LONDON GUARANTEE AND ACCIDENT COMPANY (DEFENDANT).... APPELLANT;

AND

J. F. SOWARDS (PLAINTIFF).....RESPONDENT.

1923
*Mar. 1.
*Apr. 3.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Insurance, accident—Automobile—Collision with other automobile, vehicle or object—Contact with highway—Excessive speed—Motor vehicles Act, R.S.O. [1914] c. 207; 7 Geo. V, c. 49, s. 14 (O).

An automobile was insured against loss or damage by "being in accidental collision * * * with any other automobile, vehicle or object."

Held, reversing the Judgment of the Appellate Division (52 Ont. L.R. 39) that the automobile, coming into contact with the earth by being capsized after striking a rut in the road, was not in "collision" within the meaning of that term in the policy.

Effect of speed beyond the legal rate, the car not being driven by the insured, discussed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment on the trial in favour of the defendant company.

The material facts are sufficiently indicated in the above head-note.

Grant K.C. and *Swabey* for the appellant. The word "object" in the clause describing the risk insured should be construed as something of the nature of "other automobile" and "vehicle." See Hals. Laws of England, vol. 7, page 516, par. 1038.

No authority can be found for saying that an upset results in a collision. In the United States there is authority to the contrary. *Bell* v. *American Ins. Co.* (2); *Stuht* v. *United States Fidelity and Guarantee Co.* (3).

If the car was driven at an illegal rate of speed the plaintiff cannot recover. *O'Hearn* v. *Yorkshire Ins. Co.* (4).

D. L. McCarthy K.C. and *Rigney K.C.* for the respondent referred to Berry on Automobiles (3 ed.), page 1518, Huddy (6 ed.), 1038.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 52 Ont. L.R. 39.
(2) 181 N.W. Rep. 733; 57 Ins. L.J. 546.
(3) 154 Pac. Rep. 137.
(4) 51 Ont. L.R. 130.

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Idington J.

THE CHIEF JUSTICE.—I concur in allowing this appeal. I would restore the judgment of the trial judge dismissing the action with costs.

IDINGTON J.—The respondent as owner of an automobile having had it insured by the appellant against being in accidental collision, during the period insured, with any other automobile, vehicle or object, excluding (1) loss or damage from fire or theft, however caused; (2) loss or damage to any tire due to puncture, cut, gash, blowout or other ordinary tire trouble; and excluding in any event loss or damage to any tire unless caused in an accidental collision which also causes other loss or damage to the insured automobile brought this action thereon to recover damages for alleged losses within the meaning thereof.

The automobile in question was in charge of the respondent's son and driven by him when the accident in question took place, on the road from Odessa to Kingston early in the morning of 4th May, 1921.

He was accompanied by a single companion. They are the only witnesses having a direct personal knowledge of the accident.

The son, after telling the story of his drive, states the accident as follows:—

Q. You speak of there being a culvert?—A. Yes.

Q. Describe the culvert, please?—A. The culvert was slightly raised off the road.

Q. What is your idea of slightly?—A. Up like that.

Q. How high?—A. I suppose it would be eighteen inches, twelve or eighteen inches.

Q. Do you mean the ground or top would be eighteen inches from the level of the road?—A. Yes.

Q. Do you know how the road was approaching the culvert and just over it when you left it?—A. All I know when I went over I struck and the wheel went out of my hand.

Q. A hole?—A. The wheel went out of my hand.

Q. How do you mean?—A. The wheel hit the hole and swerved out.

Q. Is that what caused the car—continue now as minutely as you can as to what happened; you say you went over the culvert and struck a hole?—A. Yes.

Q. Then what happened?—A. The front wheel of the car left the road and went down in the ditch and I put on a little more speed to try and climb to the top of the road; I couldn't make it and she slid and went over upside down.

Q. Do I understand one wheel of the car adhered to the surface or top of the road and the other wheel was down in the ditch?—A. The front and back wheels were down in the ditch and the other two wheels were down on the road.

Q. Would that be the right wheel down in the ditch?—A. Yes, the right wheel was in the ditch and the left on the road.

Q. You told me about doing something?—A. I turned the wheel, put on a little more speed to try and climb to the level of the road.

Q. Tried to get back on the road?—A. The back wheel slewed and she turned over.

It is claimed that this incident which was followed as result of said effort at recovery by a turning over of the car to its left side and being pressed a bit further onward on that side, was a collision within the meaning of the above quoted insurance.

The learned trial judge held that this striking of the earth was not a collision within said insurance any more than, if the car had been struck by an aerolite or if someone fired a rifle ball through the tire, the car would be in a collision.

The Divisional Court of Appeal for Ontario reversed this finding and held it was a collision within the meaning of said insurance as above expressed.

We have had that question fully argued out. And less fully another I am presently about to refer to.

