University of Minnesota Law School
Scholarship Repository

Minnesota Law Review

1944

Innocent Misrepresentation of Health in Insurance Applications

William L. Prosser

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation

Prosser, William L., "Innocent Misrepresentation of Health in Insurance Applications" (1944). *Minnesota Law Review*. 2538.
https://scholarship.law.umn.edu/mlr/2538

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

MINNESOTA LAW REVIEW

Journal of the State Bar Association

VOLUME 28 | FEBRUARY, 1944 | No. 3

INNOCENT MISREPRESENTATION OF HEALTH IN INSURANCE APPLICATIONS

BY WILLIAM L. PROSSER*

All's well that ends well, but it may sometimes leave a bad taste in the mouth. There are cases in which the outcome is satisfactory enough, but the detour by which it is reached is such as to arouse the hope that the court will not soon tread that path again. One such is *Laury v. Northwestern Mutual Life Insurance Company*,[1] in Minnesota in 1930. With the help of the good sense of a jury, the decision came to the right result; but in the course of the opinion the court declared some rather disturbing insurance law which, if it is to be followed, will leave Minnesota in a somewhat lonely and not exactly enviable position among her sister states.

A young man named Laury, applying to the defendant company for life insurance, was confronted with the customary application blank setting forth the usual array of detailed questions concerning the past and present state of his health. Answering them, he stated, among a great many other things, that he had had no illnesses or diseases during the past five years, that he was then in good health and had never been confined to his home by illness, and that, since childhood, he had had none of the following diseases or symptoms Dizzy Spells, Unconsciousness, Fits, Epilepsy, Apoplexy, Paralysis, Mental Derangement,

*Member of the firm of Dorsey, Colman, Barker, Scott & Barber, Minneapolis.

[1](1930) 180 Minn. 205, 230 N. W 648, 231 N. W 824.

or any disease of the Brain or Nervous System.[2] The policy was issued, and the premiums duly paid. Subsequently Laury died of an epileptic fit. When suit was brought by his mother as beneficiary of the life insurance policy, the company set up the defense of false statements in the application, in the answers referred to above.

The evidence in support of this defense was that a little more than four years before the date of the application Laury had lost consciousness after diving into a swimming pool, and had been revived by the usual methods employed in the case of drowning. At some previous time, "during athletic exercises," he had "experienced some disturbance" of a kind not described in court. Over a period of four or five years prior to the incident in the pool, his family physician had been called to see him some four or five times, early in the morning, and had found him complaining of headaches and indisposition in general, and appearing "possibly slightly stupid." This doctor, as well as one consulted in Minneapolis, found nothing in the way of organic trouble, he "never was able to find any evidence he had had convulsions." The record was "absolutely silent as to any subsequent occurrence suggestive of an epileptic symptom."[3]

On this evidence the jury, as might be expected, returned a verdict for the plaintiff, and defendant's motion for judgment notwithstanding or for a new trial was denied. On appeal, the supreme court proceeded to apply, without any specific mention

---

[2]The particular questions and answers are set forth in the opinion at page 207, as follows

"'10. Q. Give below all illnesses, diseases or accidents you have had during the past five years, with the name of physicians or attendants. If none, so state.' The answer was 'None.'

"The next question was

"'Are you now in good health? If not, give particulars.' The answer was 'Yes,' and further that he had never been confined to his home by illness, that his usual medical attendant or family physician was Dr. W M. Empie.

"Also this

"'12. Have you had since childhood any of the following diseases or symptoms? Give below full particulars, including number of attacks, date, duration and result of each. Each question must be read and answered "No" or "No, except" in regard to such diseases or illnesses which you may have had.'

"Then follow subheads from 'A' to 'I,' with no more room than a space of two and one-half inches in length and less than a quarter of an inch in width to answer each subhead. The subhead here involved is

"'B. Q. Dizzy spells, Unconsciousness, Fits, Epilepsy, Apoplexy, Paralysis, Mental Derangement, or any disease of the Brain or Nervous System?' The answer was 'No.'"

[3]Laury v. Northwestern Mutual Life Ins. Co., (1930) 180 Minn. 205, 207-8, 230 N. W 648, 231 N. W 824.

of it, the familiar section of the Minnesota statutes[4] governing life insurance, which reads

"*Misrepresentation by applicant*—No oral or written misrepresentation made by the assured, or in his behalf, in the negotiation of insurance, shall be deemed material, or defeat or avoid the policy, or prevent its attaching, unless made with intent to deceive and defraud, or unless the matter misrepresented increases the risk of loss."

In the light of this statute, the court concluded:[5]

1. That the question whether the insured, at the time of the application, suffered from some form of epilepsy, was for the jury and not for the court.

2. That the question whether, if he did suffer from such an illness at the time of the application, the matter misrepresented increased the risk of loss, was for the jury and not the court.

3. That if he did suffer from such an illness at the time of the application, and that illness increased the risk of loss, the policy was avoided even though he was ignorant of his affliction, and his misrepresentation was an innocent one.

The verdict for the plaintiff was affirmed—a result of which no disinterested person is likely to complain. Nevertheless and notwithstanding, and with all deference to the learned court, it is suggested that all three of the above conclusions are wrong.

The second one surely calls for little comment. Of all the fell scourges with which the life of man is darkened, epilepsy is one of the most grim. It is a chronic disease of the nervous system, attended by deterioration of the brain, which, except in rare instances, is incurable. It is progressive, and its normal course is one of derangement of the functions of the brain, ending in imbecility, dementia, or death.[6] If the insured in fact had such

[4]Minn. Stats., 1941, sec. 60.85, 2 Mason's Minn. Stats., 1927, sec. 3370.

[5]The order of these conclusions was 3, 1, 2.

[6]" 'Epilepsy' or 'epileptic fits' is defined by Dr. Dunglison in his Medical Dictionary to be a disease of the brain which may be either idiopathic or symptomatic, spontaneous, or accidental, and which occurs in paroxysms, with uncertain intervals between. The course of epilepsy is generally one of deterioration. The brain appears to be gradually more and more deranged in its functions in the intervals of attack. The memory and intellectual powers in general become enfeebled. Sometimes positive mania ensues, ending in dementia. Sometimes the mental disorder has the character of debility from the commencement of the process of deterioration. In rare instances an increased intellectual impairment may be seen after each paroxysm, much more frequently it is very gradual, and the effect is rendered striking only by comparing distinct points of time." Aurentz v. Anderson, (1871) 3 Pitts. (Pa.) 310, 311.

