COURT OF APPEAL FOR ONTARIO

CITATION: Brisco Estate v. Canadian Premier Life Insurance Company, 2012 ONCA 854
DATE: 20121205
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Rosenberg, Goudge and Feldman JJ.A.

BETWEEN

The Estate of Robert Brisco, by its Executor Paul Brisco, Michael Jason Brisco, Robert Jeffrey Brisco, Kelly Brianne Brisco, Brandon Andrew Brisco

Plaintiffs (Respondents)

and

Canadian Premier Life Insurance Company, Heritage General Insurance Company, Tziporah Goldberg

Defendants (Appellant)

Lloyd M. Hoffer and David Seevaratnam, for the appellant Canadian Premier Life Insurance Company

Paul J. Pape and Nicolas M. Rouleau, for the respondents

Heard: April 10, 2012

On appeal from the judgment of Justice Wolfram Tausendfreund of the Superior Court of Justice, sitting with a jury, dated June 24, 2010.

Rosenberg J.A.:

[1] The principal issue in this appeal concerns the admissibility and possible use of hearsay evidence in an action by beneficiaries of an insurance policy

against the insurance company. The appellant, Canadian Premier Life Insurance Company, had insured the deceased under a Group Accident Insurance Certificate issued to Sears Canada Inc. If the insured died in a common carrier accident, the policy paid out $1,000,000. If death occurred in other circumstances, the policy paid out lesser amounts. The insured, Robert Brisco, purchased this policy through Sears in January 1998. Mr. Brisco had a number of other policies that will be discussed more fully below. In short, however, it was Canadian Premier's contention that Mr. Brisco cancelled the policy in a telephone conversation on August 25, 1998. The respondents contended that Canadian Premier cancelled the policy by mistake and that Mr. Brisco intended to cancel a different policy. The other policy was also purchased through Sears, was effective as of December 1993, and was primarily a policy providing for supplementary hospital benefits.

[2] The respondents' case of mistake depended upon statements Mr. Brisco made over several years after 1998 evidencing his belief that he had $2,000,000 in insurance. There was no question that Mr. Brisco held a policy from Heritage General Insurance Company, obtained through Zellers, that paid $1,000,000 in case of an accidental death while on a common carrier.

[3] The trial judge admitted Mr. Brisco's statements under the state of mind exception to the hearsay rule. The appellant submits that the evidence was inadmissible. In the alternative, it argues that there was no corroboration as

required by s. 13 of the *Evidence Act*, R.S.O. 1990, c. E.23. It also raises other issues concerning the charge to the jury and the admissibility of expert evidence. For the following reasons, I would dismiss the appeal.

A. THE FACTS

(1) The Various Insurance Policies

[4] Prior to August 25, 1998, Mr. Brisco held six insurance policies. The two group insurance policies issued to Sears by Canadian Premier were described in the evidence as follows [for convenience I have used only the last 3 digits of the certificates]:

> Abbey Life [Canadian Premier took over Abbey Life] hospitalization policy certificate 972 purchased December 14, 1993; monthly premium of $12.95; pays various hospital benefits for the insured and his family and $10,000 if any family member died in an accident.
>
> Canadian Premier Life accidental death policy certificate 282 purchased January 7, 1998; monthly premium of $9.95; pays only if Mr. Brisco died; maximum of $1,000,000 if accident in a common carrier; lesser amounts for other accidents.

[5] The premiums for these two policies were paid by automatic charges to Mr. Brisco's Sears credit card. The charges were reflected in the statement of account Mr. Brisco received every month from Sears, until October 1998 when the charge for the accidental death policy was no longer shown on the statement.

[6] Mr. Brisco held four other policies, referred to as Heritage policies, that were group insurance policies issued to Zellers as follows:

> Heritage accidental death policy certificate 396 purchased January 28, 1994; monthly premium of $8.95; pays maximum of $250,000 if accident in public transportation, lesser amounts for other accidents.
>
> Heritage permanent disability policy certificate 193 purchased May 2, 1995; monthly premium of $8.95; pays $250,000 if Mr. Brisco became paralyzed in an accident.
>
> Heritage hospitalization policy certificate 943 purchased July 1, 1996; monthly premium of $8.95; pays various amounts for hospitalization, intensive care etc. if Mr. Brisco was injured in accident.
>
> Heritage accidental death policy certificate 033 purchased March 27, 1998; monthly premium of $7.95; pays maximum of $1,000,000 in case of accidental death in common carrier and lesser amounts for death in other kinds of accidents.

[7] The monthly premiums for the Heritage policies were paid automatically through Mr. Brisco's Zellers credit card.

(2) Mr. Brisco's Personal Circumstances

[8] Mr. Brisco died in January 2004 in an airplane crash, thus triggering the $1,000,000 insurance benefits for common carrier fatal accidents. He was 46 years of age. He had lived in Chatham where he ran a business as a real estate broker and property manager. He was described as frugal and someone who liked a good deal. He was good at details and in dealing with people.

(3) The August 25, 1998 Telephone Conversations

(a) The Canadian Premier Conversations

[9] Although Mr. Brisco's policies were with different companies, Canadian Premier had an agreement with Heritage to administer the operation of Heritage's insurance policies. Computer-generated records show that Mr. Brisco made at least two telephone calls to Canadian Premier on August 25, 1998. The first call or set of calls was to Tziporah Goldberg, inquiring about the two Canadian Premier policies. Ms. Goldberg had no independent recollection of the conversations and relied upon two computer records labelled "service documentation", one for each of the Canadian Premier policies. One document refers to the accidental death policy and is time stamped 11:12:11:

Purpose of call:	Cancellation
Action taken:	Offer as supplement
Result:	Cancelled
Cancel effective date:	09/98

[10] The other document refers to the Abbey Life Certificate and is time stamped 11:13:30:

Purpose of call:	Cancellation
Action taken:	Explain Product Benefit
Result:	Retained

[11] Ms. Goldberg testified that, given that the time stamps are so close in time, it is likely that there was only the one telephone conversation. The insurance was paid one month in advance; that is why the cancellation took effect in September. Mr. Brisco's August 1, 1998 Sears credit card statement shows two payments:

A.D. INS. $9.95 plus PST

AHIP INS. $12.95 plus PST

[12] Both payments show the same "1-800" telephone number. There is also a note on the statement in Mr. Brisco's handwriting enclosed in a circle: "Ziporah EXT. 2022 CANCELLED Sept. 7/98 STILL ON Aug./98". Mr. Brisco's October 1, 1998 statement shows only the "AHIP INS." payment.

