privilege rule.

In *Minsker v. John Hancock*¹⁹ the court said that "The answers * * * established as a matter of law that they were material to the risk."

This rule was followed in *Armand v. Metropolitan Life Ins. Co.*,²⁰ where although the facts were slightly different, the Court quoted from the *Pomerantz* case, "* * * In the *Pomerantz* case, the insured was squarely confronted with a question which he categorically answered in the negative. In such a contingency *the burden*

¹⁶ *Kraus v. M. & G. W. Corp.*, 203 App. Div. 582, 196 N. Y. Supp. 845 (1st Dept. 1922); *Rarogiewicz v. Brotherhood of American Yeomen*, 242 N. Y. 590, 152 N. E. 440 (1926).

¹⁷ 246 N. Y. 63, 158 N. E. 21 (1927).

^{17a} *Ibid.* at 69, 158 N. E. at 23.

¹⁸ 218 App. Div. 431, 218 N. Y. Supp. 490 (1st Dept. 1926).

¹⁹ 254 N. Y. 333, 339, 173 N. E. 4, 5 (1930).

²⁰ 134 Misc. 357, 360, 235 N. Y. Supp. 726, 729, *aff'd*, 228 App. Div. 625 (1st Dept. 1929).

would be upon the assured or his representatives to show that the misrepresentation was not material."

By these decisions, it is obvious that the courts have seen the injustice of imposing an impossible burden upon the insurance carrier. The old rule enunciated in such cases as *Cushman v. U. S. Life*,²¹ wherein it was held that failure to disclose temporary disorders or functional disturbances, as having no bearing on general health or continuance of life, was not to be considered material misrepresentation, has finally been abrogated. The requirement of the insurance company to sustain such burden has now been definitely changed.²²

It appears that this change is being consistently followed. In the recent case of *Jenkins v. John Hancock Mutual Life Insurance Company*,²³ the beneficiary of a life insurance policy brought an action to recover the proceeds thereof. Payment was resisted on the grounds that the insured had made false statements in her application for the policy.²⁴ The jury returned a verdict in favor of the plaintiff. This the court set aside and dismissed the complaint. Although the Appellate Division reversed the lower court and reinstated the verdict for the plaintiff distinguishing the facts in the instant case from those in the *Pomerantz* and like cases, nevertheless the Court of Appeals affirmed the decision of the trial court thereby extending the rule to cases wherein the misrepresentations were made not only to specific questions in an application but to general questions as well. It is indeed unfortunate that the correction of such an evil, made possible by unfounded legislative enactment,²⁵ is left to the courts. It is submitted that the attention of the legislature be drawn to the situation and such harmful statute be modified, and so deprive the unscrupulous practitioner of an unfair and dangerous weapon.

ROBERT D. FLEMING.

CONSPIRACY, A MISDEMEANOR, IS NOT MERGED IN THE FELONIOUS ACTS DONE IN FURTHERANCE THEREOF.

A recent decision¹ by the Court of Appeals has rendered obsolete another ancient common-law rule, which, until now, was deemed

²¹ *Supra* note 9.

²² *Supra* notes 19, 17, 15; *Schrader v. John Hancock*, 251 N. Y. Supp. 169 (1st Dept. 1931).

²³ 257 N. Y. 289, — N. E. — (1931).

²⁴ *Ibid.* at 291. Questions as to specifically enumerated diseases, etc., were truthfully answered; the further question, "Have you within the past five years had medical advice for any disease or disorder not included in the above?" was not.

²⁵ 5 WIGMORE, EVIDENCE (1923) §2380, p. 206.

¹ *People v. Tavormina*, 257 N. Y. 84, 177 N. E. 317 (1931).