" a chronic disease of the nervous system, attended by brain deterioration, which is progressive, is congenital and likely to be transmitted by marriage and childbearing, and is considered incurable." Busch v. Gruber, (1925) 98 N. J. Eq. 1, 131 Atl. 101.

a disease, then to say that reasonable men may find that it did not increase the risk covered by his life insurance policy is to fly in the face of all medical experience, as well as two earlier decisions of the Minnesota court.[7] The court apparently recognized as much, and seems in reality to have meant to say that the illness could be found not to have increased the risk only if it were found not to have been epilepsy at all.[8]

On this first issue itself, however, there is at least room for argument that there was nothing for the jury The problem is whether, on the evidence presented, reasonable men could find that the answers of the applicant, in the light of the questions asked on the application, fairly interpreted, were in fact false. The question is broader than that of the disease of epilepsy, since the applicant stated that he was in good health, had had no illness or disease within the past five years, and had not had since childhood any disease or symptom of dizzy spells, unconsciousness or fits. Regardless of his knowledge of falsity, did the answers given misrepresent the facts? And on this issue, should not the decision have been, as a matter of law, for the plaintiff?

Everyone knows the practice of life insurance companies in taking applications. The applicant is asked, and with good reason, whether he is in "good health" or "sound health," and whether he has, or has had within some specified period of time, any "disease," "illness," "ailment," "infirmity," or "injury" Then follows a long list of specific inquiries, often fifty or more in number, about particular diseases or symptoms, many of them more or less vague or general in character, which were once called, in the Supreme Court of the United States, "big bags to put many diseases in."[9] Taken quite literally, and with the strictest possible interpretation, the applicant's assertions of good health in reply to such an array of questions would be falsified, and the policy for which he paid his money avoided, if at the time or for

[7]Reynolds v. Atlas Acc. Ins. Co., (1897) 69 Minn. 93, 71 N. W 851, Olsson v. Midland Ins. Co., (1917) 138 Minn. 424, 165 N. W 474. Accord Kaffanges v. New York Life Ins. Co., (C.C.A. 1st Cir. 1932) 59 F (2d) 475, Westphall v. Metropolitan Life Ins. Co., (1915) 27 Cal. App. 734, 151 Pac. 159.

[8]"We should not, in answers to complicated and equivocal questions, seek the misrepresentation which as a matter of law increases the risk. For instance, it may be held as a matter of law that an affliction known as epilepsy increases the risk, but the same should not be held in respect to a single incident of unconsciousness." Laury v. Northwestern Mutual Life Ins. Co., (1930) 180 Minn. 205, 210, 230 N. W 648, 231 N. W 824.

[9]Connecticut Mutual Life Ins. Co. v. Union Trust Co., (1884) 112 U. S. 256, 5 Sup. Ct. 119, 28 L. Ed. 708.

some years past he had had a headache, a toothache, a cold, a boil, a cut on his finger, or an attack of indigestion superimposed on a supper of lobster, dill pickles, rye whiskey and ice cream. No man in his senses would apply for life insurance on such terms, nor could any company expect to do business very long on such a basis.

Obviously, then, some construction short of the extreme literal meaning of such questions must be intended, and the answers need only be those which a reasonable man applying for life insurance would understand that he was expected to give upon the particular facts. "Good health" does not mean perfect health; in ordinary human experience there is no such thing. We are all, as Lord Mansfield[10] said in an early case,[11] "born with the seeds of mortality in us," and there is none who can say that he does not carry within his body today the cause of his ultimate death. "Good health" is rather what the ordinary reasonable individual would consider good health.[12] It means the absence of recognizably serious ailments, as distinguished from those which appear temporary, transitory, or trivial.[13] It means "that the insured enjoys such health and strength as to justify a reasonable belief that he is free from organic derangements or symptoms calculated to cause reasonable apprehension that his life will be shortened and that to ordinary observation and outward apperance his health is reasonably such that he may, with ordinary safety, be insured on ordinary terms."[14] And again,

[10]*Not* Sir James.

[11]Willis v. Poole, referred to in the note to Ross v. Bradshow, (1761) 1 Wm. Bl. 313.

[12]Northwestern Mutual Life Ins. Co. v. Wiggins, (C.C.A. 9th Cir. 1926) 15 F (2d) 646, 648, Mutual Life Ins. Co. v. Frey, (C.C.A. 9th Cir. 1934) 71 F (2d) 259; Combs v. Equitable Life Ins. Co., (C.C.A. 4th Cir. 1941) 120 F (2d) 432, 436; Progressive Life Ins. Co. v. Gazaway, (1942) 67 Ga. App. 339, 20 S. E. (2d) 189, 192.

[13]Jeffrey v. United Order of Golden Cross, (1902) 97 Me. 176, 53 Atl. 1102; Goucher v. Northwestern Traveling Men's Ass'n, (C.C. Wis. 1884) 20 Fed. 596, 598, Barnes v. Fidelity Mut. Life Ass'n, (1899) 191 Pa. 618, 43 Atl. 341, 45 L. R. A. 264, McDermott v. Modern Woodmen of America, (1903) 97 Mo. App. 636, 71 S. W 833, French v. Fidelity & Cas. Co., (1908) 135 Wis. 259, 115 N. W 869, 17 L. R. A. (N.S.) 1011, Sovereign Camp W O. W v. Jackson, (1916) 57 Okla. 318, 157 Pac. 92, 95, L. R. A. 1916F 166; Metropolitan Life Ins. Co. v. Chappell, (1925) 151 Tenn. 299, 269 S. W 21, 24, Zogg v. Bankers Life Co. of Des Moines, (C.C.A. 8th Cir. 1933) 62 F (2d) 575, 578, Sovereign Camp W O. W v. Daniel, (1936) 48 Ariz. 479, 62 P (2d) 1144, 1146.

[14]National Life & Acc. Ins. Co. v. Smith, (1925) 32 Ga. App. 242, 129 S. E. 113.

"The phrase 'good health,' as used in its common and ordinary sense by a person speaking of his own condition, undoubtedly implies a state of health unimpaired by any serious malady of which the person himself is conscious. When one says that he is in good health, he does not mean, and nobody understands him to mean, that he may not have a latent disease of which he is wholly unconscious. It is doubtless competent for a life insurance company, in its policy, to take the expression 'good health' out of its common meaning and make it exclude every disease, whether latent or not (assuming that any person would ever accept a policy of that kind) but it must do so in distinct and unmistakable language. The mere statement of a party that he fully warrants himself to be in good health is not sufficient."[15]

By the same token, questions whether the applicant has suffered from specified ailments or symptoms, ranging from tuberculosis to shortness of breath, are construed to refer to the disease or pathological condition commonly known by that name. A "disease," in life insurance applications, is taken to refer to "a derangement of the vital functions sufficiently serious to impair the constitution and leave in its wake some organic or chronic effect undermining the general health, as distinguished from mere temporary or trivial affections, which ordinarily pass away without permanent injury to the system."[16] Thus,

"Before any temporary ailment can be called a disease, within a warranty or representation against its existence in an application for insurance, it must be such as to indicate a vice in the constitution, or be so serious as to have some bearing upon the general health and continuance of life, or such as, according to common understanding, would be called a disease. Disease, or sickness, or bodily infirmity, within the meaning of such war-

[15]Greenwood v. Royal Neighbors of America, (1916) 118 Va. 329, 87 S. E. 581, Ann. Cas. 1918D 1002. Accord National Council of Knights and Ladies of Security v. Owen, (1916) 61 Okla. 256, 161 Pac. 178, 180; Sovereign Camp W O. W v. Brown, (1923) 94 Okla. 277, 221 Pac. 1017, 1021, Mid-Continent Life Ins. Co. v. House, (1932) 156 Okla. 285, 10 P (2d) 718, Metropolitan Life Ins. Co. v. Walters, (1926)- 215 Ky. 379, 285 S. W 252, 60 A. L. R. 194, Johnson v. County Life Ins. Co., (1936) 284 Ill. App. 603, 1 N. E. (2d) 779, 786, Schuetzel v. Grand Aerie Fraternal Order of Eagles, (Mo. App. 1942) 164 S. W (2d) 135, 141.