[13] Ms. Goldberg testified about her usual practice when a client called to cancel insurance. She would review the coverage and confirm the cancellation if that was the client's decision. She would also tell the client to expect a confirming letter. There was no evidence as to whether such a letter was sent. No letter was found amongst Mr. Brisco's documents and there was no copy in Canadian Premier's files.

(b) The Heritage Conversations

[14] Mr. Brisco also had conversations that same morning with a Canadian Premier customer service representative about his four Heritage policies. The time stamps on the service documentation are 11:39, 11:45, 11:54 and 11:55.

Mr. Brisco spoke to Patrick Portal about cancelling three of the four policies, including the Heritage $1,000,000 accidental death policy and the $250,000 accidental death policy. There was no discussion about cancelling the hospitalization policy. This policy was similar to the coverage provided by the 1993 Abbey Life hospitalization policy, which was not cancelled during the conversation with Ms. Goldberg. In the end, Mr. Brisco only cancelled the $250,000 accidental death policy, which he had purchased on January 28, 1994.

(4) The Expert Evidence

[15] Over objection from the appellant, the respondents were permitted to adduce expert evidence from Lee Shirk concerning industry standards for insurance cancellation. It was his opinion that Canadian Premier fell short of acceptable Canadian standards of insurance record keeping by neither keeping a recording of a telephone cancellation nor requiring a written request of cancellation. The appellant's objection to this evidence centred on its submission that the report prepared by Mr. Shirk for the respondents disclosed obvious advocacy and a lack of neutrality.

[16] The appellant called its own expert, Franklin Reynolds, in response. He disagreed with Mr. Shirk's opinion that a recording of a telephone cancellation was required. The appellant objected to some of the cross-examination of Mr.

Reynolds on the contents of a website that was critical of Premier's computer system.

(5) The Hearsay Statements

[17] Mr. Brisco's children and brother testified to statements he made to them after August 1998 in which Mr. Brisco said he had two million-dollar life insurance policies. Those statements and the circumstances under which they were made may be summarized as follows.

[18] Kelly Brisco, the appellant's daughter, testified to two specific conversations. The first was in 2000. She was at a family birthday party at a restaurant in Chatham called Glitters. They were just getting ready to leave when Mr. Brisco mentioned that he had $2,000,000 in accidental death coverage. He said that he had $1,000,000 through Sears and $1,000,000 through HBC. She asked him what HBC was and he said it was Zellers. He said that if he was in a plane crash it was $1,000,000, and if it was a car crash it was a smaller amount. She asked him why he had it, and he said it was cheap insurance. She thought it odd because he did not fly very much, just to her soccer tournaments in various parts of Canada and the United States. Ms. Brisco had a clear recollection of the occasion, including what she was wearing. The family later found a photograph that their father had taken on the occasion that shows the three children.

[19] The second conversation was in February 2003, a year before Mr. Brisco died, again at a family birthday celebration at Glitters. Ms. Brisco remembered who was at the dinner, including Mr. Brisco's girlfriend and her two children. He again brought up the insurance and said it was a million with Sears and a million with Zellers and that it was cheap. She thought the topic of conversation was a little creepy. However, she remembered she asked how cheap and he said something like: "eight ninety-five".

[20] Ms. Brisco testified that there may have been other conversations but she could not remember the specifics, just that he wanted to make sure they were taken care of if something happened. In cross-examination, Ms. Brisco was asked whether she was mistaken about the date of the first conversation because Mr. Brisco's credit card statements show HBC did not replace Zellers until November 2001. Ms. Brisco maintained that the conversation was at the birthday event in 2000.

[21] Jason Brisco, Mr. Brisco's son, testified that there were several conversations all along the same lines: that Mr. Brisco had million-dollar policies with Sears and Zellers and that he purchased the policies because they were cheap. While he could describe the time of year of the conversations because of the weather, he could not give the year for any of the conversations. He spoke specifically of three conversations, including the 2000 conversation at the Glitters birthday celebration testified to by his sister. This was the last of the three. The

second conversation, which was while he was getting a ride from his father to downtown Chatham, was about one year earlier.

[22] Jeffrey Brisco, Jason's twin brother, recalled one occasion when his father spoke about insurance. Jeffrey was home for Christmas 2003. He was in the military, and he thought he would soon be sent to Afghanistan. He and his father went to see a movie, and while they were waiting for the film to start, Jeffrey mentioned to his father that he had $250,000 in insurance for his family if something should happen to him. Mr. Brisco said he had over $2,000,000 worth of life insurance and it was not expensive. He had one million-dollar policy with Zellers, one with Sears, and several smaller policies. He learned of his father's death just a month later in January 2004.

[23] Paul Brisco, Mr. Brisco's brother and the executor of his estate, testified about a conversation in the fall of 2003 when he was duck hunting with his brother. They were in a duck blind having a general discussion including "family things", and Mr. Brisco mentioned that he had a couple of million dollars of "credit card life insurance policies". He could not remember any other details of the discussion.

(6) The Trial Judge's Ruling on the Admissibility of the Hearsay Evidence

[24] The trial judge admitted the evidence of statements made by Mr. Brisco under the state of mind exception to the hearsay rule. He held that the evidence

was admissible solely to establish Mr. Brisco's state of mind "regarding his view of the existence of that policy". He reasoned as follows:

> The proposed statements of these witnesses that I reviewed would indicate that the late Mr. Brisco had made arrangements for insurance coverage on his life in the event of an accident, and that it was obviously important enough for him to have made those arrangements to cause him to raise that matter with his family on several occasions over a period of years.

[25] The trial judge did not accept the submission that the statements were unreliable because they were made months after Mr. Brisco's discussion with Ms. Goldberg in August 1998. In his view, "it would have been equally important to [Mr. Brisco] in the years immediately leading up to his death, to have remained equally important to him as the decision was when he first decided to make it".

(7) The Trial Judge's Ruling on the Application of s. 13 of the *Evidence Act*

[26] At the conclusion of the respondents' case, the appellant moved for a non-suit on the basis that there was no evidence that could satisfy the corroboration requirement of s. 13 of the *Evidence Act*. Section 13 provides as follows:

> In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

[27] The trial judge held that s. 13 did not apply because this action was not by or against an estate, but an action by the beneficiaries under an insurance policy. However, the trial judge found that, if he was wrong, there was corroboration from the evidence of Paul Brisco and from the absence of a letter from the insurance company confirming the cancellation. The trial judge also said the following:

> And I also find that the circumstances surrounding virtually all, if not all of the occasions on which Bob Brisco is said to have mentioned to his children and to his brother about these two policies are rich in detail, so rich that I am satisfied and comfortable that they are true.

