Iffco Tokio General Insurance Company ... vs Pearl Beverages Ltd. on 12 April, 2021

Equivalent citations: AIR 2021 SUPREME COURT 2277, AIRONLINE 2021 SC 211

Author: K.M. Joseph

Bench: K.M. Joseph, Indira Banerjee, Uday Umesh Lalit

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2021
[ARISING OUT OF SLP (CIVIL) NO. 12489/2020]

IFFCO TOKIO GENERAL INSURANCE
COMPANY LTD. … APPELLANT(S)

VERSUS

PEARL BEVERAGES LTD. … RESPONDENT (S)

J U D G M E N T

K.M. JOSEPH, J.

1. Leave granted.

2. An accident, which took place on 22.11.2007 involving a car (a Porsche) belonging to the respondent-Company, which was insured with the appellant, has resulted in this appeal against the Order by the National Consumer Disputes Redressal Commission ('NCDRC' for short). The car was completely damaged. The appellant repudiated the claim by the respondent. The question which arises in this Appeal is, whether the NCDRC is correct in holding that the appellant is not entitled to invoke the shield of Clause (2c) of the Contract of Insurance, under which, it was not liable, if the person driving the vehicle, was under the influence of intoxicating liquor, or drugs. The State Commission rejected the complaint of the respondent finding that there was evidence to show that the person who drove the vehicle, had consumed liquor and was under the influence of liquor. The NCDRC, by the impugned Order, on the other hand, found that there was no material to establish that the driver of the vehicle was under the influence of intoxicating liquor within the meaning of the Exclusion Clause, as aforesaid.

3. The Clause in controversy reads as follows:

> "(2)The Company shall not be liable to make any payment in respect of:
>
> (a) xxx xxx xxx
>
> (b) xxx xxx xxx
>
> (c) any accidental loss or damage suffered whilst the insured or any person driving the vehicle with the knowledge and consent of the insured is under the influence of intoxicating liquor or drugs."

4. The vehicle was driven by one Shri Aman Bangia. Following the accident, a First Information Report came to be lodged. The accident took place in the early morning at about 02.25 a.m. on 22.12.2007. The contents of the FIR, inter alia, read as follows:

> "Statement of Ct. Anand Kumar No.1226/ND, P.S. Tilak, New Delhi, stated that I am posted at Police Station Tilak Marg as constable and today on 21/22.12.07 I and constable Brijesh No.1163/DHG, Duty M/Cy. DL-1SN-8288, P.S. Tilak Marg were on patrolling. At about 2.25 when I, on my above M/cy., was reached near C-Hexagan Dr. Zakir Hussain Marg while patrolling, then I see that the driver of Car No.DL-1CJ-3577 came from Nizamuddin side towards Zakir Hussain Marg, India Gate in a very rash, negligent and at a very high speed and due to very high speed, his car was got out of control and hit at a massive force with the footpath of C- Hexagan Dr. Zakir Hussain Marg Children park India Gate, Electric Pole and wall of children Park and got overturned and the car was get fired. I alongwith my associate Home Guard brought the driver whose name and address Aman Bangia S/o Sh. S.K. Bangia R/o 42-A, Pkt. C Siddarth Extn. New Delhi-14 and his associates Richi Ram Jaipuria S/o Sh. C.K. Jaipuria R/o H.No.08, Prithvi Raj Road, Delhi out of the said car after great efforts and reported about the incident to Wireless Opp. D-56 of Police Station through wireless. After that the vehicles of Fire Brigade, PCR Van and Add/SHO van you were came on the spot. The accident has been occurred due to rash and negligent driving by the driver for which the government property has been damaged. Legal action be taken against the driver. You have recorded my statement on the spot, read over and heard which is true and correct. Sd/- English Anand Kumar Const. No.1226/ND Dt. 22/12.07 Attested SI Kukhitar Singh P.S. Tilak Mark, New Delhi Dt. 22.12.07. Sir Duty Officer Police Station Tilak Marg, New Delhi it is submitted that I SI after receipt of DD No.36A alongwith Ct. Vinod No.2098/ND reached at the place of accident i.e. C- Hexagan Dr. Zakir Hussain Marg where the Car No.DL-1CJ-3577 was got burnt. Where the Add./SHO and vehicles of Fire Brigade were also present for controlling the fire. Then we came to know that the PCR Van has taken away the accused at RML Hospital. I SI and Ct. Vinod Kumar No.2093/ ND left the spot and departed for the Hospital to know the facts, where I received MLC NO.62213/07 of Ruchi Ram Jai Puria S/o C.K. Jai Puria R/o H.No.08, Prithvi Rai Road, Delhi age

> 27½ yrs. upon which the doctors have reported/opined "no evidence of any fresh injury for medical examination and smell of Breath Alcohal (+)" and MLC No.62214/07 of Aman Bangia S/o Sh. S.K. Bangia R/o 42-A, Pkt.-C Siddarth Extn., New Delhi- 14 age 27 years. upon which the doctors have reported/ mentioned/opined "no evidence of any fresh injury for medical examination and smell of Breath Alcohal (+). I SI reached at the spot of accident where Ct. Anand Parkash No.1226/ND, P.S. Tilak Mark, New Delhi had come and got recorded his statement and from the MLC and place of occurrence a case U/s 279/427 of IPC and U/s 185 of M.V. Act have been committed to be found, therefore the Tehrir has been handed over to Ct. Vinod Kumar No.2098/ND.

The number of case would be informed after registering the case." [page 39 to 42 of paper book]

5. As far as the case under Section 279 of the IPC, it culminated in an Order dated 27.8.2011 passed on plea bargaining by the driver of the car and it reads as follows:

> "Accused Aman Bangia with counsel Sh. Rahul Arora.
>
> Heard on the point of notice. Record Perused. A prima facie case U/sec 279 IPC is disclosed against the accused. So accordingly notice for the offence U/sec. 279 IPC is separately framed against the accused to which accused has voluntary pleaded guilty, but he still insists to plead guilty. Since the accused has voluntarily pleaded guilty, so he is convicted for the offence U/sec. 279 IPC.
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> Heard on the point of sentence. The accused prayed for taking lenient view by pleading that this is his first offence. He has undertaken to drive cautiously in future. So, in view of the facts and circumstances of the case, the accused is sentenced to pay fine of Rs.1,000/- in default of S.I. of 10 days. Fine deposited vide receipt No. 866834. File be consigned to Record Room."

6. The respondent after exchange of notices, filed the complaint under Section 17 of the Consumer Protection Act, 1986 in 2009. Affidavit evidence of the Company Secretary of the respondent (PW1), the driver of the car (PW2) and the person who travelled with the driver in the car (PW3), was tendered. The FIR dated 22.12.2007, which was under Section 279/427 of the IPC and Section 185 of the Motor Vehicles Act, 1988, the medico-legal case sheet of Dr. Ram Manohar Lohia Hospital, were among the documents produced by the respondent. The Order, which we have referred to under Section 279 of the IPC, was also later produced. The appellant's Vice President gave affidavit evidence. The Investigator also gave his affidavit evidence affirming his reports. PLEADINGS

7. In the complaint filed under Section 17 of the Consumer Protection Act, 1986, we may notice the allegations, which are relevant:

> The Exclusion Clause is not applicable as the person driving the vehicle had not consumed any alcohol. Further assuming that he had consumed alcohol, the case

would not fall under the Exclusion Clause as he was, in any case, not intoxicated. Although the Police had lodged FIR under Section 185 of the MV Act besides Sections 279/427 of the IPC, no charge-sheet has been filed against the driver till date, meaning thereby, that the Police after investigating the case, could not find any evidence to prosecute the driver for any of the offences. It is the further case of the respondent, inter alia, that the respondent had informed the appellant that the MLC only says 'smell of alcohol' and this does not imply or mean that the driver was under the influence of intoxicating liquor. It is also pleaded that in the Legal Notice, it was specifically noted that the driver had not consumed liquor. Section 185 of the MV Act was invoked to plead that unless a certain percentage of alcohol is found a person cannot be prosecuted for the offence of drunken driving. The law does not prohibit driving after consuming liquor. No test was performed in regard to the person driving to establish that he was under the influence of drugs or intoxicating liquor, as provided under Section 185 of the MV Act or the Exclusion Clause.

It is also pleaded that Intoxication means 'elate or excite to the degree of frenzy' which means in simple meaning that the person has no control over his senses.

8. In the reply, filed by the appellant, it is contended, inter alia, as follows. There is official record of the person driving having been found to have consumed alcohol and driving the vehicle in that condition. The respondent got the matter investigated through experienced Investigators and they have collected relevant information and records with their finding that the driver was under the influence of alcohol. The seriousness of the accident itself showed that the driver was reckless in driving due to the consumption of the alcohol.

9. Respondent filed a Rejoinder Affidavit reiterating the allegations in the complaint. THE EVIDENCE

10. In the Affidavit of Evidence given by the Company Secretary (PW1,) on behalf of the respondent, the case set up about the law not prohibiting driving after consuming liquor and that what is prohibited is that the percentage of liquor should not exceed 30 mg per 100 ml of blood, is reiterated. The driver of the vehicle (PW2), in his Affidavit has deposed that he was neither under the influence of intoxicating liquor or drugs at the time of the accident. That he was in his full senses and capable of exercising full control over the car, at the time of the accident. His co-passenger was also not under such influence. No test was performed. He has further deposed that the FIR 453 of 2007 against him under Section 185 of the MV Act and Sections 279/427 of the IPC was falsely registered. The case was still pending. He was certain to be acquitted in the said case. The Affidavit Evidence of the co-passenger (PW3) is to the effect that he was not under the influence of intoxicating liquor or drugs. He has also supported PW2 that PW2 was able to exercise proper control over the vehicle and he was not under the influence of liquor or drugs at the time of the accident. The Police Officer and Hospital Doctor did not find them under the influence of intoxicating liquor and no test was performed. Apart from the appellant's Vice President, the Investigator of the appellant gave affidavit evidence when he vouchsafed for the correctness of his reports. THE ORDER OF THE STATE COMMISSION

11. The State Commission finds, inter alia, as follows:

> The date and time of the occurrence was 22.12.2007 at 02.25 A.M.. The official record of the driver goes to show that he was driving the vehicle after consuming alcohol. Whether he was completely or partially under the influence of alcohol was a different matter. There is not a slightest doubt that the driver drove the vehicle after consuming alcohol. The manner and intensity with which the accident had occurred and its overall impact goes to prove the said facts.

[The finding is to be appreciated in the light of the statements in the FIR about the car being driven rashly and negligently and at a very high speed. It collided with an electric pole and the wall of the Children Park as a result of which the car turned upside down/overturned and also caught fire.] Adverting to the Judgment of this Court in Bachubhai Hassanalli Karyani v. State of Maharashtra1, it was found as follows:

> The degree of proof required in a criminal case is much higher than the evidence required in civil proceedings, which are decided on the principle of Preponderance of the Evidence. The driver has confessed to his guilt under Section 279.
>
> The result of the other two offences (Sections 427 of the IPC and 185 of the MV Act was not made available). The State Commission also found it fit to apply the principle of res ipsa loquitur, having regard to the circumstances surrounding the accident. The proceedings under the Consumer Protection Act, being summary in nature, the Commission was not required to go into the technicalities of Criminal or Civil 1 (1971) 3 SCC 930 Jurisprudence. The impact of the accident was such that the vehicle turned upside down and caught fire. The vehicle of the Fire Brigade had to be pressed into service. The vehicle turned into a total wreck. The State Commission also found that there appeared to be a breach of Condition 4 of the Policy of Insurance ("The insured shall take all reasonable steps, to safeguard the loss of damage"). It is found that at the time of the accident, the vehicle was being driven rashly and negligently and the driver had consumed liquor, which by itself was in violation of the Policy conditions.

THE IMPUGNED ORDER OF THE NCDRC

12. The NCDRC, finds as follows:

> "4. The only question which arises for consideration in this case is as to whether the driver of the vehicle was under influence of intoxicating liquor or drugs at the time the vehicle met with an accident and got extensively damaged. Though it has come on record that the driver of the vehicle had taken some liquor before he drove the vehicle, the said record being available in the form of statement of a policeman who stated that the smell of the liquor was coming from the mouth of the driver, there is absolutely no evidence to prove the quantity of liquor which he had consumed before

> driving the vehicle. Admittedly, no medical examination of the driver was got conducted in order to ascertain the quantity of the alcohol in his blood at the time the vehicle met with an accident. In terms of Section 185 of the Motor Vehicles Act, a person is liable to punishment if he is found while driving, alcohol exceeding 30 mg per hundred ml of blood and the level of alcohol is required to be verified by way of test done by use of a breath synthesiser. Admittedly, no such test was conducted and, therefore, no evidence was available before the State Commission or even to the insurer to prove that the driver had alcohol exceeding 30 mg per hundred ml of the blood, at the time the vehicle met with an accident. Therefore, the insurer has failed to prove that the insured had committed a breach of the terms of the policy, the driver being under influence of liquor."

13. Thereafter, it referred to its Order in Royal Sundaram General Insurance Company Limited v. Davubhai Babubhai Ravalia in Revision Petition No. 1296 of 2018 dated 04.09.2018, which reads as follows:

> "6. The next question which arises for consideration is as to whether on account of the above referred quantity of alcohol having found in the blood of the driver, he can be said to be under influence of intoxicating liquor or not. This issue came up for consideration of this Commission in Lakshmi Rohit Ahuja Vs. SBI Life Insurance Co. Ltd., RP No.3249 of 2015, decided on 28.04.2016 and the following view was taken:
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> 6. As per the FIR, the vehicle was being driven by the deceased at the time it met with an accident. As per the chemical analysis report in respect of the viscera of the stomach and intestine of the deceased, there was 120 ml of Ethyl alcohol per 100 gm in the blood of the deceased. Hence the question which arises for consideration is as to whether a person having 120 mg of alcohol per 100 ml of his blood can be said to be under influence of intoxicating liquor. This question came up for consideration of this Commission in Consumer Complaint No. 401 of 2014 Baby Apoorva Rai Vs. New India Assurance Co. Ltd. & Anr. Decided on 03.9.2015 and the following view was taken:
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> 3. There is no direct evidence of the deceased being under influence of intoxicating liquor at the time he got drowned in the swimming pool. The only evidence relied upon the insurance company to substantiate the plea that he was under the influence of intoxicating liquor at the time he died, is the report of the laboratory reporting presence of 103.14 mg of ethyl alcohol per 100 ml of the blood of the deceased.
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> 4. Relying upon Modi's Medical Jurisprudence and Toxicology, 24th Edition, the learned counsel for the complainants submitted that the presence of 103.14 mg/100 ml of the blood does not lead to the conclusion that the deceased was under the influence of intoxicating liquor. He relied upon the following extract from the above-referred text book:

> "It is generally believed that a person with a concentration of 0.1 per cent alcohol in the blood appears to be gay and vivacious, and those with a concentration of 0.15 per cent alcohol in the blood are regarded as fit to drive a motor vehicle. This concentration of alcohol in the blood is regarded as a presumptive limit of safety, and may result from the rapid consumption of 8 ounces of whisky of 4 to 5 pints of beer.
>
> Alcohol acts differently on different individuals and also on the same individual at different times. The action depends mostly on the environment and temperature of the individuals and upon the degree of dilution of the alcohol consumed. The habitual drinker usually shows fewer effects from the same dose of alcohol. Barbiturates, benzodiazepines, antihistamines, tranquillizers, chlorpromazine and insulin, potentiate the action of alcohol, while epileptics or persons who have suffered from a head injury may show an increased effect to a small quantity of alcohol".
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> It would thus be seen that in the opinion of the Author, the percentage of alcohol in the blood would be 0.2% in case, the quantity of alcohol per 100 ml of blood is 200 mg. Thus, a person who has 200 mg alcohol per 100 ml. of his blood can be said to be moderate intoxicated, if we go by the above referred opinion. A person with a concentration of 0.15% alcohol in the blood is regarded to be fit to drive a motor vehicle. 0.15% of alcohol in the blood comes only if he has 150 mg of alcohol per 100 ml.

of his blood.

5. The learned counsel for the insurance company, however, relied upon an Article titled "While Under the Influence of Intoxicating Liquor" written by W.W. Thornton and published on 11.01.1928 in Indiana Law Journal. The question considered in the above referred Article was as to what condition must a driver of a motor vehicle be in to be "under the influence of intoxicating liquor or narcotic drugs"? The Author extracted the following observations from the judicial pronouncements considered by him:

> "A person is drunk in legal sense when he is so far under the influence of intoxicating liquors that his nerves are visibly excited or his judgment impaired by the liquor".
>
> "Intoxicated condition" means that if the person "were in such a state that he was incapable of giving the attention to what he was doing, which a man of prudent and reasonable intelligence would give".
>
> "When it appears that a person is under the influence of liquor, or when his manner is unusual or abnormal, and his inhibited condition is reflected in his walk or conversation, when his ordinary judgment and common sense are disturbed, or his usual will power is temporarily suspended, when they or similar symptoms result from the use of liquors and are manifest, then the person is 'intoxicated'. It is not necessary that the person would be so-called 'dead-drunk' or hopelessly intoxicated.