[16]This definition, which apparently originated in Joyce, Insurance (1897), sec. 1848, is repeated over and over again in the cases, which are collected in 4 Couch, Cyclopedia of Insurance Law, sec. 885b. See, for example, Life Ins. Co. of Virginia v. Mann, (1938) 28 Ala. App. 425, 186 So. 583, Fidelity Mutual Life Ins. Co. v. Miller, (C.C.A. 4th Cir. 1899) 92 Fed. 63, North Western Mutual Life Ins. Co. v. Heimann, (1883) 93 Ind. 24, National Council of Knights and Ladies of Security v. Owen, (1916) 61 Okla. 256, 161 Pac. 178, Cushman v. United States Life Ins. Co., (1877) 70 N. Y. 72, Independent Life Ins. Co. v. Butler, (1930) 221 Ala. 501, 129 So. 466, 469; Zogg v. Bankers Life Co. of Des Moines, (C.C.A. 4th Cir. 1933) 62 F (2d) 575, 578.

ranties or representations, does not include ordinary diseases of the county, which yield readily to medical treatment, and which, when ended, leave no permanent injury to the system."[17]

Similar meanings have been attached to "illness,"[18] and to "ailment,"[19] "injury,"[20] "impairment,"[21] "infirmity,"[22] and "physical defect."[23]

The Indiana court has refused to find a "disease" in a condition which produces no disorder, and of the presence of which the person affected is unconscious.[24] The distinction has frequently been made between such matters as the disease of tuberculosis specified in an insurance application and a mere latent tubercular infection, dormant and unaroused,[25] or the bare presence of tubercular bacilli in the body, with no clinical symptoms.[26] Spitting blood on a single occasion is not the "complaint" of spitting blood,[27] nor is a confined and arrested infection, innocuous until aroused and set free, to be called a disease.[28] Even a gastric or duodenal ulcer, "as trivial and benign as an uninfected

[17]Quoted in 4 Couch, Cyclopedia of Insurance Law, (1929) sec. 885b, footnote 2, from Wharton and S., Medical Jurisprudence, 5th ed., sec. 533.

[18]Pacific Mutual Life Ins. Co. v. Cunningham, (S.D. Fla. 1932) 54 F (2d) 927, Insurance Co. v. Trefz, (1881) 104 U. S. 197, 26 L. Ed. 708 ("sickness"), Travelers Ins. Co. v. Byers, (1932) 123 Cal. App. 473, 11 P (2d) 444, 446; Scofield's Adm'x v. Metropolitan Life Ins. Co., (1906) 79 Vt. 161, 64 Atl. 1107, Zogg v. Bankers Life Co. of Des Moines, (C.C.A. 4th Cir. 1933) 62 F (2d) 575, Billings v. Metropolitan Life Ins. Co., (1898) 70 Vt. 477, 41 Atl. 516, 518, Metropolitan Life Ins. Co. v. Brubaker, (1908) 78 Kan. 146, 96 Pac. 62.

[19]McDermott v. Modern Woodmen of America, (1903) 97 Mo. App. 636, 71 S. W 833, 838.

[20]Standard Life & Acc. Ins. Co. v. Martin, (1933) 133 Ind. 376, 33 N. E. 105.

[21]Cavannaugh v. North American Union, (Mo. App. 1928) 2 S. W (2d) 172, 175.

[22]Eastern Dist. Piece Dye Works v. Travelers Ins. Co., 1923) 234 N. Y. 441, 138 N. E. 401, Ocean Accident & Guaranty Corp. v. Rubin, (C.C.A. 9th Cir. 1934) 73 F (2d) 157, McClure v. World Ins. Co., (1934) 126 Neb. 676, 254 N. W 393, Meyer v. Fidelity & Cas. Co., (1895) 96 Iowa 378, 65 N. W 328. Cf. Strommen v. Prudential Ins. Co., (1932) 187 Minn. 381, 245 N. W 632.

[23]Ocean Accident & Guaranty Corp. v. Rubin, (C.C.A. 9th Cir. 1934) 73 F (2d) 157

[24]Continental Life Ins. Co. v. Young, (1888) 113 Ind. 159, 15 N. E. 220, 222.

[25]Cohen v. Metropolitan Life Ins. Co., (1939) 32 Cal. App. (2d) 1337, 89 P (2d) 732, 736.

[26]Scofield's Adm'x v. Metropolitan Life Ins. Co., (1906) 79 Vt. 161, 64 Atl. 1107

[27]Dreier v. Continental Life Ins. Co., (C.C. Ind. 1885) 24 Fed. 670.

[28]National Life & Accident Ins. Co. v. Upchurch, (1938) 57 Ga. App. 399, 195 S. E. 588 (arthritis, encapsulated in the ankle), Massachusetts Protective Ass'n v. Lewis, (C.C.A. 3d Cir. 1933) 72 F (2d) 953, 955 (abscessed tooth, with streptococcus germs at the root).

pimple," has been held to be neither disease nor bodily infirmity[29] Since it is the state of the applicant's health at the time of the application which is in question, the fact that an apparently insignificant ailment subsequently proves fatal is not enough to avoid the policy The pimple, which runs through the cases as a recurring illustration, is not transformed retroactively into a major malady because death results from squeezing it.[30]

There are not lacking Minnesota cases in which the court has refused to hold that ailments of uncertain character at the time of the application will falsify the assertion of good health. The leading case is *Rupert v. Supreme Court, United Order of Foresters,*[31] where the applicant was asked more than forty specific questions as to present and past ailments and symptoms, including shortness of breath, spitting of blood, bronchitis and consumption. At the risk of too much quotation, the language of the court in that case will bear repetition

"The applicant apart from construction, was made to guaranty opinions as to herself which no candid physician would be likely to assert with positiveness, and to insure against objective conditions which the company's own expert was unable to detect. Invariably, interrogatories of this kind are a medley of conclusions and facts. The answers called for are in part expressions of scientific opinion, and in part narrations of individual experiences. Upon its face, such an application requires the exact literal truth as to ailments, the precise nature of which an operation in major surgery might not reveal, and which only an autopsy could discover. The questions are not scientifically arranged, so that the classes are mutually exclusive. A number of them are but big bags to put many diseases in. It would require dialectical skill of no mean order to consistently interpret, and technical knowledge of no inconsiderable extent to accurately answer, all that is thereby required.