(8) The Charge to the Jury

[28] In his charge to the jury, the trial judge reviewed the statements by Mr. Brisco to his brother and children and then directed the jury as to the use to be made of this evidence as follows:

> Now, based on these particulars, and the detail of that description, you may likely conclude that on these occasions, that these occasions happened as described, including Bob's references to his belief of what his insurance coverage was. That evidence goes to Bob's state of mind, and that is his belief that he had two one-million-dollar accidental policies.
>
> Now, if you find that it's probable that Bob had such a belief as to his insurance coverage, you will ask yourself how probable it is that he had given instructions on August 25th, 1998 to cancel each one of these two policies, or at least one of these policies, or whether it is probable that such cancellation was a mistake. Your

> conclusion on finding in that regard is entirely your conclusion.

B. POSITION OF THE PARTIES

[29] The appellant submits that the trial judge erred by admitting Mr. Brisco's hearsay statements concerning his insurance coverage under the state of mind exception to the hearsay rule. It further submits that such evidence was also inadmissible under the principled approach to hearsay because it was not reliable. The appellant also submits that the trial judge erred in holding that s. 13 of the *Evidence Act* did not apply and in holding that there was corroboration because Canadian Premier did not send a letter confirming the cancellation of the accidental death policy.

[30] Further, the appellant submits that the trial judge made a number of errors in his charge to the jury. It submits that even if the hearsay evidence was admissible, the trial judge did not adequately direct the jury as to how to approach that evidence. It argues that the jury charge did not adequately or accurately review the defence evidence. It also argues that the trial judge misdirected the jury by reversing the burden of proof by directing the jury that any doubt as to whether the instructions were given to cancel the policy must be construed against cancellation.

[31] The appellant also submits that the trial judge erred in admitting the expert evidence of Mr. Shirk and in permitting its own expert, Mr. Reynolds, to be cross-examined on the contents of a website.

[32] The respondents support the trial judge's rulings. In particular, they support the trial judge's ruling that the hearsay statements were admissible under the state of mind exception to the hearsay rule. Alternatively, they submit that the statements were admissible by application of the principled approach to hearsay.

[33] Following oral argument, the panel requested further submissions on the application of the principled approach and the impact of the court's recent decision in *R. v. Baldree*, 2012 ONCA 138, 109 O.R. (3d) 721, leave to appeal to S.C.C. granted, [2012] S.C.C.A. No. 136, appeal heard and reserved November 7, 2012. In their written submissions, both parties submit that the *Baldree* decision can be applied to support their own position.

C. ANALYSIS

(1) The Hearsay Evidence

(a) State of Mind

[34] I will first deal with the admissibility of the disputed evidence on the basis that it showed Mr. Brisco's state of mind, either as an exception to the general rule that hearsay is inadmissible or as evidence from which an inference of state of mind can be drawn. The appellant submits that the statements did not fall

within the state of mind exception and, alternatively, even if they did, they were so unreliable that they should not have been admitted.

[35] The issue to which the hearsay evidence is relevant is whether, on August 25, 1998, Mr. Brisco cancelled the accidental death policy that he had taken out some seven months earlier. The respondents contend that he did not cancel that policy and that Canadian Premier mistakenly cancelled the policy. The relevance of the hearsay lies in the proposition that the statements made by Mr. Brisco over the years after 1998 show his continuing belief that he had two million-dollar policies. It can therefore be inferred that he did not cancel one of those two policies and that Canadian Premier mistakenly cancelled the policy.

(i) State of Mind as a Hearsay Exception

[36] The two leading modern cases on the state of mind exception to the hearsay rule are *R. v. Smith,* [1992] 2 S.C.R. 915 and *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144. In *Starr*, at paras. 168-69, Iacobucci J. provided the following definition of the state of mind exception:

> The Crown argued that the "state of mind" or "present intentions" exception to the hearsay rule applied to render Cook's statement to Giesbrecht admissible. This exception was most recently discussed in detail by this Court in *Smith, supra,* where it was recognized that an "exception to the hearsay rule arises when the declarant's statement is adduced in order to demonstrate the intentions, or state of mind, of the declarant at the time when the statement was made" (p. 925). Wigmore has argued that the present intentions

exception also includes a requirement that a statement "be of a *present existing state of mind*, and must appear to have been made in a natural manner and not under circumstances of suspicion": *Wigmore on Evidence*, vol. 6 (Chadbourn rev. 1976), at para. 1725, p. 129 (emphasis in original). L'Heureux-Dubé J., at para. 63 of her reasons, denies that Wigmore's suggestion has ever been adopted in our jurisprudence. As I will discuss below, regardless of whether the present intentions requirement ever had such a requirement, the principled approach demands that it must have it now. I will therefore examine the admissibility of Cook's statement under the present intentions exception in light of that understanding.

In *Smith*, Lamer C.J. explained that the exception as it has developed in Canada permits the admission into evidence of statements of intent or of other mental states for the truth of their contents and also, in the case of statements of intention in particular, to support an inference that the declarant followed through on the intended course of action, provided it is reasonable on the evidence for the trier of fact to infer that the declarant did so. *At the same time, there are certain inferences that may not permissibly be drawn from hearsay evidence of the out-of-court declarant's intentions.* On this point, Lamer C.J. cited with approval (at p. 927) from the judgment of Doherty J. in *P. (R.), supra* [(1990), 58 C.C.C. (3d) 334 (Ont. H.C.)], at pp. 343-44, where the case law was summarized as follows:

> The evidence is not, however, admissible to show the state of mind of persons other than the deceased (unless they were aware of the statements), or to show that persons other than the deceased acted in accordance with the deceased's stated intentions, save perhaps cases where the act was a joint one involving the deceased and another person. *The evidence is also not admissible to establish that past acts or*

> *events referred to in the utterances occurred.*
>
> [Emphasis added.]

[37] Mr. Brisco's statements were not tendered to prove a present intention, but rather a present belief. That belief can be broken down into two assertions: first, that he believed he had purchased two million-dollar accidental death policies, one from Sears and one from Zellers; and second, that he believed he still owned these policies at the time of the statements to his brother and children. The first assertion is not in issue in the case because the purchase of the two policies was not contested. The second assertion is very much in issue. I will deal first with the relevance of that assertion and then its admissibility under the present state of mind exception.

