

(52 La. Ann)

PETITPAIN v. MUTUAL RESERVE FUND LIFE ASS'N. (No. 13,139)  
(Supreme Court of Louisiana. Jan 22, 1900).  
LIFE INSURANCE - WARRANTY - COMPLAIANCE.

A warranty stipulated in contract of life insurance must be strictly complied with, or literally fulfilled, before the Insured is entitled to recover on the policy. A warranty need not be material to the risk, because it is of itself an implied agreement that the representations warranted are material. (Syllabus by the Court).

Appeal from civil district court, parish of Orleans; John St. Paul, Judge.

Action by Maude V. Petitpain against the Mutual Reserve Fund Life Insurance Association. Judgment for defendant, and plaintiff appeals Affirmed.

Parkerson & Tobin, for appellant. Denegre, Blair & Denegre, for appellee.

WATKINS, J. This suit is brought by the beneficiary of a policy of insurance upon the life of Frank H. Petitpain for the sum of \$5,000; the plaintiff having been his wife, and now his surviving widow, to whom the policy is made payable upon the death of her husband. The petition alleges that the policy was issued on the 30<sup>th</sup> day of March, 1897, by the defendant, and that the same was in force at the time the assured died, on the 16<sup>th</sup> day of December 1897, and that she is entitled to recover the amount thereof; proof of death having been made and furnished to the company as required by the terms of the policy. For answer, the defendant pleads a general denial and further answering, sets up the following defenses, to wit: **(1) Because the assured committed suicide, and death by suicide is not a risk assumed by the policy within three years from it date,** (2) Because to his application the assured stated that he was at the date thereof, and had been in good health during the past twelve months, and that he was at the date of said application, and had always been, in good health, and free from all ailments, diseases, weaknesses, and infirmities, whereas the truth and fact were to the contrary; said assured having had, among other ailments, diseases, and infirmities, attacks of the fits. (3) Because in his said application the assured stated that he had never had any illness, local disease, or injury, mental or nervous disease or infirmity, or any disease, weakness, or ailment whatever, whereas the truth and fact were to the contrary. Said assured, besides being subject to fits, had, some years prior to his application for membership of aforesaid, been shot in the back, and suffered injury and sickness therefrom. (4) Because in his said application the assured stated that he had never been an inmate of any infirmary, sanitarium, or hospital, whereas the truth and fact were to the contrary; said assured having been an inmate of the Charity Hospital of this city, and had been treated therein. (5) Because in his said application the assured stated that he had not consulted or been attended by any physician within nine years, whereas the truth and fact are to the contrary; said assured having frequently consulted physicians during that time. For the foregoing reasons the defendant avers that it is not liable to the plaintiff to any sum whatever. On the issues thus formulated the case went to trial, testimony was adduced and considered by the judge below, and he thereupon rendered a judgment in favor of the defendant, rejecting the demands of the plaintiff. It is from that judgment that the plaintiff prosecutes this appeal.

The defendant claims that the application of the assured forms a part of the policy of insurance, - same being read into the contract, - and that the policy declares that the policy declares that the latter is predicated upon the application, and that the application for membership in the defendant association, and the policy of insurance that was issued to the assured, warranted "that all of the answers and statements contained therein, by whomsoever written, were full, complete, and true, and that it further agreed that the constitution and by-laws of the association with the amendments thereto, as modified by the board of directors, were made in part of the policy, and that if any of the answers or statements made were not full, complete, and true, or if any condition or agreement should not be fulfilled as required in said application or in the policy, then the policy issued thereon should be null and void, and all money paid thereon forfeited to the association." **The policy was issued and bears date March 30, 1897, and the assured died about the 16<sup>th</sup> day of December, following, - his body having been found in the Mississippi river; but there is no proof furnished by the record as to whether his death was the result of accident or intention. The proof does show that there were some bruises, of not very serious**

