18/74

SUPREME COURT OF VICTORIA

DIMITRIEVSKI v AGC (INSURANCES) LTD

Harris J

18 February 1974

CIVIL PROCEEDINGS – MOTOR VEHICLE COLLISION – DAMAGE CAUSED – CLAIM MADE BY DRIVER OF MOTOR VEHICLE – DEFENCE BY INSURER THAT DRIVER WAS UNDER THE INFLUENCE OF INTOXICATING LIQUOR AT THE TIME OF THE ACCIDENT – EXCLUSION CLAUSE IN THE INSURANCE POLICY – NO LIABILITY IF DAMAGE CAUSED WHILST MOTOR VEHICLE WAS DRIVEN BY A PERSON UNDER THE INFLUENCE OF INTOXICATING LIQUOR – EVIDENCE OF EXPERT WITNESSES GIVEN AT THE TRIAL – FINDING BY JUDGE THAT DRIVER HAD A BLOOD ALCOHOL READING OF NOT LESS THAN .17% – FINDING THAT DRIVER WAS UNDER THE INFLUENCE OF INTOXICATING LIQUOR – DEFENCE MADE OUT.

The plaintiff while driving his car collided with a stationary semi-trailer. Prior to the accident the plaintiff had entered a contract of insurance with the defendant company indemnifying him against liability at law by way of damages in respect of damage to property. The contract contained a number of exclusions to the cover. The particular exclusion clause relevant to this matter stated that the policy does not cover liability for damage caused "whilst the motor vehicle is being driven by any person under the influence of intoxicating liquor". The plaintiff sought indemnity under the policy against damages to his car and any liability to the owner of the semi-trailer. As a defence, the defendant company raised that at the time of the accident the motor vehicle was being driven by the plaintiff whilst he was under the influence of intoxicating liquor and therefore the agreement did not cover damages to the plaintiff's vehicle or the semi-trailer. [Note: Discussion on fact has been omitted from the judgment. Ed.]

HELD: Insurer's defence made out and entitled to judgment.

1. The exclusion clause in the insurance policy was a defence to a liability to indemnify which otherwise existed, and hence the burden of establishing it lay on the defendant/insurer. The defendant/insurer had to indemnify the plaintiff driver unless it established the defence, and it had to establish that defence to the reasonable satisfaction of the court.

2. In order to come within the exclusion, all that had to be shown was that the plaintiff/driver was under the influence of intoxicating liquor at the time when his car was damaged. This was all that had to be shown. It was not necessary to establish that this fact caused or contributed to the damage to the motor car.

3. After making allowances for the fact that the experts called by the insurer were using general conclusions and not observations of this particular plaintiff, and after discarding some possibilities that were particularly adverse to the plaintiff, the Court was justified in concluding that at the time of the accident the plaintiff's blood alcohol percentage was, at the lowest, only slightly less than .17 per cent and was, most probably, not less than .17 per cent. On this finding it followed that at the time of the accident the plaintiff's ability to drive his car was materially affected by the intoxicating liquor he had drunk.

4. That finding required the Court to apply that finding to the terms of the Exclusions clause in the policy. Whatever may have been the whole scope of the clause, a driver, whose ability to drive his car at the time of this accident was materially affected by intoxicating liquor, was a driver 'under the influence of intoxicating liquor', with the result that any loss and damage and any liability which had been caused was caused whilst the insured vehicle was being driven by a person under the influence of intoxicating liquor.

5. Accordingly, although the accident caused damage to the plaintiff's motor car and may have exposed him to liability to the owner of the semi-trailer for the damage done to it, that damage and liability were caused whilst the plaintiff's motor car was being driven by a person, namely the plaintiff, under the influence of intoxicating liquor. The insurer's defence was therefore made out and the defendant was entitled to judgment.

HARRIS J: ... In order to come within the exclusion, all that has to be shown is that the plaintiff was under the influence of intoxicating liquor at the time when his car was damaged. This is all

that has to be shown. It is not necessary to establish that this fact caused or contributed to the damage to the motor car. This, in my opinion, is the proper construction of the exclusion clause. It is supported by most of the reported decisions on similar exclusion clauses, and it was conceded by Mr Batt that that was the way in which the clause should be construed, at all events, in this court, for, as I understood him, he reserved his right to argue otherwise in a higher court.