It is enough that his sense are obviously destroyed or distracted by the use of intoxicating liquors within the meaning of the statute authorizing recovery of damages against a saloon keeper who sells liquors to an intoxicated person".

"Under the law a man is intoxicated whenever he is so much under the influence of spirituous or intoxicating liquors that it so operates upon him, that it so affects his acts, or conduct or movement, that the public or parties coming in contact with him could readily see and know that it was affecting him in that respect. A man to that extent under the influence of liquor that parties coming in contact with him, or seeing him, would readily know that he was under the influence of liquor, by his conduct or his words or his movements, would be sufficient to show that such party was intoxicated".

Whenever a man is under the influence of liquor so as not to be entirely at himself, he is intoxicated; although he can walk straight' although he may attend to his business, and may not give any outward and visible signs to the casual observer that he is drunk, yet if he is under the influence of liquor so as not to be at himself, so as to be excited from it, and not to possess that clearness of intellect and that control of himself that he otherwise would have, he is intoxicated".

It would thus be seen that the Article relied upon by the learned counsel for the opposite party is not based on the quantity of the alcohol found in the blood of a person. This Article does not go into the question as to how much quantity of the ethyl alcohol in the blood of a person can lead to the inference that he was under

influence of intoxicating liquor.

6. The learned counsel for the opposite party has also relied upon the following information in Lyon's Medical Jurisprudence and Toxicology:

"The American Medical Association and the National Safety Council of USA have adopted the following policy statement with regard to intoxication – "Blood alcohol of 0.10% can be accepted as prima facie evidence of alcoholic intoxication, recognizing that many individuals are under the influence in the 0.05 to 0.10% range." The Uniform Vehicle Code of USA 1962 has as its standards: "Blood alcohol of 0.05% or less raises a presumption that the subject was not under the influence of alcoholic beverage; blood alcohol in excess of 0.05% but less than 0.10% raises no presumption of intoxication or soberness; blood alcohol of 0.10% or more raises the presumption that the subject was under the influence of alcoholic beverage".

In different countries the prescribed limit for permissible blood alcohol is as follows:

India	-	30 mg%
USA	-	100 mg%

Australia - 40 mg%

Terminologies used in medico-legal context: The following terminologies are employed in medico-legal cases. Their exact meaning should be understood.

• Sober – blood alcohol concentration of less than 10 mg% • Drinking – Blood alcohol concentration of 20-70 mg% • Under the influence of alcohol – blood alcohol concentration of 80-100 mg% • Drunk or intoxicated – blood alcohol concentration of 150-300 mg% • Coma and death – blood alcohol concentration in excess of 400 mg%".

As per the above referred text book, a person is under the influence of alcohol when the blood alcohol concentration is 80-100mg/100 ml of the blood. The above referred text book also shows that the USA, which is most liberal, as far as the quantity of alcohol which a person can consume at the time of driving also allows only upto 100 mg alcohol/100 ml of the blood. It further shows that if the alcohol content is .1%, it would be the prima facie evidence of alcoholic intoxication. Blood alcohol percentage of .1% comes when the quantity of ethyl alcohol in the blood is 100 mg/100 ml of the blood. Thus, if we go by the text book of Modi, a person, who has consumed less than 150 mg of alcohol per 100 ml. of his blood, cannot be said to be under influence of intoxication, whereas as per the text book of Lyon's, a person having 100 mg or more per 100 ml of blood will be said to be under influence of alcohol.

7. In a Manual for Physicians in National Drug Dependence Treatment Centre, All India Institute of Medical Sciences, New Delhi the effects of alcohol has been stated as under:

BAC mg/dl	Effects
<80	Euphoria, feeling of relaxation and talking freely, clumsy movement of hands and legs, reduced alertness but believes himself to be alert.
	Noisy, moody, impaired judgement, impaired

	driving ability
<80	Electroencephalographic changes begin to appear, Blurred vision, unsteady gait, gross motor in-
100-200	coordination, slurred speech, aggressive, quarrelsome, talking loudly.
200-300	Amnesia for the experience – blackout.
300-350	Coma
355-600	May cause or contribute to death

It would thus be seen that

in terms of the above referred compilation issued by the AIIMS, if the quantity of alcohol in the blood is 100 or more mg. /dl (100 ml), it leads to vision getting blurred, the gait become unsteady and the coordination gets affected. These changes, in our opinion, can occur only when someone is already under the influence of alcohol by that time. The judgment of the drinker as well as his driving ability gets affected even where the quantity of alcohol in the blood is 80 mg or more per 100 ml of the blood.

8. The learned counsel for the complainant has relied upon the decision of this Commission in LIC of India & Anr. Vs. Ranjit Kaur III (2011) CPJ 232 (NC), where the quantity of alcohol in the blood was found to be 86.2 mg./100 ml of blood. Ruling in favour of the complainant, this Commission inter-alia observed as under:

"It has also come in evidence that this by itself is not adequate proof that the deceased was intoxicated at the time of his death. As rightly observed by the learned Fora below, the specific clinical picture of alcohol intoxication also depends on the quantity and frequency of consumption and duration of drinking at that level and, therefore, mere presence of alcohol even above the usually prescribed limits is not a conclusive proof of intoxication. Apart from this, there is also no evidence that there was a nexus between the death caused by electric shock and consumption of liquor".

9. The learned counsel for the opposite party, on the other hand has relied upon the decision of this Commission in LIC of India & Anr. Vs. Priyanka Singh First Appeal No.368 of 2014 decided on 14.10.2005. In the above referred case, 109.92 mg of ethyl alcohol per 100 ml of blood was found in the body of the insured. Dismissing the complaint, this Commission, inter-

alia observed and held as under:

"As per the medical literature, "HWV COX 'Medical Jurisprudence and Toxicology', Seventh Edition PC Dikshit" brought on record, there are three stages of alcoholic intoxication, which reads as follows:

"Stage of Excitement (50 to 150 mg percent) Feeling of well-being slight excitement, increased confidence, lack of self-control are usually seen. There is a heightened sexual desire, but performance is reduced. The visual acuity is reduced. It also alters time and space orientation. There is poor judgment and mental concentration is retarded".

The learned counsel for the complainant/respondent in the above referred case relied upon the text book of 'Biochemistry' as per which quantity of 50-150 mg was described as Pre-intoxication in which there are signs of instability, decreased neuromuscular coordination and the judgment and control required for quick responses such as car driving are impaired. Whereas in intoxicating stage (150-300 mg/dl) speech is impaired and motor skills are incoordinated. However, relying upon the Medical Literature produced by the appellant Corporation, this Commission held that the deceased was under intoxication as a result of consumption of alcohol found in his blood sample, making him ineligible to the benefits of double accident policy. It would be pertinent to note that in the above referred case, no amount was payable in case the insured was under influence of intoxicating liquor drug or narcotics.

10. Considering the opinion expressed in the Manual issued by All India Institute of Medical Sciences, which is the premier most medical Institution in this Country, we are not inclined to accept the opinion expressed in Modi's Medical Jurisprudence and Toxicology, particularly when the opinion of AIIMS also find corroboration from the opinion expressed in Lyon's Medical Jurisprudence and Toxicology. Though, this is not a case of the death while driving after consuming alcohol, the maximum quantity of alcohol permitted by various countries for a person to drive a motor vehicle cannot be said to be an altogether irrelevant since the purpose of prohibiting driving after consuming liquor beyond the prescribed quantity is to ensure that the driver does not commit an accident on account of the effect of liquor on him. The purpose of the insurer behind excluding the cases of accident when the insured is under influence of intoxicating liquor is to ensure that the consumption of the liquor does not lead or contribute to happening of the accident in which the insured dies or injured. Therefore, consumption of liquor beyond a safe limit must necessarily disqualify the insured from getting the benefits of the insurance policy taken by him. The quantity of alcohol allowed to the driver of a motor vehicle is not more than 100 mg/100 ml of the blood in any country, including USA though, in our country it is only 30 mg/100 ml of blood. Therefore, in our opinion, if a person is found to have consumed more than 103.14 mg of alcohol/100 ml of his blood, which is position in the case before us, it would be reasonable to say that he was under the influence of the intoxicating liquor at the time he died or got injured. We are fortified in taking this view from the decision of this Commission in Priyanka Singh (supra). As far as the decision of this

> Commission in Ranjit Kaur (supra) is concerned, we find that the quantity of alcohol in the blood of the insured in that case was of 86.2 mg, which was much less than quantity of the alcohol found in the blood of the deceased Surya Kiran.
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> Though in Ranjit Kaur (supra), this Commission, inter-

alia observed that there was no nexus between the death caused by electric shock in consumption of liquor, the aforesaid observation is only an obiter and does not constitute the ratio decidendi of the case. In fact, the aforesaid obiter is contrary to the express terms of the insurance policy which absolves the insurer of its obligation under the policy, in case the insured was under the influence of the intoxicating liquor at the time of the accident and the policy does not require any nexus to be shown between the case of accident and the consumption of liquor."

14. It was further found that in the case of Ranjit Kaur (supra), which is referred to, the quantity of liquor in the blood sample was found to be 86.2 mg and it was still found that the driver was not intoxicated. In the present case, it is found that there is no evidence regarding the quantity of liquor in the blood of the driver. The onus was upon the appellant-Insurer to prove that the quantity of alcohol was at least 30 mg and, therefore, exceeded the limit prescribed under Section 185 of the MV Act. The NCDRC allowed the appeal and set aside the order of the State Commission and directed the appellant to assess the loss of the respondent and to pay the amount at the rate of 9 per cent per annum from the date of complaint within six weeks of the date of assessment to the respondent.

SUBMISSIONS OF PARTIES

15. We heard Shri Shivam Singh, learned Counsel for the appellant and Shri Gopal Sankarnarayanan, learned Senior Counsel for respondent.

16. Shri Shivam Singh, learned Counsel, contended that this is a clear case where unimpeachable material in the form of official records established that the car was being driven by a person who was under the influence of intoxicating liquor. The high speed and the manner in which the accident occurred, viz., the vehicle hitting against the pole, turning turtle and further catching fire, along with the fact that the FIR and the MLC indicating that the driver smelt of the alcohol sufficed to attract the Exclusion Clause and protect the appellant. The impact of the accident, resulting in the car becoming a complete wreck, is emphasised, to point out that the circumstances existed which entitled the appellant to extricate itself from the huge financial burden in tune with a specifically provided Exclusion Clause. He drew our attention to the following decision in V. Kishan Rao v. Nikhil Super Speciality Hospital and another2. Therein, this Court held as follows:

> "13. Before the District Forum, on behalf of Respondent 1, it was argued that the complainant sought to prove Yashoda Hospital record without following the provisions of Sections 61, 64, 74 and 75 of the Evidence Act, 1872. The Forum overruled the objection, and in our view rightly, that complaints before the Consumer Fora are tried summarily and the Evidence Act in terms does not apply.
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> This Court held in Malay Kumar

> Mukherjee [(2009) 9 SCC 221 : (2010) 2 SCC (Cri) 299] that provisions of the Evidence Act are not applicable and the Fora under the Act are to follow the principles of natural justice (see para 43, p. 252 of the report).

17. The said decision was rendered in regard to a complaint regarding medical negligence and the 2 (2010) 5 SCC 513 question which arose was, whether Expert evidence was necessary to prove such medical negligence. This Court also held as follows:

> "50. In a case where negligence is evident, the principle of res ipsa loquitur operates and the complainant does not have to prove anything as the thing (res) proves itself. In such a case it is for the respondent to prove that he has taken care and done his duty to repel the charge of negligence."

> 18. He further pointed out that the Court may appreciate the nature of the case set up by the driver of the vehicle. It is pointed out that it was contended by the respondent that the vehicle was not driven rashly and negligently. Yet, in the criminal case, the driver pleaded guilty and the sentence, as already noticed, came to be pronounced by the Criminal Court. This, beyond doubt, established that the case of the respondent that car was not being driven in a rash and negligent manner, was false. It clearly probablised the case of the appellant that the car was being driven rashly and negligently and this is attributable only to the fact that the driver was under the influence of intoxicating liquor. The evidence in this regard is furnished by the Report of a Police Officer (the FIR) and further strengthened by the MLC. He further complained that the NCDRC has completely erred in holding that the burden was on the Insurer to prove the quantity of alcohol in the blood of the driver. He would point out the sheer impossibly to fulfil such an obligation on the Insurer. He would question the correctness of the declaration.

> 19. Per contra, Shri Gopal Sankarnarayanan, learned Senior Counsel for the respondent would, in the first place, draw our attention to the Report of the Investigator engaged by the appellant. He would point out that the Report would reveal that upon being informed, the Investigator was very much at the scene in the early morning and, still, no steps were taken to ascertain the level of the alcohol in the blood of the driver. This adequately counters the apprehension about the impossibility for the insurer to prove the level of alcohol. In this regard, he drew our attention to the questions put in the interrogatories and the answers which have been received. As far as the conviction under Section 279 of the IPC is concerned, he would submit that it was only a case of plea bargaining and, more importantly, it related to rash and negligent driving under Section 279 of the IPC. The offence, which is pertinent to the controversial Clause, is the one contemplated under Section 185 of the MV Act and it has not been invoked/proved against the driver. In other words, the attempt appears to be to contend that at worst a case of rash or negligent driving

may be established, which is not the same as driving under the influence of alcohol. He also sought to draw support from the Judgment of this Court in Bachubhai Hassanalli Karyani (supra). The other case law appears to be mostly Orders passed by the NCDRC itself and it appears to be on the lines, indicated in the impugned Order itself, as noticed by us. He further pointed out that the car caught fire as the fuel tank of the car is located in the front.

20. In Bachubhai Hassanalli Karyani (supra), the Court was dealing with a case inter alia under Section 117 of the Motor Vehicles Act, 1939.

This Court held as follows:

"4. The learned counsel contends that the heavy sentence has been imposed on the appellant because he was found to have been drunk on that night. He says that Dr Kulkarni, who examined the appellant, based his conclusion merely on the facts that the appellant's breath was smelling of alcohol, that his gait was unsteady, that his speech was incoherent and that his pupils were dilated. The doctor had admitted that a person, placed in the circumstances in which the appellant was put as a result of the accident, would be under a nervous strain and his gait might be unsteady. The doctor had also admitted that a person could smell of alcohol without being under the influence of drinking. No urine test of the appellant was carried out and although the blood of the appellant was sent for chemical analysis, no report of the analysis was produced by the prosecution.

5. It seems to us that on this evidence it cannot be definitely held that the appellant was drunk at the time the accident occurred." FINDINGS

21. The expression "under the influence of intoxicating liquor" does not appear to be of recent origin in a Contract of Insurance. It has been around for quite a while. In this regard, we may notice the judgments of the English Courts. In Mair (Administratrix) v. Railway Passengers Assurance Co. (Limited)3, Lord Coleridge, the Chief Justice made the following observations, while dealing with the very same words "under the influence of intoxicating liquor", and held as follows:

"... I should think, speaking only for myself, that the words "under the influence of intoxicating liquor" would be sufficiently satisfied by construing them to mean under such influence of intoxicating liquor as disturbs the balance of a man's mind. There is a point up to which any stimulating liquor, with most people at least, possibly benefits, at any rate for the time, the exercise of the intellect. There is a point beyond which it certainly impedes – disturbs it. I concede that it is very difficult even in language – certainly in the English language – to ascertain 1877 37 L.T. 356 DC with precision where that point is;

> but it is enough to say that there is a point, and it seems to me these words would be satisfied when the influence of intoxicating liquor is found in point of fact to be such as to disturb the quiet and equable exercise of the intellectual faculties of the man who has taken the liquor. Of course, if I think there is evidence to satisfy me that the intoxication in this case was enough to have gone to the point of contributing to the accident, it follows a fortiori that it had arrived at the disturbing point which I think, speaking for myself, would be enough to satisfy the words of the proviso...."
>
> 22. This, in fact, was not a case where a vehicle was being driven and it was alleged that the driver was under the influence of alcohol. On the other hand, it was a case where the deceased had been drinking for a while. In this condition he rudely accosted a woman and tried to put his arms around her. He was knocked down by a man who was in the company of the woman.

He died as a result of the injury. The insurer sought protection under a clause which excluded liability if the assured was under the influence of intoxication of liquor.