**character, found upon the body, but insufficient to have reasonably indicated the cause of his death.**

The policy acknowledges the receipt of \$99.24, as the first annual premium, paid thereon upon the delivery thereof to the assured; and evidently no further premium was paid, as the stipulation of the policy is for an annual premium of \$71.10 on the 6<sup>th</sup> day of March of each succeeding year during the continuance of the policy. The policy contains the stipulation that, if it: "shall have been in continual force for three years from its date, it shall thereafter be incontestable, except for nonpayment of premiums as herein provided for," etc. It further provides that "death of a member caused by engaging in any violation of law, or by his own hand, whether sane, or insane, voluntary or involuntary, is not a risk assumed by this contract, within three years from this date." There are the two provisions of the policy upon which the defendant mainly relies. In part 1 of the application for membership and policy of insurance we find the following provisions: "It is hereby agreed that the answers and statements contained in parts 1 and 2 of this application, by whomsoever written, are warranted to be full, complete, and true, and that this agreement, and the constitution and by-laws of the association, with the amendments thereto, as modified by the board of directors. In adopting other plans and systems as authorized by said constitution and by-laws, together with this application, are hereby made parts of any policy that may be issued thereon; that if any of the answers or statements made are not full, complete, and true, or if any condition or agreement shall not be fulfilled as required herein or by such policy, then the policy issued hereon shall be null and void, and all money paid thereon shall be forfeited to said association." In part 2 of the application we find the following: "I do hereby agree and warrant that the foregoing answers written to the above questions are my answers, and are full, complete, correct, and true, and that the same shall be made a part of my application for membership and policy of insurance." This application was signed by the applicant in the presence of the medical examiner. The following extracts are made from part 2 of the aforesaid application to wit: "Q. 2. Are you now, and have you always been, in good health, and free from all ailments, diseases, weakness, and infirmity? A. Yes; except yellow fever 8 or 9 years ago. Had no physician \*\*\* Q. 12. Have you ever had any illness, local disease, injury, mental or nervous disease or infirmity, syphilis, or any disease weakness, or ailment of the head, throat, lungs, heart, stomach, liver, kidneys, bladder, or any disease or infirmity whatever? If yes, state nature, date, duration, and severity of attack, and whether fully recovered. A. No; except as above \*\*\* Q. 15. (a) How long since you consulted or were attended by a physician? Give date. (a) 9 years ago. (b) State name and address of such physician. (b) No physician. (c) For what disease or ailment? (c) None. (d) Give name and address of each physician who has prescribed for or attended you within the past 5 years, and for what disease or ailments, and date. (d) ---, (e) Have you had any illness, disease, or medical attendance not stated above? (e) ---, \*\*\* Q. 17. Have you been an inmate of any infirmary, sanitarium, institute, asylum, or hospital? If so, where, when, duration, for what cause? State expressly each and every case. A. No."

From the parol evidence adduced on the trial we gather the following facts pertinent to the issue before the court: One physician attended a patient bearing the name of Petitpain at his office and at the Charity Hospital, and that physician states that Dr. Miles attended him previously. That was in the year 1894. A witness states that he was a collector for Dr. Miles just prior to his death, and had been so engaged for four or five years previously; that he knew a man by the name of Petitpain, who came to Dr. Miles' office, stating that he worked on ships; and that he had seen the same man there frequently, two or three times a week. He states that he had bills against this man, in favor of Dr. Miles, to collect. Another witness states: That he knew the assured and was employed on the same ship, and that he knows that he had something like fits. That he knew of his falling down on the deck at sea. Saw this more than once. When in that condition, he was unconscious for a while, and remained so 10 or 15 minutes. The witness states that he knew that the deceased had fits once in the office of the steamer Aransas. Witness states that he was the purser of the ship. A certificate was produced from the Charity Hospital, bearing date January 25, 1898, and signed by the clerk of that institution, which shows an extract from the admission book, to the effect that Frank Petitpain, clerk by occupation, native of Mexico, age 21 years, last from Matamoras, was admitted on December 11, 1888, and discharged December 18, 1888. A like certificate is produced from the Hotel Dieu, which shows that F.H. Petitpain entered that institution on June 24, 1889, and was

discharged January 28, 1889. That his trouble was a "gunshot wound; wall of abdomen. Born in Matamoras, Mexico, age 21 years."