* * *

"To construe this application in accordance with the defendant's contention, so as to give its words their broadest import, although they are equally consonant with a sense limited to its purpose, leads to folly and demands the impossible. Witness its effect upon the failure of the applicant here to answer questions of pure fact complained of 'Number 20. Shortness of breath.' This the applicant should answer by giving a list including all the times shortness of breath came from violent blows or fright or exercise. If she did not

---

[29]Silverstein v. Metropolitan Life Ins. Co., (1930) 254 N. Y. 81, 171 N. E. 914, Railway Mail Association v. Shrader, (1939) 107 Ind. App. 235, 19 N. E. (2d) 887

[30]Strommen v. Prudential Ins. Co., (1932) 187 Minn. 381, 245 N. W 632.

[31](1905) 94 Minn. 293, 102 N. W 715.

remember and correctly state the number of times she ran rapidly upstairs or to catch a street car, she could not recover. '21. Spitting of blood.' If the applicant did not enumerate the number of teeth she had had pulled, she could not recover."[32]

Following this decision is a line of later cases, involving a "throat trouble" apparently cured, whose nature was at the time uncertain;[33] sugar in the urine;[34] influenza and suspected infection of the appendix;[35] "la grippe," coupled with mild pyelitis and cystitis, fistula, piles, a sore mouth and an operation to remove a chicken bone lodged in the rectum (surely an unusual state of health);[36] a fractured shoulder;[37] arthritis;[38] an earache, followed later by stiffness in the neck and swelling behind the right ear;[39] and a hypersusceptibility to novocaine.[40] In all of these cases the court refused to hold that the disorder was necessarily to be regarded as a "disease" or "illness," or that the applicant was not in reasonably good health.

Reverting to the *Laury Case,* with its fainting spell after a dive four years before the application, its unidentified "disturbance" during athletic exercises earlier still, and its four or five occasions, over as many years, when there were headaches and a "slightly stupid" feeling in the morning—is this evidence from which reasonable men could possibly conclude that at the time of the application there was disease, illness, or unsound health, within the meaning of those terms as outlined above? And especially in the face of medical examinations which had found nothing organically wrong? The court, of course, was not required to do more than affirm a verdict for the plaintiff, but should not that verdict have been directed at the trial?

[32]Rupert v. Supreme Court, United Order of Foresters, (1905) 94 Minn. 293, 296-7, 102 N. E. 715.

[33]Gruber v. German Roman Catholic Aid Society, (1911) 113 Minn. 340, 129 N. W 581.

[34]Rice v. New York Life Ins. Co., (1940) 207 Minn. 268, 290 N. W 798, Ames v. New York Life Ins. Co., (1922) 154 Minn. 111, 191 N. W 274 (on one occasion).

[35]Ames v. New York Life Ins. Co., (1922) 154 Minn. 111, 191 N. W 274.

[36]Mack v. Pacific Mutual Life Ins. Co., (1926) 167 Minn. 53, 208 N. W 410.

[37]Domico v. Metropolitan Life Ins. Co., (1934) 191 Minn. 215, 253 N. W 538.

[38]Schaedler v. New York Life Ins. Co., (1937) 201 Minn. 327, 276 N. W 235.

[39]Robbins v. New York Life Ins. Co., (1935) 195 Minn. 205, 262 N. W 210, 872.

[40]Taylor v. New York Life Ins. Co., (1929) 176 Minn. 171, 222 N. W 912.

Let us assume, however, that David Laury was in fact afflicted with epilepsy, a dread disease which greatly increased the risk of death, when he applied for life insurance. There remains the court's third conclusion, that the policy was then avoided even though he was ignorant of his affliction and the misrepresentation was made innocently and in entire good faith. If this is the law, it means that the risk of death at any future time which may be traceable to latent and unknown conditions of health existing at the time of the application does not fall upon the insurance company but upon the insured, and that the undertaking of the company in return for the premium paid it is to that extent partial and incomplete. Certainly that is not the layman's understanding of his insurance contract, nor is it the law in other states. In Minnesota, the question turns on construction of the statute[41] to which reference has been made above. The Minnesota cases are confused and far from clear, but undoubtedly there is a good deal of language in other decisions whose general import is in accord with the conclusion in the *Laury Case*.

THE COMMON LAW

By way of background to the discussion of the statute which is to follow, it is necessary to return to an older, unhappier day in the law and business of insurance. Before the Hughes investigation, and before even the extensive government regulation which preceded it, there were disreputable insurance companies abroad in the land who made their profits out of taking premiums for coverage of a risk and giving nothing in return. The situation never has been described better than in the classic denunciation of Justice Doe of New Hampshire,[42] which, as a reminder, may well be repeated after sixty years

"Some companies, chartered by the legislature as insurance companies, were organized for the purpose of providing one or two of their officers, at headquarters, with lucrative employment,—large compensation for light work,—not for the purpose of insuring property, for the payment of expenses, not of losses. Whether a so-called insurance company was originally started for the purpose of insuring an easily earned income to one or two individuals, or whether it came to that end after a time, the ultimate evil was the same. Names of men of high standing were necessary to represent directors. The directorship, like the rest of the institution

[41]Minn. Stats., 1941, sec. 60.85, 2 Mason's Minn. Stats., 1927, sec. 3370, quoted above, text at footnote 4.

[42]In De Lancey v. Rockingham Farmers' Mutual Fire Ins. Co., (1873) 52 N. H. 581.

and its operations, except the collection of premiums and the division of the same among the collectors, was nominal. Men of eminent respectability were induced to lend their names for the official benefit of a concern of which they knew and were expected to know nothing, but which was represented to them as highly advantageous to the public. There was no stock, no investment of capital, no individual liability, no official responsibility—nothing but a formal organization for the collection of premiums, and their appropriation as compensation for the services of its operators.

"The principal act of precaution was, to guard the company against liability for losses. Forms of applications and policies (like those used in this case), of a most complicated and elaborate structure, were prepared, and filled with covenants, exceptions, stipulations, provisos, rules, regulations and conditions, rendering the policy void in a great number of contingencies. These provisions were of such bulk and character that they would not be understood by men in general, even if subjected to a careful and laborious study; by men in general, they were sure not to be studied at all. The study of them was rendered particularly unattractive, by a profuse intermixture of discourses on subjects in which a premium payer would have no interest. The compound, if read by him, would, unless he were an extraordinary man, be an inexplicable riddle, a mere flood of darkness and confusion. Some of the most material stipulations were concealed in a mass of rubbish, on the back side of the policy and the following page, where few would expect to find anything more than a dull appendix, and where scarcely anyone would think of looking for information so important as that the company claimed a special exemption from the operation of the general law of the land relating to the only business in which the company professed to be engaged. As if it were feared that, notwithstanding these discouraging circumstances, some extremely eccentric person might attempt to examine and understand the meaning of the involved and intricate net in which he was to be entangled, it was printed in such small type, and in lines so long and so crowded, that the perusal of it was made physically difficult, painful, and injurious. Seldom has the art of typography been so successfully diverted from the diffusion of knowledge to the suppression of it. There was ground for the premium payer to argue that the print alone was evidence, competent to be submitted to a jury, of a fraudulent plot. It was not a little remarkable that a method of doing business not designed to impose upon, mislead, and deceive him by hiding the truth, practically concealing and misrepresenting the facts, and depriving him of all knowledge of what he was concerned to know, should happen to be so admirably adapted to that purpose. As a contrivance for keeping out of sight the dangers created by the agents of the nominal corporation, the system displayed a degree of cultivated ingenuity, which, if it had been exercised in any useful calling, would have merited the strongest commendation.