That still leaves the matter of the meaning of the expression 'under the influence of intoxicating liquor'. There may be problems in giving a complete definition which encompasses the whole of the scope of that expression. There is certainly some authority on it, but it is clear that whatever may be the complete scope of the expression, there are some factual situations which are within its scope and others that are outside it. Rather than embark upon the task of further examining the scope of the clause at this stage, it is preferable to examine the evidence and consider what findings should be made on that evidence. The extent to which it will be necessary to consider the scope of the clause can then be considered in the light of those findings. But first it is necessary to refer to the onus of proof.

The exclusion clause is a defence to a liability to indemnify which otherwise exists, and hence the burden of establishing it lies on the defendant. The defendant must indemnify the plaintiff unless it establishes the defence, and it must establish that defence to the reasonable satisfaction of the court. I turn now to the evidence.

The defendant called a considerable amount of evidence in support of its defence. This evidence fell into two categories. The first category consisted of expert evidence to prove the plaintiff's blood alcohol content at the time of the accident and thereby to prove the extent to which he was affected by intoxicating liquor at that time. The second category comprised evidence of observations of the plaintiff at the time of the accident, and of admissions made by him after the accident.

The plaintiff himself gave evidence and he also called as witnesses three of his friends. Their evidence consisted of an account of events preceding the accident, on which the witnesses stated the amount of liquor the plaintiff had drunk, and described his behaviour, both before he began to drive his car, and while he was driving.

I have considered all the evidence before coming to a conclusion about this case. Having done so, I find it more convenient to deal with the defendant's evidence first. The starting point of the defendant's evidence was evidence from Senior Constable Dettman. Senior Constable Dettman gave evidence that at 11.10 p.m, on 29th March 1972, he administered a breathalyser test to the plaintiff and that the result was a reading of .170 per cent blood alcohol. It was conceded that the evidence showed that the instrument used was in proper order and that the test was properly administered. That evidence was the foundation upon which the defendant built the other expert evidence.

One of these experts was a scientist and I will deal with his evidence first. He was Dr Scroggie, a Master of Science and a Doctor of Philosophy in the Melbourne University. His appointment now is that of a Principal Research Scientist with C.S.I.R.O. He had carried out extensive investigation work on breathalysers, and he gave evidence of the extent to which breathalyser readings accurately measure blood alcohol percentages. *[After referring to the resume of Dr Scroggie's evidence given in the judgment, His Honour continued]* ... In my opinion, it is a proper conclusion to draw from Dr Scroggie's evidence, if accepted, that at the time of the accident the plaintiff was distinctly affected by intoxicating liquor, even if his blood alcohol percentage was as low as .1 per cent.

The other three experts called by the defendant were all doctors. They were Dr Birrell, the Victoria Police surgeon, Dr Santamaria, physician in charge of the Alcoholism Unit at St Vincent's Hospital, and Dr Rose, Physician to in-patients and senior pathologist at the Royal Melbourne Hospital, Dr Rose had had to deal with all aspects of alcohol problems generally as part of his practice as a physician, for some 25 years. All three of those doctors were well qualified to express opinions on the effect of alcohol upon people. I will deal with Dr Birrell's evidence first. *[After referring to Dr Birrell's evidence, His Honour continued]* ... But it is reasonable to infer from Dr Birrell's evidence, if accepted, especially as he said the plaintiff had passed his peak when tested with

the breathalyser, that at the time of the accident the plaintiff's blood alcohol was either above .17 per cent or not much below .17 per cent. As will be seen later this conclusion is supported by Dr Santamaria's opinion. Further, Dr Birrell said that in his opinion every man was affected by liquor, so far as driving was concerned, once his blood alcohol percentage reached a figure somewhere between .03 and .05 per cent.

Taking Dr Birrell's evidence as a whole, if it is accepted, it is reasonable to conclude from it that at the time of the accident the plaintiff's blood alcohol content was so much in excess of .05 per cent that the plaintiff was materially affected by the liquor he had drunk at the time when the accident occurred.