[38] All of the statements relied upon are similar. For the purposes of this discussion I will use the most compelling, the 2003 Christmas statement to Jeffrey. This statement was made on an occasion of some solemnity: Jeffrey was preparing to be sent to Afghanistan and had brought up the issue of insurance. He was concerned about his own mortality and that his family would be properly cared for in the event of his death. It is difficult to understand why Mr. Brisco would have any motive to lie about his own insurance in those circumstances. On this occasion, Mr. Brisco said he had over $2,000,000 worth of life insurance and it was not expensive. He had one million-dollar policy with Zellers, one with Sears, and several smaller policies.

[39] The respondents did not contend that these statements were admissible for the truth of their contents, that is, that Mr. Brisco in fact owned two $1,000,000 policies. They concede properly that the statements would be hearsay and there is no existing exception that would apply to admit the statements. Rather, they assert that the statements are admissible only to show that he had a certain state of mind in 2003, namely his present (2003) belief that he owned the two policies. However, his state of mind in 2003 was not directly in issue in the case; what was in issue were his acts many years earlier when speaking to Ms. Goldberg. His state of mind in 2003 was relevant only as it might shed light on what actions Mr. Brisco took in 1998, that is, past acts, the very inference prohibited by the Supreme Court of Canada in both *Smith* and *Starr*, adopting Justice Doherty's statement of the exception in *R. v. P. (R.)* (1990), 58 C.C.C. (3d) 334 (Ont. H.C.). To repeat what Justice Doherty said, at p. 344:

> The evidence is also not admissible to establish that past acts or events referred to in the utterances occurred.

[40] The past acts to be proved by Mr. Brisco's statements are that he purchased the policies and that he had not cancelled them. While the courts in *Smith*, *Starr* and *P. (R.)* were considering the state of mind exception as applied to present intentions, I can see no principled basis for applying a different test where the state of mind is present belief. Indeed, to allow the state of mind

exception to include present state of belief to prove past acts would all but eliminate the hearsay rule.

[41] To take a simple example, assume that in a prosecution for sexual assault, the prosecution seeks to tender a statement by the now deceased declarant saying that he was sexually assaulted. The prosecution contends that the statement is admitted only to prove the declarant's belief that he was sexually assaulted. But, the relevance of the statement lies solely in its ability to prove that the declarant was sexually assaulted in the past.

(ii) State of Mind as Non-hearsay Circumstantial Evidence

[42] It may be argued that there is no hearsay problem at all. This is because evidence is only hearsay when it is adduced to prove the truth of the contents and there is no contemporaneous cross-examination of the declarant: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 56. The respondents argue they do not tender the statement to prove the truth of the contents, i.e. that the policies were purchased and were still in force, but only to prove Mr. Brisco's belief that they were in force. Viewed this way, the respondents do not need a hearsay exception at all. However, in my view, the limitations on the use of utterances of present state of mind apply whether the statements are explicit statements of state of mind or merely statements from which an inference as to the declarant's state of mind can be inferred. In *P. (R.)*, at pp. 341-43, Doherty J.

referred to both methods of proving state of mind. The passage from that decision at p. 344, approved in *Starr* and cited above, does not distinguish between the two methods of proof of state of mind.

[43] The respondents' argument for the use of Mr. Brisco's statements is not unlike the argument dealt with by this court in *Baldree*. As I have indicated, this court asked for further submissions on the application of *Baldree* to this case. In *Baldree*, the Crown sought to rely upon a telephone call from an anonymous caller to the appellant's cell phone asking to buy some marijuana. There was no direct assertion in the statement that the appellant was a drug dealer, but this was the inference sought to be drawn. Feldman J.A. dealt with the issue in the following way, at paras. 140-41:

> I agree with Chief Justice McMurtry in *R. v. Wilson* that admitting the contents of one call into evidence is admitting that evidence for a hearsay purpose. It is the implied assertion of the caller, untested by cross-examination, that the accused is a drug dealer. That was also the conclusion of the majority of the House of Lords in *Kearley*, with which I also agree.
>
> When there are a significant number of calls, the analysis of the minority in that case, that the fact of the calls requires an explanation which comes from the content of the calls, which content is admitted to show the operation of a market in drugs, becomes cogent. However, even on that analysis, in my view, it is still the truth of the content of the calls that is being relied on. *With respect to those of the contrary view, it is not circumstantial evidence from which an inference can be drawn that the accused is a drug dealer. The evidence*

> *gets its probative value from the belief of the callers, which may or may not be accurate.* [Emphasis added.]

[44] Similarly, the evidence here gets its probative value from the belief of Mr. Brisco, which may or may not be accurate. It may be that the evidence could be admitted on a principled application of the hearsay rule on the basis that the statements were necessary, because Mr. Brisco was deceased, and reliable, because it was unlikely Mr. Brisco was mistaken or lying about his own insurance, a matter to which I turn below.

[45] In his concurring reasons, Blair J.A., at paras. 160-62, adopted a different approach to analyzing the evidence in *Baldree*, but he agreed it should be excluded:

> However, if the hearsay nature of the prospective testimony is particularly difficult to pinpoint, courts should consider falling back on the newer, more principled tools of reliability and prejudice/probative value assessments to resolve the question of admissibility. Such a situation may arise where – as here, for example – the purpose for which the evidence is tendered is ambivalent or open to more than one usage, but the evidence, at least on its face, has many of the hearsay-danger characteristics that make courts cautious about receiving it. “Necessity” is less of a factor in these circumstances. If evidence lacks sufficient reliability it will have little probative value in any event, but even if the proffered evidence meets the reliability threshold for admissibility a judge may still conclude, in his or her discretion, that the evidence ought to be excluded because its prejudicial potential outweighs any probative value it may have: *Khelawon*, at para. 3; *R. v. Seaboyer,* [1991] 2 S.C.R. 577.

> Like Feldman J.A., I conclude that the trial judge erred in admitting the evidence of the one drug-purchase call on the basis that it showed the appellant was in the drug-dealing business. I agree with her analysis at paras. 144-49 of her reasons, in this regard.
>
> If the phone call evidence was hearsay, it ought to have been subjected to a necessity/reliability analysis, which, in my view, it would fail. If, as the trial judge concluded on the basis of the authorities he followed, it was not hearsay, it ought nonetheless to have been subjected to a prejudice/probative value balancing exercise, which the trial judge did not do. Like my colleague, I do not think the fact that defence counsel did not seek to have the phone call excluded on *Khelawon* principles is fatal in the circumstances. In circumstances such as this, trial judges should be alive to their discretion to exclude evidence on the prejudice vs. probative value ground.

[46] The fundamental difficulty with the respondents' claim is that any declaration can be converted to a statement of belief, tendered not for the truth of the assertion. A majority of this court has rejected that approach in *Baldree*. I see no reason to revisit the issue on the facts of this case.