"When a premium payer met with a loss, and called for the payment promised in the policy which he had accepted upon the most zealous solicitation, he was surprised to find that the voluminous, unread and unexplained papers had been so printed at headquarters, and so filled out by the agents of the company, as to show that he had applied for the policy This, however, was the least of his surprises. He was informed that he had not only obtained the policy on his own application, but had obtained it by a series of representations (of which he had not the slightest conception), and had solemnly bound himself by a general assortment of covenants and warranties (of which he was unconscious), the number of which was equalled only by their variety, and the variety of which was equalled only by their supposed capacity to defeat every claim that could be made upon the company for the performance of its part of the contract. He was further informed that he had succeeded in his application by the falsehood and fraud of his representations—the omission and misstatement of facts which he had expressly covenanted truthfully to disclose. Knowing well that the application was made to him, and that he had been cajoled by the skillful arts of an importunate agent into the acceptance of the policy and the signing of some paper or other, with as little understanding of their effect as if they had been printed in an unknown and untranslated tongue, he might well be astonished at the inverted application, and the strange multitude of fatal representations and ruinous covenants. But when he had time to realize his situation,—had heard the evidence of his having beset the invisible company, and obtained the policy by just such means as those by which he knew he had been induced to accept it, and listened to the proof of his obtaining it by treachery and guile, in pursuance of a premeditated scheme of fraud, with intent to swindle the company in regard to a lien for assessments, or some other matter of theoretical materiality, he was measurably prepared for the next regular charge of having burned his own property"

Lest it be thought that this picture was in any way exaggerated, let it be remembered that there was a national scandal, and an historic investigation in New York, before insurance companies put on the financial integrity, honesty and fair dealing which, with rare exceptions,[43] have characterized them at the present day

The courts, struggling with such chicanery buried in a mass of legal verbiage, did what they reasonably could. Two lines of holding in particular are of interest here. One made the distinction

[43]The writer has recently encountered a fire insurance policy written by a farmers' mutual cooperative fire insurance company, which contains just such a mass of conditions, exceptions, warranties, provisos, rules, regulations, by-laws and stipulations as Justice Doe described. It is difficult to imagine a fire in any normal farm building for which the company would be liable under such a policy. This is precisely the type of policy which called forth Doe's denunciation, and such insurance is still unregulated by statute in Minnesota.

between warranties in the contract of insurance and mere representations to obtain it. A warranty was an express term or condition of the contract, which would avoid the policy if it was not literally true, even though it covered a matter which was itself not material to the risk, and even though the applicant did not know of its falsity. A representation was a mere statement or assertion, not a term of the contract but only an inducement to it, which would avoid the policy only if it concerned a matter material to the risk, and if it was not substantially, rather than literally, true.[44] Wherever possible, and often in the face of rather plain language in the instrument, there was a deliberate effort to find that a particular statement was a representation rather than a warranty.[45]

The second group of cases held that assertions that the applicant was in good health, that he was not afflicted with a specified disease, and the like, *if* they were found to be merely representations rather than expressly warranted as a term of the contract, must be construed merely as statements of opinion. From this it followed that they would not avoid the contract unless the opinion was consciously false. The reasoning was that the company must be aware that the applicant could have no positive scientific knowledge of his own as to the state of his health and could offer nothing more than an opinion, and so the question asked must be taken to call for nothing more. One of the leading cases is *Moulor v. American Life Insurance Co.*,[46] where there was evidence that the applicant, in bona fide ignorance, had stated that he was not afflicted with scrofula, asthma, or consumption. The Supreme Court said, in part:[47]

"Looking into the application upon the faith of which the policy was issued and accepted, we find much justifying the conclusion that the company did not require the insured to do more, when applying for insurance, than observe the utmost good faith, and deal fairly and honestly with it, in respect of all material facts about which inquiry is made, and as to which he has or should be presumed to have knowledge or information. The applicant was required to answer yes or no as to whether he was afflicted with certain diseases. In respect of some of these diseases, particularly

[44]Vance, Insurance (2d ed. 1930), 389; Price v. Phoenix Mutual Life Ins. Co., (1871) 17 Minn. 497 (Gil. 473). This history is sufficiently well known to require no other reference.

[45]See for example Price v. Phoenix Mutual Life Ins. Co., (1871) 17 Minn. 497 (Gil. 473).

[46](1884) 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447

[47]Moulor v. American Life Ins. Co., (1884) 111 U. S. 335, 343-4, 4 Sup. Ct. 466, 28 L. Ed. 447

consumption, and diseases of the lungs, heart, and other internal organs, common experience informs us that an individual may have them, in active form, without at the time being conscious of the fact, and beyond the power of any one, however learned or skillful, to discover. Did the company expect, when requiring categorical answers as to the existence of the diseases of that character, that the applicant should answer with absolute certainty about matters of which certainty could not possibly be predicated? Did it intend to put upon him the responsibility of knowing that which, perhaps, no one, however thoroughly trained in the study of human diseases, could possibly ascertain?"

A long line of cases, in many jurisdictions, came to the same conclusion.[48] In particular there were two decisions[49] arising under the common law in Minnesota, and in one of them,[50] where the applicant had stated that his mother was in good health, our court made use of language very similar to that of the *Moulor Case*

"We quite agree with counsel for the defendant in his argument that the parties to the contract had the right and power to warrant the truth of their statements, and that the failure of the truth of warranties avoids a life insurance policy Accordingly, when the warranty is of fact, like the age of the applicant, he insures the literal truth of his statement , but, if we assume that the applicant warranted an expert opinion as to his mother's health, he did not thereby insure the coincidence of his statement with fact, but only his honest judgment. Any other rule would be obviously bad logic. It would be solemn nonsense to hold that an ordinary applicant insures the exact reality of physical conditions and causes at a time when the greatest pathologists might differ or even when they might be impossible of definite determination."