23. Nearly a century later, in Louden v. British Merchants Insurance Company Limited4, the plaintiff, claimed under a policy, in regard to a bodily injury suffered by her husband. The Insurer invoked the Exclusion Clause, which again protected it in a case where the person was under the influence of drugs or intoxicating liquor. It was a case of a motor vehicle accident, which proved fatal for the plaintiff's husband. One of the contentions raised by the plaintiff was that the words "sustained whilst under the influence of drugs or intoxicating liquor, were so uncertain as to [1961] WLR 798 QB their meaning that no effect should be given to them". Lawton,J., while dealing with this contention drew support from Mair (Administratrix) (supra), and what is more, reiterated the principles laid down therein. We may advert to the following:

> "... The words used in the exemption clause of the policy before me have probably been used for many years in policies giving assurance against injury. Counsel for the defendants referred to Mair v. Railway Passengers Assurance Co. Ltd. The policy in that case provided that the assurance should not extend to any death or injury happening while the assured was under the influence of intoxicating liquor. The case came before Lord Coleridge C.J. and Denman J. by way of an application for a new trial on the ground that the verdict had been against the weight of evidence. Both judges construed the words, "whilst the assured is under the influence of intoxicating liquor," although it may not have been necessary for the purposes of their judgment to do so. Neither seems to have thought that the words were so uncertain as to be incapable of construction. Both were of the opinion that these words connoted a disturbance of the faculties, Lord Coleridge using the words "as disturbs the balance of a man's mind," and Denman J. the words "disturbing the quiet, calm, intelligent exercise of the faculties." Mr. Everett, whose experience in matters of personal injury insurance is extensive, was unable to refer me to any case in which a different construction had been put upon these words. In those circumstances, I find that the words are not so uncertain as to be incapable of construction, and I adopt the

> constructions in Mair v. Railway Passengers Assurance Co. Ltd., albeit they have been expressed in mid-nineteenth century idiom. I add no gloss, as to do so might add confusion where none may have existed amongst insurers and policy holders during the past 84 years."

24. This was the case of alleged driving under the influence of alcohol. The deceased was travelling in a car with a friend after having drinks (beer). They appeared to be sober. While so, the motor car attempted to negotiate a bend and it knocked off the Warning post and an accident ensued, the vehicle having fallen to a ditch. The court went on to find that the blood alcohol was 260 mg in 100 ml and in favour of the insurer.

A CASE FROM SCOTLAND

25. In Kennedy v. Smith5, decided on 20th June, 1975 by the Inner Court of Session of Scotland from which appeal lies to the U.K. Supreme Court now, the defendant (described as the defender) drove a car after having consumed a pint or at the most one and a half pints of lager (a kind of beer) and an accident occurred in which two of the passengers died. In an action by the widows, the insurer (referred to as a third party) relied upon an exception in the policy 1975 S.C. 266; (1975) 6 WLUK 97 which inter alia excluded its liability if the driver was under the influence of intoxicating liquor. Lord President of the Court with whom the other two Judges agreed, observed as follows:

> "They mean, as the Lord Ordinary accepted, "under such influence of intoxicating liquor as disturbs the balance of a man's mind." This was the meaning given to them by Lord Coleridge C.J. in Mair v. Railway Passengers Assurance Co., 1877 37 L.T. 356 in which Denman J. referred to the condition as "disturbing the quiet calm intelligent exercise of the faculties," and was the meaning adopted by Lawton J. in the later case of Louden v. British Merchants Insurance Co. Ltd., 1961 1 W.L.R.
>
> 798. The only proved facts are (i) the admitted consumption by the defender of one pint of lager and
>
> (ii) the happening of the accident.

The Lord Ordinary was not entitled to rely as he did upon the facts that the defender drank lager upon an empty stomach and was unaccustomed to alcohol since there was no evidence whatever that either of these facts made it more probable that the amount of alcohol consumed would adversely affect the faculties of the defender. In so far as the Lord Ordinary refers to the erratic and unexplained behaviour of the defender's car this is only to be understood as a reference to the movement of the car at the time of the accident as the result, according to the defender, of the back wheels striking either the kerb or an object on the road surface. The happening of the accident is explicable as the result of momentary inattention or loss of concentration and it is sheer speculation to say that the defender's consumption of one or even one and a half pints of lager had placed him under such influence of alcohol as had disturbed the balance of his mind. They also argued that it was relevant to consider that this was a case of wholly unexplained and extraordinary movement of

the motor car which the defender had driven accident free for some years. It was further, they said, relevant in this connection to have regard to the plea tendered by the defender to the charge of contravening section 1 (1) of the Road Traffic Act 1960.

In my opinion, the defender's submission in this matter is well founded. The Lord Ordinary was not, in my view, entitled to have regard to the fact that the lager drunk by the defender was consumed upon an empty stomach and that he was unaccustomed to alcohol. Whether or not a particular combination of circumstances is likely to exacerbate the effects of a particular consumption of alcohol is a matter of evidence (as was the case in Louden). In this case there was no evidence to show that the circumstances in question were other than neutral. In my opinion, also, no weight can be given to the defender's plea of guilty. The Lord Ordinary gave no weight to this. Such a plea is explicable as soon as it is remembered that even a slight degree of carelessness may justify a conviction for driving in a manner dangerous to the public. In these circumstances the "inference" drawn by the Lord Ordinary rests only upon

(i) proved consumption of one pint of lager and possibly—only possibly— another half pint, and (ii) the happening of the accident as it emerged in evidence. There was not one scintilla of evidence of any behaviour on the part of the defender, or of his car before the accident, which pointed to the alcohol he had consumed having to any material extent affected the balance of the defender's mind. For the exception to apply it is not enough to show that the defender had consumed a particular quantity of alcohol shortly before a claim arose. In my opinion mere proof that the defender had consumed at most a pint and a half of lager and that he had later been driving the car when it left the westbound dual carriageway in the manner described, does not justify an inference that he was at the time of the accident under the influence of intoxicating liquor within the meaning of exception 5 (a). The accident is consistent with momentary inattention and to say that he was under the influence of alcohol at the time can only, on the facts proved in this case, be speculation."

26. Lord Avonside in his concurring opinion inter alia held as follows:

> "The explanation of the respondent that his rear wheels had hit something, a brick or possibly the kerb, was either rejected by the Lord Ordinary or, at least, also pointed to negligence influenced by drink. Plainly also the Lord Ordinary did not believe the assertion of the appellant that the drink he had taken did not affect his judgment. It is regrettable, in my view, that more evidence was not led in regard to the accident. It would, I imagine, be available and perhaps its omission was considered tactical. Be it so, the onus was on the respondent. In my opinion, the Lord Ordinary has gone too far. There is no evidence of the likely effect of the consumption of a not immoderate amount of low content alcohol on a person unused to drink whose stomach may be empty. The Lord Ordinary as a judge is not, in my view, entitled to draw a positive conclusion from such facts, without some evidence before him and there was none. The smell of alcohol after the accident was, it is I think accepted, simply evidence of the fact of prior consumption of alcohol. The circumstances of the accident were remarkable enough, but could be explained by what the appellant said. That the appellant pleaded guilty to a charge under section 1 (1) of the Road Traffic Act 1960,

> and the Lord Ordinary seems to make significance of this, is neither here nor there, looking to the comparatively minor degree of negligence which the Courts have held sufficient to invoke the sub- section. But looking at the facts found at best for the respondent I see no more than that the appellant had taken some drink for the first time in his life on an empty stomach and had very shortly thereafter been involved in a bad accident which his previous safe record would not suggest as being likely to happen."

27. Obviously, there are certain parallels as there are distinctions between facts of the case before us. The similarity lies in the fact that the driver in the case before us also smelt of alcohol. The other similarity lies in the nature of an accident. The differences, however, lie in the fact that in the case referred to, there was evidence of the actual quantity and nature of the alcohol which was consumed by the driver. In the case before us, there is no evidence either recording the exact nature of alcoholic drink which was consumed by the driver and there is also no material as to the quantity consumed by him. There is no evidence, in fact, as to the exact point of time when the alcohol was consumed by the driver in the case before us. Whereas on the evidence adduced in the case before the Court in the decision referred to, there was evidence as to the time when the alcohol was consumed. Further the driver offered an explanation as to how the accident unfolded when there is none in the case before us.

28. As far as the conviction under the Road Traffic Act, 1960, which was based on the plea of the defendant-driver in the said case is concerned, Section 1(1) of the Road Traffic Act, 1960, may be noticed:

> "1. Causing death by reckless or dangerous driving: (1)A person who causes the death of another person by the driving of a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, shall be liable on conviction on indictment to imprisonment for a term not exceeding five years."

29. It may be noticed that both the trial Judge as well as the Appellate Court did not lay any store by the blood test and also the conviction and therefore what is significant is that a finding could be rendered in an action that the insurer was not liable if the driver, in contravention of the policy was under the influence of intoxicating liquor and the matter goes to the evidence which would support such a finding.

30. As far as the view taken by the President of the Court that the Trial Judge was not entitled to rely upon the fact that the defendant drank a lager upon an empty stomach, we are unable to endorse the same. This is for the reason that there is enough material available to show that when one drinks on an empty stomach, there is greater and faster infusion of the alcohol into the system leading to increased Blood Alcohol Concentration (BAC) level. This is for the reason that when liquor is consumed on an empty stomach, the liquor moves on from the stomach unobstructed into the small

intestine from where 80% of the absorption of alcohol takes place. Therefore, this does indeed play a role in the Court assessing and finding, that given the other circumstances to support the finding of consumption of alcohol as to whether the alcohol has contributed to the occurrence of the accident. It is also not irrelevant to bear in mind that a person who is alcohol tolerant which means that having become accustomed to consume liquor, the brain in particular is able to hold up to the alcoholic consumption and deal with its effect whereas when a novice or a beginner consumes alcohol, its consequences would be different.

THE POSITION IN THE UNITED STATES OF AMERICA

31. Interestingly, the terms in the Contract of Insurance may exclude the liability of the Insurer in regard to liquor based on the mere consumption of the liquor and its presence in the body. In 2016 NC (10) 1939, in a claim upon a life and accidental insurance, one of the questions was whether there was an error in the charge of the court relating to intoxicating liquor. The policy in question did not cover any injury or death which the insured may suffer while the insured has in his or her body, physically present intoxicating liquor or narcotics. The Supreme Court of North Carolina in Webb v. Imperial Life Ins. Co., [Inc. 216 N.C. 10 (1939)] had to consider the legality of the charge which the trial court had given to the jury. The Court noticed the charge as follows:

> "The court further instructs you that an intoxicated person is a drunken person, a drunken person is an intoxicated person and that means- intoxicated means in law that the subject must have drunk of alcohol to such an extent as to appreciably affect and impair his mental or bodily faculties or both. The court instructs you further that to be under the influence or affected by the liquor means that the subject must have drunk a sufficient quantity to influence or affect, however slightly, his body and his mind, his mental and physical faculties, in other words, it all comes to this, that he has drunk, that he has intoxicating liquor in his body to the effect that it influences his conduct detrimentally. It means the question for you is whether the deceased at the time of his impact and death had in his body intoxicating liquor of sufficient quantity to be intoxicated or to affect his conduct and influence his conduct and action." "The court further instructed the jury: "The question for you is whether the deceased at the time of the impact and death had in his body intoxicating liquor of sufficient quantity to be intoxicated or to affect and influence his conduct and action."

32. The Court held as follows:

> "The court further instructed the jury to answer the issue in favor of defendant if they found by the greater weight of the evidence that the deceased had present in his body at the time of the injury "intoxicating liquor as the court has just defined and explained intoxicating liquor;" and again, if they found the deceased "was under the influence of alcohol or intoxicating liquor." While the court followed this by charging the jury to answer the issue in favor of defendant if they found deceased "had present in his body intoxicating liquor," this did not cure the previous instruction.

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Thus      the     learned      judge
inadvertently   placed    upon   the
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> defendant the burden not only to show the physical presence of intoxicating liquor in the body of the insured at the time of the injury, but also to show that he was intoxicated or under the influence of intoxicating liquor.
>
> The defendant by the language of the policy excluded from its coverage injury suffered by the insured while he had present in his body intoxicating liquor. This was the contract between the parties, and the defendant was entitled to avoid liability upon proof that the insured had in his body, physically present, any quantity of intoxicating liquor, regardless of whether he thereby became intoxicated or not. The defendant was entitled to have the instruction to the jury confined to the language of the policy. Payne v. Stanton, 211 N.C. 43, 188 S.E.
>
> 629.

The defendant's exceptions to the charge in the respects noted must be sustained, necessitating a new trial.

New trial." (Emphasis supplied)

33. In Heltsley v. Life & Casualty Ins. Co. [299 Ky. 396 t(1945)], the Court of Appeal observed as follows in regard to the similar clause in a Contract of Insurance:

> "The exact language of the policy provision under consideration is:'***nor does it cover loss or injury sustained by the insured while he was physically present in his body alcoholic or intoxicating liquors in any degree. ***That this provision is not contrary to public policy; that it is not susceptible of double construction or of an interpretation that the extent or degree of intoxication is material; that it is not unreasonable, and that it does not constitute a limitation unavailable to appellee, is amply affirmed by the authorities both local and foreign. In Robinson & Son v. Jone, 254Ky.637, 72 S.W.2d 16, 19, it is said: 'It is known of all men that the drinking of intoxicating liquor, though it be not done to the extent of actual intoxication, begets a spirit of recklessness, and is responsible for numerous accidents.' And in Equitable Life Assurance Society of United States v. Adams, 259 Ky. 726, 83 S.W.2d 461, 464, 'It is the duty of the courts to take the words of an insurance policy as they are found in it, and as persons with usual and ordinary understanding would construe them when used to express the purpose for which they were employed,***.

34. The Supreme Court of Alabama in Standard Life & Acc. Ins. Co. v. Jones 94 Ala. 434, decided in November, 1891, had occasion to consider the question as to whether the phrase "under the influence of intoxicating drinks" had a different connotation in law from that it carried in common parlance. No doubt, it was a case whether a workman was covered by an insurance policy and he met with an accidental death while he was discharging his duty as a Swtichman. We find the following

discussion:

> "...To be under the influence of whiskey, is not necessarily to be intoxicated. One may well be said to be under the influence of strong drink when he is to any extent affected by it--when he feels it; and this condition may result from potations so small as not to impair any mental or physical faculty, and when the passions are not visibly excited, nor the judgment or any physical function impaired. This is very far short of intoxication, which is the synonym of inebriety, drunkenness, implying or evidenced by undue and abnormal excitation of the passions or feelings, or the impairment of the capacity to think and act correctly and efficiently....
>
> But the phrase "under the influence of intoxicating drinks," as used in policies of this character and in this connection, has a legal significance, differing from the popular one, and implying such influence as in reality amounts to intoxication. In a well considered case, it was said by the Supreme Court of New York, that "to be under the influence of intoxicating liquors, within the meaning of this policy, the insured must have drunk enough to disturb the action of the physical or mental faculties, so that they are no longer in their natural or normal condition. When, therefore, the defendant imposed upon persons insured by it the condition that it would not be liable when death or injury should happen while the insured was under the influence of liquor, the intention manifestly was to require the insured to limit its use in such a degree as that he retained full control over his faculties of mind and body...."

35. Therefore, an analysis of the principles as laid down both by the English Courts/Scottish Court and decisions from the United States would persuade us to hold as follows:

> The exclusion from the liability of the Insurer would depend upon the exact terms of the Insurance. We are in this case not dealing with a third-party claim. Under the aegis of the Motor Vehicles Act, we are not oblivious of the provisions of Section 149(2) in the unamended provisions of the Motor Vehicles Act,1988 which are captured in Section 150 of the present avtaar after the amendment as regards the defences available to the Insurer regarding such claims. We are dealing with a case of own damage and the clause which extricates the Insurer on the basis of the driver being under the influence of alcohol, inter alia.
>
> We would find that the there are two variants. One of the models is represented by American cases where all that required is that the person has in his body alcohol in any degree. Under the said model, it need not influence his conduct. Under the said model, it is not necessary for the Insurer to show that person concerned was intoxicated or under the influence of intoxicated liquor.

36. This brings us to the other model which model is applicable in the facts of the case, viz., the insurer must show that the person driving the vehicle was under the influence of liquor. The contrast between the models is stark and perceptible. As far as the exclusion of the nature we are

concerned with, which requires driving of the vehicle by a person under the influence of intoxicating liquor, it would appear to be clear that mere presence of alcohol in any small degree would not be sufficient. This is for the reason that the court cannot re- write the contract and hold that the mere presence of the alcohol, in the slightest degree, is sufficient to exclude the liability of the insurer. It requires something more, namely, that the driver of the vehicle was at the time of the accident acting under the influence of intoxicating liquor. Now it is clear that the decisions of the English Courts are closer home and of assistance in the laying down of the law. It must be shown that in the facts and circumstances of each case that the consumption of liquor had, if not caused the accident, which undoubtedly would bring the accident within the mischief of the clause but at least contributed in a perceptible way to the causing of the accident.