Dr Santamaria expressed a firm opinion that at .08 per cent, everybody, irrespective of what their normal habits were, would show impairment of driving ability whatever their driving experience was. *[After referring to the resumes of Dr Santamaria's and Dr Rose's evidence, His Honour continued]* ... I have now indicated the conclusions which in my opinion are capable of being drawn from the expert evidence called by the defendant. As Mr Batt has pointed out, the mere fact that experts depose to opinions and these are not contradicted does not mean that the court must accept the expert's opinions. It is still a matter for the court to evaluate and assess the evidence and decide whether it is sufficiently persuasive for it to be accepted. Furthermore, Mr Batt has pointed to the fact that there are discrepancies between the views of the experts.

Finally, the critical matter is whether the evidence of the experts enables the court to reach a conclusion as to whether the plaintiff was under the influence of intoxicating liquor within the meaning of the policy at the time of the accident. If the conclusions which I have expressed as being open on the evidence of the four experts ought to be accepted, then, it follows that there is a general consensus of opinion among them that the plaintiff was affected by intoxicating liquor at the time of the accident and that he was so affected to a quite marked degree.

It is not a matter of finding what quantity of liquor he had consumed; it is a matter of finding what quantity of alcohol was in his blood at the time of the accident and what was the effect of this upon him. I have given close attention to the evidence of the experts since the conclusion of the hearing. On close examination it proved necessary to be able to put together parts of their evidence and to draw what I believe to be logical conclusions from those parts if the court was to be able to reach a conclusion as to the blood alcohol level of the plaintiff at the time of the accident and as to the effect that level had upon him.

After making allowances for the fact that the experts were using general conclusions and not observations of this particular plaintiff, and after discarding some possibilities that were particularly adverse to the plaintiff, I am persuaded that I am justified in concluding that at the time of the accident the plaintiff's blood alcohol percentage was, at the lowest, only slightly less than .17 per cent and was, most probably, not less than .17 per cent and I so find.

On this finding it follows that I am persuaded further that at the time of the accident the plaintiff's ability to drive his car was materially affected by the intoxicating liquor he had drunk. That requires me to apply that finding to the terms of the Exclusions clause in the policy. As stated earlier I postponed consideration of its scope until I had examined the evidence. Whatever may be the whole scope of the clause, in my opinion, a driver, whose ability to drive his car at the time of this accident is materially affected by intoxicating liquor, is a driver 'under the influence of intoxicating liquor', with the result that any loss and damage and any liability which has been caused was caused whilst the insured vehicle was being driven by a person under the influence of intoxicating liquor.

The plaintiff has said that he was not affected by what he had in driving his car, and in this he was supported by Mihalovski who was a passenger in the car. The plaintiff, in fact, drove the from the Railway Hotel, Yarraville, by way of a number of streets, involving a number of turns, in order to take home another Macedonian who has since moved to parts unknown, and he, the plaintiff, was on the way to Mihalovski's home when the accident occurred in Somerville Road.

There is nothing in the evidence to show that there was anything perceptibly wrong with his driving up to the time of collision. Furthermore, the accident was a sudden emergency. A car

travelling in the opposite direction moved on to its wrong side to pass another car, just after the plaintiff had made a left hand turn into Somerville Road. There was a semi-trailer parked on the plaintiff's side of the road and in the emergency the plaintiff collided with the rear of that semi-trailer.

It may be that the same result would have happened even if the plaintiff had not drunk any liquor at all. This is not the point. The defendant, as I have already held, does not have to establish that the influence of intoxicating liquor on the plaintiff caused or contributed to the accident. It only has to show that the accident occurred whilst, that is at the time when, the car was being driven by a person under the influence of intoxicating liquor. The evidence of the plaintiff, and Mihalovski, as the plaintiff's driving, does not cause me to doubt that I have the correct conclusion from the expert evidence and from the evidence of Constable Rutherford.

Therefore, although the accident caused damage to the plaintiff's motor car and may have exposed him to liability to the owner of the semi-trailer for the damage done to it, I hold that damage and liability were caused whilst the plaintiff's motor car was being driven by a person, namely the plaintiff, under the influence of intoxicating liquor. Paragraphs 5 and 6 of the Defence are therefore made out and the defendant is entitled to judgment.
