IN FACT AND IN LAW

Personal Insurance

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Misrepresentations and Changes in the Insurability of the Risk: *Biscuits Leclerc Ltée* v. *Transamerica*

By Evelyne Verrier

On April 5, 2001, the Supreme Court of Canada refused Biscuits Leclerc Ltée leave to appeal the judgment rendered by the Quebec Court of Appeal on May 9, 2000. The Court of Appeal had dismissed Biscuits Leclerc Ltée's action for payment of life insurance proceeds following the death of one of its shareholders.[1]

The Facts

In this case, Transamerica was being sued for $2,000,000 under a policy it had issued on the life of the shareholders and officers of Biscuits Leclerc Ltée. Transamerica had refused to pay the insurance proceeds claimed for the following reasons:

- misrepresentations or material concealment at the time the insurance application and the medical questionnaire required by the insurer were filled out;
- change in the insurability of the risk between the date on which the application was signed and the date the first premium was paid.

Chronology of Events

January 25, 1991: Leclerc fills out an insurance application in which he states that he is in very good health;

January 30, 1991: Leclerc consults his family doctor and informs him that he is constantly tired, has fever at the end of the day and has lost a significant amount of weight. The doctor diagnoses overwork and prescribes a two-week sick leave as well as blood and urine tests;

February 8, 1991: Leclerc fills out a medical questionnaire at the insurer's request and also provides blood samples;

End of February 1991: Leclerc notices the appearance of nodules near his collarbone and is seen at the emergency department of the Centre hospitalier de l'Université Laval;

March 4, 1991: The insurer accepts the insurance application;

March 7, 1991: Leclerc is diagnosed with a non-Hodgkin's malignant diffuse lymphoma;

March 11, 1991: A cheque is given to the broker as payment of the premium on the shareholders' life insurance policy;

March 13, 1991: The insurance policy is issued;

March 18, 1991: The cheque in payment of the first premium is cashed.

October 2, 1991: Leclerc dies.

The Superior Court Judgment

On April 25, 1997, the Superior Court dismissed Biscuits Leclerc Ltée's action, concluding that there had been misrepresentations which were likely to materially influence a reasonable insurer in deciding whether to accept the risk and that there had also been a change in the insurability of the risk between the date on which the application was signed and the date on which the first premium was paid.[2]

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[1] *Biscuits Leclerc Ltée* v. *Transamerica*, S.C.C., 28039, April 5, 2001, and C.A. 200-09-001467-973, May 9, 2000, Justices Fish, Chamberland and Pidgeon

[2] *Biscuits Leclerc Ltée* v. *Transamerica*, Quebec S.C., 200-05-000648-928, April 25, 1997, Mr. Justice Laurent Guertin

Concerning the misrepresentations, the trial judge examined the following questions which were included in the medical questionnaire that had been filled out on February 8, 1991:

> **[TRANSLATION]"2.A. Name and address of the physician you usually consult (if you do not have a physician, indicate "none")**
>
> **Answer: Yvon Nadeau, Clinique Médibourg, Halle Quatre-Saisons, 512, blv. De L'Atrium, CHARLESBOURG, G1H 7H1.**
>
> **2.B. Date and reason for your most recent visit?**
>
> **Answer: 91/01/31 Routine annual examination.**
>
> **2.C. What treatment or medication was prescribed to you?**
>
> **Answer: No**
>
> **2.D. Are you currently under observation, under treatment or taking medication on the recommendation of a physician? If so, please provide details.**
>
> **Answer: No**
>
> **12. Over the past 5 years:**
>
> **A. Have you undergone any [] laboratory tests or other tests for diagnostic purposes?**
>
> **Answer: No"**

The trial judge determined that Leclerc had made a misrepresentation not only in stating that he was in "very good health" in the insurance application filled out on January 25, 1991, but also in answering the way he did the application's medical questionnaire. Indeed, the Court was of the opinion that in answering question 2.B., Leclerc should have mentioned his constant fatigue, his feverish condition as well as his significant loss of weight. The trial judge also concluded that Leclerc should have mentioned the two-week rest period prescribed by his doctor as a "treatment" within the meaning of questions 2.C. and 2.D. Finally, the Court determined that, in response to question 12 A, Leclerc should have mentioned the blood and urine tests prescribed by his doctor.

As regards to the second ground, the trial judge considered that when the broker visited the company on March 11, 1991 in order to collect the premium, he should have been informed of Leclerc's state of health, given that the latter's serious illness was a circumstance giving rise to a change in the insurability of the risk since the application was signed.

