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*May 25
Oct. 3

UNION INSURANCE SOCIETY OF CANTON LIMITED (*Defendant in Warranty*) ..... APPELLANT;

AND

ANDRE ARSENAULT (*Plaintiff in Warranty*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Insurance—Automobile—Collision with rear of preceding vehicle—Negligence—Refusal of insurer to defend—Alleged breach of condition of policy—Impaired driving—Extra-judicial admission of offence—Whether incapable of controlling vehicle—Evidence—Credibility—Action in warranty—Criminal Code, 1953-54 (Can.), c. 51, s. 223.

When the plaintiff was involved in an automobile accident, his insurance company refused to defend the action on the ground that he had violated a condition of the policy by driving while his ability to control the vehicle was impaired by alcohol. The evidence as to this was contradictory, but he was charged with having driven an automobile while his faculties were impaired by alcohol, contrary to s. 223 of the *Criminal Code*, and he pleaded guilty to this charge. He explained the plea on the ground that his brother and a police officer had advised him to do so and that he had not been represented by a lawyer. The action for damages against him was allowed and he brought an action

*PRESENT: Taschereau, Fauteux, Abbott, Martland and Ritchie JJ.

in warranty against the insurer. This action was dismissed by the trial judge, but maintained by a majority judgment in the Court of Appeal.

Held (Abbott and Ritchie JJ. dissenting): The appeal should be allowed and the action dismissed.

Per Taschereau, Fauteux and Martland JJ.: The decision of the trial judge regarding the condition of the plaintiff at the time of the accident was a finding of fact and there was evidence on which such a finding could be made. His judgment, therefore, should not have been reversed on appeal. While it may be that impairment of the ability to drive as a result of the consumption of alcohol does not necessarily mean that a driver is incapable of the proper control of his vehicle, none the less an admission of impairment is at least some evidence of such incapacity. There were other additional circumstances which, in the opinion of the trial judge, were sufficient to establish a breach of the condition: there were the quantity of liquor admittedly consumed, the conclusions reached by the police following the accident, and the circumstances of the accident itself.

Per Abbott and Ritchie JJ., dissenting: By raising the defence of a breach of the policy, the insurer had assumed the burden of proving affirmatively that the condition had been violated. The insurer has failed to discharge this burden of proving by a preponderance of evidence that the condition had been violated.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Tellier J. Appeal allowed, Abbott and Ritchie JJ. dissenting.

L. P. de Grandpré, Q.C., for the defendant, appellant.

François Mercier, Q.C., for the plaintiff, respondent.

The judgment of Taschereau, Fauteux and Martland JJ. was delivered by

MARTLAND J.:—The matter in issue in this appeal is as to the liability of the appellant to the respondent under the provisions of an automobile insurance policy, issued by the appellant, which insured the respondent's 1956 Meteor Coach for the period from March 5, 1956, to March 5, 1957. The respondent was involved in an accident on April 28, 1956, shortly after 3 p.m., when the insured vehicle collided with another vehicle on Highway 11, a few miles south of St. Jerome. As a result of the accident the respondent was sued by and held responsible to one André Lanoue for damages in the amount of $9,370.21. The respondent's liability to Lanoue is not in issue. The issue is as to whether

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the respondent had been in breach of Condition no. 5 of the policy so as to justify the appellant's refusal to pay under the policy.

Condition no. 5 provides as follows:

> 5. L'assureur n'encourra aucune responsabilité en vertu de la police:
> 1) si l'assuré se sert de ou conduit l'automobile:
> a) lorsqu'il est sous l'influence de boissons enivrantes ou de drogues au point d'être, pour le moment, incapable de manœuvrer convenablement l'automobile; . . . .

The learned trial judge held that the respondent had been in breach of that condition. The Court of Queen's Bench[1], by a majority of three to two, reversed the trial judgment.

The facts, as found by the learned trial judge, are briefly as follows: The respondent admitted having consumed, prior to the accident, at least two glasses of beer and two glasses of rye whisky of two and one-half to three ounces each. The second of these glasses of whisky had been consumed by the respondent shortly before he commenced to drive his car.