SECTION 185 OF THE MOTOR VEHICLES ACT, 1988

37. It is at this juncture that it becomes necessary to notice and deal with the argument of the respondent under Section 185 of the Motor Vehicles Act. Section 185 of the Motor Vehicles Act, 1988 reads as follows:

> "185. Driving by a drunken person or by a person under the influence of drugs.—Whoever, while driving, or attempting to drive, a motor vehicle,—
>
> (a) has, in his blood, alcohol exceeding 30 mg. per 100 ml. of blood detected in a test by a breath analyser, or
>
> (b) is under the influence of a drug to such an extent as to be incapable of exercising proper control over the vehicle, shall be punishable for the first offence with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both; and for a second or subsequent offence, if committed within three years of the commission of the previous similar offence, with imprisonment for term which may extend to two years, or with fine which may extend to three thousand rupees, or with both.

Explanation.—For the purposes of this section, the expression "drug" or drugs specified by the Central Government in this behalf, by notification in the Official Gazette, shall be deemed to render a person incapable of exercising proper control over a motor vehicle."

38. Our attention was also drawn by Mr. Gopal Sankaranarayan, learned Senior Counsel for the respondent to the provisions under Sections 203 and 204 of the Motor Vehicles Act. Section 203 as was extant as on the date of the accident read as follows:

> "203. Breath tests.—(1) A police officer in uniform or an officer of the Motor Vehicles Department, as may be authorised in this behalf by that Department, may require any person driving or attempting to drive a motor vehicle in a public place to provide one or more specimens of breath for breath test there or nearby, if such police officer or officer has any reasonable cause to suspect him of having committed an offence

under section 185:

Provided that requirement for breath test shall be made (unless, it is made) as soon as reasonably practicable after the commission of such offence.

(2) If a motor vehicle is involved in an accident in a public place and a police officer in uniform has any reasonable cause to suspect that the person who was driving the motor vehicle at the time of the accident, had alcohol in his blood or that he was driving under the influence of a drug referred to in section 185 he may require the person so driving the motor vehicle, to provide a specimen of his breath for a breath test:—

(a) in the case of a person who is at a hospital as an indoor patient, at the hospital,

(b) in the case of any other person, either at or near the place where the requirement is made, or, if the police officer thinks fit, at a police station specified by the police officer:

Provided that a person shall not be required to provide such a specimen while at a hospital as an indoor patient if the registered medical practitioner in immediate charge of his case is not first notified of the proposal to make the requirement or objects to the provision of a specimen on the ground that its provision or the requirement to provide it would be prejudicial to the proper care or treatment of the patient.

(3) If it appears to a police officer in uniform, in consequence of a breath test carried out by him on any person under sub-section (1) or sub-section (2), that the device by means of which the test has been carried out indicates the presence of alcohol in the person's blood, the police officer may arrest that person without warrant except while that person is at a hospital as an indoor patient.

(4) If a person, required by a police officer under sub-section (1) or sub-section (2) to provide a specimen of breath for a breath test, refuses or fails to do so and the police officer has reasonable cause to suspect him of having alcohol in his blood, the police officer may arrest him without warrant except while he is at a hospital as an indoor patient.

(5) A person arrested under this section shall while at a police station, be given an opportunity to provide a specimen of breath for a breath test there.

(6) The results of a breath test made in pursuance of the provisions of this section shall be admissible in evidence. Explanation.—For the purposes of this section, "breath test", means a test for the purpose of obtaining an indication of the presence of alcohol in a person's blood carried out, on one or more specimens of breath

provided by that person, by means of a device of a type approved by the Central Government, by notification in the Official Gazette, for the purpose of such a test. "

39. Section 204 again as was in existence on the date of the accident (12.12.2007) read as follows:

"204. Laboratory test.—(1) A person, who has been arrested under section 203 may, while at a police station, be required by a police officer to provide to such registered medical practitioner as may be produced by such police officer, a specimen of his blood for a Laboratory test, if—

(a) it appears to the police officer that the device, by means of which breath test was taken in relation to such person, indicates the presence of alcohol in the blood of such person,

(b) such person, when given the opportunity to submit to a breath test, has refused, omitted or failed to do so:

Provided that where the person required to provide such specimen is a female and the registered medical practitioner produced by such police officer is a male medical practitioner, the specimen shall be taken only in the presence of a female, whether a medical practitioner or not.

(2) A person while at a hospital as an indoor patient may be required by a police officer to provide at the hospital a specimen of his blood for a laboratory test:—

(a) if it appears to the police officer that the device by means of which test is carried out in relation to the breath of such person indicates the presence of alcohol in the blood of such person, or

(b) if the person having been required, whether at the hospital or elsewhere, to provide a specimen of breath for a breath test, has refused, omitted or failed to do so and a police officer has reasonable cause to suspect him of having alcohol in his blood:

Provided that a person shall not be required to provide a specimen of his blood for a laboratory test under this sub-section if the registered medical practitioner in immediate charge of his case is not first notified of the proposal to make the requirement or objects to the provision of such specimen on the ground that its provision or the requirement to provide it would be prejudicial to the proper care or treatment of the patient.

(3) The results of a laboratory test made in pursuance of this section shall be admissible in evidence.

Explanation.—For the purposes of this section, "laboratory test" means the analysis of a specimen of blood made at a laboratory established, maintained or recognised by the Central Government or a State Government."

40. We may also incidentally notice Section 205 of the MV Act. It reads as follows:

> "205. Presumption of unfitness to drive.—In any proceeding for an offence punishable under section 185 if it is proved that the accused, when requested by a police officer at any time so to do, had refused, omitted or failed to consent to the taking of or providing a specimen of his breath for a breath test or a specimen of his blood for a laboratory test, his refusal, omission or failure may, unless reasonable cause therefor is shown, be presumed to be a circumstance supporting any evidence given on behalf of the prosecution, or rebutting any evidence given on behalf of the defence, with respect to his condition at that time."

> 41. The Motor Vehicles Act, 1988 repealed the Motor Vehicles Act 1939. It is important to notice certain provisions of the said Act also.

Section 117 can be referred to as the provision corresponding to Section 185 of the present Act with significant differences. Section 117 as it originally stood read as follows:

> "117.Driving while under the influence of drink or drugs.- Whoever while driving or attempting to drive a motor vehicle is under the influence of drink or a drug to such an extent as to be incapable of exercising proper control over the vehicle shall be punishable for a first offence with imprisonment for a term which may extend to three months or with fine which may extend to five hundred rupees, or with both, and for a subsequent offence if committed within three years of the commission of a previous similar offence with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both."

> 42. This provision came to be substituted by Act 27 of 1977. After its substitution as aforesaid Section 117 the lawgiver ushered in a stricter restriction in regard to drunken driving. It read as follows:

> "117. Driving by a drunken person or by a person under the influence of drugs .

> Whoever, while driving or attempting to drive, a motor vehicle or riding or attempting to ride, a motor cycle, -

> (a) Has, in his blood, alcohol in any quantity, howsoever small the quantity may be, or

> (b) Is under the influence of a drug to such an extent as to be incapable of exercising proper control over the vehicle, Shall be punishable for the first offence with

> imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees or with both; and for a second or subsequent offence, if committed within three years of the commission of the previous similar offence, with imprisonment for a term which may extend to two years, or with fine which may extend to three thousand rupees, or with both.

In fact, prior to present Section185 of the Motor Vehicles Act being substituted by Act 54 of 1994, Section 185 was similarly worded as Section 117 of the Motor Vehicles act 1939, as substituted in 1977.

43. It will be noticed immediately that the decision of this Court rendered in Bachubhai Hassanalli Karyani v. State of Maharashtra6 relied upon by the respondent arose under Section 117 of Motor Vehicles Act, 1939 which 6 (1971) 3 SCC 930 required not merely that the person was under

> the influence of drink but it was to be to such an extent as to render him incapable of exercising proper control over the vehicle.
>
> Section 117 after its substitution in 1977, on the other hand, carved out a criminal offence insofar as alcohol is concerned, on the basis that the driver had in his blood, alcohol in any quantity, however small the quantity was. This was similar in fact to the clauses in the contracts of insurance obtaining in the United States which we have referred to (supra). No doubt, this became associated with the presence of the smallest quantity of alcohol in the blood. As far as Section 185 of the Motor Vehicles Act, 1988 is concerned, the offence is committed if there is a specified amount of alcohol found namely, 30 mg in 100 ml. of blood.
>
> In this regard, we may profitably refer to the law in the United Kingdom corresponding to the Motor Vehicles Act and also an early decision of the Bombay High Court interpreting a statute dealing with the issue.
>
> THE U.K. ROAD TRANSPORT TRAFFIC ACT, 1930 AND LATER ENACTMENTS
>
> 44. In the U.K. Road Transport Traffic Act, 1930, Section 15(1) made it an offence to drive or attempt to drive or to be in charge of a motor vehicle while under the influence of drink or drug 'to such an extent as to be incapable of having proper control of the vehicle'.

Section 11 provided for punishment for dangerous driving. In (1931) 22 Cr. App 172, the appellant was convicted under Section 15 and acquitted under Section 11. The Court held as follows:

> "... We have considered that finding with great care, but, upon the whole, and not without hesitation, we have come to the conclusion that. notwithstanding the summing up, it is ambiguous.

> The jury ought to have been asked whether they meant-by their last answer that the appellant was under
>
> the influence of drink to such an extent as to be incapable of having proper control of the vehicle, and we cannot reject the view that, if that question had been pointedly put, they might have answered in the negative or said that they were not agreed on that point. ..."
>
> 45. This view appears to hold good even now. In other words, being under the influence of alcohol is different from being under the influence of alcohol to the extent as declared in such a provision. However statutory changes that occurred make it irrelevant.
>
> 46. In this regard, it is pertinent to note the decision of the High Court of Bombay reported in Emperor vs. Rama Deoji7. Rule 27-A of the Motor Vehicles Rules provided that "no person shall, when intoxicated, drive a motor vehicle

7 AIR 1928 BOM 231 in a public place." The contention raised by the accused was that his conviction was improper as the charge actually was merely one of being under the influence of liquor. There is a distinction between being under the influence of liquor and being intoxicated, it was contended. The Court held, inter alia, as follows:

> "4. In our opinion the word "intoxicated" cannot be read in this very extreme sense. It in fact corresponds with the word "drunk" that is generally used in similar English enactments. No doubt, there has been a good deal of controversy in England as to when a person can properly be said to be drunk, and a distinction has been made between his being drunk and his being merely under the influence of liquor. I do not, however, think it is necessary for us in this particular case to go into any controversy of that kind. The fact remains that the words "under the influence of liquor" do sufficiently represent the meaning of the word "intoxicated," except that it may be said that the latter word expresses a degree of influence which is not sufficiently expressed in the words "under the influence of liquor." But this question of degree is one that is at any rate involved in the words; and if the accused intended to assert that he was not under the influence of liquor to a degree that really mattered in regard to his exercising due care and judgment in driving the car, then that should have been stated by the accused clearly, so as to raise an issue on the point. On the contrary he pleaded guilty; and in view of the fact that his act in suddenly swerving was one of extreme rashness, as admitted by Mr. Bhandarkar himself, the circumstances clearly point to the accused's understanding that he was pleading guilty to a degree of intoxication which would bring the case under this rale. There has, in our opinion, been no misapprehension of the accused, so as to justify our holding that he did not plead guilty to a breach of this particular rule." (Emphasis supplied)

47. The Road Traffic Act, 1960 repealed the Act in 1930. Section 6(1) of the 1960 Act penalised driving by a person who was unfit to drive through drink or drugs. Section 6(6) reads as follows:

"6(6) In this section "unfit to drive through drink or drugs" means under the influence of drink or a drug to such an extent as to be incapable of having proper control of a motor vehicle." By the Road Traffic Act, 1962, however unfitness was linked with being "impaired".

48. For the first time, objective scientific testing became the basis for the offence of driving while having drunk alcohol in 1967 under the Road Safety Act, 1967. Section 1 penalised driving on a road or other public place having consumed alcohol in such quantity that its proportion in the blood, as ascertained through the blood test, exceeded the prescribed limit, which was provided as 80 mg. of alcohol in 100 ml. of blood (0.08 %). Thereafter, the Road Safety Act, 1988 came into force.

49. The provisions of relevance in the latest enactment, that is the Act of 1988 are Sections 3A, 4 and 5. Section 3A, inserted with effect from 01.07.1992, reads as follows:

"3A. Causing death by careless driving when under influence of drink or drugs.

(1) If a person causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, and—

a) he is, at the time when he is driving, unfit to drive through drink or drugs, or

b) he has consumed so much alcohol that the proportion of it in his breath, blood or urine at that time exceeds the prescribed limit, or ba) he has in his body a specified controlled drug and the proportion of it in his blood or urine at that time exceeds the specified limit for that drug, or

c) he is, within 18 hours after that time, required to provide a specimen in pursuance of section 7 of this Act, but without reasonable excuse fails to provide it, or

d) he is required by a constable to give his permission for a laboratory test of a specimen of blood taken from him under section 7A of this Act, but without reasonable excuse fails to do so, he is guilty of an offence.

(2) For the purposes of this section a person shall be taken to be unfit to drive at any time when his ability to drive properly is impaired.

(3) Subsection (1)(b),(ba),(c)and

(d)above shall not apply in relation to a person driving a mechanically propelled vehicle other than a motor vehicle." (Emphasis supplied) Sections 4(1) and 4(5) read as follows:

"4. Driving, or being in charge, when under influence of drink or drugs.

(1) A person who, when driving or attempting to drive a mechanically propelled vehicle on a road or other public place, is unfit to drive through drink or drugs is guilty of an offence.

xxx xxx xxx (5) For the purposes of this section, a person shall be taken to be unfit to drive if his ability to drive properly is for the time being impaired." (Emphasis supplied) Section 5 reads as follows:

"5. Driving or being in charge of a motor vehicle with alcohol concentration above prescribed limit.

(1) If a person –

(a) Drives or attempts to drive a motor vehicle on a road or other public place, or

(b) Is in charge of a motor vehicle on a road or other public place, After consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he is guilty of an offence.

(2) It is a defence for a person charged with an offence under subsection (1)(b) above to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit.

(3) The court may, in determining whether there was such a likelihood as is mentioned in subsection (2) above, disregard any injury to him and any damage to the vehicle." (Emphasis supplied)

50. Section 3A was inserted w.e.f. 01.07.1992.

A perusal of Sections 3A, 4 and 5 of the Road Traffic Act, 1988, and comparing it with Section 185 of the MV Act, 1988, yields the following results:

The provision, in the British Act, which is comparable to Section 185 of the Indian Act, is Section 5. This is for the reason that Section 5 also penalises driving or attempting to driving a motor vehicle on a road or other public place, after consuming alcohol and when the proportion in his breath is in excess of the

prescribed limit. There is no provision in the Motor Vehicles Act, 1988 corresponding to Section 4 of the Road Traffic Act. In other words, in the U.K., apart from driving or attempting to drive a vehicle, having consumed alcohol, with a blood alcohol level in excess of the prescribed percentage, being an offence, it is also an offence to drive or attempt to drive a vehicle on a road or a public place, if the person is unfit to drive due to drink or drugs. Section 4(5) of the Road Traffic Act, 1988, makes it clear that a person shall be taken as unfit, if his ability to drive is for the time being, impaired. Section 6B, in fact, provides for a preliminary impairment test, which primarily consists of tasks to be performed by the person driving.