*The brother of the deceased, as a citizen of New York City, was interrogated under commission, and we extract the following from his depositions: "Third Interrogatory, Do you know whether or not said Frank H. Petitpain ever suffered from attacks of fits, or had fits? If you say that you do know, please state fully your knowledge on the subject. Say whether or not you have personally seen him suffering from any attacks? If you say that Frank H. Petitpain suffered from any such attacks, say how frequently; and please state whether or not he suffered from any such attacks during the year 1897," ect. The answer is as follows: "Yes; I know that he had them up to the time I left New Orleans to go to Europe, which was I think, about 1894. While he was in Mexico, previous to going to New Orleans, he had them only occasionally. This was in the years 1885, 1886, or 1887. He was engaged as purser on one of the Morgan Line boats, and on one occasion he went to Saunders' Plantation, in St. Mary's parish. He had a difficulty with the son of nephew of the proprietor of the plantation about a certain bill of lading. My brother thought the fellow was trying to trick him, and refused to sign the bills of lading or take the sugar, and as he turned to go he was shot. He recovered from that, but after that he had fits very frequently. I saw him have as many as 8, 10, or 15 a day when he was under treatment of DR. Miles. After Dr. Miles' death he was treated by another doctor, - I believe, Dr. Bloom. He became better, and did not have them so often. This was between the years 188 and 1894. At the time I lived in New Orleans, -I believe, March, 1894, - he had gone for three or four months without having any fits. Prior to that time, ever since he was wounded, in 1888, he had them every year and very frequently throughout the year. I saw him again and again suffering from these attacks of fits. He was living at my house once, and had them there. For a time he was in the habit of carrying, sewed in the inside of his coat, a piece of linen, with instructions written thereon in indelible ink, - that, should a fit take him in a street car, to look in such a pocket, and they would find a vial of some medicine to give him. He was apt to be taken with these fits in any place." This witness says that his brother was treated for these fits by Dr. Miles and Dr. Bloom up to the time he left New Orleans, that he was treated in the Charity Hospital at New Orleans by Dr. Miles for the gunshot, that a year later he was taken to the Hotel Dieu, and that the bullet was extracted one year after he was wounded Counsel for plaintiff makes the complaint that he was a willing witness, and had evidently given to the company items of his information so as to enable its counsel to propound the foregoing Interrogatories. He also insists that his statements are extravagant and unreasonable. On the contrary, the statements of this witness are in some respects borne out by the statements of other witnesses, and by the certificates from the Charity Hospital and the Hotel Dieu.*

The Captain of the steamship Olympia, of the Oteri Line, was interrogated as a witness, and says that he knew Frank H. Petitpain, who was with him as purser on the steamship Rover in May and June of 1897 (that was only a month or two after the policy was issued); that he does not know whether or not he was subject to fits; but that he had an attack of fits once on board of his vessel, and he thinks it was June, 1897. He states that upon his recovery from the attack he said that he had an attack about four or five years before. The witness says this was the only occasion he had fits while he was with him on the vessel. He says that he and the engineer held him for perhaps about 15 minutes; that he held him in his arms, and was assisted by the engineer, and, if they had not done so, he would have "knocked himself all to pieces; he would have torn himself up."