In this connection we have had pressed upon us as usual in such like cases, the application of the *ejusdem generis* rule.

I prefer wherever possible in regard to the application of said rule to adopt the mode of thought given expression to by the late Lord Macnaghten in the case of *Thames & Mersey Marine Ins. Co.* v. *Hamilton, Fraser & Co.* (1), as follows:—

> Your Lordships were asked to draw the line and to give an exact and authoritative definition of the meaning of the expression "perils of the sea" in connection with the general words. For my part I decline to attempt any such task. I do not think it is possible to frame a definition which would include every case proper to be included, and no other. I think that each case must be considered with reference to its own circumstances and that the circumstances of each case must be looked at in a broad common sense view and not by the light of strained analogies and fanciful resemblances.

Applying that to the facts in question as above related I fail to see herein how the rough treatment even a driver gets by running into a rut on the road, which was (save rate of speed and want of care) the sole originating cause of all else that happened and is herein in question, can be

(1) 12 App. Cas. 484, at page 502.

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classed under the term collision as used in above quoted insurance.

With great respect I cannot see the necessity for elaborating further this branch of the case.

The clause read in the light of common sense should not, and I respectfully submit never was intended by the contracting parties to, indemnify an owner for damages flowing from such a cause.

The learned trial judge, besides holding that the case as presented did not fall within the meaning of the insurance clause relied upon, found as a fact that the appellant's son was, at the time in question, driving at a rate of speed which exceeded that of the twenty-five miles an hour limit allowed by the Motor Vehicles Act 9 Geo. V, c. 57, sec. 3.

Upon that ground also he rested his judgment.

A perusal of the entire evidence leads me to agree with this finding of the learned trial judge; and at all events in face of the peculiar nature of much of said evidence the finding of the learned trial judge I respectfully submit should not have been disturbed.

And thereupon I am strongly of the impression that in law an insurance company cannot legally insure the owner of an automobile against anything arising out of driving at a prohibited rate of speed.

The cases cited by the learned trial judge and others cited by counsel do not (though some of them are illuminative of the law involved) by any means finally and conclusively dispose of this question in the way I should like to see it settled.

To illustrate my way of looking at it I would refer to the case of *Webster* v. *De Tastet* (1), and the remarks in regard thereto in Pollock on Contracts, page 306, and the reason given for the decision. Yet the Merchant Shipping Act of 1854 had apparently eliminated the said reason.

Although the said case seems to have been given due weight in the case of *Cohen* v. *Kittell* (2), many years after said Act, yet under the legislation here in question that may not help.

(1) 7 T.R. 157.

(2) [1889] 22 Q.B.D. 680.

In a somewhat analogous manner we are met with the peculiar provision which has resulted from the several amendments to section 19 of the Motor Vehicles Act which, before these amendments, read as follows:—

19. The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council.

The first two lines continue the same throughout all the amendments.

What does this section mean? To whom is the owner responsible? Is he to indemnify him who has been penalized? Or him who has suffered injury? If not something like that is it to be interpreted as rendering the owner liable to be convicted? If so why is it not so expressed as plainly as in section 28 of the same Act?

The persistent observance of the same expression in the several amendments in later sessions, suggests something possibly different from the intention of imposing liability to a conviction for the like penalty imposed upon him actually committing the offence.

If the latter meaning it would not be as clear as the case of *Coppen* v. *Moore* (1), relied upon by the respondents, for the Act there in question expressly declared that the owner, subject to certain limitations, would be guilty of the offence there in question.

I incline to the opinion that whichever of the two meanings I have suggested as applicable to the responsibility of the owner under said section may be the correct one, that it would be against public policy for the appellant to attempt to insure against the risk of speed, beyond the statutory limitations, and hence void if so interpreted.

Yet as there is a decided difference arguable and in the one view possibly the result I incline to not maintainable and the distinction was not grappled with in argument, I prefer resting my opinion on the merits of this appeal upon the first ground taken alone.

Indeed there may, as happened in the Merchants Shipping Act, be some legislative amendment which has escaped my attention.

I submit that the Act now in question may well be amended so as to render the question beyond dispute.

(1) [1898] 2 K.B. 306.

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Duff J.

I would allow this appeal with costs here and in the Court of Appeal and restore the judgment of the learned trial judge.

DUFF J.—

The risk insured against is the risk of loss

by being in accidental collision * * * with any other automobile, vehicle or object.

The respondent's automobile capsized and was damaged in consequence. The appeal turns upon the point (subject to another element in the case which I shall presently discuss) whether or not what happened falls within the words describing the risk. In other words, whether in the circumstances it can be fairly affirmed that the automobile was "in accidental collision" with an "other automobile, vehicle or object," within the meaning of the policy.