[48]A partial list includes Goucher v. Northwestern Traveling Men's Ass'n, (C.C. Wis. 1884) 20 Fed. 596, Schwarzbach v. Union, (1885) 25 W Va. 622, 52 Am. Rep. 227, Royal Neighbors of America v. Wallace, (1902) 64 Neb. 330, 89 N. W 758, Ames v. Manhattan Life Ins. Co., (1899) 40 App. Div. 465, 58 N. Y. S. 244, Rasicot v. Royal Neighbors of America, (1910) 18 Idaho 85, 108 Pac. 1048, Knights of Pythias v. Rosenfeld, (1893) 92 Tenn. 508, 22 S. W 204, Hann v. National Union, (1893) 97 Mich. 513, 56 N. W 834, Illinois Bankers Life Ass'n v. Theodore, (1934) 44 Ariz. 160, 34 P (2d) 423, Metropolitan Life Ins. Co. v. Johnson, (1911) 49 Ind. App. 233, 94 N. E. 785, Columbia Life Ins. Co. v. Tousey, (1913) 152 Ky. 447, 153 S. W 767, Feinberg v. New York Life Ins. Co., (1917) 256 Pa. 61, 100 Atl. 538, Suravitz v. Prudential Ins. Co., (1914) 244 Pa. 582, 91 Atl. 495, L. R. A. 1915A 273. See Vance, Insurance (2d ed. 1930), 377-8, note to Fidelity Mut. Life Ass'n v. Jeffords, (C.C.A. 5th Cir. 1901) 107 Fed. 402, in 53 L. R. A. 193.

[49]Rupert v. Supreme Court, United Order of Foresters, (1905) 94 Minn. 293, 102 N. W 715, Ranta v. Supreme Tent, Knights of the Maccabees, (1906) 97 Minn. 454, 107 N. W 156. Although these cases arose after the passage of the statute considered below, they did not fall within it because the defendants were mutual benefit insurance companies.

[50]Ranta v. Supreme Tent, Knights of the Maccabees, (1906) 97 Minn. 454, 458, 107 N. W 156.

It would be closing our eyes to the obvious to deny that such cases were a species of judicial legislation to defeat the clear intent of the insurance company because it was inequitable. The justification must be found in the familiar rule that the language of policies and applications is to be construed most strongly against the company that drew them.[51] Nevertheless, so long as the rule remained one of construction only, it still remained open to any company with a sufficiently careful draftsman to provide in terms which could not be evaded that the insured warranted the literal truth of whatever was said about his health, or anything else, even though the matter was immaterial and he might have no reason whatever to suspect its falsity. It was to meet this situation, and for that purpose only, that the statute was passed.[52]

THE STATUTE

The statute in question was enacted in 1895.[53] It was adapted[54] from an act of Massachusetts passed in 1887,[55] which became the model for statutes in numerous other states. Its wording, as it

[51]Vance, Insurance (2d ed. 1930), 690: "The tendency of the courts to emphasize this rule was greatly strengthened by the one-time practice of insurance companies of placing such numerous and lengthy conditions in such very small type in their policies as practically to prohibit their being read or understood by the insured. The courts naturally went to the extreme limit of the law, and sometimes even beyond that limit, in order to prevent the insurer from trapping the insured by any such inequitable method of doing business. The natural result has been that in many cases the insurance companies have thus overreached themselves, and induced the courts to allow dishonest claims that would scarcely have been considered if made under contracts less unfair on their face."

[52]"The law relating to this subject has been expressed, when a similar statute was under consideration, as follows: 'This act has effected a change in life insurance contracts, and a very wise and wholesome change it is. It provides against the effect which formerly attached to warranties as to many frivolous and unimportant matters contained in the questions and answers set forth in the applications, which often were of no consequence as to the risk involved, but which the courts were obliged to uphold simply because they were warranties. This class of merely technical objections to recovery is now swept away. But it was never intended by this act, nor does it 'assume to change the law in cases where the matter stated was palpably and manifestly material to the risk, or where it was absolutely and visibly false in fact.' Hermany v. Fidelity, 151 Pa. St. 17, 24 Atl. 1064." Price v. Standard Life & Accident Ins. Co., (1903) 90 Minn. 264, 95 N. W 1118.

[53]Minn. Laws 1895, c. 175, sec. 20. Now found in Minn. Stats., 1941, sec. 60.85, Mason's Minn. Stats., 1927, sec. 3370.

[54]Vance, Insurance (2d ed. 1930), 395, note 78.

[55]The history of the Massachusetts act is set forth in White v. Provident Savings Life Assur. Soc., (1895) 163 Mass. 103, 39 N. E. 771, Metropolitan Life Ins. Co. v. Burno, (1941) 309 Mass. 7, 33 N. E. (2d) 519.

applies to commercial life insurance companies,[56] must be repeated here

"Misrepresentation by applicant—No oral or written misrepresentation made by the assured, or in his behalf, in the negotiation of insurance, shall be deemed material, or defeat or avoid the policy, or prevent its attaching, unless made with intent to deceive and defraud, or unless the matter misrepresented increases the risk of loss."

The question is whether this provision has the effect of changing the common law rule that statements as to health are to be taken merely as statements of opinion, and will not avoid the policy if they are made in good faith. Concerning this question, there are four things to be said

1. The statute is a negative one only It says that no misrepresentation shall avoid the policy *unless* made with intent to deceive and defraud, or *unless* it increases the risk. It does not say that the misrepresentation shall necessarily avoid the policy, if it is not intended to deceive, merely because it does increase the risk. Its purpose was to prevent the misuse of warranties to take advantage of innocent and immaterial misstatements in the application. It was not meant to enable insurance companies to take advantage of any defense not open to them at common law Nothing can be more evident than that the legislature did not intend that result. In the earliest case[57] considering the statute, the Minnesota court made this very clear·

"This statute modifies and controls the policy, and was designed to prevent unfair practices which had theretofore been adopted by a few life and accident insurance companies when seeking risks, through which they secured opportunities to litigate actions brought to recover in case accidents happened or death came to the insured. It must be construed with reference to the wrong it was intended to reach and to remedy, and its meaning is perfectly plain and easily comprehended. A misrepresentation or untrue statement made in the course of negotiations for insurance is *not* to be deemed material, *nor* shall it defeat or avoid the policy,

[56]The statute has no application to fraternal benefit insurance. Farm v. Royal Neighbors of America, (1920) 145 Minn. 193, 176 N. W 489; Bratley v. Brotherhood of American Yeomen, (1924) 159 Minn. 14, 198 N. W 128. Nor to life insurance policies issued without medical examination, which are governed by Minn. Stats., 1941, sec. 61.24, Mason's Minn. Stats., 1927, sec. 3396. Elness v. Prudential Ins. Co., (1933) 190 Minn. 169, 251 N. W 183, Hafner v. Prudential Ins. Co., (1933) 188 Minn. 481, 247 N. W 576. There is a similar provision applicable to accident and health insurance policies in Minn. Stats., 1941, sec. 62.06, Mason's Minn. Stats., 1927, sec. 3420.

[57]Price v. Standard Life & Accident Ins. Co., (1903) 90 Minn. 264, 95 N. W 1118.

unless made with actual intent to deceive and defraud, or *unless* it relates to some matter material thereto which has increased the risk of loss. If a misrepresentation is *not* made with an actual intent to deceive and defraud, if the risk of loss is *not* thereby increased, the policy can*not* be defeated or avoided." (Italics supplied.)