The respondent's car collided with the rear end of Lanoue's vehicle, which was proceeding in the same direction, at a speed of 30 to 40 miles an hour, along a straight, paved highway. The weather was clear and the visibility was good. At the place where the collision occurred the highway consisted of three lanes and the centre passing lane was not occupied at the time. The impact was such that Lanoue's vehicle was practically demolished and was thrown into a field. The respondent's stopping distance was some 300 feet.

Following the accident two police constables arrived. The respondent was arrested and charged with having driven an automobile while his faculties were impaired by alcohol, contrary to s. 223 of the *Criminal Code*. Subsequently the respondent pleaded guilty to this charge.

For the respondent it was contended that the consumption of liquor had been over a period of time overall extending from 10 a.m. to 3 p.m. and that during that time the respondent had consumed a steak dinner.

Two witnesses gave evidence to the effect that after the accident the respondent appeared to them to be normal.

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It was pointed out that the evidence given by the police constables was not very satisfactory, one of them in particular not having a memory of the details of the occasion and relying entirely upon the report which had been made of the accident.

The plea of guilty to the charge, under s. 223 of the *Criminal Code,* was explained on the ground that the respondent's brother and a police officer had advised him to do so and that he had not been represented by a lawyer.

In my view the decision made by the learned trial judge regarding the condition of the respondent at the time of the accident was a finding of fact, made after hearing the evidence of the witnesses, and there was evidence on which he could make such a finding. This being so, I do not think that his judgment should be reversed on appeal. *Prudential Trust Company Limited v. Forseth*[1].

He pointed out that the proof of the actual quantity of liquor consumed by the respondent was difficult to make, but he clearly had doubts as to the truth of the story told by the respondent; i.e., as to whether the amounts admitted represented the quantity which had actually been consumed.

He preferred the evidence of the police constables to that of the other witnesses regarding the condition of the respondent after the accident.

He also felt that the circumstances of the accident itself, involving as they did a manœuvre by the respondent which was otherwise inexplicable, constituted evidence that the respondent was under the influence of liquor to an extent which rendered him incapable of the proper control of his vehicle.

The learned trial judge did place some reliance upon the plea of guilty made by the respondent to the charge, under s. 223 of the *Criminal Code.* He pointed out that this plea, while not binding the Court in the present case, constituted an admission of certain facts, which required consideration.

The relevant portion of s. 223 reads as follows:

> 223. Every one who, while his ability to drive a motor vehicle is impaired by alcohol or a drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence or an offence punishable on summary conviction . . . .

[1] [1960] S.C.R. 210, 30 W.W.R. 241, 21 D.L.R. (2d) 587.

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The learned trial judge referred to the similarity between the words describing this offence and the wording of Condition no. 5 of the policy and said that impairment by alcohol of the ability to drive is virtually synonymous with incapability of proper control of the vehicle while under the influence of intoxicating liquor.

While it may be that impairment of ability to drive as a result of the consumption of alcohol does not necessarily mean, in all cases, that a driver is incapable of the proper control of his vehicle, none the less an admission of impairment of ability is at least some evidence of such incapacity. The circumstances in which the admission was made, in this case, affect only the weight to be attached to it. The learned trial judge did not rely solely upon the admission in reaching his conclusion. There were other additional circumstances which, even apart from the admission, were, in his opinion, sufficient to establish a breach of Condition no. 5. Those may be summarized as follows:

1. The quantity of liquor admittedly consumed by the respondent, coupled with the doubt, after hearing the evidence of the respondent and his brother, that they had told the whole truth on this subject.
2. The conclusions reached by the police, after seeing the respondent's condition following the accident, which led to his immediate arrest.
3. The circumstances of the accident itself.

In view of this evidence I do not think that the finding of fact made by the learned trial judge, that the respondent was incapable of the proper management of his vehicle as a result of alcohol, ought properly to have been disturbed on appeal.

In my opinion the appeal should be allowed, the trial judgment restored and the appellant should be entitled to its costs throughout.

The judgment of Abbott and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting*):—This is an appeal from a judgment of the majority of the Court of Queen's Bench of the Province of Quebec[1] allowing an appeal from a judgment of Tellier J. of the Superior Court of the District of Terrebonne whereby he dismissed the respondent's action in warranty

[1] [1961] Que. Q.B. 59.

arising out of the appellant's refusal to defend an action brought against the respondent for damages sustained by one André Lanoue when his Pontiac car was struck in the rear by a Meteor owned and operated by the respondent and insured by the appellant.