(iii) Some Similar Examples

[47] This court rejected similar evidence in *Burns Estate v. Mellon* (2000), 48 O.R. (3d) 641. In that case, the estate sought to rely upon evidence from the deceased's accountant to show that a large sum of money transferred by the deceased to the respondent was not a gift. The accountant testified that he had conversations with the deceased in which the deceased indicated that he had demanded the money back and regarded the money as his. The trial judge had

refused to admit the accountant's evidence of statements made to him by the deceased some 20 months after the transaction. Speaking for the court, at para. 25, Laskin J.A. held that the evidence was not admissible:

> Even if King's [the accountant's] evidence should have been admitted to show the deceased's state of mind, the trial judge was quite correct not to give any effect to it because of its obvious unreliability. Two considerations undermine the reliability of King's evidence. First, his conversation with Burns was not contemporaneous with the transfer, but took place months afterwards. Thus the conversation is of little help in determining Burns' intention at the time of the transfer. *A party cannot ordinarily rely on a declaration subsequent to a transfer to support his or her position. A subsequent declaration is only admissible as evidence against the party who made it.* Therefore because Burns' statements to King were not contemporaneous with the transfer the appellant cannot rely on them to support her position that the transfer was not a gift. [Emphasis added; footnote omitted.]

[48] The respondents also rely upon the reasons of Power J. in *Jones-Ottaway v. Bank of Montreal*, 2000 ABQB 680, 275 A.R. 305, as an example of a case in which such evidence was admitted. The *Jones-Ottaway* case has some superficial similarity to the facts of this case. The plaintiff and her husband transferred various accounts and financial dealings from a trust company to the Bank of Montreal. In particular, they replaced the trust company mortgage on their property to a mortgage held by the Bank of Montreal. The plaintiff's husband died a short time later. The issue in the case was whether the mortgage was covered by a policy of life insurance. The trial judge permitted the plaintiff to

adduce evidence of various statements made by her husband to the plaintiff and others, confirming that he had intended to cover his mortgage loan with life insurance. In my view, the *Jones-Ottaway* case does not assist the respondents for two reasons.

[49] First, in his ruling admitting the husband's statements, the trial judge referred to an excerpt from *Smith* citing Doherty J.'s reasons in *P. (R.)*, which are set out above, at para. 36. However, he omitted the crucial final sentence of that statement: "The evidence is also not admissible to establish that past acts or events referred to in the utterances occurred."

[50] Second, the nature of the utterances relied upon by the plaintiff were not set out with clarity. In particular, it appears that some of the utterances were statements of intention, that is, that the deceased intended to obtain life insurance for the new mortgage. If so, the statements would qualify as statements of present intention. Those statements are not, as in this case, statements of a present belief referring to prior acts.

[51] Accordingly, in my view, the trial judge in the present case erred in relying on the state of mind exception.

(b) Application of the Principled Approach

[52] In the alternative, the respondents rely upon the principled approach to hearsay to support the trial judge's ruling. The principled approach permits the

admission of hearsay if sufficient indicia of necessity and reliability are established: *Khelawon*, at para. 42. The only issue in applying the principled approach to the hearsay in this case is reliability. The necessity prerequisite is satisfied because Mr. Brisco is deceased and unable to provide his version of the conversation with Ms. Goldberg.

[53] In a jury trial, the trial judge's only concern with reliability is threshold reliability. The ultimate reliability of the statements is a question for the jury. Threshold reliability of statements may be demonstrated because of the circumstances in which they came about or because in the circumstances, their truth and accuracy can nonetheless be sufficiently tested: *Khelawon*, at paras. 49, 62-63. In this case, threshold reliability depends upon demonstrating that the circumstances in which the statements came about are such that there is no real concern about whether the statement is true or not. As the Supreme Court said in *Khelawon*, at para. 62: "Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form." In that same paragraph, the court adopted the following passage from Professor Wigmore's treatise on evidence:

> There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it

> would be pedantic to insist on a test whose chief object is already secured.

[54] In making the threshold reliability decision, the trial judge is not limited to considering only the circumstances under which the statements were made. The judge may also consider whether there exists evidence that confirms or corroborates the truthfulness and accuracy of the statements or undermines their reliability. In *Khelawon*, at paras. 98-99, the court referred with approval to the dissenting reasons of Kennedy J. in *Idaho v. Wright*, 497 U.S. 805, at pp. 828-29 (1990):

> I see no constitutional justification for this decision to prescind corroborating evidence from consideration of the question whether a child's statements are reliable. It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence.
>
> …
>
> The [majority] does not offer any justification for barring the consideration of corroborating evidence, other than the suggestion that corroborating evidence does not bolster the "inherent trustworthiness" of the statements. But for purposes of determining the reliability of the statements, I can discern no difference between the factors that the Court believes indicate "inherent trustworthiness" and those, like corroborating evidence, that apparently do not. Even the factors endorsed by the Court will involve consideration of the very evidence the Court purports to exclude from the reliability analysis.

[55] In my view, Mr. Brisco's statements, when considered with the confirmatory evidence, have sufficient threshold reliability to warrant their reception. I rely on the following circumstances:

- The consistency of the statements: over many years and to several different people, Mr. Brisco referred to the existence of the two policies.
- There was no obvious motive for Mr. Brisco to lie to his children or brother.
- At least one of the statements, the statement to his son Jeffrey just before Christmas 2003, was made under circumstances of some solemnity: Jeffrey thought he was about to go to Afghanistan, and they were having a serious discussion about insurance.
- It is unlikely that Mr. Brisco would have forgotten that he cancelled a million-dollar policy.

[56] There is also some evidence that, considered cumulatively, tends to confirm the truthfulness of the statements, i.e. that Mr. Brisco believed he still owned both $1,000,000 policies, and supports the inference that the accidental death policy was cancelled through Canadian Premier's mistake. There is the fact, noted by the trial judge, that no letter confirming the cancellation of the accidental death policy was found in Mr. Brisco's papers or in the appellant's own files. There is the inherent improbability that Mr. Brisco would have chosen to retain the older (1993) Abbey Life hospitalization policy when he already had a similar policy from Heritage, purchased in 1996. It is also somewhat improbable that Mr. Brisco would cancel the Canadian Premier accidental death policy on

August 25, 1998, when he had purchased it just months earlier in January 1998. Finally, there is the fact that the records of the conversations later the same day, concerning the Heritage policies, show some discussion about cancelling both of the accidental death policies with Heritage: the $1,000,000 policy and the $250,000 policy. It seems highly improbable that Mr. Brisco would discuss cancelling the $1,000,000 dollar Heritage policy if he had just, only minutes earlier, cancelled the Abbey Life $1,000,000 policy.