I am not disposed to agree that the word "object" can be limited in deference to *noscitur a sociis* or to the principle of *ejusdem generis* to the degree for which Mr. Grant contends. I am inclined to think that the broader idea, that of "conveyance," must be ascribed to "vehicle" in this connection, and that so read it would express everything falling within the word "automobile." In all the instances put, there is conveyance; in the case of the locomotive stone crusher, for example, there is conveyance of the mass of the locomotive. Nevertheless I am not disposed to disagree with the view of the learned trial judge that some significance must be attached to the words "automobile" and "vehicle," and that the presence of these words limits the scope of the word "object" —at least sufficiently to exclude from the class of perils insured against, impact of the body of the motor upon the earth resulting from collapse or capsize. I agree also with the learned trial judge that "collision" is not a word which anybody would be likely to use in this context to describe impact upon the earth involved in collapse or capsize. I think, moreover, that it is not a meaning which anybody receiving a policy of insurance would on reading the policy be likely, without a good deal of reflection and analysis, to ascribe to the word "collision."

I have considered carefully the judgment delivered in the Appellate Division, and while I agree that there are difficulties in drawing an abstract line between cases in respect of which good reasons might be given for bringing them within the language of the policy, and cases which ought to be excluded, I must say with the most unaffected respect that I think the cases mentioned, capsize and collapse and consequential impact upon the earth of the body of the car, very clearly fall on the other side of the line.

It appears that after the capsize of the car it came into violent contact with a boulder, and I was disposed to think on the argument that sufficient attention had not been paid to the question whether the damage to the car was in part due to this impact. The learned trial judge, however, has found, and I think not without good warrant on the evidence, that the damage was entirely due to what occurred before the collision with the boulder.

This is sufficient to dispose of the appeal, but I cannot take leave of the appeal without expressing my opinion in concurrence with the view of the Appellate Division that there is nothing in the common law and nothing in the Ontario statute relied upon which disqualifies the owner of an automobile or other vehicle or the owner of a ship from contracting for indemnity for loss arising from accidents due to the negligence (in which he is not personally implicated) of his servants or his licensees. The principle invoked by the learned trial judge under which he held the plaintiff to be disqualified, was discussed in *Weld-Blundell* v. *Stephens* (1), and the following passage from the judgment of Kennedy J. in *Burrows* v. *Rhodes* (2), was approved by Lord Wrenbury at p. 998 and adopted by him as a correct statement of the law upon the point:—

> It has, I think long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void.

I agree with the Appellate Division that the circumstances of this case do not bring it within that principle.

(1) [1920] A.C. 956.

(2) [1899] 1 Q.B. 816, at p. 828.

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Anglin J.

ANGLIN J.—The material facts of this case appear in the reports of it in the provincial courts, 52 Ont. L.R. 39; 22 Ont. W.N. 513.

In order to recover the plaintiff was obliged to establish that the damage sued for was sustained by his automobile by being in accidental collision with any (some) other automobile, vehicle or object.

The policy so limits the risk.

The insurance company was relieved of liability by the learned trial judge on three distinct grounds—that no collision had taken place; that, if there had been a "collision" it was not with an "object" within the meaning of that word in the relevant clause of the policy; that the automobile was driven at an illegal rate of speed and liability under the policy therefore did not arise.

The Appellate Divisional Court held a contrary opinion on all three grounds.

I am, with respect, unable to regard the impact of an overturned car with the highway on which it was being driven as a "being in collision" within the meaning of the clause of the policy above in part quoted. However comprehensive the meaning to be given to the word "object" it is quite certain that the coming together of the automobile and the highway, due to the upsetting of the former, was not an event which anybody would dream of describing as a "collision." That word, in my opinion, is used in the policy in the sense in which it is ordinarily employed. Injury to the car sustained by its overturning owing to some defect in the road-bed was a risk which it was not intended to cover.

But a witness, Wilson, who saw the overturned automobile after the accident, deposes that, while sliding along the roadside ditch after overturning, it had come into contact with a large stone; and it is urged that that was a collision. Assuming the fact to be established, I very much doubt whether it was a collision within the meaning of the policy. But it is unnecessary to determine that question. The learned trial judge, expressly basing his finding on the credibility of the evidence, says:—

> Practically all the damage was caused at once when the car landed on its right side, and nothing which took place subsequently was of any consequence.

The only evidence in the record on the point is to that effect. It was given by the driver of the car. It has been urged that his physical condition immediately after the accident was such that he was incapable of forming any opinion on such a matter. However that may be and however likely it may seem that some appreciable part of the injury to the car is ascribable to its violent impact with the stone, there is no evidence to that effect such as might easily have been obtained from the witness, Wilson, or from others who examined the car after the accident, if its appearance warranted such an inference. It must not be forgotten that the burden of proving that the injuries for which he claims damages were caused by his automobile "being in accidental collision" rested on the plaintiff. That burden he has not discharged. Upon the record before us I find it impossible to say that the learned trial judge was clearly wrong in finding, as the plaintiff's son deposed, that

practically all the damage was caused at once when the car landed on its right side.