What we are pointing out is, a person under the law in England, could, if by consumption of alcoholic drink, be impaired, in his ability to drive properly, then, irrespective of whether he has a blood alcohol level in excess of or below the prescribed level, he would commit an offence. The same principle animates Section 3A, which speaks about an offence upon death following an accident, when he was driving the vehicle, while being unfit to drive through consumption of alcoholic drink. Here again, Section 3A(2) makes it clear that unfitness to drive, on account of consumption of liquor, is predicated on the driver's ability to drive properly, being impaired. This is also to be determined by the impairment test, apparently held under Section 6B. We would find that a person can be said to be under the influence of alcohol, if his faculties are so disturbed that his driving abilities, is impaired. This concept of law is essentially following up on what has been laid down by the court in in Mair (Administratrix) supra. Cases can arise where there is a clause of the nature we are dealing with, viz., excluding the liability of the insurer, when the driver is under the influence of alcohol, in vastly different circumstances. A 21-year-old, who is otherwise licenced to drive a vehicle, may experiment with drinking in the company of his friends. He may consume a small quantity of liquor. This may not satisfy the requirement of alcohol present in the blood (30 mg./100 ml. = 0.03%). However, it is unquestionable that the impact of the drink on the person, may be demonstrated to be that he is unable to drive in the manner in which he would have driven, had he not taken that small drink. In such a case, to insist that he cannot be under the influence of alcohol, unless, he has in his blood, the requisite percentage of alcohol under Section 185 of the MV Act, would be to make a new bargain for the parties and also to rewrite the contract. To be under the influence of alcohol, in other words, must be understood as, a question going to the facts and a matter to be decided with reference to the impact of consumption of alcohol on the particular driver. Yet another example will throw light on a seemingly vexed issue. A person, who drinks on an empty stomach, would necessarily have a faster rate of the alcohol making its presence in the blood, and consequently, in the brain. A person, on the other hand, who has had food along with the alcohol, may manifest the effect of alcohol later. The effects of drinking alcohol, in terms of external signs, have been described by Modi in his work - Modi's Medical Jurisprudence and Toxicology. They are as follows:

> "In order to ascertain whether a particular individual is drunk or not, a medical practitioner should bear the following points in mind:
>
> 1. The quantity taken is no guide.
>
> 2. An aggressive odour of alcohol in the breath, loss of clearness of intellect and control of himself, an unsteady gait, a vacant look, dry and sticky lips, congested eyes, sluggish and dilated pupils, increased pulse rate, an unsteady and thick voice, talking at random and want of perception of the passage of time, are the usual signs of drunkenness.
>
> However, the smell of an alcoholic drink can persist in the breath for many hours after the alcohol has been excreted from the body, as it is due to non-alcoholic constituents (congeners) in the drink."
>
> 51. If in a case, without there being any blood test, circumstances, associated with effects of consumption of alcohol, are proved, it may certainly go to show that the person who drove the vehicle, had come under the influence of alcohol. The manner, in which the vehicle was driven, may again, if it unerringly points to the person having been under the influence of alcohol, be reckoned. Evidence, if forthcoming, of an unsteady gait, smell of alcohol, the eyes being congested, apart from, of course, actual consumption of alcohol, either before the commencement of the driving or even during the process of driving, along with the manner in which the accident took place, may point to the driver being under the influence of alcohol.

It would be a finding based on the effect of the pleadings and the evidence.

52. A conspectus of the aforesaid provisions would lead us to the following conclusions:

> Section 185 of the Motor Vehicles Act creates a criminal offence. The short title of Section 185 undoubtedly proclaims that it purports to deal with driving by a drunken person or by a person under the influence of drugs. The offence as far as driving by a drunken person is concerned, was built around breach of an objective standard, viz., the presence of alcohol in the driver in excess of 30 mg per 100 ml. of blood detected in a test of breath analyser. The Section mandates the proving of the objective criteria of presence of alcohol exceeding 30 mg per 100 ml. of blood in a test by a breath analyser. It is here that Section 203 of the Motor Vehicles Act becomes apposite.

It empowers the police officer to require any person driving or attempting to drive motor vehicle in a public place to provide one or more specimen of breath for breath test, if Police Officer or Officer of Motor Vehicle Department has reasonable cause to suspect the driver has committed an offence u/s 185. Section 203(2) deals with the situation where the vehicle is involved in an accident in a public place. In such circumstances, on a Police Officer in uniform entertaining any reasonable cause to suspect that the person driving the vehicle, at the time of the accident, had alcohol in his blood, inter

alia, he may require the person to provide specimen of his breath in the breath test in the manner provided. Section 203(6) declares that the result of the breath test made under Section 203 shall be admissible in evidence. Section 203 contemplates arrest without warrant being effected, if the test indicated the presence of alcohol in the breath test. Section 204 follows up on a person who is arrested under Section

203. It, inter alia, provides that a person who has been arrested under Section 203 is to provide to such medical practitioner as may be produced by such police officer, a specimen of his blood for a laboratory test, if either it appears to the police officer that the breath test reveals the presence of alcohol in the blood of such person or such person when given the opportunity to submit to a breath test, has refused, omitted or failed to do so. The result of the laboratory test is also made admissible.

53. It is clear that Section 185 deals with driving or attempting driving of a motor vehicle a person with alcohol in excess of 30 mg per 100 ml in blood which is detected in a test of breath analyser. Being a criminal offence, it is indisputable that the ingredients of the offence must be established as contemplated by law which means that the case must be proved beyond reasonable doubt and evidence must clearly indicate the level of alcohol in excess of 30 mg in 100 ml blood and what is more such presence must be borne out by a test by a breath analyser. We may also notice that with effect from 01.09.2019, the following words have been added to Section 185, that is “or in any other test including laboratory test”.

54. It is to be noticed that this Court had occasion to deal with the question whether the prosecution under section 185 can succeed in the absence of a test by a breath analyser. In the decision reported in State through PS Lodhi Colony v. Sanjeev Nanda8, the accused 2012 (8) SCC 450 escaped from the scene of occurrence. He could not, therefore, be subjected to breath test analyser instantaneously or to provide a specimen of his breath for a breath test or a specimen for his blood for a laboratory test. Dealing with these provisions, K.S. Radhakrishnan, J., in his concurring judgment has held as follows:

> “82. The accused, in this case, escaped from the scene of occurrence, therefore, he could not be subjected to breath analyser test instantaneously, or to take or provide specimen of his breath for a breath test or a specimen of his blood for a laboratory test. The cumulative effect of the provisions, referred to above, would indicate that the breath analyser test has a different purpose and object. The language of the above sections would indicate that the said test is required to be carried out only when the person is driving or attempting to drive the vehicle. The expressions “while driving” and “attempting to drive” in the above sections have a meaning “in praesenti”. In such situations, the presence of alcohol in the blood has to be determined instantly so that the offender may be prosecuted for drunken driving. A breath analyser test is applied in such situations so that the alcohol content in the blood can be detected. The breath analyser test could not have been applied in the case on hand since the accused had escaped from the scene of the accident and there was no question of subjecting him to a breath analyser test instantaneously. All the same, the first accused was taken to AIIMS Hospital at 12.29 p.m. on 10-1-1999 when his blood

> sample was taken by Dr Madhulika Sharma, Senior Scientific Officer (PW 16). While testing the alcohol content in the blood, she noticed the presence of 0.115% weight/volume ethyl alcohol. The report exhibited as PW-16/A was duly proved by the doctor. Over and above, in her cross-examination she had explained that 0.115% would be equivalent to 115 mg per 100 ml of blood and deposed that as per traffic rules, if the person is under the influence of liquor and alcohol content in blood exceeds 30 mg per 100 ml of blood, the person is said to have committed the offence of drunken driving.
>
> 83. Further, the accused was also examined in the morning of 10-1-

1999 by Dr T. Milo, PW 10, Senior Resident, Department of Forensic Medicine, AIIMS, New Delhi who reported as follows:

> "On examination, he was conscious, oriented, alert and cooperative. Eyes were congested, pupils were bilaterally dilated. The speech was coherent and gait unsteady. Smell of alcohol was present."
>
> 84. Evidence of the experts clearly indicates the presence of alcohol in blood of the accused beyond the permissible limit, that was the finding recorded by the courts below. The judgments referred to by the counsel that if a particular procedure has been prescribed under Sections 185 and 203, then that procedure has to be followed, has no application to the facts of this case. The judgments rendered by the House of Lords were related to the provision of the Road Safety Act, 1967, the Road Traffic Act, 1972, etc. in UK and are not applicable to the facts of this case."

55. No doubt in the case noted above, the presence of the alcohol content was much more (that is 0.115% than the permissible limit). It is also the case where the accident caused the deaths of six persons. The above view, no doubt, turned on the facts which rendered the taking of the test by breath analyser impossible. It was also found that the first accused had been taken to the All India Institute of Medical Science (AIIMS) at 12.29 p.m. on 10.01.1999 and the blood samples revealed alcohol far in excess of the limit indicated in Section 185. Also, after the judgment, with effect from 01.09.2019, a laboratory test or any other test aids the prosecution to establish a case under section

185.

56. We have set out the provisions of Sections of 185, 203 and 204 to deal with the argument of the parties based on the impact of these provisions, upon the operation of exclusion clause of the Contract of Insurance in a case, which does not involve any third party. The Contract of Insurance, in the present case, is a comprehensive Contract of Insurance dealing with own damage and, no doubt, also third party. What is, however, involved in this case, is the liability alleged with the Insurer under Clause (A), which deals with 'own damage'.

57. In regard to a claim involved in this case as aforesaid, we are of the view that there is nothing in law which would otherwise disentitle the appellant from setting up the case that the exclusion clause would disentitle the respondent from succeeding. As to whether it is a case of driving of the vehicle under the influence of the alcohol is different matter, altogether. The requirement of Section 185 is in the context of a criminal offence. While it may be true that if there is a conviction under Section 185, it would, undoubtedly, fortify the Insurer in successfully invoking Exclusion Clause 2(c), is the reverse also true? We expatiate. If prosecution has not filed a case under Section 185, that would not mean that a competent Forum in an action alleging deficiency of service, under the Consumer Protection Act, is disabled from finding that the vehicle was being driven by the person under the influence of the alcohol. The presence of alcohol in excess of 30 mg per 100 ml. of blood is not an indispensable requirement to enable an Insurer to successfully invoke the clause. What is required to be proved is driving by a person under the influence of the alcohol. Drunken driving, a criminal offence, under Section 185 along with its objective criteria of the alcohol-blood level, is not the only way to prove that the person was under the influence of alcohol. If the Breath Analyser or any other test is not performed for any reason, the Insurer cannot be barred from proving his case otherwise.

58. What we are dealing in this case is, construction of words in a contract between the parties. There is no case for the respondent that the terms of the contract to exclude the liability of the appellant, are in any way illegal. We can without difficulty imagine a circumstance in which the proposition that should the Insurer fail to establish a case in terms of Section 185 BAL (Blood Analyser Test), it would fail, may not be the proper approach to the issue. It is not difficult to contemplate that the accident may take place with the driver being under the influence of alcohol and neither the Breath Test nor the laboratory test is done. A driver after the accident, may run away. A test may never be performed. However, there may be evidence available which may indicate that the vehicle in question was being driven at the time of the accident by a person under the influence of alcohol. It cannot then be said that merely because there is no test performed, the Insurer would be deprived of its right to establish a case which is well within its rights under the contract.

A FEW SCIENTIFIC ASPECTS ABOUT ALCOHOL

59. In Modi's Medical Jurisprudence and Toxicology, 26th Edition, it is, inter alia, stated:

> "Pure ethyl alcohol is a transparent, colourless, mobile and volatile liquid, having a characteristic spirituous odour and a burning taste.
>
> Ethyl alcohol exists in alcoholic beverages in varying proportions. Absolute alcohol (alcohol dehydratum) contains 99.95 percent of alcohol.
>
> Alcohol acts differently on different individuals and also on the same individual at different times. The action depends mostly on the environment and temperature of the individuals and upon the degree of dilution of the alcohol consumed. The habitual drinker usually shows fewer effects from the same dose of alcohol.

> Alcohol acts differently on different individuals and also on the same individual at different times. The action depends mostly on the environment and temperature of the individuals and upon the degree of dilution of the alcohol consumed. The habitual drinker usually shows fewer effects from the same dose of alcohol.
>
> Widmark's Formula.—The basis for calculating the approximate quantity of alcohol in the body, after equilibrium between the blood and tissues has been reached, is by Wid- mark's formula:
>
> a = cpr
>
> (i) a represents the amount of alcohol expressed in grams.
>
> (ii) c, the amount of alcohol in grams per kg estimated in the blood.
>
> (iii) p is the weight of the person in kg, and
>
> (iv) r is the value obtained by dividing the average concentration of alcohol in the body by the concentration of alcohol in the blood. This is constant and the average is + 0.085 for men and + 0.055 for women.

For a male with a body weight of 69.85 kg and assuming average alcohol content, having 45 mg in the blood or 60 mg/100 mL of alcohol in urine, the minimum amount consumed must be 2 fluid oz of whisky (70 per cent proof = 9.98 g/fluid oz) and with 55 mg in blood or 73 mg/100 mL in urine, the minimum amount of beer consumed must be 1½ pints (ordinary beer = 14.7 g/pint)." "For a male with a body weight of 69.85 kg and assuming average alcohol content, having 45 mg in the blood or 60 mg/100 mL of alcohol in urine, the minimum amount consumed must be 2 fluid oz of whisky (70 per cent proof = 9.98 g/fluid oz) and with 55 mg in blood or 73 mg/100 mL in urine, the minimum amount of beer consumed must be 1½ pints (ordinary beer = 14.7 g/pint)." [We may profitably remind ourselves in Kennedy v. Smith (See paragraph 25 of the judgment), it was a case of one and a half pints of lager (a kind of beer) and it would have meant today 55 mg/100 ml well over the 30 mg/100 ml limit in India.] "... Taken orally, alcohol is quickly absorbed as it is, by simple diffusion mostly from the small intestine, less than 20 per cent from the stomach and circulates in the blood. The absorption of alcohol is facilitated if it is swallowed rapidly in a concentrated solution on an empty stomach, and it is delayed if a weaker solution is slowly drunk while the stomach is full of food; particularly, if it is fatty or contains much proteins. Seventeen to twenty per cent of ingested alcohol may not be absorbed in the blood stream if there is food in the stomach. The rate of absorption of 6 per cent alcohol is 4.7mL/minute. Even drinks mixed with carbonated soda increase absorption. Milk is a potent factor in delaying the absorption of alcohol. Alcohol reaches its maximum concentration in the blood within approximately 30 minutes to about 2 hours after it is taken and thus concentration is ordinarily proportional to the amount consumed. While the concentration of alcohol that is excreted in the urine reaches its maximum level in about 20- 25 minutes later than in the blood, the range of the fall is parallel to the fall in the level of alcohol in the blood. The concentration of alcohol in the urine is usually 20-30 per cent higher than that in the

blood and is fairly constant. The distribution of alcohol after absorption is throughout the fluids and tissues of the body in proportion to their water content and is the least in fat and bones.

The peculiar feature of metabolism of alcohol is that a fix quantity of alcohol is metabolised in unit time. This is called the zero order kinetic of metabolism (most of the drugs are metabolised by first order kinetics where a certain proportion of the drug is metabolised and the absolute quantity metabolised quantity will go on decreasing as the blood level decreases). About 90 per cent of the consumed alcohol is metabolised in the body, chiefly by oxidation in the liver, which contains the enzyme alcohol dehydrogenase @ about 9-15 mL/hour which is equal to about half a peg of whisky. The result is lowering of alcohol in blood by about 12-15 mg/hour.

xxx xxx xxx Alcohol from the blood passes into the alveolar air through the lungs and during the active absorption stage, a breath analysis will give reliable information. ..." (Emphasis supplied)

60. The learned Author discusses about 'acute alcohol intoxication'. He also talks about chronic poisoning of habitual drinker. We may, at once, observe that under the Exclusion Clause, the Court need not be detained by either condition. In other words, it is not necessary for the Insurer to establish that there was acute alcohol intoxication and equally, it need not be shown that the vehicle was driven by a person who was a chronic alcoholic. All that is required is to show that at the time of driving the vehicle, resulting in the accident, the driver was under the influence of alcohol. In this regard, we may notice the following observations of Modi:

> "In order to ascertain whether a particular individual is drunk of not, a medical practitioner should bear the following points in mind:
>
> 1. The quantity taken is no guide.
>
> 2. An aggressive odour of alcohol in the breath, loss of clearness of intellect and control of himself, an unsteady gait, a vacant look, dry and sticky lips, congested eyes, sluggish and dilated pupils, increased pulse rate, an unsteady and thick voice, talking at random and want of perception of the passage of time, are the usual signs of drunkenness. However, the smell of an alcohol drink can persist in the breath for many hours after the alcohol has been excreted from the body, as it is due to non-alcoholic constituents (congeners) in the drink." (Emphasis supplied)

61. We notice that Blood Alcohol Concentration or BAC is, thus, the concentration of alcohol in a person's blood. In India, the permissible BAC level is pegged at 30 mg of alcohol in 100 ml. of blood in Section 185 of the MV Act, 1988. This corresponds to 0.03 percentage of alcohol in the blood, beyond which, it is an offence under Section 185 to drive or attempt to drive as declared. As noticed, BAC is correlated to a number of variables. It is affected by gender and body weight. The male has more water content than a female. On same quantity drunk, the latter builds up greater BAC than the former. BAC is also affected clearly on whether the person drank on an empty stomach or not. The liver metabolises ordinarily a standard drink at the rate of a drink in an hour. The frequency, at which the drinks are taken, impacts the BAC level. Even the genes play their part. THREE REPORTS

62. In the United States of America, in fact, a Report to the Congress on 'Driving under the influence and relating to alcohol limits' given by the Department of Transportation, National Highway Safety Administration, in October, 1992, states as follows, inter alia:

> "EXECUTIVE SUMMARY Current law defines the danger of driving under the influence of alcohol in two ways. First, it is illegal in all states to drive while impaired by alcohol at any BAC level. For example, any person who is observed driving in an unsafe manner and found to have been drinking, can be charged for driving under the influence of alcohol regardless of actual BAC.
>
> In addition, there are basically two types of laws for the driving public that specify BAC limits.
>
> "Presumptive"2 laws state that if an individual is driving at or above a given BAC, it is presumed that the driver is impaired or intoxicated, but the presumption is open to rebuttal in court. "Per se" laws make it illegal by (or in) the act itself to drive if one's BAC is at or over 'a specified BAC. The per se BAC level is 0.10 in 41 states and the District of Columbia and is 0.08 in 5 states. Four states have only a presumptive limit of 0.10. The laws in some states presume that a person is not impaired if their BAC is 0.05 or below.
>
> CHAPTER II. ALCOHOL. EFFECTS The first report to Congress reviewed the scientific literature on the influence of BAC on driver performance and the relationship between BAC level and crashes. The evidence from these two areas was integrated to draw a number of conclusions about alcohol effects and BAC levels, especially those below 0.10. Among the major conclusions were:
>
> • There is no threshold for alcohol impairment, i.e, there is no lower level at which impairment starts, or below which no impairment is found.
>
> • The greater the amount of alcohol, the greater the degree of impairment on a given task, the more functions (or different kinds of tasks) that are impaired, and the greater the risk of a crash." (Emphasis supplied)

63. Therefore, the presumptive laws provide for presumptive limits for alcohol consumption, contravening which, would result in the presumption subject to it being rebuttable, that a person was driving under the influence of alcohol. As of now, in the United States of America, the presumptive limit, which was initially reduced from 0.15 to 0.10, has been further reduced in almost all the States to 0.08. In fact, there are lower BAC (Blood Alcohol Concentration) levels or zero tolerance levels, for under aged drivers.

