AMERICAN INTERNATIONAL ASSURANCE CO LTD v. CH'NG EONG CHEANG
HIGH COURT, PULAU PINANG
ABDUL HAMID MOHAMED J
CIVIL APPEAL NO. 12-34-90
7 APRIL 1995
[1995] 1 LNS 10

INSURANCE *- Claim - inordinate delay - appeal by Insurance Company*

Counsel:

For the appellant - Mubashir Mansor; M/s. Skrine & Co.

For the respondent - S.K. Lee; M/s. N.M. Tiong & Co.

JUDGMENT:

This is an appeal by the defendant (appellant) against a decision of the Sessions Court giving judgment for the plaintiff (respondent).

In order to get a clearer picture, let me narrate the facts first.

On 6 April 1981 the respondent, then about 54 years old took out an insurance policy with the appellant company for RM50,000. His son (PW3) was an insurance agent of the appellant company. The respondent bought the policy through his son.

According to the respondent, on 30 July 1982 (*i.e.* about 15 months later) after giving his dog a bath, he brought it to the front of his house. He was holding the dog by the leash. Suddenly the dog on seeing another dog dashed forward and dragged him along. He tripped and fell on the cement floor. As a result he had a stroke and lost consciousness. At that time his son (PW3) was in the house reading newspapers. A member of the JKKK (Jawatankuasa Kemajuan dan Keselamatan Kampong) by the name of Khoo Leong Sooi PJM (PW4) said he saw the whole incident. On 28 June 1984 (two months before the writ was issued) he (PW4) gave a letter entitled "TO WHOM IT MAY CONCERN" describing the accident, of course, bearing his JKKK rubber stamp.

Coming back to the accident, the plaintiff was not taken to the hospital, though advised by a doctor (PW5) to do so. Instead, a few doctors and a singseh came/were called to the house.

The first point raised by the learned Counsel for the appellant was whether there was such a fall. I am aware that this is a finding of fact and an appellate Court should be slow to interfere with the finding of the learned trial Judge. Having perused the grounds of judgment, the notes of evidence and the arguments of learned Counsel for the appellant, even though admittedly there are some discrepancies in the evidence of the witnesses for the respondent, I do not

think I should reverse this finding of the learned Sessions Court Judge. So I accept the finding of the learned Sessions Court Judge that there was a fall.

The next question is whether the fall had caused the paralysis of the left side of the plaintiff's body.

The burden of proof is on the plaintiff that it was the fall which had caused the injury - see *Leong Luen Kiew & Anor. v. The New Zealand Insurance Co. Ltd.* [1939] MLJ Rep. 136. I must add here that a finding on this issue is not a finding of pure facts as in the case of whether there was a fall or not. None of the doctors who gave evidence could say for certain that it was the fall which caused the paralysis. In evaluating the evidence regarding this issue the learned Sessions Court Judge did not have any advantage over this Court. This Court is in a similar position to evaluate the evidence and decide whether the plaintiff had proved his case or not. It should also be noted that this case was part-heard by one Sessions Court Judge and then continued by the Sessions Court Judge who finally decided the case. The whole of the evidence of PW1 and PW2 (both doctors) and PW3 (the son) were recorded by the first Sessions Court Judge. So for this reason too, the learned Sessions Court Judge who decided this case could not have an advantage which a trial Judge normally has over an appellate Court as far as these three witnesses are concerned.

The learned Sessions Court Judge did make an attempt to analyse the evidence of the doctors. But, with respect, it appears to me that her analysis concentrated more on the evidence of the two doctors called by the appellant (DW1 and DW3). It appears that she was not satisfied with the evidence of DW1 and DW3 and then made a conclusion that the respondent had proved his case. This appears to me, despite what she says, to be shifting the burden of proof to the appellant/defendant.

We must bear in mind that it is for the respondent/plaintiff to prove that the hemiplegia (paralysis) of the left side of the plaintiff's body was caused by the fall. It is not for the appellant/defendant to prove that it was caused by something else.

I am of the view that in the circumstances of this case, the proper approach is first to ask the question whether the evidence of the doctors called by the respondent/plaintiff had proved his case.

First let us examine the evidence of PW1 (Dr. Ng Sik Gim). He wrote the report on 1 November 1983 which was one year and four months after the accident. He wrote it without examining the patient. The report was based on his record of the respondent who had gone to see him eight times between 1 November 1980 to 27 March 1982, which period was at least four months prior to the accident. According to him on 1 November 1980 the respondent's blood pressure was 155/90. His latest reading 146/85 on 27 March 1982 which was four months before the accident.

He admitted that he was not a specialist. However, he said, "On the basis of the available readings I can say whether he is likely a patient for pressure. I can do so with certainty. In this case his blood pressure was on the maximum side of the normal. There is a possibility that his pressure will go up with pressure. It is also possible that his pressure can go up immediately". To further questions, with leave of the Court, he again said "In this case the patient's pressure was stable. It may or may not increase in this case. This increase could

happen any time".

