

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 3/98

BEFORE: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE PANTON, J.A. (AG.)

BETWEEN BLUE CROSS OF JAMAICA APPELLANT
AND CENTURY NATIONAL BANK
LIMITED
AND APRYL LUE RESPONDENTS

Garth McBean instructed by Dunn, Cox, Ashenhein & Stone for Appellant

Ransford Braham & Suzan Ridsen-Foster instructed by Livingston, Alexander & Levy for Respondents

May 10 & July 26, 1999

RATTRAY, P.

The defendant/appellant Blue Cross of Jamaica entered into a contract dated 1st September, 1993 with the first plaintiff/respondent Century National Bank Limited for health insurance coverage on Apryl Lue, the second named respondent, a designated employee of the bank.

In November 1995 Miss Lue experienced pains in her joints and consequently consulted Dr. Horace Fisher at the Oxford Medical Centre on the 11th November who examined her and instructed her to undergo a series of blood tests. Dr. Fisher made no diagnosis and proffered no opinion. He prescribed pain killers to alleviate the pain.

On that same day Miss Lue had the necessary blood tests done on the instructions of Dr. Fisher. Prior to receiving any results of the tests she travelled to the United States

of America to visit with her family for the Thanksgiving holidays.

Whilst there she developed an ear and throat infection which progressively worsened. On November 19, 1995 she was admitted to the emergency room of the Good Samaritan Medical Center at West Palm Beach, Florida. A tentative diagnosis was made of her condition as being HIV disease complicated by pneumonitis, pancytopenia and stomatitis. The result of the Jamaican blood tests were not yet available either to her or the doctors at the Good Samaritan Medical Centre.

Within a few days after she was admitted for emergency treatment and advised that the diagnosis was wrong she was advised that contact had been made with Dr. Fisher in Jamaica, and he had by then received the results of the blood tests which proved positive for Systemic Lupus Erythematosus commonly called S.L.E. That diagnosis was further confirmed at the Good Samaritan Medical Centre by one Dr. Whelton, a Rheumatologist.

On the 10th December, 1995 she was discharged from the Good Samaritan Medical Centre and she returned to Jamaica to seek further consultation and continue her treatment.

Expenses incurred for emergency treatment and hospitalisation at the Good Samaritan Medical Centre amounted to US\$87,118.46.

Century National Bank her employer, submitted a formal claim to Blue Cross requesting Blue Cross to pay to the Good Samaritan Medical Centre the medical costs incurred by Miss Lue for the treatment in the United States of America in accordance with the terms and conditions of the Health Insurance Policy.

Blue Cross maintained that under the provisions of the Policy and in particular the Traveller's Emergency Health Plan which excludes "... conditions for which the participant received treatment within the 90 days period preceding the first date of service for which benefits are currently being claimed." Miss Lue's medical condition was pre-existing and

she had received her treatment in Jamaica within the 90 day period referred to and thus her claim fell within the exclusion clause. Thus they refused to pay the bills incurred.

By way of an Originating Summons Century National Bank and Miss Lue asked the Supreme Court to determine the following questions of construction of the relevant clause of the policy under which Blue Cross sought to avoid responsibility for the payment of Miss Lue's medical expenses in the U.S.A. and to make the consequential orders and declaration thereon:

1. "That on a proper construction of Section 4 Clause 6 of the Defendant Blue Cross of Jamaica's contract of insurance made between the First Plaintiff Century National Bank Ltd. and the Defendant Blue Cross of Jamaica dated September 1, 1993 which provides as follows:

'that benefits shall not be made available for conditions for which the participant received treatment within the ninety (90) days period preceding the first date of service for which benefits are currently being claimed.'

the defendant cannot rely on the said provision and is therefore liable under the terms and conditions of the said Policy to honour the claim made by the Plaintiffs in relation to emergency treatment received by the Second Plaintiff at the Good Samaritan Medical Centre in Florida during the period November 19 to December 10, 1995.

2. That on a proper construction of what constitutes treatment for the purposes of Section 4 Clause 6 of the Defendant, Blue Cross of Jamaica's contract of insurance made between the First Plaintiff Century National Bank Limited and the Defendant Blue Cross of Jamaica dated September 1, 1993 the second Plaintiff had not received treatment within the ninety (90) day period preceding the date of service for which benefits are being claimed.
3. That on a proper construction of Section 4 Clause 6 of the Defendant Blue Cross of Jamaica's contract of insurance made between the First Plaintiff Century

National Bank limited and the Defendant Blue Cross of Jamaica dated September 1, 1993 the Defendant is liable to indemnify the Second Plaintiff for medical expenses incurred as a consequence of the said Second Plaintiff's illness and emergency hospitalisation at the Good Samaritan Medical Centre in Florida during the period November 19 to December 10, 1995.

4. That under the terms of the said policy the Defendant is therefore obliged to honour the claim made by the First Plaintiff on behalf of the Second Plaintiff and indemnify and/or to compensate the Second Plaintiff for expenses incurred in relation to emergency treatment received by the Second Plaintiff at the Good Samaritan Medical Centre in Florida during the period November 19 to December 10, 1995.
5. That it be declared that the Second Plaintiff is entitled under the terms and conditions of the Policy to be indemnified by the Defendant for all expenses incurred in relation to emergency treatment received by the Second Plaintiff at the Good Samaritan Medical Centre in Florida during the period November 19 to December 10, 1995.
6. That the costs occasioned by this application be paid by the Defendant."