The appellant denied liability on the ground that the respondent was in breach of Condition no. 5 of the conditions which form a part of the insurance policy in question. This condition reads as follows:

> 5. L'assureur n'encourra aucune responsabilité en vertu de la police: Quant à l'assuré—1. Si l'assuré se sert de ou conduit l'automobile (a) Lorsqu'il est sous l'influence de boissons enivrantes ou de drogues au point d'être, pour le moment, incapable de manœuvrer convenablement l'automobile;

The equivalent of this provision is to be found in the following statutory condition which is in force in the common law provinces of Canada:

> The insurer shall not drive or operate the automobile whilst under the influence of intoxicating liquor or drugs to such an extent as to be for the time being incapable of the proper control of the automobile.

By raising this defence the appellant assumed the burden of proving that at the time of the accident the respondent was under the influence of intoxicating liquor or drugs "au point d'être, pour le moment, *incapable de manœuvrer convenablement l'automobile*". (The italics are mine.)

The evidence given by the respondent and his brother as to the amount of liquor consumed by the respondent did not impress the trial judge who said:

> Evidemment la preuve contraire de la quantité d'alcool réellement consommée était difficile à rencontrer, mais les témoignages des deux frères Arsenault démontrent des contradictions, des hésitations qui laissent planer certains doutes à ce sujet;

As the learned trial judge had the opportunity of seeing and hearing the witnesses, his finding in this regard cannot, in my opinion, be safely disturbed, and the evidence of the two witnesses who testified in the respondent's favour as to his sobriety after the accident was far from impressive so that if the respondent had had the burden of proving that he was not under the influence of intoxicating liquor to the point of being incapable of properly operating his automobile he could not be said to have discharged it.

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It was, however, for the appellant to prove affirmatively that Condition no. 5 had been violated and, apart from the unsatisfactory evidence of drinking given by the Arsenault brothers themselves, the evidence of the respondent's condition at the time of the accident is limited to the circumstances of the accident itself, the fact that the respondent had pleaded guilty to driving while his ability to drive was impaired by alcohol and the evidence of the police officers Tassé and Calvé.

In direct examination Tassé says of the respondent: "Il n'était pas dans un état de conduire une automobile." It is quite apparent, however, from his cross-examination that he remembered nothing of the incident and was basing his evidence entirely on a report which he had made at the time. The following excerpt from his evidence is significant:

Q. Comment marchait-il?

R. Je ne peux pas dire, je ne m'en souviens pas du tout. Je me base sur le rapport, je ne me souviens pas ce qui a été fait dans le temps.

Q. Vous n'êtes pas en état de vous souvenir ce qui est arrivé?

R. Du tout.

Officer Calvé's description of the respondent is: ". . . je me suis aperçu que monsieur, malheureusement, avait les facultés affaiblies par l'alcool". It is noteworthy that Officer Calvé used the phrase "affaiblies par l'alcool" to describe the condition of the respondent, thus employing the language of the *Criminal Code* (s. 223) in respect of which the respondent had pleaded guilty. Section 223 reads as follows:

223. Quiconque, à un moment où sa capacité de conduire un véhicule à moteur est affaiblie par l'effet de l'alcool ou d'une drogue, conduit un véhicule à moteur ou en a la garde ou le contrôle, que ce véhicule soit en mouvement ou non, est coupable d'un acte criminel ou d'une infraction punissable sur déclaration sommaire de culpabilité . . . .

It is particularly significant in this connection to note that the learned trial judge treated the offence described in this section and to which the respondent pleaded guilty as being synonymous with the conduct described in Condition no. 5 of the policy. In this regard he says:

Le demandeur n'a pas contesté la dénonciation portée contre lui, il a plaidé coupable à l'accusation. Il a reconnu que le 28 avril 1956, il avait conduit une automobile alors que sa capacité de conduire était affectée par l'alcool. Ce sont presque les mêmes termes que nous rencontrons dans

l'exception prévue par la condition n° 5 de la police. La capacité de conduire une automobile alors que cette capacité est affectée par l'alcool est pour ainsi dire synonyme à l'incapacité de conduire convenablement une automobile alors que l'on est sous l'influence de boissons enivrantes.