What does his evidence prove? At the most it is that the patient had no history of high blood pressure even though his blood pressure was on the maximum side of normal. And that was for the period ending four months before the accident. What happened during the four months is anybody's guess.

Now, let us examine the evidence of PW2 (Dr. Koay Eng Ho). He was also a private practitioner. He first saw the plaintiff as an out-patient on 22 December 1983, which was one year and five months after the accident. He prepared his report on 5 March 1984.

According to him the respondent came to see him one and a half years after the accident in order to have his blood pressure tested and for vitamin injections and for nothing else. The respondent came to see him every day from 22 December 1983 until 5 March 1984 for that same purpose. In his report he said: "No evidence of hypertension detected". In his evidence in Court he admitted: "Kejadian ini telah berlaku 11/2 tahun dahulu. Saya tidak berani mengatakan ini berpunca daripada tekanan darah atau pun tidak". He also repeated "Saya tidak tahu punca penyakit lumpuhnya kerana ini telah berlaku 11/2 (tahun) dalulu".

One also wonders the real reason why beginning from a date one year and four months **after** the accident, the plaintiff went, (I think, more correctly, was taken) to see the doctor only to have his blood pressure tested (besides vitamin injection)**every day** for about two and a half months. But, if one takes note that the writ was filed on 25 August 1984, which is about five months later, the reason is obvious.

Plaintiff also called Dr. Sivasundaram (PW5). He wrote a medical report on the respondent on 1 November 1983 (see p. 156 of appeal record) which was about one year and three months after the accident. His medical report is very brief and I reproduce here:

To Whom It May Concern

CHING KONG CHEANG

I/C No: 2540109

Dear Sir,

This is to state that the above named person was examined by me today and found to have weakness of his left hand and left leg. He also has evidence of injury scars on his left limbs.

We attribute his present condition to the fall he sustained on the 30th July, 1982 and was said to have been seen by me in his house and advised admission to the hospital.

I vaguely recollect making the visit but did not maintain any official record of the visit as no treatment was given by me.

Thank you.

Yours faithfully,

sgd.

(DR.S.SIVASUNDARAM.)

His evidence in Court was no better, but at least he should be complimented for being honest about it. He said "I remember making a visit to a house just behind my clinic. I don't remember the actual date that I made the visit. I remember seeing a case but I can't remember him. I can't recognize him... What I remember, I saw the patient lying on a couch and it is beyond my ability to heal him. I advised him to go to the hospital...".

Under cross-examination he said, *inter alia*, "I cannot remember the history of this patient. All I can remember that I saw patient lying there... I don't remember seeing any injury...".

Respondent's son (PW3) said that he went to call Dr. Sivasundaram (PW5) and the latter came to see his father (plaintiff) on the day of the accident. Like the learned Sessions Court Judge, I accept this evidence. But PW3's evidence regarding what PW5 did or did not do supports PW5's evidence.

What does the evidence of these three doctors called by the respondent/plaintiff prove? At the very most, four months before the accident the respondent's blood pressure was on the maximum side of normal. One year and five months after the accident his blood pressure was normal. What was the condition during the one year and nine months (four months before the accident plus one year and five months after the accident) is anybody's guess. Neither of the three doctors called by the respondent said that the paralysis was not caused by high blood pressure. Even assuming that it was not caused by high blood pressure, does it prove that it was caused by the fall? I do not think so. So, I am of the view that even without the evidence of the doctors called by the appellant the respondent had not proved his case.

As I have said, the learned Sessions Court Judge seems to have focussed more on the evidence of the doctors called by the appellant.

Briefly the evidence of DW1 (Dr. Joseph Fernandez) is that he was called by PW3 (respondent's son) and went to the respondent's house at about 12.00 noon on the day in question. He examined the respondent. He said, "There was not really a sign of fall but there was a tenderness on the hip area. There was no other injuries. My diagnosis was CVA *i.e.* cerebro-vascular accident. This is due to haemorrhage to the blood vessel in the brain". He further said that he could not see the connection between the CVA and the alleged fall. His conclusion was that the possible cause of CVA was due to hypertension. However, he admitted that there was "no definitive conclusion that he (respondent) was hypertensive".

It should be pointed out that this witness was not cross-examined so much on his medical evidence but rather on whether he did really see the respondent that day.

The learned Sessions Court Judge appears to doubt whether DW1 really saw the respondent on the day in question apparently for two reasons. First, all the respondent's witnesses, I must say in particular PW3 (respondent's son) and PW6 (the JKKK committee member) did not see him there on that day. Secondly, because DW3 could not produce his patient's card.

Going through the records very carefully, I do not think one should doubt that the doctor (DW1) did see the respondent on the day in question. My reasons are, first the learned Sessions Court Judge herself had said with which I agree, that PW4's (the JKKK Committee member) evidence must be viewed with caution as he was overzealous. Secondly, she was in no better position than myself to evaluate PW3's (respondent's son's) evidence as his evidence was given before another Sessions Court Judge. Taking the circumstances of the whole case, I am of the view that PW3's evidence that he did not see DW1 on the day in question is also suspect. Thirdly, it is unimaginable why if the doctor (DW1) did not see the respondent at the latter's house on the day in question that he would come to Court and give evidence that he did. What had he to gain or to lose?

