AMERICAN AUTOMOBILE INSURANCE CO. (DEFENDANT IN WARRANTY). APPELLANT;

AND

DAME ANNIE WALLACE DICKSON (PRINCIPAL DEFENDANT AND PLAINTIFF IN WARRANTY) ..... RESPONDENT;

AND

JAMES BUCHANAN WEIR (PRINCIPAL PLAINTIFF IN TWO ACTIONS),

AND

MARGARET C. BRUCE CAMERON (PRINCIPAL PLAINTIFF).

1942
*Nov. 13, 16, 17, 18, 19.
1943
*Feb. 23.

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

Motor vehicle—Negligence—Collision—Claims for damages to car and injury to passengers—Action in warranty by defendant against insurance company—Public liability insurance policy—Intoxication of driver—Excessive speed—Whether driver's acts amounting to criminal misconduct—Concurrent findings—Rule of public policy—Whether "intoxicated person" driving the car means owner of the car—Criminal negligence—Elements constituting it.

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

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An automobile, owned and driven by one Dickson while alone in the car, came into a head-on collision with another automobile belonging to one Weir and driven by one Cameron. The two drivers were killed and the occupants in the other automobile were seriously injured. As a result of the accident, three actions were instituted against the respondent, the mother and the universal residuary legatee of her son, Dickson, Weir claiming damages for his car and for bodily injuries and the widow of Cameron asking compensation for the death of her husband. The respondent, defendant, took three actions in warranty against the appellant insurance company under a public liability indemnity policy issued in favour of Dickson. The appellant denied its liability on the ground that, at the time of the collision, Dickson was driving his car in a state of intoxication and at a dangerous and illegal rate of speed, that such reckless conduct constituted an act of gross negligence as well as a crime and that, upon the rule of public policy, no indemnity can be recovered for the loss resulting therefrom. The trial judge maintained the three principal actions and the three corresponding actions in warranty; and the appellate court, dealing only with the latter, dismissed the appeals.

Held that the judgments appealed from should be affirmed. There were concurrent findings in the courts below that intoxication of the driver Dickson had not been proved, and that negligence and reckless driving on his part and excessive speed of his car have not been such that they would amount to criminal misconduct. That being so, there was no ground for the appellant company to invoke what was contended to be a rule of public policy, which under some circumstances might disentitle a plaintiff to recover on a policy of indemnity insurance.

Clause 5 of the policy stipulated that the insurance company would not be bound to indemnify the insured, if the accident occurs "while the automobile, with the knowledge and consent or connivance of the insured, is being driven * * * by an intoxicated person".

Held that the words "intoxicated person" do not mean the owner of the automobile: such clause applies and makes the policy void, when the "intoxicated person" is not the owner, but one who drives with the consent of the owner. *Home Insurance Co.* v. *Lindal and Beattie* ([1934] S.C.R. 33) foll.—Davis and Hudson JJ. expressing no opinion.

Held, also, that, in order to allow a court to see in the driver Dickson's acts the distinguishing marks of criminality, there should be proved a high degree of negligence and a "moral quality carried into the act" before it becomes culpable. *Rex* v. *Greisman* (46 C.C.C. 172, at 178) approved. Davis and Hudson JJ. expressing no opinion.

APPEALS from three similar judgments rendered by the Court of King's Bench, appeal side, province of Quebec, affirming three judgments of the Superior Court, Errol McDougall J., which judgments had maintained three actions in warranty and condemned the appellant company to pay to the plaintiffs the sum of $18,612.41, being the amounts of the condemnations upon the three principal actions.

L. E. Beaulieu K.C. and *Gérald Fauteux K.C.* for the appellant.

G. C. Papineau-Couture K.C. and *John Kerry K.C.* for the respondent.

The judgment of Rinfret, Kerwin and Taschereau JJ. was delivered by

TASCHEREAU J.—This is an appeal (*in re* Cameron) from a judgment of the Court of King's Bench, affirming the judgment of the trial judge, Chief Justice Létourneau and Mr. Justice St-Germain dissenting. This last judgment had maintained an action in warranty and condemned the appellant to pay to the respondent the sum of $15,000, being the amount of the condemnation upon the principal action.

On the 23rd of July, 1937, on the Taschereau Boulevard, Parker Dickson was proceeding alone in his automobile from Laprairie towards Montreal. At a short distance from Montreal, his automobile came into a head-on collision with another automobile belonging to James Buchanan Weir, which was driven by Alexander Fraser Cameron. The two drivers, Parker Dickson and Cameron, were killed, and the other occupants in the other automobile were seriously injured.