These observations make it apparent that the learned trial judge proceeded on the assumption that the condition of being "incapable de manœuvrer convenablement l'automobile" was the same thing as having the ability to drive a motor vehicle "affaiblie par l'effet de l'alcool" and in my view this misconception of the nature and effect of the fifth condition of the policy governed his whole approach to the question before him.

Section 223 of the *Criminal Code* is designed for the protection of the public, whereas the fifth condition of the policy is definitive of circumstances which relieve the insurer from liability. The word "impaired" or "affaiblie" as used in s. 223 must be construed in contradistinction to the provisions of s. 222 of the *Criminal Code* which provide that:

> Every one who, while intoxicated or under the influence of a narcotic drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence . . . .

The phrase describing a driver as having "sa capacité de conduire un véhicule à moteur . . . affaiblie par l'effet de l'alcool" or "his ability to drive a motor vehicle . . . impaired by alcohol" connotes to me a condition in which the driver is a potential danger to the other users of the highway because he is more likely to drive his motor vehicle improperly than he would be if he had not consumed so much alcool. In my view there is a wide difference between being likely to drive improperly and being *incapable* of driving properly. Every driver who is under the influence of liquor to the point of being *incapable* of proper control is certainly impaired, but in my opinion it does not follow that every impaired driver is necessarily *incapable* of proper control. The danger to the public which is involved in driving an automobile while the ability to drive is impaired is recognized by the language of s. 223 of the *Criminal Code,* but the terms of Condition no. 5 do not serve to relieve an insurer from liability unless and until it has been proved by a preponderance of evidence that the insured was under the influence of intoxicating liquor to the point of being incapable of the proper control of the automobile.

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I agree with the majority of the Court of Queen's Bench that the respondent's plea of guilty was an extra-judicial admission which was satisfactorily explained by his evidence to the effect that he had been persuaded to make such a plea by his brother and a police officer and that he had no legal advice, but in any event, as I have indicated, it is my view that the admission that he was "affaibli" within the meaning of s. 223 was not an admission that he was "incapable" and had, therefore, violated Condition no. 5 of the policy.

In conformity with the above, I am of opinion that the evidence of the Arsenault brothers is of no assistance in determining the respondent's condition at the time of the accident, that the evidence of the police officers does not establish that the respondent was incapable of properly operating his automobile, and that even if the respondent's plea of guilty had not been satisfactorily explained it could not amount to anything more than an admission that the respondent was "affaibli" at the time of the accident and would, therefore, not serve to relieve the appellant from liability.

It is true that the circumstances of the accident itself were consistent with the respondent being under the influence of intoxicating liquor so as to be, for the time being, incapable of properly operating his automobile, but they were equally consistent with negligence for which indemnity is provided in the insurance policy.

Condition no. 5 of the policy is not designed to relieve the insurer of liability by reason of the manner in which the automobile is operated, but is exclusively concerned with the question of whether or not the insured was driving whilst under the influence of intoxicating liquor or drugs to a point when he was incapable of properly operating his automobile. It is the condition of the insured and not the nature of the accident which relieves the insurer from liability, and although the nature of the accident may be a circumstance to be taken into consideration in determining the condition of the insured it does not of itself constitute proof that the policy condition has been violated.

Like the majority of the Court of Queen's Bench, it is not without much hesitation that I have concluded that the learned trial judge was in error, but the advantage which he had of seeing and hearing the witnesses was, in my opinion, counterbalanced by the fact that he treated Condition no. 5 of the policy as relieving the insurer from liability in cases where the insured's ability to drive is impaired by alcohol instead of limiting its application to cases where it can be proved that the insured was incapable of properly operating his automobile.

In my view the appellant has failed to discharge the burden which it assumed by its pleading of proving by a preponderance of evidence that the respondent violated Condition no. 5 of the policy.

I would dismiss this appeal with costs.

Appeal allowed with costs, ABBOTT *and* RITCHIE JJ. *dissenting.*

Attorneys for the defendant, appellant: Tansey, de Grandpré, de Grandpré, Bergeron & Monet, Montreal.

Attorneys for the plaintiff, respondent: Brais, Campbell, Mercier & Leduc, Montreal.