[57] There are also some circumstances that tell against the $1,000,000 policy having been cancelled by mistake, especially the fact that the credit card statement no longer showed the premium deduction for that policy. On balance, however, the repeated statements by Mr. Brisco evidencing his belief that he had two million-dollar accidental death policies are sufficiently reliable to warrant their being admitted into evidence.

(2) Section 13 of the *Ontario Evidence Act*

[58] The appellant submits that the trial judge erred in holding that s. 13 of the *Ontario Evidence Act* did not apply and that, in any event, there was evidence to corroborate the testimony of the children and Paul Brisco. In my view, s. 13 only applied to the evidence of the executor, Paul Brisco, and not to the evidence of the children. Stripped of the unnecessary language, s. 13 provides as follows:

> In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased

> person, an … interested party shall not obtain a verdict … on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

[59] Section 13, which is similar to provisions in other provinces, is an exception to the general rule in most common law countries that the evidence of one witness is capable of meeting the burden of proof in civil or criminal proceedings: see *R. v. Vetrovec*, [1982] 1 S.C.R. 811, at pp. 819-20. Most statutory and common law requirements have fallen away in the last thirty to forty years, including requirements for corroboration of the evidence of children, rape victims and accomplices. Section 13 thus now stands as something of an anomaly in the law of evidence. Professor Wigmore was critical of these survivor disqualification statutes, especially when their effect was to wholly bar the testimony of the survivor. As he said, at *Wigmore on Evidence*, vol. 2 (Chadbourn rev. 1979), at para. 578, p. 821:

> The truth is that the present rule is open, in almost equal degree, to every one of the objections which were successfully urged nearly a century ago against the interest rule in general. Those objections may be reduced to four heads: (1) That the supposed danger of interested persons testifying falsely exists to a limited extent only; (2) That, even so, yet, so far as they testify truly, the exclusion is an intolerable injustice; (3) That no exclusion can be so defined as to be rational, consistent, and workable; (4) That in any case the test of cross-examination and the other safeguards for truth are a sufficient guaranty against frequent false decision. Every one of the first three objections applies to the

> present rule as amply as to the old and broader rule. The fourth applies with less apparent force, because the opponent's testimony is lacking in contradiction. And yet, upon what inconsistencies is based even this support for the rule! For its defenders in effect declare the lack of this opposing testimony to be the sole ground for an exceptional rule adapted to that particular situation; and yet, since the deceased opponent is a party, he would have been by hypothesis a potential liar equally with the disqualified survivor; so that the rule rests on the supposed lack of a questionable species of testimony equally weak with that which is excluded. There never was and never will be an exclusion on the score of interest which can be defended as either logically or practically sound. Add to this, the labyrinthine distinctions created in the application of the complicated statutes defining this rule, and the result is a mass of vain quiddities which have not the slightest relation to the testimonial trustworthiness of the witness.

[60] That said, Wigmore was of the view that if there needed to be some safeguard, a compromise in the nature of a corroboration requirement was better than an absolute exclusionary rule, although he still considered this compromise to be "misguided". As he said, at *Wigmore on Evidence*, vol. 7 (Chadbourn rev. 1978), at para. 2065, p. 488:

> The danger against which this proposal attempts to guard is plausible. The same danger led most states to adopt the rule of absolute exclusion of such testimony. But the obnoxious character of that rule has been already noticed (§578 *supra*). It remains only to observe that the present proposal, though decidedly an improvement over the rule of exclusion, and though lacking the peculiar vices of the latter, is nevertheless a misguided one:
>
> In the first place, it favors the dead above the living, for it would rather see an honest survivor unjustly lose his

> claim than an honest decedent be made unjustly to pay; yet, the equities being equal, the living person should rather be favored.
>
> In the next place, it is based on a mere contingency – the contingency that the claim will be dishonest and that there will be no means of exposing its dishonesty; and so, for the sake of defeating the dishonest man who may arise, the rule is willing to defeat the much more numerous honest men who are sure to possess just claims.
>
> Finally, there is always an abstract impropriety and injustice in any rule which interposes a technicality to prevent judicial action upon testimony which is in fact completely believed and trusted.

[61] The purpose of the rule is to guard against fraud in an action against the estate by a party to a transaction with the deceased. This objective is based on the fact that only the survivor's testimony is available. Section 13, however, is drawn in broad terms to capture not only those who bring an action against the estate, but those bringing an action on behalf of the estate. And, as in this case, the rule potentially captures a case where the court does have the testimony of the deceased, albeit in the form of hearsay. In this latter case, the primary danger lies in the witnesses' possible perjury, but they are available for cross-examination. That point is made by Corliss J. in *St. John v. Lofland,* 64 N.W. 930, at p. 931 (N.D. Sup. Ct. 1895), which is referred to in *Wigmore on Evidence*, vol. 2, at para. 578, p. 821:

> But those against whom a dishonest demand is made are not left utterly unprotected because death has sealed the lips of the only person who can contradict the

> survivor, who supports his claim with his oath. In the legal armory, there is a weapon whose repeated thrusts he will find it difficult, and in many cases impossible, to parry if his testimony is a tissue of falsehoods, — the sword of cross-examination. For these reasons, which lie on the very surface of this question of policy, we regard it as a sound rule to be applied in the construction of statutes of the character of the one whose interpretation is here involved, that they should not be extended beyond their letter when the effect of such extension will be to add to the list of those whom the act renders incompetent as witnesses.

[62] Given its anomalous place in the modern law of evidence, especially in a case such as this, I see no reason to give s. 13 a broad interpretation when considering its application nor a narrow interpretation when considering the scope of evidence capable of corroborating the evidence of the interested party.

(a) The Application of s. 13 in the Present Case

[63] In considering the meaning of the phrase “heirs, next of kin, executors, administrators or assigns of a deceased person”, it is my view that s. 13 is limited to circumstances in which the interested party claims as an heir, next of kin, executor, administrator or assignee and not simply because, coincidentally, the person happens to fall within one of these categories. In this case, the Brisco children do not claim as next of kin or heirs but under a contractual right as beneficiaries of an insurance policy. Under the Canadian Premier policy, Mr. Brisco’s wife was the beneficiary. If she was not living, the benefits were to be paid “equally to your then living lawful children”. Mr. Brisco’s spouse waived her

right under the policy, leaving the children as next beneficiaries on the contract. It appears that Paul Brisco brought the action on behalf of the estate because the children had all signed an “authorization” for the estate to deal with contractual insurance matters on their behalf. As executor, he is caught by s. 13 and his evidence requires corroboration. However, such corroboration is available, both in the testimony of the children and in other independent evidence.