In a judgment delivered by Ellis, J on the 19th December, 1997 the Court held:

1. "The second plaintiff had not received treatment for S.L.E. prior to her being admitted to hospital in Florida.
2. She could not have been so treated since she had not been diagnosed as having the disease.
3. The meaning of treatment in the exclusion clause 6 is referable to a specific condition.
4. The exclusion clause does not avail the defendant."

It is this decision of Ellis, J which has come before us on appeal at the instance of Blue Cross. The question was whether Miss Lue received treatment for the condition diagnosed within “the 90 days period preceding the first date of service for which benefits are currently being claimed.”

Essentially, this is a question of fact. Was there evidence on which Ellis, J could have found as he did that Dr. Fisher in Jamaica had not diagnosed Miss Lue as suffering from S.L.E. and had not treated her for this condition?

The affidavit of Miss Lue in support of the Originating Summons deponed to the following:

- (1) That her attendance on Dr. Fisher in Jamaica in November 1995 resulted in the doctor:
 - (a) instructing the patient to undergo a series of blood tests;
 - (b) prescribing a pain killer to alleviate pain.

No treatment for S.L.E. was given by Dr. Fisher since no diagnosis at that stage had been made as to the condition.

The affidavit of Dr. Fisher discloses that on his examination his initial suspicion was that she was suffering from some form of collagen vascular disease either rheumatoid arthritis or S.L.E. The latter was most likely. He did not alarm her by advising her of his suspicion because of:

- (a) the serious nature of the suspected condition;
- (b) Miss Lue had in September 1995 consulted Dr. DaSilva of the Oxford Medical Centre and the blood tests ordered by him had shown negative for S.L.E.

The court had the benefit of seeing the results of those blood tests.

Dr. Fisher provided no treatment for S.L.E. since Miss. Lue's condition was still unknown. The only medication prescribed was to relieve pain until a diagnosis could be made consequent on the results of the blood tests which he ordered to be taken. Mrs. Venus Lue, the mother of Miss Lue contacted him for the results of the blood tests after Miss Lue had been admitted for emergency treatment in the Good Samaritan Medical Centre in Florida. Dr. Fisher advised Mrs. Lue that the results of her daughter's blood tests indicated that Miss Lue was suffering from S.L.E. Dr. Fisher prepared a written medical report of his examination and evaluation of the patient which was exhibited.

On December 19, 1995 Century National Bank made a claim on Blue Cross enclosing the reports of Dr. Fisher and the Good Samaritan Medical Centre, Florida. It is this claim for which payment was refused by Blue Cross.

The critical question is whether Miss Lue received treatment for S.L.E. before going to Florida for the Thanksgiving holidays of 1995.

Counsel for Blue Cross maintains that the health plan was designed and intended to cover emergency health problems for which the claimant had not been treated within the last 90 days before travelling abroad and which is of sudden onset. It does not relate to treatment for which the claimant leaves the island with the express purpose of receiving treatment abroad. Dr. Fisher's treatment for pain was in fact a treatment for a symptom of S.L.E., and his prescription of pain killers was treatment to alleviate the symptoms of the disease.

This submission flies in the face of Dr. Fisher's affidavit as to why he prescribed pain killers and his failure at that time to diagnose the patient as suffering from S.L.E.

The onus is on the appellant to bring itself within the exclusion in clause 6 of the policy which reads:

“Benefits shall not be made available to conditions for which the participant received treatment within the ninety (90) days period preceding the first date of service for which benefits are currently being claimed.”

In *Cooke (A.P.) v. Financial Insurance Company Ltd* a decision of the House of Lords on the 3rd December, 1998 published on the internet the clause of the Insurance Contract which was before their Lordships for construction were even wider than that in the instant appeal. It reads:

“Exclusions No benefit will be payable for disability resulting from (a) Any sickness, disease, condition or injury for which an insured person received advice, treatment or counselling from any registered medical practitioner during the 12 months preceding the commencement date.”

The majority judgment delivered by Lord Lloyd of Berwick and concurred in by Lord Steyn and Lord Hope of Craighead stated the question which arose on the facts as follows:

- “(1) Did the plaintiff receive advice, treatment or counselling for angina prior to 15 October? if not,
- (2) Is it enough to bring the case within the exclusion that he received advice, treatment or counselling for symptoms which later turned out to be those of angina.”

The trial judge had found that in the relevant period the patient “did not receive advice treatment or counselling for angina.” He stated - “In my judgment the words ‘for which’ link the sickness with the advice, treatment or counselling. Treatment cannot be given for a sickness unless the sickness is recognised.” (Emphasis mine)

This judgment was referred to by Lord Lloyd of Berwick as “admirably clear and succinct.” As he further stated: “... I think, treatment for a disease requires some knowledge on the part of the doctor of the disease which he is treating.”

He further added:

“It is said that the purpose of the exclusion clause is to exclude liability for disability which may eventuate, not for disability which must eventuate. But if this were the purpose, then it would be easy enough to exclude liability for any disability resulting from sickness, disease or injury from which the insured was in fact suffering before the commencement of the policy. But the insurers did not mean to go that far. Hence the qualification introduced by the words ‘for which.’ If there were any doubt as to the meaning of the exclusion clause, which I do not think there is, then on well known principles of construction I would not hesitate to construe it against the defendants, ...”

Ellis, J., was therefore correct in finding as he did that the exclusion clause did not avail the defendant (appellant) since Miss Lue had not received treatment for S.L.E. prior to her being admitted to hospital in Florida.

For those reasons I would dismiss the appeal with costs to the respondent.

BINGHAM, J.A.

I agree.

PANTON, J. A. (Ag.)

I agree.