The learned Sessions Court Judge also doubted his evidence because he did not do a CAT scan. But it was an unchallenged evidence that CAT scan was not available in Penang then.

However, even if DW1's evidence is not accepted it only means that that he could not prove that the paralysis was caused by hypertension. It does not mean that it was therefore caused by the fall. This the plaintiff has to prove.

Very lengthy evidence was given by Dr. Chan Koon Yan (DW5). I do not intend to reproduce it. Again I am of the view that even if his evidence is not accepted, it does not mean that the respondent had proved his case.

In conclusion, I am of the view that, even though the learned Sessions Court Judge did remind herself that the burden of proof was on the respondent/plaintiff, she concluded in favour of the respondent because the appellant had failed to prove that the paralysis was caused by something else. She should have considered whether the respondent had proved his case. It is clear that the respondent had not. For the reasons I have given earlier I am of the the view that this is not a case where an appellate Court is at a disadvantage because it did not see or hear the witnesses. I think, in the circumstances of this case, I am justified to reverse her finding.

The appeal should be allowed.

There is another issue. In para. 6 of the amended statement of defence the appellant/defendant pleaded:

> 6. It was a condition of the said policy that proof of loss must be furnished to the defendant within 90 days after the date of such loss. No such proof has been furnished by the plaintiff to the defendant within the stipulated period or at all.

It is not disputed that the claim was made 9 months after the accident. The reason given by PW3 (respondent's son) was that he did not receive the claim from the appellant. The learned Sessions Court Judge was of the view that as PW3 (respondent's son) was the agent of the appellant the respondent should not be penalised.

I have perused the record very carefully. This is not a usual case where the policy holder is on one side and the insurance company and its agent is on another. Here PW3 is both the policy holder's son and an agent of the company. The policy was taken from him. Indeed it is more likely that it was taken by him for his father - soon after he became the defendant's agent. He

was deeply involved in the making of this claim, if not the man behind it all. He ought to have known that the claim would have to be submitted within 90 days of the accident. The reason for such requirement was given by DW2, the legal advisor to defendant and was not contradicted. It should therefore be accepted. And that is:

> The reason being the sooner the company knows of the accident the company can take steps to verify whether an accident took place. Also to verify the extent of the alleged injuries. The longer the time period between accident and certification to the company the more remote are the changes (sic - it should read "chances") of knowing the truth of the alleged accident and injuries.

True, it is the duty of the appellant's agent to provide the form. But PW3 was himself an "agency leader". There should be no difficulty for him to obtain the form and give to his father or fill it up himself. He did not do it. Thus he seriously prejudiced the appellant in that the appellant was deprived from taking immediate steps to verify the accident and the injury. Indeed in view of the whole circumstances of the case the inordinate delay in making the claim makes the *bona fide* of the claim highly suspicious.

The case of *Pacific & Orient Insurance Co. Sdn. Bhd. v. Kathirvelu* [1992] 1 MLJ 249 SC was referred to me. In that case the plaintiff met with two accidents. Condition 7 of the policy required notice to be given within fourteen days. (It should be noted that condition 7 notice refers to the first notice required to be given, as under condition 6 here. That is not in issue here. Here we are concerned with the **claim form** which should be submitted within 90 days as required by condition number 9.) On 27 December 1983, *i.e.* 38 days after the second accident, the plaintiff gave written notice to the defendant informing it of the two accidents. On 11 January 1994, the defendant forwarded a claim form for completion within 14 days by the plaintiff. The plaintiff was unable to complete that form as all the doctors were unable to diagnose his condition and the claim was only returned to the defendant on 30 August 1984 with words "still in the ward under treatment" and signed by the orthopaedic registrar of the Johor Bahru General Hospital. The Supreme Court held that condition 7 was not a condition precedent to the liability of the defendant and the plaintiff was not precluded from making his claim.

I accept that on the authority of that case, condition 9 is not a condition precedent to the appellant's liability. In other words, not every breach, even for one day, disentitled a policy holder to make a claim. That would be most unjust as the facts of that case would show. But an authority has to be looked at according to the facts of the case. In the present case, it is not that the respondent was unable to complete the form because all the doctors were unable to diagnose the claimant's condition. The reason given was that the respondent or his son did not receive the claim form when he (the son) himself was the agent and should have the form or should be able to get it. This is not a case where the respondent was warded in the hospital during the period. In fact he was never taken to hospital at all. In addition the undue delay has prejudiced the appellant in that the appellant could not immediately verify the accident and the injury. In the circumstances I think that the undue delay in submitting the claim form in this case is such a serious breach of condition 9 that it relieves the appellant of its liability.

On these grounds I allowed the appeal with costs.