64. In another paper brought out by the U.S. Department of Transportation in July, 1998, dealing with 'the effects of low doses of alcohol on driving related skills, a review of the evidence', the study used 177 citations. Driving is a multitask skill. Driving involves performance of various tasks. It

includes psycho-motor skills, perception, visual function, information processing, concentrated attention, divided attention, reaction and tracking. The Report finds as follows: "it seems there is no lower threshold level, below which impairment does not exist for alcohol": The conclusion and Recommendations read as follows:

> "CONCLUSIONS AND RECOMMENDATIONS The aim of the present review was to consider alcohol effects on aspects of skilled performance related to driving, with a view to assessing the extent of impairment caused by low doses of alcohol. The evidence reviewed here indicates that alcohol does not uniformly impair all aspects of performance. Areas such as oculomotor function and divided attention performance demonstrate that impairment can occur at BACs as low as 0.02%. It is clear, moreover, that BACs of 0.05% or more impair nearly all of the important components of driver performance. In assessing the minimum BACs required to produce performance decrements relevant to driving, it can be noted that for most of the performance areas discussed here impairment has been reported at BACs between 0.01 and 0.02%. Unfortunately, relatively few studies have investigated the effects of BACs below 0.04%, so that information about the behavioral impairment at BACs below 0.04% is less available than at 0.05% and above. There is sufficient evidence, however, to demonstrate that BACs of 0.05% and more produce impairment of the major components of driver performance: reaction time, tracking, divided attention performance, information processing, oculomotor functions, perception, and other aspects of psychomotor performance. The few studies on alcohol-aggression effects are consistent with frequent reports by police officers of hostile behaviors exhibited by offenders. The present review has worked from the model provided by Moskowitz (1973a,b), which suggested that driving is a time sharing task, the principal components of which are tracking and visual search and recognition. It is clear that BACs of 0.05% or more impair both of these individual skill components and, at lower levels, also impair the combination of these skills in a divided attention situation. Higher BAC levels (for example, those over 0.10%) also show consistent impairment effects. Evidence from studies of alcohol on actual driving tasks demonstrates that driver performance is similarly affected. Thus, the weight of existing empirical evidence is considered sufficient to scientifically justify the setting of legal BAC limits at 0.05% or lower. Research on BACs below 0.05% should be encouraged. As noted, there is extensive evidence of performance impairments at these lower BACs, but further studies would permit better definition of the BAC levels at which impairment first appears for different behavioral areas. ..." (Emphasis supplied)

65. We deem it appropriate also to refer to "Report of the Review of Drink and Drug Driving Law" which was submitted in the year 2010 in the U.K. The Road Safety Act, 1967, makes it an offence in the U.K. to drive inter alia a vehicle with a blood-alcohol concentration in excess of 80 mg. of alcohol per 100 ml. of blood. The Government appointed Sir Peter North, CBE, Q.C. to enquire and submit a Report as to whether there was need to reduce the limit. The Report, inter alia, states as follows:

> "Research findings 3.26. The Centre for Public Health Excellence of the National Institute of Health and Clinical Excellence (NICE) has recently conducted an extensive independent review of the literature which was commissioned by the Department for Transport.34 The review aimed to assess how effective the blood alcohol concentration (BAC) laws are at reducing road traffic injuries and deaths. It also assessed the potential impact of lowering the BAC limit from 80 mg/100 ml to 50 mg/100 ml.

Drink driving and the risk of a road traffic accident 3.29. NICE concluded that there is strong evidence that someone's ability to drive is affected if they have any alcohol in their blood. Studies consistently demonstrate that the risk of having an accident increases exponentially as more alcohol is consumed. Drivers with a BAC of between 20 mg/100 ml and 50 mg/100 ml have at least a three times greater risk of dying in a vehicle crash than those drivers who have no alcohol in their blood. This risk increases to at least six times with a BAC between 50 mg/100 ml and 80 mg/100 ml, and to 11 times with a BAC between 80 mg/100 ml and 100 mg/100 ml.

3.30. Younger drivers are particularly at risk of crashing whenever they have consumed alcohol – whatever their BAC level – because they are less experienced drivers, are immature and have a lower tolerance to the effects of alcohol than older people. Younger drivers may also be predisposed to risk-taking – regardless of whether or not they have drunk alcohol.

Breath testing devices – Non-

evidential, fixed evidential and portable evidential 3.69. The first practical device for the analysis of alcohol in human breath was developed in the USA in the mid-1950s. The Breathalyzer® instrument gained wide acceptance and was used in traffic law enforcement by police officers in the USA, Canada and Australia over many years.93 The Breathalyzer® provided a non-

intrusive way to determine the driver's BAC although European nations showed no interest in this method for forensic purposes and instead determined alcohol in blood as evidence for prosecution of drunken drivers. Interest in Europe in evidential breath-alcohol testing arose in the 1980s when more compact, automated and reliable instruments became available.

In Chapter 4: Drink driving – Conclusions and recommendations, following conclusions have been noted:

> Lowering the current blood alcohol limit from 80 mg/100 ml to 20 mg/100 ml

4.6. As paragraph 1.23 sets out, a blood alcohol concentration (BAC) limit of 20 mg/100 ml is effectively a zero tolerance level. The NICE Report provides clear evidence that a person's ability to drive is affected after consuming any amount of alcohol. A driver who has a BAC of between 20 mg/100 ml and 50 mg/100 ml is at least 3 times more likely to die in a road traffic accident than a person who has no alcohol in their body.

4.7. In consideration of this evidence, there is clearly merit and sense in a general BAC limit, applicable to all, of 20 mg/100 ml. It is also recognised that a limit of 20 mg/100 ml is consistent with the absolutely correct and necessary 'do not drink and drive message'. Indeed, a number of European countries including Sweden, Poland and Belgium have adopted a 20 mg/100 ml, or close to 20 mg/100 ml, BAC limit. The Review also noted with interest the vote in support of a 'zero tolerance' drink drive limit at the Royal College of Nursing's annual conference in April 2010."

66. We may observe here, no doubt that, the age bracket for younger driver appears to be 17-24 years going by para 3.10 of the report. The committee recommended for a reduction of the BAC level to 50 mg of alcohol in 100ml of blood. TWO ARTICLES EFFECT OF ALCOHOL ON BRAIN DEVELOPMENT BY FARHIN PATEL AND PALASH MANDAL

67. "When people consume alcohol, about 20% is absorbed in the stomach and almost 80% is absorbed in the small intestine. Alcohol absorption is related to the two main factors:

a. Concentration of alcohol and b. Heavy meal consumption before drinking.

An empty stomach will fasten the alcohol absorption."

68. "Absorbed alcohol enters the blood stream and is carried all through the body. Upon reaching the body, simultaneously the body works to eliminate it. The 10% of alcohol is removed by the kidneys (urine) and lungs (breath). Left- out alcohol is oxidized by the liver, converting alcohol into acetaldehyde first and then further converted to acetic acid." HOW DOES ALCOHOL ACT AT THE NEUROLOGICAL LEVEL?

69. "Brain chemistry is affected by alcohol through alteration of neurotransmitters. Neurotransmitters are chemical messengers that send out the signals all through the body and control thought processes, behaviour and sensation processes. Neurotransmitters are either excitatory (excite brain electrical motion) or inhibitory (decrease brain electrical motion). Alcohol increases the effects of the inhibitory neurotransmitter GABA in the brain. GABA causes the lethargic movements and garbled speech that often occur in alcoholics. At the same time, alcohol inhibits the excitatory neurotransmitter glutamate, which results in a suppression of a similar type of physiological slowdown. In addition, alcohol also increases the amount of chemical dopamine in the brain centre, which creates the feeling of pleasure after drinking alcohol. Just after a few drinks, the physical effects of alcohol become perceptible. The level of BAC rises when the body takes up alcohol faster than it can release it."

70. In an Article titled "Police officers' detection of breath odors from alcohol ingestion" by Herbert Moskowitz, Marcelline Burns and Susan Ferguson, we note the following:

> "Usually the strength of the odor is categorized as either slight, moderate or strong. Despite the frequent reliance on this clue in officers' investigation of drivers, little objective evidence is available on the probability of successfully detecting, identifying or measuring alcohol odors.

A computer literature search supplemented by examining references in various publications elicited only two studies examining the detectability of breath alcohol odor. The first study was found in a monograph published by Widmark (1932) (German Edition 1932, English Transaltion, 1981). Widmark was a professor at the University of Lund, Sweden and presented data obtained from behavioral testing of 562 drivers arrested for possible driving under the influence of alcohol. The behavioral testing occurred in police stations throughout Sweden, and were performed by more than 150 physicians. The seven behavioral tests included the odor of alcohol on the breath, the Romberg Test of body sway, walking a straight line and turning, finger to finger test, picking up small objects and slurred speech. Each of these items in the behavioural battery was administered to all subjects. Widmark noted that the examination occurred sometime after arrest at the police station and therefore the breath odor would have been during the post absorption stage. No subject whose blood alcohol concentration (BAC) was 0.06% of below had an alcohol breath odor detected by physicians. Between 0.061 and 0.08% BAC, 33% of the drivers were detected as having an odor; between 0.081 and 0.10% BAC, 63% of the drivers were detected; from 0.101 to 0.181% BAC, detections averaged 81%; between 0.181% and 0.260% BAC, detections averaged 92%; and it was only above 0.261% BAC that an alcoholic odor was 100% detected on the breath.

The other reference dealing with the issue was a National Highway Transportation Safety Administration, Department of Traffic (NHTSA/ DOT) pilot study examining cues utilized by officers in detecting drivers under the influence of alcohol (DUI) (Compton, 1985). This was an experimental study where 75 male volunteer drivers were administered ethanol beverages sufficient to produce BACs of either zero or between 0.05 and 0.15%. Consumption was spaced over a 1.5-2h period. After an additional half hour wait, subjects drove a car over a closed course to a check point, where an officer/ observer conversed with the driver and noted among other symptoms whether an alcohol odor was presented. Other symptoms examined were face flushing, slurred speech, eye dilation, demeanor, disheveled hair, poor dexterity and clothes disheveled. The officers then made a determination whether the driver should be detained for further investigation. Drivers with a zero BAC were correctly identified 93% of the time. There were 7% false-positives, i.e. identification of a zero BAC driver as having alcohol odor. Since officers were aware that they were participating in an alcohol study, a 7% false-positive rate is undoubtedly higher than would occur in actual traffic stops. An alcohol odor was detected in drivers with BACs between 0.05 and 0.09% only 39% of the time producing a false negative error rate of 61%. Conversely, 61% of drivers with BACs between 0.10 and 0.15% were detected as emitting an alcohol odor with 39% false negatives, i.e. drivers above 0.10%, not detected. Variability between officers in detecting odor was quite large." (Emphasis supplied) It is not clear whether the odor in the breath was sought to be discerned without any devise.

THE ARGUMENT BASED ON INVESTIGATOR'S REPORT AND THE QUESTION RELATING TO BURDEN OF PROOF

71. Shri Gopal Sankarnarayanan, learned Senior Counsel for respondent contended that the argument of the appellant that the Insurer was saddled with the liability to prove violation of the condition, which is impossible of achievement, is without basis, in the facts of this case. In this regard, he pointed out the contents of the Investigator Report. He pointed out that the Investigation Report would show that the Investigator was very much present in the early morning, and therefore, he had the opportunity to interact with the driver of the car, the Police Officers and the Doctors. The Investigator could have also insisted on getting the test done on the driver. However, despite this opportunity being presented, he has not availed of the same. Thus, it shows that there is no merit in the appellant's contention that the person driving the vehicle was under the influence of alcohol.

72. The relevant portion of the Investigation Report reads as follows:

> "Description of Investigation with regard to accident of above said vehicle:
>
> With regard to above said Accident Claim, I have been deputed by you to investigate the above said claim. In this regard, I went to accident spot at India Gate on 22.12.07 and inspected the car and thereafter went to P.S. Tilak Marg and enquired about said accident from S.I. Mukhtiyar Singh, I.O. of this case. Information Received from S.I. Mukhtiar Singh:
>
> S.I. Mukhitar Singh posted as P.S. Tilak Marg informed me that he received an accident call which was entered in DDR register vide D.D. entry no. 39 A on 22/12/07 in the morning at 5:05 a.m. and thereafter he alongwith the constable Vinod no. 2098/ND left from P.S. Tilak Marg for the accident spot at India Gate and while they reached at the spot they saw a car no. DL1CJ-3577 has been burning and the Addl SHO and fire brigade were present at the spot. He was being informed that the injured were taken to RML Hospital, where is received copy of MLC No. 62213/07 in the name Ruchi Ram Jaipuria S/o C.K. Jaipuria R/o 11.No. 8, Prithvi Raj Road, New Delhi wherein the doctor has mentioned "No Evidence of Fresh injuries" for medical examination and smell of Breath Alcohol (+) and MLC No. 62214/C7 in the name of Aman Bangia S/o Sh. S.K. Bangia r/o 42A, Pkt C, Siddharth Extn. New Delhi — 14 was made by the doctor wherein doctor has mentioned 'No Evidence of Fresh Injuries "for medical examination and smell of Breath Alcohol (+).
>
> Thereafter he again reached at the spot, where constable Anand Prakash No. 1226 /ND posted at P.S. Tilak marg gave his statement with regard to said accident and on the basis of the record of MLC's of injured Mr. Ruchi Ram Jaipuria and Mr. Aman Bangia they have lodged FIR No. 453/07 on 22/12/07 u/s 279/427 IPC as well as u/s 185 of M.V. Act 1988. Copy of said FIR is enclosed herewith and same is annexed as Annexure "A". My observations are as under:

> 1. As per the information received from SI Mukhtiar Singh, and after persuing the FIR No. 453/07 dated 22/12/07 of P.s. Tilak Marg and MLC nos. 62213/07 of Mr. Aman Bangia it has been confirmed that the driver, Mr. Aman Bangal was under influence of alcohol due to which he lost the control and as a result of which the said accident has taken place."

73. An addendum report dated 06.02.2008, is found as follows:

"This is further to my investigation report dated 27/01/08 relating and pertaining to the investigation of the motor claim of vehicle no. DL1CJ-3577 of M/S Pearl Beverages under covemote no.

37669622.

As per FIR no. 453/07 dated 22/12/07 of P.S.Tilak Marg filed in the instant case,.Section 185 of M.V.Act 1988 has also been imposed. As per section 185 of M.V.Act 1988, driving of a vehicle by a drunken driver is an offence under such section and which is punishable with imprisonment. Thus the said vehicle was being driven by it's driver Mr. Aman Bangia, under the influence of alcohol at the time of said accident.. As such' Prima Facie drunkep driving by the driver Mr. Aman Bangia, has been proved.

The insurer may treat the claim as per the policy terms conditions."

74. It must be noted that the Report, thus, indicates that the Investigator was deputed by the appellant. It also suggests that he went to the accident spot on 22.12.2007. The reference to the time being 5.05 A.M. relied upon by the learned Counsel for the respondent as the time at which the Investigator, inter alia, is alleged to have reached the spot, is actually part of the information which the Investigator received from the Sub-Inspector. The Sub- Inspector has informed the Investigator that he received information at 5.05 am and, thereafter, he, along with a Constable, had reached the spot and that he saw the car, which was burning. The only part which makes up the Report, as such, of the Investigator, is his observations. Thus, the Investigator's Report does not appear to suggest that the Investigator had been to the accident site at 05.00 A.M. in the morning and, therefore, had the opportunity to interact with the driver of the vehicle or ensure that the test was conducted to show that the driver was driving under the influence of alcohol. Thus, we repel the contentions of the respondent.

