1962
*Nov. 2
Dec. 17

THE LONDON & LANCASHIRE GUARANTEE & ACCIDENT CO. OF CANADA (*Defendant*) ..... APPELLANT;

AND

CANADIAN MARCONI COMPANY (*Plaintiff*) ..... RESPONDENT.

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

Insurance—Travel accident policy—Clause excluding liability if insured intoxicated—Liability also excluded if death caused by disease or natural causes—Burden of proof—Blood sample showing quantity of alcohol.

The plaintiff company claimed under a travel accident insurance policy, issued by the defendant company, in respect of the accidental death of W, one of its employees covered by the policy. W was killed when driving alone and when, after swerving back and forth across the highway a number of times, his car left the road and collided with a tree. The policy excluded indemnity in the event that the insured was "in a state of intoxication" or if the death was caused "by disease or natural causes". The defendant company denied liability on the ground that the accident occurred whilst W was in a state of intoxication within the meaning of the policy. The evidence disclosed that W had been drinking about an hour previously and a blood test made three days after the death disclosed a high content of alcohol. The trial judge maintained the action and this judgment was affirmed by the Court of Queen's Bench. The defendant company appealed to this

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

Court and a further ground of appeal was based on an observation made by Owen J. of the Court of Queen's Bench that the deceased might have felt "faint or ill' which would mean that the death was caused "by disease or natural causes".

Held: The appeal should be dismissed.

The circumstances of this accident were not sufficient to discharge the burden assumed by the defendant of proving by a predonderance of evidence that W was in a state of intoxication or that his death was caused or contributed to by disease or natural causes, nor was there any evidence as to his behaviour on that day which would make such a conclusion any more probable. There were concurrent findings on the question of fact as to whether W was intoxicated or not, and these findings should not be disturbed.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Demers J. Appeal dismissed.

L. P. de Grandpré, Q.C., and *Guy Gilbert*, for the defendant, appellant.

Hazen Hansard, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Queen's Bench of the Province of Quebec[1] (Tremblay C.J. and Choquette J. dissenting) dismissing an appeal from a judgment of Demers J. of the Superior Court for the District of Montreal which had maintained the respondent's action against the appellant for $25,000 in respect of the accidental death of Mr. Ronald J. Williams, one of the respondent's senior employees, who was an "Insured Person" under the provisions of a Travel Accident Insurance Policy issued by the appellant to the respondent as the "Insured". The policy in question provided, *inter alia*, that:

> The Company hereby agrees to make to the Insured, payments as detailed hereunder when any Insured Person sustains bodily injuries (hereinafter referred to as "such injuries") *caused solely by accidental means and resulting directly and independently of all other causes from the said accidental means* . . . .
>
> * * *
>
> Unless endorsed hereon by the Company to the contrary, this Policy does not cover death, injury or disablement:
>
> (3) Directly or indirectly caused or contributed to by intentional self-injury, by disease or natural causes, by suicide or attempted suicide (whether felonious or not), by provoked assault, by dueling or by fighting (except in bona fide self-defense).
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> * * *

[1] [1962] Que. Q.B. 396.

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Ritchie J.

(5) Resulting from the Insured Person's own criminal act or from bodily injury occasioned or occurring whilst he is in a state of insanity (temporary or otherwise) or intoxication.

Mr. Williams was killed as the result of an accident which occurred at 6:35 p.m. on July 22, 1956, while he was driving alone to the Dorval Airport, and when, after swerving back and forth across the highway a number of times, his car left the right-hand side of Côte de Liesse Road and collided with a large tree.

In view of the nature of the accident and the evidence that the deceased had had two $1\frac{1}{2}$-oz. drinks of whisky about an hour previously and that a blood test made three days after the death purported to disclose a finding of 2.3 parts per 1000 by weight of alcohol in the deceased's blood, the appellant company denied liability on the ground that the accident occurred whilst Mr. Williams was "in a state of . . . intoxication" within the meaning of exclusion 5 of the policy.

In the course of his reasons for judgment in the Court of Queen's Bench, Owen J. observed that the accident was consistent with explanations other than intoxication, saying, *inter alia,* that "Williams might have felt faint or ill . . . .", and it is in relation to this observation that the appellant invokes exclusion 3 on the ground that such an explanation would mean that the death was caused "by disease or natural causes" and that it was, therefore, an event for which no indemnity was provided by the policy.

In light of all the evidence, I do not think that the circumstances of this accident are sufficient to discharge the burden assumed by the appellant of proving by a preponderance of evidence that Mr. Williams was in a state of intoxication or that his death was caused or contributed to by disease or natural causes, nor do I think that there was any evidence as to his behaviour on the day of his death which would make such a conclusion any more probable.

The remarkable feature of this case, however, is that although Mr. Williams was said to be "perfectly normal" an hour before death after having had two drinks of whisky, the blood test made three days later is consistent with his having consumed the equivalent of approximately 16 ounces of whisky during the day of his death. If no evidence had been tendered to explain this anomalous result, it would

unquestionably have supported the theory that the deceased, in some unexplained manner, had consumed enough additional alcohol between 5:25 and 6:35 p.m. to induce a state of intoxication in the average man. The evidence of Dr. Rabinovitch which appears to have been accepted by the learned trial judge and the majority of the judges of the Court of Queen's Bench was, however, to the effect that in the particular circumstances of this case the appearance of the presence of indicia of high alcoholic content in the blood disclosed by the test was probably due to natural processes operating after death and that the result of that test was not to be relied upon as indicating the amount of alcohol consumed by Williams.

The conclusion reached by both of the Courts below is, in my view, succinctly stated by Mr. Justice Owen in the last paragraph of his reasons for judgment where he says:

> . . . I would conclude that the Appellant did not discharge the burden imposed by the civil law of proving according to the balance of probabilities that Williams was intoxicated at the time of the accident which caused his death and I would dismiss the present appeal with costs.

The question of whether Mr. Williams was intoxicated or not is a question of fact, and as the learned trial judge and the majority of the Court of Queen's Bench are in agreement with respect to that question, I cannot express my opinion in more apt words than those employed by Taschereau J. in *American Automobile Insurance Company v. Dickson*[1], where he said:

> Although I have been impressed by the able arguments of counsel for the appellant, I feel it impossible to hold that intoxication was sufficiently proven, without violating the well-known rule established before this Court by a long series of judicial pronouncement, and which is that "concurrent findings" should not be disturbed, unless they cannot be supported by the evidence.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

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

Attorneys for the plaintiff, respondent: Common, Howard, Cate, Ogilvy, Bishop & Cope, Montreal.

[1] [1943] S.C.R. 143 at 149, 2 D.L.R. 15.