In recent years, however, the court has lost sight of this language, and so far as appears from the cases the argument based on it has not been presented by counsel in any brief.

2. The statute deals only with the *effect* of misrepresentations. It says nothing about, and obviously is not intended to deal with, the construction of the questions and answers themselves. The common law rule that statements as to health are statements of opinion is a rule of construction of the questions asked, to call for an opinion only. Otherwise stated, the question is construed to ask for an opinion, the applicant gives his opinion, and there is no misrepresentation at all. There is nothing in the statute to change this rule. So far as appears from the cases, this argument never has been presented to the supreme court of Minnesota.

3. At the present day, at least, the statute must be construed together with the accompanying provision of the standard life insurance policy statute,[58] which requires every policy to contain an incontestable clause, reading in part as follows:

"All statements made by the insured shall in the absence of fraud be deemed representations and not warranties "

At common law a warranty of health avoided the policy even if innocently made, a representation as to health was construed as a matter of opinion only, and did not avoid the policy if made in good faith. The effect of the standard policy statute is to do away with warranties, and leave only representations. It was enacted in 1907,[59] twelve years after the mispresentation statute. If there is any conflict between the two, the standard policy statute must prevail. So far as appears from the cases, the relation between the two statutes never has been brought to the attention of the supreme court of Minnesota. In Kansas, where there are substantially identical statutes, it has been held that their combined effect is to require only good faith on the part of the applicant.[60]

4. The Minnesota misrepresentation statute is identical, or substantially so, with statutes found in seven other states. Massachusetts has construed its act, after which that of Minnesota was

[58]Minn. Stats., 1941, sec. 61.27, Mason's Minn. Stats., 1927, sec. 3399.
[59]Minn. Laws 1907, c. 220, sec. 2.
[60]Sharrer v. Capital Life Ins. Co., (1918) 102 Kan. 650, 171 Pac. 622.

patterned, and with substantially the same wording, to mean that misstatements as to health will not avoid the policy if they are innocently made.[61] The other states have reached the same conclusion.[62] If Minnesota is to follow the line of the *Laury Case,* and adopt a contrary interpretation, it stands entirely alone.

THE CASES

The cases interpreting the Minnesota statute are in something of a tangle, and it is only too apparent that the court, doubtless because of lack of assistance from counsel, never has given thorough consideration to its meaning. The earliest case,[63] as has been noted above, started out well enough, recognizing the purpose of the act, and declaring that it did not have the effect of altering the common law in favor of the insurer Following this decision, the statute next fell into the hands of Justice Dibell, in *Johnson v. National Life Insurance Company.*[64] The case was one of alleged misrepresentation as to tuberculosis, which, on the evidence presented, was either conscious and deliberate, or was not misrepresentation at all. The only real issue was the existence of the disease. Justice Dibell's opinion is a bit of a puzzle. He says[65] that

> "Our statutes, and statutes like them, were intended *to put warranties upon substantially the basis of representations,* and to do away with defenses made by incorporating conditions and terms in policies, making them by agreement material representations or warranties, and controlling on the right of recovery,"

and again,[66] that

> "Long prior to the statute this court held that a fraudulent misrepresentation of an immaterial matter did not avoid the policy,

[61]Metropolitan Life Ins. Co. v Burno, (1941) 309 Mass. 7, 33 N. E. (2d) 519.

[62]Massachusetts Mutual Life Ins. Co. v. Crenshaw, (1915) 195 Ala. 263, 70 So. 768, Blades v. Farmers' & Bankers' Life Ins. Co., (1924) 116 Kan. 120, 225 Pac. 1082, Cole v. Mutual Life Ins. Co., (1911) 129 La. 704, 56 So. 645, Brennan v. National Life & Accident Ins. Co., (La. App. 1929) 122 So. 147, Donahue v. Mutual Life Ins. Co., (1917) 37 N. D. 203, 164 N. W 50, Brown v. Inter-State Business Men's Accident Ass'n, (1929) 57 N. D. 941, 224 N. W 894, Suravitz v. Prudential Ins. Co., (1914) 244 Pa. 582, 91 Atl. 495, Feinberg v. New York Life Ins. Co., (1917) 256 Pa. 6, 100 Atl. 538, Livingood v. New York Life Ins. Co., (1926) 287 Pa. 128, 134 Atl. 474, Blackman v. United States Casualty Co., (1907) 117 Tenn. 578, 103 S. W 784.

[63]Price v. Standard Life & Accident Ins. Co., (1903) 90 Minn. 264 95 N. W 118, quoted above at notes 52, 57

[64](1913) 123 Minn. 453, 144 N. W 218.

[65]At page 456.

[66]At page 457

and the 1895 law was not intended to make the insurer's liability less." (Italics supplied.)

Notwithstanding this language, he construed the statute in words which have been repeated almost verbatim in nearly every later decision dealing with the statute.

"As we construe the statute a material misrepresentation, made with intent to deceive and defraud, avoids the policy. A material misrepresentation, not made with intent to deceive or defraud, does not avoid the policy, unless by the misrepresentation the risk of loss is increased. *If a material misrepresentation increases the risk of loss the policy is avoided, regardless of the intent with which it was made.* An immaterial representation, though made with intent to deceive and defraud, does not avoid the policy." (Italics supplied.)

This language is in itself confusing. Apparently there is an attempt to distinguish, in the second sentence, between representations which are material and those which increase the risk. What that distinction may be it is difficult to imagine, particularly in the light of later decisions[67] holding that a representation which "increases the risk of loss" is any representation which has influenced the judgment of the insurer in making the insurance contract. Our concern, however, is with the last sentence in italics. This, at least, entirely overlooks the question—which, it is only fair to say, was not in any way raised by the facts of the case—whether statements as to health are to be considered statements of fact or of opinion.

This dictum of Justic Dibell, incorporated in the entire passage quoted, has been repeated in a long list of cases which as first glance may appear rather impressive. On examination, however, it becomes evident that all but a few of them did not bear on the issue we are now considering. In some of the cases property or fidelity insurance was in question, and misrepresentations of health were not involved at all.[68] In others, the language quoted was pure dictum because the evidence was conclusive that the applicant was fully aware that his answers were false.[69] In still others, there was

[67]Mack v. Pacific Mutual Life Ins. Co., (1926) 167 Minn. 53, 208 N. W 410; Shaughnessy v. New York Life Ins. Co., (1925) 163 Minn. 134, 203 N. W 600. See (1931) 15 MINNESOTA LAW REVIEW 593.

[68]W A. Thomas Co. v. National Surety Co., (1919) 142 Minn. 460, 172 N. W 697 (fidelity), First National Bank v. National Liberty Ins. Co., (1923) 156 Minn. 1, 194 N. W 6 (fidelity), Whitcomb v. Automobile Ins. Co., (1926) 167 Minn. 362, 209 N. W 27 (automobile), Romain v. Twin City Fire Ins. Co., (1934) 193 Minn. 1, 258 N. W 289; Elness v. Prudential Ins. Co., (1933) 190 Minn. 169, 251 N. W 183 (life insurance policy issued without medical examination).