75. On facts, having rejected the argument of the respondent that the surveyor appointed by the appellant was present at the time of the accident or immediately after the accident, we must look at the some of the terms of the insurance policy. The contract provides that the notice shall be given in writing to the insurer immediately after the occurrence of any accidental loss or damage in the event of any claim. The insured has to give all information and assistance as required by the company. It is obviously true that the appellant was intimated on 22.12.2007 which is evident from the fact that investigator did go to the accident spot on 22.12.2007 and inspected the car. The exact time given is however not mentioned in the report. The time at which he went was also not got articulated

through the interrogatory issued by the respondent. It would appear to be a case where the driver of the car not having suffered any fresh injury would not have been available in the hospital. The police authorities obviously did not carry out the blood test or the breath test. As to what transpired in this regard the matter remains a mystery. From the F.I.R. it appears that the informant officer's priority was to take the men out and to take them to the hospital. However, we cannot resist recording our disquiet at the conduct of the police officer in not pursuing the matter in the form of conducting a breath test or other tests and pursuing the matter under Section 185 of the Motor Vehicles Act or by filing of final report. However we desist from saying anything more having regard to the fact that 14 years have gone by.

76. Coming to the question again on burden of proof, insofar as the appellant–insured seeks to establish exclusion of liability is concerned, the burden of proof is upon it, subject to what we hold.

77. In the context of question relating to burden of proof, in the case of this nature, we cannot but notice Section 106 of the Evidence Act. Section 106 of the Evidence Act speaks of the burden of proving facts which are in the special knowledge of the person. Section 106 of the Evidence Act reads as follows:

> "106 Burden of proving facts specially within knowledge - when any fact is specially is within knowledge of any person the burden of proving that fact is upon him."

78. This Section enshrines the principle which conduces to establishing facts when those facts are especially within the knowledge of a party. There can be no doubt this is a salutary provision which applies to both civil and criminal matters also. We do notice V. Kishan Rao (supra), where this Court held as follows:

> "13. Before the District Forum, on behalf of Respondent 1, it was argued that the complainant sought to prove Yashoda Hospital record without following the provisions of Sections 61, 64, 74 and 75 of the Evidence Act, 1872. The Forum overruled the objection, and in our view rightly, that complaints before the Consumer Fora are tried summarily and the Evidence Act in terms does not apply.
>
> This Court held in Malay Kumar Ganguly v. Dr. Sukumar Mukherjee [(2009) 9 SCC 221 : (2010) 2 SCC (Cri) 299] that provisions of the Evidence Act are not applicable and the Fora under the Act are to follow the principles of natural justice (see para 43, p. 252 of the report)."

79. Even if, the Section as such is not applicable to the Consumer Protection Act, there can be no reason why the principle cannot apply to proceedings under the Consumer Protection Act. We may notice a decision of this Court in Shambu Nath Mehra v. State of Ajmer9. Paragraph 11 of the said judgment reads as under:

> "11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that.
>
> It means facts that are pre- eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person 9 AIR 1956 SC 404 to show that he did not commit the crime for which he is tried. These cases are Attygalle v. Emperor [AIR 1936 PC 169] and Seneviratne v. R. [(1936) 3 All ER 36, 49]." (Emphasis supplied)
>
> 80. The same view has been taken in Murlidhar and others v. State of Rajasthan10 .
>
> 81. If we apply the principle of Section 106 of the Evidence Act, would it not produce the following result?

The respondent set up the case that the driver had not consumed any alcohol. In the very next sentence, it is pleaded that further assuming that he had consumed alcohol, as he was not intoxicated the exclusion clause is not attracted. When it came to affidavit evidence, however, the driver has not deposed that he had not 10 AIR 2005 SC 2345 consumed intoxicating liquor. He has only stated that he was neither under the influence of intoxicating liquor or drugs at the time of the accident. In view of the evidence that pointed to the driver smelling of alcohol and the absence of any evidence by even the driver that he has not consumed alcohol and as even found by the National Commission, it would appear to be clear that the car was driven by the driver after having consumed alcohol. In such a case as to what was the nature of the alcohol and what was the quantity of alcohol consumed, and where he had consumed, it would certainly be facts within the special knowledge of the person who has consumed the alcohol. The driver has not, for instance also, once we proceed on the basis that he has consumed alcohol, indicated when he has consumed the alcohol. It would be "disproportionately difficult" as laid down by this Court for the insurer in the facts to have been proved as to whether the driver has consumed liquor on an empty stomach or he had food and then consumed alcohol or what was the quantity and quality of the drink (alcohol content) which would have been circumstances relevant to consider as to whether he drove the vehicle under the influence of alcohol. The driver has merely stated that he was not under the influence of intoxicating liquor and he was in his full senses.

82. It is true, no doubt, there are no interrogatories served on the driver by the appellant. It must be noted here that this Court has laid down that having regard to the nature of the proceeding under the Consumer Protection Act, the proceeding being summary, cross examination be conducted

ordinarily through the modality of interrogatories. In Dr. J.J. Merchant (Dr) v. Shrinath Chaturvedi11 "19. It is true that it is the discretion of the Commission to examine the experts if required in an appropriate matter. It is equally true that in cases where it is deemed fit to examine experts, recording of evidence before a Commission may consume time. The Act specifically empowers the Consumer Forums to follow the procedure which may not require more time or delay the proceedings. The only caution required is to follow the said procedure strictly. Under the Act, while trying a complaint, evidence could be taken on affidavits [under Section 13(4)(iii)]. It also empowers such Forums to issue any commission for examination of any witness [under Section 13(4)(v)]. It is also to be stated that Rule 4 in Order 18 CPC is substituted which inter alia provides that in every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence. It also provides that witnesses could be 11 (2002) 6 SCC 635 examined by the court or the Commissioner appointed by it. As stated above, the Commission is also empowered to follow the said procedure. Hence, we do not think that there is any scope of delay in examination or cross-examination of the witnesses. The affidavits of the experts including the doctors can be taken as evidence. Thereafter, if cross-examination is sought for by the other side and the Commission finds it proper, it can easily evolve a procedure permitting the party who intends to cross-examine by putting certain questions in writing and those questions also could be replied by such experts including doctors on affidavits. In case where stakes are very high and still a party intends to cross-

examine such doctors or experts, there can be video conferences or asking questions by arranging telephonic conference and at the initial stage this cost should be borne by the person who claims such video conference. Further, cross- examination can be taken by the Commissioner appointed by it at the working place of such experts at a fixed time." (Emphasis supplied)

83. Thus, unlike in proceeding in a court, ordinarily the insurers may not be in a position to cross examine. It is no doubt true that since the principle of Section 106 of the Evidence Act only cast the burden on the person who has special knowledge of the facts, apart from the facts, which we have referred to above, viz., where it was consumed, the quality and quantity of alcohol consumed, the time at which it was consumed, whether it was accompanied by food which can clearly be said to be within the knowledge of the person who drove the vehicle, the effects of the drinking by way of signs discernible, after the accident took place, in the facts, cannot be said to be within the knowledge of the driver only. We say this for the reason that according to FIR, the police constable on patrol has purported to describe the happening of the accident and was present at that time. According to his version, he has with the aid of his companion officer helped the driver and the co-passenger out of the vehicle and they were taken to the hospital. At the hospital, in the medical legal report, there is reference to breath of alcohol(+). It is, however, true that the insurer or his agent may not have been given notice at that stage. We also agree that it would not be proper or legal to hold that in such circumstances, the insurer would still be in a position to prove through a breath test or blood test that the driver was under the influence of alcohol. If the driver having regard to the fact did not suffer any fresh injury is discharged from the hospital and goes away, we find it inconceivable as to how the insurer could be at fault for not having a breath or blood test conducted. It may be true that the insurer could have obtained material in the form of affidavit evidence from the police officer or the medical practitioner concerned regarding any other facts regarding consumption of alcohol by

the driver. RES IPSA LOQUITUR

84. The State Commission has applied the principle of res ipsa loquitur. The question to be answered is not whether the driver of the vehicle was negligent. Res ipsa loquitur has been discussed in the decision of this Court in Syad Akbar v. State of Karnataka12 and this is what is held:

> "19. As a rule, mere proof that an event has happened or an accident has occurred, the cause of which is unknown, is not evidence of negligence. But the peculiar circumstances constituting the event or accident, in a particular case, may themselves proclaim in concordant, clear and unambiguous voices the negligence of somebody as the cause of the event or accident. It is to such cases that the maxim res ipsa loquitur may apply, if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the 12 (1980) 1 SCC 30 defendant. To emphasise the point, it may be reiterated that in such cases, the event or accident must be of a kind which does not happen in the ordinary course of things if those who have the management and control use due care. But, according to some decisions, satisfaction of this condition alone is not sufficient for res ipsa to come into play and it has to be further satisfied that the event which caused the accident was within the defendant's control. The reason for this second requirement is that where the defendant has control of the thing which caused the injury, he is in a better position than the plaintiff to explain how the accident occurred. Instances of such special kind of accidents which "tell their own story" of being offsprings of negligence, are furnished by cases, such as where a motor vehicle mounts or projects over a pavement and hurts somebody there or travelling in the vehicle;

one car ramming another from behind, or even a head-on collision on the wrong side of the road. (See per Lord Normand in Barkway v. South Wales Transport Co. [(1950) 1 All ER 392, 399]; Cream v. Smith [(1961) 8 AER 349]; Richley v. Faull [(1965) 1 WLR 1454 : (1965) 3 All ER 109])

20. Thus, for the application of the maxim res ipsa loquitur "no less important a requirement is that the res must not only bespeak negligence, but pin it on the defendant".

85. Thus, it is used in cases of tort and where the facts without anything more clearly and unerringly points to negligence. The principle of res ipsa loquitur, as such, appears to be inapposite, when, what is in question, is whether driver was under the influence of alcohol. It may be another matter that though the principle as such is inapplicable, the manner in which the accident occurred may along with other circumstances point to the driver being under the influence of alcohol. THE FLAWS IN THE IMPUGNED ORDER

86. In the order of the National Commission which is relied upon, the Commission has referred to Modi's Medical Jurisprudence and Toxicology, 24th edition. The Commission finds that in the opinion of the author, the percentage of alcohol in the blood would be 0.2% in case the quantity of alcohol per 100 ml of blood is 200 mg. The finding that a person can be said to be moderately intoxicated if he has 200 mg per 100 ml is an incorrect inference. The person who has such a level of

alcohol would have 0.2% of alcohol. Such a person would clearly be heavily intoxicated. This is clear from a perusal of the table showing the effects in the Manual for Physicians referred to in paragraph 7 of the relied upon order.

87. The further finding that a person with a concentration of 0.15% of alcohol in the blood is regarded as fit to drive a motor vehicle and such percentage happens when he has 150 mg of alcohol per 100ml blood is an observation made based on Modi's Medical Jurisprudence and Toxicology. Modi in his work has in this regard drawn upon the presumptive limit which prevailed in the United States. In the United States, at one point of time, 0.15% of alcohol concentration was the maximum presumptive limit. If the alcohol concentration was found to be in excess of 0.15% unless rebutted by the accused, it was presumed that the driver was under the influence of alcohol. In fact, there was a lower presumptive limit of 0.05% and if the concentration was below this limit it was presumed that the driver was not in the wrong. What is relevant is that following various studies the presumptive limit on the one hand stood lowered in all the states and the maximum presumptive limit was initially reduced to 0.10% and thereafter it was reduced to 0.08%. In India the percentage is 0.03 which is the same as 30 mg in 100 ml of blood. In China and in Sweden, the percentage is still lower. It is 0.02%. In paragraph 6 of the relied upon order reference is made to Lyon's Medical Jurisprudence and Toxicology. Reference is made therein to the policy statement of the American Medical Association and National Safety Council of the USA that 0.10% can be taken as prima facie evidence of alcoholic intoxication and recognising that many individuals are under the influence of 0.05% to 0.10% range. This is at loggerheads with the earlier reference to 0.15% alcohol not rendering a person unfit to drive the motor vehicle unless it is understood as the law at an earlier point of time. The further reference to 0.05% blood alcohol level raising a presumption that a subject was not under the influence of alcoholic beverage is again based on the set of laws in the United States which provided for such a presumption. The National Commission has not considered the fact that along with such presumptive limit, the laws in the United States also further provide that irrespective of the alcohol percentage or BAC level, if the vehicle is not driven safely and a person has consumed alcohol, he is liable to be booked under another set of laws. The observation made in Lyon's Medical Jurisprudence that blood alcohol level of less than 0.10% does not raise a presumption of intoxication is also contrary to the developments under which even the presumptive limit has been reduced to 0.08%. In fact, there is a zero-percentage alcohol level or 0.02% alcohol in most states for the underaged drivers in the United States. Coming to paragraph 7 of the relied upon order, the Commission has referred to the Manual for Physicians in National Drug Dependence Treatment Centre, All India Institute of Medical Sciences, New Delhi. There is in the first-place error in the second classification. Actually, it is intended for a BAC level of 'above 80'. Even in the said classification the actual effects of alcohol consumption are shown as follows – "Noisy, moody, impaired judgement, impaired driving ability" as against the third classification 100 to 200 BAC, the effects of which are – "Electroencephalographic changes begin to appear, Blurred vision, unsteady gait, gross motor in-coordination, slurred speech, aggressive, quarrelsome, talking loudly." The Commission has not referred to the effects of BAC below 80 brought out in the Manual. In the same, the effects are shown as – "euphoria, feeling of relaxation and talking freely, clumsy movement of hands and legs, reduced alertness but believes himself to be alert." The relied upon order also shows disinclination to accept views expressed in Modi's Medical Jurisprudence and Toxicology on the basis of the opinion of All India Institute of Medical Sciences which is allegedly collaborated by the

opinion expressed in Lyon's Medical Jurisprudence and Toxicology. The Commission in the said case, which did not deal with a case of driving after consuming liquor, found the limits relevant as fixed in various countries. The quantity of alcohol allowed in the USA is stated to be not above 100 mg in 100 ml of blood. In fact, in the USA where it also used to be 100mg in 100 ml, it has now further been reduced to 0.08% corresponding to 80 mg in 100 ml.

88. We also find that the NCDRC was in error in conflating the requirement under Section 185 of the Motor Vehicles Act, with that under the exclusion clause in the contract of insurance in question.

THE FIR

89. The Report is based on a statement given by a Police Constable Anand Kumar. His statement would show that as the Constable posted at the Police Station, Tilak Marg, New Delhi, on 21/22.12.2007, he and another Constable were on patrolling. At about 02.25, he on his motorcycle reached c-hexagon, Zakir Hussain Marg. He saw the driver of the car No. DL-1CJ-3577 (the car in question), came from the Nizamuddin side towards the Zakir Hussain Marg, India Gate, in a very rash, negligent way and at a very high speed. Due to very high speed, this car got out of control and hit at a massive force with a footpath of c-hexagon, Dr. Zakir Hussain Marg, Children Park, India Gate, electric pole and the wall of the Children park and got overturned. The car caught fire. He along with his associate, a Home Guard, brought the driver Shri Aman Bangia and his associate out of the said car, after great efforts and reported about the incident to wireless opp. (must be operator) D-56 of Police Station, through wireless. Vehicles of the fire brigade, PCR Van and Additional SHO Van, came to the spot. He reports that the accident occurred due to the rash and negligent driving. FIR shows that the Sub- Inspector, on the basis of the said information, which he recorded, goes to the site of the accident. It is recorded in the FIR further that the Add/SHO and the vehicles of the fire brigade were all so present for controlling the fire. The PCR van, it is stated, had taken away the accused to the Ram Manohar Lohia Hospital. The Sub-Inspector goes to the Hospital. He received the MLC of the driver of the car and the co- passenger. In the same, the Doctors have reported that there is no evidence of fresh injury and smell of alcohol (+). Virtually, the same report is made about both the driver and the co-passenger. The age of the driver is shown as 27 years. It was further recorded that a case under Section 279/427 of the IPC and Section 185 of the MV Act had been committed. The date and time of the occurrence is again shown as 22.12.2007 at about 02.25.

90. This FIR is FIR No. 453 of 2007. The proceedings of the Metropolitan Magistrate dated 27.08.2011 would show that for the offence under Section 279 of the IPC the charge was separately framed against the driver of the car and he voluntarily pleaded guilty. He was convicted under Section 279 of IPC and sentenced to pay a fine of Rs.1,000/- with, no doubt, a default clause.

91. A perusal of the Order of the State Commission would show that the FIR and the Medico Legal Case sheet has been produced by the respondent itself.