Issues in Dispute

1. Were there any misrepresentations or any material concealment when the insurance application was filled out or when the insurer's medical questionnaire was completed (2485, 2486 and 2487 C.C.L.C.)?[3]
2. Was there a change in the insurability of the risk between the signing of the insurance application and the payment of the first premium (2516 C.C.L.C.)?[4]

The Court of Appeal's Judgment

On May 9, 2000, the Court of Appeal dismissed Biscuits Leclerc Ltée's appeal. For the reasons set forth by Mr. Justice Robert Pidgeon, the Court of Appeal overturned the Superior Court's judgment on the first issue in dispute relating to the misrepresentations or material concealment but, with respect to the second issue in dispute, the Court of Appeal upheld the decision that there was a change in the insurability between the time the insurance application was signed and the time the first premium was paid.

The Court of Appeal ruled that the trial judge had erred in determining that there had been misrepresentations or material concealment in the information given by Mr. Leclerc in response to questions 2.B., 2.C., 2.D. and 12.A. of the medical questionnaire filled out on February 8, 1991.

First of all, the Court of Appeal was of the opinion that in answering question 2.B., Leclerc had acted in good faith when he characterized the visit to his family doctor on January 30, 1991 as a "routine annual examination".

[3] Now 2408, 2409 and 2410 C.C.Q.

[4] Now 2425 C.C.Q.

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With respect to questions 2.C. and 2.D., the Court of Appeal considered that Leclerc was well founded in answering "no" to the questions regarding any treatments which had been prescribed to him or that he was undergoing:

> **[TRANSLATION]"Although a rest period may be considered medically as a treatment, I do not believe that, given all of the circumstances of this case, one could conclude that a reasonable insured would have considered a two-week vacation as a treatment."**

Finally, regarding question 12.A. of the medical questionnaire, the Court of Appeal determined that Leclerc was not required to mention the blood and urine tests which his doctor had prescribed during the visit of January 30, 1991 and for which certain results had already been received on February 7, 1991.

Indeed, in the insurance application filled out by Leclerc on January 25, 1991, there was a question with wording very similar to that of question 12.A. of the medical questionnaire, to which Leclerc had answered as follows:

> **[TRANSLATION]"Saw doctor Westbury - life - re issuance policy 1,000,000 - 1987 Saw doctor Fernandez Clinique Charlesbourg - re sinusitis - received antibiotic - Dec. 1990 - no work stoppage. Very good health."**

In these circumstances, considering this answer together with the blood samples requested by the insurer, the Court of Appeal stated the following:

> **[TRANSLATION]"34. First of all, Leclerc knew that the insurer would carry out blood tests and, secondly, two weeks earlier, when he had filled out the insurance application, he indicated that he had seen one doctor in 1987 and a second doctor in December 1990 for sinusitis.**
>
> **35. Given the answers provided by Leclerc in the two questionnaires which the insurer had in its possession prior to acceptance of the risk, I cannot conclude that we are faced with misrepresentations or material concealment within the meaning of article 2487 C.C.L.C. Rather, we are faced with incomplete answers which, in light of all the answers provided, should have prompted a careful insurer to ask the applicant additional questions and to examine more carefully the results of the blood tests that the insurer itself had carried out.»**

(Emphasis added)

Concerning the second issue in dispute, the Court of Appeal upheld the Superior Court's decision and dismissed the appellant Biscuits Leclerc Ltée's argument that an objective test should be applied to determine whether or not there had been a change in insurability within the meaning of article 2516 C.C.L.C., which reads as follows:

> **"Art. 2516. Life insurance becomes effective when the application is accepted by the insurer, to the extent that it is accepted without modification, that the initial premium is paid and that there has been no change in the insurability of the risk from the signing of the application."**

In other words, the appellant argued that the medical evidence had established that Leclerc was suffering from a serious illness well before the signing of the insurance application and that, given these facts, there had not been any objective change in Leclerc's insurability. The Court of Appeal dealt with this argument as follows:

> **[TRANSLATION]"In my opinion, the change referred to in this provision is a change in the "insurability" of the insured, not, as the appellant has tried to argue, a change in the state of health of the insured. A change is one which takes place between the date of signing of the application and the date of payment of the first premium. In addition, the change must be such that it would result in an additional premium, an exclusion or even a refusal to provide coverage."**

In the case at bar, the evidence clearly established that when he signed the application, Leclerc stated that he was in "very good health" and the presence of a lymphoma was not known. However, this was not the case when the broker came to the appellant's place of business on March 11, 1991 to collect the premium, and he should have been informed of this fact.

Conclusion

When examining an insurance application or a medical questionnaire, it will be necessary to keep in mind the concept of "incomplete answers" which will henceforth have to be distinguished from misrepresentations or material concealment, particularly when the insured is acting in good faith.

One will also have to consider the "careful insurer" model with respect to the wording of the questions which appear on the insurance application and the medical questionnaire and with respect to the extent of the analysis that is done on these forms, notably when blood tests have been requested.

Indeed, even if the Courts have often stated that an insured has the obligation to disclose facts which are material to an evaluation of the risk and the insurer is not required to "cross-examine" the insured regarding the information provided in response to the questions asked, it seems that insurers can no longer take a passive role when they have information which warrants further investigation.

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