[69]Flikeid v. New York Life Ins. Co., (1925) 163 Minn. 127, 203 N. W 598 (consulting physician about supposed stroke), Shaughnessy v. New York Life Ins. Co., (1925) 163 Minn. 134, 203 N. W 600 (told of syphilis by physician), Mack v. Pacific Mutual Life Ins. Co., (1926) 167 Minn.

again dictum, because it was found that the ailment misrepresented was trivial or temporary, and the questions asked did not call for disclosure of such ailments.[70] In still others, the case was disposed of on procedural grounds only, and the court did not find it necessary to consider the effect of an innocent misrepresentation of health.[71]

There remain two, and only two decisions in which the quotation was pertinent to our issue. One of these is the *Laury Case*, with which this discussion began. Even here there was technically dictum, since the decision was after all for the plaintiff, but the court did consider the effect of the plaintiff's good faith, and disposed of it by repeating Justice Dibell. The other is *Lawien v Metropolitan Life Insurance Company*,[72] an opinion of Justice Hilton. There the statement was that the applicant had not consulted or been treated by a physician within the past five years. He had in fact been treated for severe pains in the stomach, which turned out to be carcinoma. It is to be noted that the applicant consciously misstated the fact as to his consultation and treatment, and the only question before the court was whether this was excused by his mistaken belief that the ailment was temporary or trivial.[73] The court held that it was not. No doubt what was said as

53, 208 N. W 410 (variety of ailments, obviously known to applicant), Harnischfeger Sales Corp. v. National Life Ins. Co., (1935) 195 Minn. 31, 261 N. W 580 (court finds statements known to be false), Sorenson v. New York Life Ins. Co., (1935) 195 Minn. 298, 262 N. W 868 (known tuberculosis).

[70]Schaedler v. New York Life Ins. Co., (1937) 201 Minn. 327, 276 N. W 235. Also Mack v. Pacific Mutual Life Ins. Co., (1926) 167 Minn. 53, 208 N. W 410.

[71]Olsson v. Midland Ins. Co., (1917) 138 Minn. 424, 165 N. W 474 (trial court entered judgment notwithstanding verdict on ground that it conclusively appeared the applicant knew the statements were false; reversed because evidence not considered conclusive), Schmitt v. United States Fidelity & Guaranty Co., (1926) 169 Minn. 106, 210 N. W 846 (instruction in the alternative held harmless error), Iblings v. Phoenix Mutual Life Ins. Co., (1927) 172 Minn. 341, 215 N. W 429 (jury finding that applicant did not know answers were false and that he did not have an illness increasing the risk not disturbed), Bullock v. New York Life Ins. Co., (1930) 182 Minn. 192, 233 N. W 858 (instructions not objected to become law of the case)

[72](1941) 211 Minn. 211, 300 N. W 823.

[73]" Clearly, the improper diagnosis of an ailment by a prior doctor or an underestimation of its danger by the patient does not in law or fact operate to transform serious diseases into trivial ailments. Where subsequent developments establish that the nondisclosure of previous consultation did increase the risk of loss, it is not for the beneficiary to say that the insuror was not entitled to the opportunity of satisfying itself whether the purpose and result of the consultation were of such nature as to remove the applicant from the class of desirable risks." Lawien v. Metropolitan Life Ins. Co., (1941) 211 Minn. 211, 300 N. W 823.

to the applicant's state of mind was not dictum; but it is at least weak authority as to any case in which there was no conscious misrepresentation of anything.

The state of the law in Minnesota is further obscured by one decision which appears to hold quite clearly that innocent misrepresentations of health will not avoid the policy. *Domico v. Metropolitan Life Insurance Company*,[74] is again an opinion of Justice Hilton. The ailments misrepresented were chronic tuberculosis and a mitral heart condition, sufficiently serious in themselves. There was evidence that the physician who examined the applicant did not tell him about them, and it did not appear that he knew of them. When he subsequently died of a misunderstanding conducted with firearms in the course of a Chicago holdup, the court affirmed a verdict for his widow, saying:

"Even assuming that his testimony was true, it would not here be a ground for avoiding the policy. The failure of the applicant to disclose facts of which he is ignorant is not a ground for such avoidance. It is generally so held."

Again, there is *Robbins v. New York Life Insurance Company*,[75] where the applicant stated that he had had no illnesses, diseases or bodily injuries, and had not been treated by or consulted a physician for two years past. At the time he had "a little stiffness in the neck" and a swelling behind the right ear, and had had an earache, and consulted and been treated by a physician. The ailment turned out to be an incipient mastoid abscess, which reached his brain and killed him. It was held that the jury could find that this was not an "illness, disease or personal injury" as understood in ordinary parlance, and a verdict for the plaintiff was affirmed. It appears quite impossible to reconcile this decision with the *Lawien Case*.[76] The court refers[77] to "the harsh rule under § 3370," and apparently does not like the statute. Neither, strangely enough, did Justice Dibell like it, as he construed it—for there is a later case[78] in which he referred to his own construction as a "harsh rule."

---

[74](1934) 191 Minn. 215, 253 N. W 538. It seems impossible to reconcile this decision with the Lawien Case, decided by the same judge, unless it be on the ground that the latter involved conscious misrepresentation that the applicant had not been treated by a doctor.

[75](1935) 195 Minn. 205, 262 N. W 210, 872.

[76]Lawien v. Metropolitan Life Ins. Co., (1941) 211 Minn. 211, 300 N. W 823.

[77]Robbins v. New York Life Ins. Co., (1935) 195 Minn. 205, 210, 262 N. W 210.

[78]Elness v. Prudential Ins. Co., (1933) 190 Minn. 169, 171, 251 N. W 183.

Conclusion

The "harsh rule" did not exist under the common law Representations of health were construed to be representations of opinion only, and did not avoid the policy if they were made innocently and in good faith. The background of the statute, the evils which led to its passage, and its evident purpose, recognized by our court in the first decision which considered it, leave no room for any belief that it was intended to open any new defense to the insurer Nor does it in terms so provide. The courts of other states with identical statutes have found no reason to adopt any such construction. The dictum that innocent misrepresentation of health will avoid the policy crept into the Minnesota cases through an opinion of Justice Dibell in which the issue was not presented by the facts, and in which the question undoubtedly was not argued by counsel. That dictum has been repeated over and over, usually in the same words as part of a formula, until at last the facts with which it supposedly dealt arose in the *Laury Case*. There is nothing in any of the cases to indicate that anyone ever has set before the court the history of the statute, or any argument as to what it was intended to accomplish, or what it means.

It is respectfully suggested that, although the *Laury Case* was rightly decided, the conclusions by which that result was reached were wrong. There is still time to reconsider those conclusions, which cannot be regarded as firmly established in the law of Minnesota. All's well that ends well.