92. There can be no doubt that the respondent itself sought to rely on the FIR and the Medico Legal Case (MLC). We have noticed its contents. The FIR has been prepared on the basis of the Report of the Police Officer. The use of the FIR in criminal case is to be distinguished from its employment in

a consumer case. This is so, in particular, when the FIR is relied upon by the complainant himself. It is noteworthy further that though in the complaint, it was contended that the Police had lodged the FIR under Section 185 of the Motor Vehicles Act besides Section 279/427 of IPC but no charge-sheet had been filed till the date of the complaint, meaning thereby that the Police, after investigating the case, could not find any evidence to prosecute the driver for any of the offences, it must be noticed that the complaint is of the year 2009 and it seen dated 04.03.2009, the case of the respondent that there was no evidence to prosecute the driver for any of the offences, is falsified by the driver pleading guilty in regard to at least one of the offences, viz., the offence under Section 279 of IPC, which took place, apparently, during the pendency of the complaint before the State Commission and the State Commission has taken notice of this development.

93. As far as MLC is concerned, in the complaint filed by the respondent, there is no dispute that the MLC contained reference to the driver and the co-passenger smelling of alcohol.

94. At this juncture, it is necessary to notice the case set up by the respondent. It expressly sets up the case that the person driving the vehicle had not consumed any alcohol. The very next sentence, no doubt, sets up the alternate case, which is that further assuming that he had consumed alcohol, the case would not fall under the Exclusion Clause, as he was, in any case, not intoxicated.

95. It is further noteworthy that PW1, the Company Secretary of the respondent, has, in is his Affidavit evidence, stated that under Section 185 of the MV Act, a certain percentage of alcohol is to be found before a person is to be prosecuted for the offence of drunken driving. The law does not prohibit driving after consuming liquor and all that is prohibited is, that the percentage of liquor should not exceed 30 mg. per 100 ml. of blood. Therefore, the understanding appears to be that only in circumstances, where the act of driving, having consumed liquor, attracts the wrath of Section 185 and an offence is committed thereunder, that the opprobrium of the Exclusion Clause in the Contract of Insurance, for own damage, is attracted.

96. The Affidavit of PW2, the driver himself, would show that he does not depose that he had not consumed liquor as was the case in the complaint. Instead, he deposes only that he was neither under the influence of intoxicating liquor or drugs at the time of the accident. He further deposed that he was in his full senses and capable of exercising proper control over the said vehicle. Even, at the stage of the deposition through affidavit, which appears to have been filed in 2010, he reiterates that the case in FIR No. 453 of 2007, was falsely registered. The case pending against him in the Court of the Metropolitan Magistrate, New Delhi, is stated to be malafide and he is sure to be acquitted in the said case. Nearly, within a year, as already noticed by us, however, the allegedly false case is accepted by the driver as true. The Affidavit of PW2, would not show that the driver had not consumed liquor, which case is set up. On the contrary, driver having drunk, is fortified by the MLC, which clearly indicates that the driver was smelling of alcohol.

97. Therefore, it can be safely concluded that the case set up of the respondent that the person driving the car had not consumed liquor, is clearly false.

THE INTERROGATORIES

98. The following interrogatories dated 18.10.2010, were apparently served by the respondent on the appellant:

> "INTERROGATORIES ON BEHALF OF COMPLAINANT
>
> 1. Name the surveyor who was appointed in this case.
>
> 2. Is the said surveyor still associated with your company?
>
> 3. Why have you not filed the affidavit of the said surveyor In the present proceedings?
>
> 4. Is M/s Bhola & Associates a Lawyer's Firm?
>
> 5. What are the educational qualifications of Mr. Sonu Bhola Advocate?
>
> 6. Does Mr. Sonu Bhola have licence to practise as an Advocate. If yes, please give his Bar Council Registration Number?
>
> 7. Has Mr. Bhola personally met Mr. Aman Bangia, the Driver of the vehicle. If yes when and where?
>
> 8. Whether observation made by Mr. Bhola in his investigation report is only an inference drawn from FIR, MLC or is it based upon some cogent and reliable evidence?

Please furnish details of all those cogent and reliable evidence and show the same from the record of present proceedings.

9. Whether M/s Bhola and Associates are qualified to investigate such case. If yes, how.

10. Did Mr. Sonu Bhola meet any doctor or during his investigation? If yes, please give the time, place and the name of the doctor.

11. Did Mr. Bhola obtain any medical test report from the Doctor or the Investigating officer during his Investigation?

12. Whether any urine test was carried out upon the driver Mr. Aman Bangia to determine consumption of alcohol?

13. Whether the blood sample of the driver Mr. Aman Bangia was taken by the Doctor. If yes, whether the said sample was sent for chemical analysis to determine consumption of alcohol?

14. Do you have any report of urine or blood test of the driver Mr. Aman Bangia?

15. Have you flied affidavit of the Doctor in these proceedings who had stated "smell of alcohol" in his report?

16. Do you have any medical test report which could show the level of alcohol in the blood of the driver?

17. Do you know that a criminal case against Mr Aman Bangia is still pending in the court?

99. The reply given to the interrogatories by the appellant, read as follows:

> “REPLY BY RESPONDENTS TO INTERROGATORIES FILED ON BEHALF OF COMPLAINANT
>
> 1. Name the surveyor who was appointed in this case.

Ans. Mr. Vikas Puri (Spot Survey), Mr. Jawaharlal (Final Survey).

2. Is the said surveyor still associated with your company?

Ans. Yes.

3. Why have you not filed the affidavit of the said surveyor in the present proceedings?

Ans. Not necessary.

4. Is M/s Bhola & Associates a Lawyer's Firm?

Ans. Yes.

5. What are the educational qualifications of Mr. Sonu Bhola Advocate?

Ans. B.Com LLB.

6. Does Mr. Sonu Bhola have licence to practise as an Advocate. If yes, please give his Bar Council Registration Number?

Ans. It is not relevant with the investigation, hence we did not enquire.

7. Has Mr. Bhola personally met Mr. Aman Bangia, the Driver of the vehicle. If yes when and where?

Ans. No.

8. Whether observation made by Mr. Bhola in his investigation report is only an inference drawn from FIR, MLC or is it based upon some cogent and reliable evidence? Please furnish details of all those cogent and reliable evidence and show the same from the record of present proceedings.

Ans. Based on MLC, FIR.

9. Whether M/s Bhola and Associates are qualified to investigate such case. If yes, how.

Ans. Yes. No specific qualifications are prescribed by law.

10. Did Mr. Sonu Bhola meet any doctor or during his investigation? If yes, please give the time, place and the name of the doctor.

Ans. We are not aware of it.

11. Did Mr. Bhola obtain any medical test report from the Doctor or the Investigating officer during his Investigation?

Ans. No.

12. Whether any urine test was carried out upon the driver Mr. Aman Bangia to determine consumption of alcohol? Ans. Don't know.

13. Whether the blood sample of the driver Mr. Aman Bangia was taken by the Doctor. If yes, whether the said sample was sent for chemical analysis to determine consumption of alcohol? Ans. Don't know.

14. Do you have any report of urine or blood test of the driver Mr. Aman Bangia?

Ans. No.

15. Have you flied affidavit of the Doctor in these proceedings who had stated "smell of alcohol" in his report?

Ans. No.

16. Do you have any medical test report which could show the level of alcohol in the blood of the driver?

Ans. No.

17. Do you know that a criminal case against Mr Aman Bangia is still pending in the court?

Ans. No."

100. The interrogatories, along with the answers, reveal the following:

a. The Surveyor of the appellant is a Lawyers Firm.

b. The Surveyor has not personally met the driver of the car.

c. The observations made by the Surveyor is based on the MLC and FIR.

d. The appellant is not aware as to whether the Surveyor had met any Doctor, during his investigation.

e. The Surveyor has not obtained any medical test report from the Doctor or the Investigating Officer, during his investigation.

f. The appellant pleads ignorance as to whether any urine test was conducted on the driver to determine the consumption of the alcohol.

g. The same is the answer also in regard to as to whether any blood sample was taken to determine the consumption of alcohol.

h. The appellant, in its answer, has stated that it has not filed affidavit of the Doctor, who has stated 'smell of alcohol' in his Report.

i. The appellant has also stated that he does not have any Medical Report to show the level of alcohol in the blood.

101. We would think that it would not be appropriate to conflate the two situations, viz., the requirement under Section 185 of the MV Act and an Exclusion Clause in the Contract of Insurance in question. The requirements of drunken driving under Section 185 of the MV Act, can be proved only with reference to the presence of the alcohol concentration which is 30 mg per 100 ml of blood. This corresponds to 0.03 per cent BAC. In fact, it is noteworthy that in Sweden and in China, it is 0.02.

102. As far as establishing the contention by the insurer in a Clause of the nature, we are dealing with, viz., a case where the insurer alleges that the driver was driving the vehicle under the insurance of alcohol, it is all very well, if there is a criminal case and evidence is obtained therein, which shows that the driver had 30 mg/100 ml or more. Or in other words, if the BAC level was 0.03 or more. We would think that in a case where, there is a blood test of breath test, which indicates that there is no consumption at all, undoubtedly, it would not be open to the insurer to set up the case of exclusion. The decision of this Court in Bachubhai Hassanalli Karyani (supra) was rendered under Section 117 of the Motor Vehicles Act, 1939, prior to its substitution in 1977, and what is more it turned on the evidence also.

103. However, in cases, where there is no scientific material, in the form of test results available, as in the case before us, it may not disable the insurer from establishing a case for exclusion. The totality of the circumstances obtaining in a case, must be considered. The scope of the enquiry, in a case under the Consumer Protection Act, which is a summary proceeding, cannot be lost sight of. A consumer, under the Act, can succeed, only on the basis of proved deficiency of service. The deficiency of service would arise only with reference to the terms of the contract and, no doubt, the law which surrounds it. If the deficiency is not established, having regard to the explicit terms of the contract, the consumer must fail.

104. It is, in this regard, we would think that an exclusion of the nature involved in this case, must be viewed. We can safely proceed in this case, on the basis that the person driving the vehicle had consumed alcohol. We can proceed on the basis that he drove the car after having consumed alcohol. It is true that the exact quantity, which he had consumed, is not forthcoming. The fact that he smelt of alcohol, is indisputable, having regard to the contents of the FIR and also the MLC. He was accompanied by PW3. PW3 also smelt of alcohol. The incident took place in the early hours of 22.12.2007. It happened at New Delhi. It is further clear that it happened in the close vicinity of India Gate. The driver and the passenger were in their twenties. At that time of the day, viz., the early hours, the version of the parties must be appreciated without reference to any possibility of the accident happening as a result of any sudden incident happening, as for instance, attempted crossing of a person or an animal, which necessitated the vehicle, being involved in the accident, in the manner, which is borne out by the FIR. There is simply no such case for the respondent. It is clear that we can safely proceed on the basis that the vehicle was driven in a rash and negligent manner, having regard to the conviction entered under Section 279 of the IPC. This is also to be viewed in the context of the respondent putting up the case that the driver had not consumed alcohol and that the case, even under Section 279 of the IPC was a false case. Still further, if we examine the exact nature of the accident, it speaks eloquently for the influence, which the consumption of alcohol had produced on the driver of the vehicle. The car, which is undoubtedly a Porsche, which we presume, has a very powerful engine and capable of achieving enormous speed, is reported to have gone out of control and hit at a massive force with the footpath of the road. It overturned. It caught fire. In fact, it is the case of the respondent that the car was a complete wreck. It was described as a total loss. The vehicles of the fire brigade came to douse the fire. We are conscious that speed and its impact can be relative to the road, the traffic and the speed limits. The FIR refers to the car being driven ‘very fast’. A person can be rash and negligent without having been under the influence of alcohol. At the same time, being under the influence of alcohol can also lead to rash and negligent driving. They are not incompatible.

105. This Court would not be remiss, if it takes into account the improbability of any traffic worth the name at the time of the accident. While we may be in agreement with the respondent that it would be for the insurer to make out a case, for pressing the Exclusion Clause, we cannot be oblivious to the fact that there is no material in the pleadings of the respondent or in the evidence tendered for explaining the accident. We can take judicial notice of the fact that the roads in the Capital City, particularly in the area, where the accident occurred, are sufficiently wide and the vehicle dashing against the footpath and turning turtle and catching fire, by itself, does point to, along with the fact that the alcohol which was consumed manifests contemporaneously in the breath

of the driver, to conclude that alcohol did play the role, which, unfortunately, it is capable of producing.

106. Applying the principles, which have been referred to, to the facts of the present case, we summarize the following conclusions:

A. Firstly, in the MLC, in regard to the driver, the Report, inter alia, indicates that smell of alcohol (+);

B. Pertinently, the very same Report is there in regard to the co-passenger. Both the driver and the passenger were in the late twenties;

C. The smell of alcohol has been discerned by a Medical Practitioner;

D. Though the case was set up by the respondent that the driver had not consumed alcohol, the driver, in his evidence (Affidavit evidence), has not even stated that he has not consumed alcohol, as was the specific case set up in the complaint. On the other hand, the alternate case, which was set up that he was not under the influence of alcohol, alone was deposed to. This is even though the respondent had reiterated in the Rejoinder Affidavit that the driver of the vehicle had not consumed alcohol or any other intoxicating drink/drug;

E. Even the NCDRC has proceeded on the basis that the driver had consumed some alcohol.

Therefore, the conclusion is inevitable that the appellant has established that the driver had consumed alcohol and was driving the vehicle, when the accident took place;

F. There is no evidence as to the quantity of alcohol consumed. It is also true that there is no evidence other than the smell of alcohol being detected on both the driver and the co-passenger, of any other effects of consumption of alcohol;

G. The requirement under Section 185 of the Motor Vehicles Act is not to be conflated to what constitutes driving under the influence of alcohol under the policy of insurance in an Own Damage Claim. Such a claim must be considered on the basis of the nature of the accident, evidence as to drinking before or during the travel, the impact on the driver and the very case set up by the parties.

H. The other aspect, which is pressed is, as regards the manner in which the accident itself occurred. In this regard, it is clear that in any such case, this is an important circumstance, which may establish that the driver was under the influence of alcohol. Driving, while under the influence of alcohol, is to be understood as driving when, on account of consumption of alcohol, either before commencement of driving or during

the driving and before the accident, when consumption of alcohol by the driver would affect (influence) his faculties and his driving skills. We would expatiate and hold that it means that the alcohol consumed earlier was the cause or it contributed to the occurrence of the accident.

I. The respondent has no case that the accident occurred as a result of a sudden event which took place, which necessitated the car being driven into the footpath.

For instance, if there was sudden attempted human or animal crossing, and the driver to obviate any such accident, may drive in the manner, which culminated in the accident. It would be a case where the driver would still be in control of his faculties even while having caused the accident. There is material (particularly, in the nature of the Summary Proceedings) under the Consumer Protection Act, in the form of the FIR. The Police Officer, who has lodged the information has specifically stated that the car was being driven in a very fast manner;

J. The driver, in his chief examination, has not given any explanation, whatsoever, for the happening of the accident. He does not have a case that there was any breakdown in the car or of the brakes.

K. The driver has pleaded guilty and stands convicted under Section 279 of the IPC, which penalises rash or negligent driving.

A person, who is not under the influence of alcohol, can be rash and negligent. But a person, who is under the influence of alcohol, can also be rash and negligent.

In other words, they are not wholly incompatible. On the other hand, being under the influence of alcohol, aggravates the possibility of rash and negligent driving as it can be the proximate cause.

The car was driven by the driver aged about

27. Both, he and his companion had, indeed, consumed alcohol. The accident took place when the road would have been wholly free from any traffic (There is no case whatsoever that the accident was caused by another vehicle being driven in any manner or any person or animal attempting to cross the road or otherwise deflecting the attention of the driver). The accident has no apparent cause, even according to the respondent and the driver and his companion (PW3), yet we are asked to believe that the driver was in full control of his senses. If the State Commission, in the circumstances, believed the version of the respondent, in a summary proceeding, we would believe that NCDRC erred in interfering, on the reasoning, which we find as erroneous.

107. What is in a summary proceeding noteworthy, is in the setting of the width of the road (a road near India Gate, New Delhi) and the thinnest possible traffic, and without the slightest excuse, hitting at the footpath with massive force, not being able to maintain control, hitting the electric pole, the wall of the children park. The impact is so much that it led to the overturning of the car and what is more, catching fire of the vehicle. This accident is inexplicable, if the driver is to be believed as PW2, when he deposed "I was in my full senses and capable of exercising full control over the car, at the time of the accident". It is more probable that his drink, really led to it. On the facts, the view of the State Commission is a plausible view.

108. The upshot of the discussion is that the impugned Order is liable to be set aside. We order accordingly. The Appeal stands allowed. There will be no order as to costs.

.....J. [UDAY UMESH LALIT] .....J. [INDIRA BANERJEE] .....J. [K.M. JOSEPH] NEW DELHI;

APRIL 12, 2021.