[64] Since s. 13 has no application to the Brisco children, there is no need for corroboration of their evidence. The fact that the estate is involved does not mean that the evidence of the children must be corroborated: *Anderson v. Bradley* (1921), 51 O.L.R. 94 (C.A.), at p. 104, Middleton J.; and Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis, 2009), at para. 17.51. In any event, it is my view that there is evidence that, when considered cumulatively, is capable of corroborating both the evidence of the children and that of Paul Brisco.

[65] In *Sands Estate v. Sonnwald* (1986), 9 C.P.C. (2d) 100 (Ont. H.C.), Watt J. considered at some length the nature of the corroboration requirement in s. 13. He held, at p. 110, that “corroboration should be such as to enhance the probability of truth of the suspect witness' evidence upon a substantive part of the case raised by the pleadings”. As he pointed out, at p. 119:

> [S]everal pieces of circumstantial evidence, taken together, may potentially corroborate the evidence of an

> opposite or interested party, notwithstanding that each item or piece of evidence viewed in isolation may not be so capable, provided that cumulatively the pieces or items satisfy the test of corroboration, that is to say, independent evidence which renders it probable that the evidence of an opposite or interested party upon a material issue is true.

[66] In considering the admissibility of Mr. Brisco's statements under the principled approach to hearsay, I have set out the evidence that I consider to be confirmatory of Paul's and the children's evidence of Mr. Brisco's statements, at para. 56 above. In my view, that same evidence, viewed cumulatively, is capable of satisfying the corroboration requirement in s. 13. Circumstantial evidence of a similar nature was found to be corroborative in *Burns Estate*. In that case, the issue was whether the transfer of a very large sum of money to the deceased's friend was intended as a gift. Laskin J.A. found corroboration in the fact that no mention was made of this money in the deceased's will and that the deceased refused to give his daughters an explanation for the transfer.

[67] In this case, the following evidence supports the truthfulness of Paul's and the children's evidence. No letter confirming the cancellation of the accidental death policy was found in Mr. Brisco's papers or in the appellant's own files, and it is somewhat improbable that Mr. Brisco would have retained the older (1993) Abbey Life hospitalization policy (instead of the $1,000,000 accidental death policy) when he already had a similar hospitalization policy from Heritage, purchased in 1996. It is also somewhat improbable that Mr. Brisco would cancel

the Canadian Premier accidental death policy in August 1998, only months after having purchased it in January of that year. Finally, records of the conversations concerning the Heritage policies show discussion about cancelling both of the accidental death policies with Heritage: the $1,000,000 policy and the $250,000 policy. As I have said earlier, it seems highly improbable that Mr. Brisco would discuss cancelling the $1,000,000 policy if he had just cancelled the Canadian Premier $1,000,000 policy. Thus, in my view, this evidence, when viewed cumulatively, is capable of corroborating the evidence of the children, if that were necessary. This evidence, along with the evidence of the children, also corroborates the evidence of Paul Brisco.

(3) The Charge to the Jury

(a) The Charge to the Jury on the use of the Hearsay Evidence

[68] The appellant submits that the trial judge did not adequately direct the jury as to the frailties of the hearsay evidence and that, in particular, he erred in failing to include a warning that the statements could not be used to prove the truth of their content, that they could not be cross-examined upon, and that the fact that the statements had been made to multiple plaintiffs did not constitute corroboration of them.

[69] While I agree that the trial judge's directions concerning the frailties of the hearsay evidence could have been more expansive, I would not give effect to this

submission. I say that for several reasons. First, the trial judge did instruct the jury that the statements went to Mr. Brisco's state of mind and specifically to his belief that he had two million-dollar policies. He then instructed the jury how that belief could be used to draw an inference as to the probability that he would have cancelled one of them on August 25, 1998. Second, there was no objection by counsel for the appellant to the trial judge's charge on the frailties of the hearsay evidence. Third, it would have been patently obvious to the jury that Mr. Brisco was not available for cross-examination. Fourth, counsel for the appellant reviewed at considerable length in his closing address to the jury the circumstances of the August 25 calls and the frailties of the statements by Mr. Brisco. Finally, in the pre-charge conference, counsel made no submissions to the trial judge concerning this issue and did not request any special instruction.

[70] As this court has repeatedly said, in a civil jury trial, the failure to object will be given considerable weight. Most recently, in *Vokes Estate v. Palmer*, 2012 ONCA 510, 294 O.A.C. 342, at para. 7, the court held as follows:

> While a failure to object is not always fatal in a civil jury trial, "an appellate court is entitled to give it considerable weight": *Marshall v. Watson Wyatt & Co.* (2002), 57 O.R. (3d) 813, 209 D.L.R. (4th) 411 (C.A.). In the absence of an objection at trial, in most instances, an alleged misdirection or non-direction will not result in a new trial in a civil case unless the appellant can show that a substantial wrong or miscarriage of justice has occurred: *Pietkiewicz v. Sault Ste. Marie District Roman Catholic Separate School Board* (2004), 71 O.R. (3d) 803 (C.A.) at paras. 22-28.

[71] In considering whether a miscarriage of justice has occurred, the court will consider the entire record, including counsel's jury addresses: *Berthiaume-Palmer v. Borgundvaag*, 2010 ONCA 470, 273 O.A.C. 397, at paras. 15 and 20. While it would have been better for the trial judge to have expanded upon the hearsay evidence, especially the possibility that Mr. Brisco forgot he had cancelled the policy and made no inquiry about his credit card statement that showed the continued deduction for the hospitalization policy and not the accidental death policy, the appellant has not shown that the charge is materially deficient: see *Brochu v. Pond*, (2003), 62 O.R. (3d) 722 (C.A.), at para. 68.

(b) Review of the Evidence in the Charge to the Jury

[72] The appellant submits that the trial judge did not adequately review the evidence and misstated some of the evidence. At trial, counsel's objection to the review of the evidence as it related to whether Canadian Premier had mistakenly cancelled the accidental death policy was limited to the trial judge's comments on how some of the earlier policies were characterized and to the evidence of Ms. Goldberg about the length and number of telephone calls on August 25, 1998. On appeal, the appellant launches a much broader attack on the review of the evidence, submitting, for example, that the references to the evidence of Ms. Goldberg and to Mr. Brisco's credit card statement were not sufficient.

