**BOWSKILL**

**V.**

**DAWSON AND ANOTHER**

QUEEN'S BENCH DIVISION (HIGH COURT OF ENGLAND)

2ND DAY OF NOVEMBER, 1953

**LEX (1953) – B. 1029**

OTHER CITATIONS

2PLR/1953/3 (QB)

[1951 B. 1029.]

**BEFORE:** DEVLIN J.

**BETWEEN**

BOWSKILL

AND

DAWSON AND ANOTHER.

**REPRESENTATION**

R. MARVEN EVERETT Q.C. and H. TUDOR EVANS for the Plaintiff.

W. A. FEARNLEY-WHITTINGSTALL Q.C. and P. M. O'CONNOR for the Defendants.

Solicitors:

*E. P. RUGG AND CO.;*

*WILLIAM EASTON AND SONS.*

**ISSUES FROM THE CAUSE(S) OF ACTION**

TRANSPORTATION AND MOTOR VEHICLE LAW:- Fatal accident – Collision between Motor cycle and motor car and Motor cycle and truck – Fault – How proved - how treated

ESTATE ADMINISTRATION:- Action for damages brought against deceased cyclist’ estate – Damage to vehicle due to negligent driving - Prove of

**PRACTICE AND PROCEDURE ISSUES**

EVIDENCE:- Admissibility – Written statement signed by plaintiff shortly after the accident - Copy made by police sergeant - Original lost - Death of Plaintiff before trial of his action for damages - Copy inadmissible in evidence - Evidence Act, 1938 (1 &. 2 Geo 6, c. 28), s. 1 (1) (2) and (3).

**CASE SUMMARY**

SUMMARY OF FACTS AND JUDGMENT

By section 1 (1) of the Evidence Act, 1938:

"In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact."

Subsection (2) provides:

"In any civil proceedings, the court may, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible as evidence.

(*b*) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document ... certified to be a true copy. ..."

Shortly after a collision had occurred between a motor-car driven by the plaintiff and another vehicle, the plaintiff signed a written statement; and on the next day a police sergeant made a typewritten copy of his statement. At the hearing of the plaintiff's action for damages against the other driver it was sought to tender the copy statement in evidence since the original had been lost and the plaintiff had died:-

DECISION OF QUEEN’S BENCH DIVISION

***Held****,*

1.. that the copy was inadmissible in evidence as section 1(1) of the Act of 1938 in terms excluded the ordinary common law rules regarding secondary evidence of a lost document, and subsection (2) concerned the production of certified copies in cases where the original documents were in existence but unnecessary delay and expense would be caused by producing them.

2. that the copy was inadmissible by virtue of subsection (3) as the plaintiff was an interested person, and at the time of making, the statement must have anticipated that proceedings would be taken.

**MAIN JUDGMENT**

ACTION.

A collision occurred between a motor-car which was driven by the plaintiff, Dr. Ernest William Bowskill, and a motor-cycle. The motor-car also ran into the rear of a stationary lorry. Shortly after the collision, in which the motor-cyclist was killed, the plaintiff made a statement which was taken down in writing by a police inspector and signed by the plaintiff. On the next day a police sergeant made a typewritten copy of the statement.

The plaintiff brought this action against the defendants, the administrators of the deceased motor-cyclist's estate, claiming damages for the loss and expense which he alleged was caused by the motor-cyclist's negligence; and the defendants counterclaimed for damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934. The plaintiff died shortly before the hearing of the action, and counsel on his behalf sought to tender in evidence by virtue of section 1 of the Evidence Act, 1938, the copy of the statement as the original had been lost. That was objected to by counsel appearing for the defendants on the ground that such evidence was inadmissible under the terms of section 1 of the Act of 1938.

DEVLIN J. (after stating the facts):

It is clear that the only way in which this document could become evidence is by virtue of the Evidence Act, 1938. [His Lordship read section 1 (1) of that Act, and continued:] The subsection states "production of the original document." In my judgment, these words, if they stood alone, would be sufficient to exclude the ordinary common law rule of evidence which admits secondary evidence of a lost document. What has been proved in this case is that the original statement which was taken down by Inspector King and signed by the plaintiff has been lost, and that is why the copy has been tendered. It cannot be done merely by the common law rule as to secondary evidence of lost documents. I think that the words of the statute, "on production of the original document," mean that the original document itself must be produced. The Act is doing something which makes admissible a document which would not at common law be admissible, and therefore its provisions must be strictly followed. The only qualification, therefore, to the words "original document" that can be introduced must be found, not in the common law, but from the Act itself.

[His Lordship read subsection (2) of section 1, and continued:] Mr. Fearnley-Whittingstall argued that subsection (2) was not applicable in this case. The condition which is required to be satisfied before a copy can be produced is that the court should, having regard to all the circumstances of the case, be satisfied that undue delay or expense would otherwise be caused. It is not therefore a proviso which is designed to be some substitution for the common law rule as to secondary evidence of lost documents; it requires the court to be satisfied that undue delay or expense would otherwise be caused, and therefore implicitly requires that the original document should be in existence, and the only question that arises is whether it will not cause an unnecessary delay or expense to have it produced. That is borne out by what follows in the rest of the section. It is something certified to be a true copy. It looks as if the statute had in mind the very common arrangement that where there are original documents which are kept in somebody's custody, such as a bank or a public authority, and it is inconvenient to have them brought to court, a certified copy is accepted instead.

I am bound to say that I think that this is not an altogether satisfactory ground, from the common sense point of view, for excluding documents. I have no reason to doubt that the copy in this case is an accurate copy and of just as much value as the original would have been. However, I think that an Act of this sort must be carefully followed and applied, and in my judgment the Act does not allow the admission of a copy which is produced in the way in which this one has been produced in substitution for a lost document.

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That really concludes the matter, but I think that it is desirable that I should also express my view on the second point. That turns on the well-known provision of section 1 (3), namely: "Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish." Subsection (5) permits the court to draw any reasonable inference from the form or contents of the document in which the statement is contained. Accordingly, with Mr. Fearnley-Whittingstall's consent, I have looked at the document which the plaintiff's counsel desires to be put in as the statement of Dr. Bowskill. I am satisfied that, quite apart from the fact that Dr. Bowskill admittedly knew that the motor-cyclist was killed and, therefore, that there would be an inquest, it is a case in which a person in Dr. Bowskill's position would have been likely to anticipate that proceedings would result; and it is plain, I think, that he was personally interested. He was the driver and the owner of the car. Of course, nobody knows for certain that proceedings will result because of a road collision - there might be a knock for knock agreement, or something of that sort. But, subject to that, it seems to me to be obvious, in the circumstances of the case where a stationary lorry was run into from behind and had its rear light damaged, that the owner of the lorry would require to be indemnified by the owner of the car which had driven into it.

It is plain from the nature of the statement at which I have looked that one of the things which Dr. Bowskill was naturally concerned to do was to explain how it came about that, without his fault, he drove into the back of the stationary lorry. I think that that is sufficient to satisfy me that he anticipated that proceedings would result, unless, of course, he gave a satisfactory explanation which the lorry driver accepted and proceedings were diverted against someone else. I think that the case also falls within subsection (3).

Accordingly, for these reasons, I exclude the statement.

*Statement excluded.*

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S. C.