It is not necessary to pass upon the effect on the plaintiff's right to recover of the illegal speed at which his car was being driven as disclosed by the evidence. I venture to suggest, however, that an explicit provision in the Motor Vehicles Act, barring the recovery by an automobile owner or driver of insurance for injury either to the car owned or driven by him or to the persons or property of others, to the causing of which the driving of the car at an illegal rate of speed while under the control of such owner or of any person in his service or with his privity had contributed, would not only be commendable on grounds of public policy, but would also be conducive to better observance of the speed laws, which are now so frequently and flagrantly violated.

I would allow the appeal with costs in this court and in the Appellate Divisional Court and restore the judgment of the learned trial judge dismissing the action.

BRODEUR J.—The plaintiff Sowards had insured his automobile with the appellant company and it was stipulated in the policy that there would be indemnity for

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Brodeur J.

damage in an "accidental collision * * * with any other automobile, vehicle or object."

On the 4th of May, 1921, this automobile struck a hole or rather a rut in the road and the machine was upset on its right side and went down in the ditch.

Was this an *accidental collision* which entitled the insured to claim indemnity?

Collision in such a policy means the act of two vehicles coming together or of the insured automobile running against or coming into violent contact with some other object. *Lepman* v. *Employers' Liability* (1). The driving of an automobile into a hole is not such a collision with an object as is contemplated by the parties to an insurance policy containing a collision clause. *Dougherty* v. *Ins. Co.* (2).

Accidental collision with the surface of the roadbed in being turned over was not and could not be contemplated by the policy. The collision with another automobile or object could not be considered as covering the case of a turning over. The upsetting and the collision present different aspects and the parties would not intend insurance against upsetting when they have provided collision insurance. *Bell* v. *American Ins. Co.* (3).

It is contended, however, by the plaintiff that when the automobile was upset, one of the wheels struck a stone which turned the automobile over to its left side. That would bring us to consider whether the collision with a stone in the highway would be covered by the policy. I would be inclined to think so, because policies of the nature of the one under consideration permit recovery for injuries occasioned by a collision with either a moving or a stationary body. *Cantwell* v. *General Accident Insurance Corp.* (4). But the trial judge, on conflicting evidence, has found that practically all the damage had been caused previously, when the car was upset for the first time. In view of this finding, it is not necessary then to decide the question whether a stone in a highway would be considered as one of the objects mentioned in the policy.

(1) 170 Ill. App. 379.
(2) 38 Pa. Co. Ct. 119.
(3) 181 N.W. Rep. 733.
(4) 205 Ill. App. 335.

I have come to the conclusion that the accident alleged by the plaintiff did not result in a collision, and it is, therefore, useless to consider the other questions raised on this appeal.

I am of the opinion that the judgment of the Appellate Division, which maintained the action of the insured, is not well founded.

The appeal should be allowed with costs throughout and the plaintiff's action should be dismissed.

MIGNAULT J.—The collision clause in the insurance policy relied on by the respondent is in the following terms:—

> In consideration of ninety-eight dollars ($98.00) premium, this policy also covers, subject to its other conditions, damage to the automobile and/or equipment herein described, in excess of twenty-five dollars ($25.00) (each accident being deemed a separate claim and said sum being deducted from the amount of each claim when determined) by being in accidental collision during the period insured with any other automobile, vehicle or object, excluding (1) loss or damage from fire or theft, however caused; (2) loss or damage to any tire due to puncture, cut, gash, blowout or other ordinary tire trouble, and excluding in any event loss or damage to any tire unless caused in an accidental collision which also causes other loss or damage to the insured automobile.

The learned trial judge found that

> practically all the damage was caused at once when the car landed on its right side and nothing which took place subsequently is of any consequence.

Mr. Justice Ferguson of the Appellate Division, with whom the other learned judges agreed, expressed the opinion that the collision was with the highway, and also that the surface of the highway was "an object" within the meaning of the policy.

Even granting that in the clause insuring the automobile against damage

> by being in accidental collision * * * with any other automobile, vehicle or object,

the words "or object" are not to be construed according to the rule *noscitur a sociis,* still I cannot bring myself to believe that what the parties meant was to treat as a collision the overturning of the car. The car was necessarily in contact with the highway all the time and if it overturned or upset, bringing its side, instead of its wheels, in contact with the roadway, that certainly was not a collision within the meaning of the policy.

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Mignault J.

My opinion therefore is that the respondent is not entitled to recover from the appellant under the collision clause of its insurance policy the damages caused by the upsetting of the car.

I would allow the appeal with costs here and in the Appellate Division and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitors for the appellant: *Clarke, Swabey & McLean.*

Solicitor for the respondent: *T. J. Rigney.*