[73] I would not give effect to these submissions. The trial judge may have misspoken when referring to some of the policies, but the jury had a "Brisco Coverage Chart", Exhibit #13, that accurately summarized the various policies. As to the complaint about the length and number of telephone calls on August 25, the trial judge's review of that evidence was accurate. As to the other complaints, for the reasons set out above with respect to the charge to the jury on the hearsay evidence, I would not give effect to them. When the extensive references to the evidence in the appellant's counsel's jury address are considered, the appellant has not shown that any alleged misdirection or non-direction resulted in a substantial wrong or miscarriage of justice.

(c) The charge to the jury on the burden of proof

[74] The trial judge repeatedly told the jury that the burden of proof was on the plaintiffs to prove their case. And, the written questions left with the jury concerning cancellation of the policy inform the jury that the burden of proof was on the plaintiffs. The relevant questions were worded as follows:

> 1. Have the plaintiffs proven that the Canadian Premier Certificate 44AG4M7282 was cancelled by mistake? (yes or no)
>
> 2. If the answer to question #1 is yes, whose mistake was it, Canadian Premier or Robert Brisco?

[75] The appellant submits, however, that the trial judge misdirected the jury concerning the burden of proof when dealing with cancellation of insurance policies. The impugned directions were as follows:

> Now, let me tell you about the law with respect to cancellation of insurance policies. In considering the question of whether the Canadian Premier Life policy for one million dollars was cancelled, *you must be certain as a matter of law that the instructions received by the company to cancel the policy were clear, unconditional, and unequivocal, and that in all circumstances, any doubts as to whether instructions were given to cancel the policy must be construed against the cancellation.*
>
> Your task, as reflected in the questions which you will take to the jury room with you to consider and answer will include not only your conclusion as to what happened on August 25th, 1998, but also, what Bob intended to accomplish with his telephone calls that day. In that regard, you may draw whatever inferences there are available to you based on the evidence you heard.
>
> It will be your task to determine if Bob Brisco intended to cancel the million-dollar policy or whether it came about as a result of a mistake or misunderstanding. You must decide whether Bob was confused or if his instructions accurately reflected what it was that he wanted to have carried out. In that regard, you will be asked to determine if Ms. Goldberg, on behalf of the Canadian Premier Life, adequately carried out her responsibilities, and what was occasioned as a result of the failure by Premier Life to send any correspondence to Bob Brisco confirming his conversation that day on August 25th, 1998 about the million-dollar policy.
>
> *In that regard, I will advise you that there is a heavy onus on an insurance company such as the Canadian Premier Life to ensure a safe handling of all correspondence relating to their policies of insurance.*

> If you conclude that the plaintiffs have not persuaded you on a balance of probabilities that the million-dollar Canadian Premier Life policy was cancelled by mistake, that would be the end of the matter for your consideration with respect to that policy. However, if you find that it was cancelled by mistake, you must then decide whose mistake it was, and whether it was cancelled by the mistake of the Canadian Premier Life, or by the mistake of Bob Brisco.
>
> If you find on a balance of probabilities that it was Canadian Premier Life that made the mistake in cancelling the policy, then that would be the end of your deliberation with respect to that policy. If you find on a balance of probabilities that Robert Brisco, although not intending to cancel this policy, mistakenly instructed Ms. Goldberg to cancel that policy, you must then decide whether Canadian Premier Life was negligent in failing to send a confirming letter to Bob Brisco of his instructions to cancel that policy, and if you find that Canadian Premier Life was in fact negligent in failing to send such a written notification to Bob Brisco, you must then find on a balance of probabilities that – well, you must then find, not on a balance of probabilities, and I'll tell you the degree of proof related to that shortly, you must then find whether, for the lack of that notice, Bob Brisco would have requested that the Canadian Premier one-million-dollar accidental-death policy be reinstated, and if you should conclude that Bob Brisco, under these circumstances, would have made that request to Canadian Premier to reinstate the policy which he had mistakenly requested to be cancelled, you must then decide whether this policy would have been reinstated by Canadian Premier. [Emphasis added.]

[76] In the pre-charge discussion, there was considerable discussion about whether the appellant bore the burden of proof of cancellation because it had raised an affirmative defence and about how the jury questions should be worded. In the course of that discussion, trial counsel for the respondents

referred to the decision of Goodman J. in *Ethier Estate v. T. Eaton Life Assurance Co.*, [1977] I.L.R. 587, at p. 593:

> Although my findings do not depend on this, I was far from satisfied on the evidence that the Assurance Company had established any adequate procedure to protect both their policyholder and itself from the possibility of errors being made in the handling of correspondence, authorizations and premiums to the detriment to any of them. *In my view, there is a heavy onus on the Assurance Company to ensure the safe handling of all correspondence* relating to policies of insurance having regard to the fact that it is obvious that all dealings between the company and its policyholders, as was the case in the present instance, is transacted from beginning to end by mail. [Emphasis added.]

[77] At least some of the impugned instructions would seem to have originated in this part of Goodman J.'s reasons for judgment in the *Ethier Estate* case. Trial counsel for the appellant did not suggest that this was an erroneous statement of the law, and he did not object to the trial judge's charge to the jury on the burden of proof. Counsel for the appellant did object to portions of the charge to the jury concerning the burden of proof, but only as it related to the jury questions about negligence. In my view, given the repeated references to the plaintiff having the burden of proof, the impugned instructions did not result in a miscarriage of justice in respect of whether the plaintiffs proved both that the policy was cancelled by mistake and that the mistake was made by Canadian Premier. The impugned directions would more likely be taken by the jury as relating to the issue of negligence rather than the factual question of who cancelled the policy. I

am strengthened in that view by the fact that appellant's counsel did not object to the charge as it related to jury questions one and two.

(4) Grounds of appeal relating to negligence

[78] The respondents argued at trial in the alternative that the appellant was negligent in failing to properly notify Mr. Brisco of the cancellation of the accidental life policy. Since the jury found that the insurance certificate was cancelled by Canadian Premier's mistake, it did not reach any of the questions relating to negligence. On appeal, the appellant raises a number of grounds of appeal that relate to the issue of negligence, including the admissibility of the respondents' expert evidence, the cross-examination of the appellant's expert, and the wording of the questions left to the jury concerning negligence. In view of my conclusion that the hearsay evidence was admissible and there was therefore a basis for the jury's verdict that the appellant mistakenly cancelled the accidental life policy, it is unnecessary to consider the grounds of appeal relating to negligence. If there were any errors, they could not have affected the verdict, which did not rest upon negligence.

D. DISPOSITION

[79] Accordingly, I would dismiss the appeal with costs fixed at $25,000 inclusive of HST and disbursements.

Released: “M.R.” December 5, 2012

“M. Rosenberg J.A.”
“I agree S.T. Goudge J.A.”
“I agree K. Feldman J.A.”