The foregoing is the substance of the parol testimony, and, in our opinion, it is diametrically opposed to several statements contained in the application of the assured. For instance, he was asked the question if he was then, or had he always been, in good health and free from all ailments, diseases, weaknesses, and infirmities; and his answer is: "Yes; except yellow fever eight or nine years ago; but had no physician." He was again, asked the question if he had ever had any illness, local disease, infirmity of any kind whatsoever; and his answer is: "No; except as above." Again, he was asked the question, "How long since you consulted or were attended by a physician?" His answer is, "Nine years ago." When asked to state the name and address of such physician, his answer was "No physician." Again he was asked

if he had ever been an inmate or any infirmary, sanitarium, or hospital, - when, for what cause, ect; and his answer was, "No." In the face of these statement we have that of the captain of a vessel of which he as purser, that he had a fit on board of a vessel in June, after the issuance of the policy in March; and the statement of a physician that he had been treated the Hotel Dieu several years prior to his application. The proof shows clearly that he had been an inmate of both the Charity Hospital and the Hotel Dieu on several occasions prior to his application, and that he had been therein treated for a gunshot wound, and that a bullet had been extracted by a physician attending at the Hotel Dieu, wherein he was a patient. The extracts made from the application of the assured are to the effect that the assured warranted ther answers and statements therein contained to be full, complete, and true, and that if any of said answers were made were not full, complete, and true, then they policy issued thereon shall be null and void. It further shows that he agreed and warranted that all the foregoing answers written to the questions therein contained are full, complete, correct, and true in every respect. In our view, argument is unnecessary, upon these facts, to demonstrate the violation of the warranty clause of the contract of insurance. The statements of the assured in answer to the questions propounded in the application are absolutely inconsistent and irreconcilable with the parol proof adduced on the trial.

The instant case is quite similar in its facts to that of *Well v. Insurance Co.*, 47 La. Ann. 1405, 17 South. 858, from which we make the following extract: "The theory of defendant's answer is that the application is the primary evidence, on the faith of which only the policy was issued to the insured, and that the validity and binding force of the policy necessarily depend upon the statements and representations which are made in the application. Upon this theory, the answer avers that the deceased made, in his application, certain statements and representation and gave answers to certain questions propounded to him in the course of his medical examination, which is made part of the application, concerning facts "then unknown to the defendant, but necessary and material to the defendant's risk; and it further represents that 'said statements were false and untrue,' and that the truthfulness of same was 'necessary and material to the defendant's risk.' Reiterated, the representations and statement alleged to untruthful are that he answered that he had never had any 'severe headaches, vertigo, fits, or any nervous or neuralgic trouble.' Whereas he had an attack f trigeminal neuralgia in May 1893, for which he had been treated by a physician for the space of a week; an attack of vertigo or convulsions in October, 1893, for which he was similarly treated for a period of several days; and an attack of la grippe in November, 1893, for which he was similarly treated for a period of two weeks. That these different attacks of illness were by the deceased concealed from the medical examiner, and consequently not made known to the defendant at the time it issued the policy. And the further defense is predicated upon the fact that, when interrogated as to the name and residence of his physician, the deceased only gave the name of R. D. Randolph, whereas in truth and in fact he was attended by Dr. Smith Gordon, as well as by Dr. Randolph, during his attack in May 1893, and was examined and prescribed for by Dr. Rudolph Matus of New Orleans, in May, 1893, at the suggestion of Dr. Randolph, of Alexandria. And in truth and fact was attended by Dr. Gordon in September and October, 1893. It is not a point made in the answer that the death of the deceased resulted from an excepted cause in the risk of the defendant; but this testimony is pertinent to show the materiality of the information which was necessary that the defendant should have known in determining whether it would issue a policy, and in enabling the court to estimate the probable effect of the failure of the deceased to make known those fact to the defendant through the instrumentality of his medical examination." In our view, the points made in this case are quite similar, and are sustained by proof even stronger than the evidence in that case. Upon careful examination of the facts, and a large number of authorities bearing upon question involved therein, our conclusions were stated be as follows: "Applying the principles of law herein above related to the application of the insured, and to the policy of insurance issued by the company, there is in our minds no possible doubt that there was a breach of the warranty by the insured, on the faith of which the insurer undertook the risk." We are of the opinion that the Judge a quo decided the case correctly. Judgment affirmed.