As a result of this accident, three actions were instituted against Dickson's mother, Annie Dickson, who was the universal residuary legatee of her son. Weir claimed $1,037.86 for his car, and $6,778.68 for bodily injuries, and Mrs. Cameron, the wife of Alexander Fraser Cameron, claimed $50,000 for the death of her husband.

In May, 1937, the appellant, the American Automobile Insurance Company, had issued in favour of the late William Parker Dickson an insurance policy known as a combination automobile policy, where it undertook to indemnify the latter against loss or damages which the insured might become liable to pay for injury caused to any person, or destruction of property. Annie Dickson, therefore, took three actions in warranty praying that the insurance company, the appellant, be condemned to guarantee and indemnify her against any condemnation which might be rendered against her. The learned trial judge maintained the three principal actions and the three corresponding actions in warranty. The Court of

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King's Bench, which had to deal only with the appeals on the actions in warranty, dismissed the three appeals with costs, and the present appellant now appeals before this Court.

It is submitted on behalf of the appellant that, at the time of the collision, the late William Parker Dickson was driving his car in a state of intoxication and that the risk resulting from such a conduct was not covered by the terms of the policy. The appellant further submits that Dickson was driving his car at such a dangerous and illegal rate of speed and in such a reckless manner that his conduct constituted an act of gross negligence, manifestly unlawful, as well as a crime under the provisions of the Criminal Code of Canada, and that, on the ground of public policy, no indemnity could be recovered for the loss resulting therefrom.

An important feature of this case is that there has been no witness heard on the question as to how the accident happened, both drivers being killed and all the passengers in Weir's automobile being unable to remember anything that happened, having suffered, as a result of the shock, complete loss of memory. This coincidence of three persons, being similarly and simultaneously affected, was declared by the medical evidence as being unusual but not impossible. The last concrete fact prior to the accident which was revealed by the evidence was told by Bingham who was seated beside the driver of Weir's car. Shortly after they had crossed the Harbour Bridge and had turned right into Taschereau Boulevard, which is approximately six miles from where the accident occurred, Bingham observed that the speedometer of their car indicated a speed of fifty miles an hour. He believes that Cameron was driving to the right of the roadway and that the speed appeared to be the " cruising speed ". There is no other direct evidence to indicate the speed of the automobiles, and nobody knows how the accident happened. It is by the damaged condition of the cars, their position on the highway, the pieces of shattered glass on the spot where they were found, the evidence of experts, that the learned trial judge made the following findings and came to the conclusion that there was contributory negligence:—

From observations made after the accident, in reconstruction of what must have occurred, it would seem that the Weir car, a Buick Sedan, had been driving slightly to the right of the centre line of the travelled roadway, and the Dickson car, a Plymouth, the lighter of the two, had been proceeding upon the highway to its left of the centre line thereof. Such fact is determined by measurements taken after the accident, showing that the left wheels of the Buick were six inches from the centre line, parallel to the side of the roadway. It is a fair assumption from the position in which the two cars were found and the physical evidence of damage to conclude that the impact had been practically head-on, which is entirely consistent with the curious phenomenon of both cars abruptly brought to a stop where they collided, without trace upon the roadway of tire marks indicating the slightest movement, forward or lateral. Given the weight of the Weir car (3,610 lbs.) plus the weight of passengers, as compared with that of Dickson's (3,145 lbs.), in which he was alone; that both cars stopped dead upon impact, and that the Weir car was travelling at 50 miles per hour, it is a simple problem in dynamics to conclude that the smaller and lighter of the two cars (Dickson's) must have been travelling at a considerably higher speed than the heavier vehicle.

So, on a clear moonlight night, upon a roadway thirty feet and more in width, these two automobiles came into head-on collision. It is obvious that such an occurrence could not take place without negligence. Upon whom is the responsibility to rest? Clearly, Dickson cannot escape. He was driving at an excessive and illegal rate of speed under the circumstances, and in disregard of the cardinal rule of safe driving that a driver must keep to the right of the roadway. His car was found to have been proceeding beyond the centre line of the roadway, i.e. to the left thereof. But Dickson's negligence does not necessarily absolve the driver of Weir's automobile from blame. He too was driving at high speed, true, to his own side of the centre line, but well in the centre. Coming up the slope to the crest of the overpass, it was negligent and careless for him to proceed in that position and at such speed when he could not see the approaching car upon the opposite side of such slope. He must be held to have contributed to the accident by his negligence. The Court is then called upon to assess the degree of responsibility attributable to each driver proportionate to the negligence of each (*Nichols Chemical Company of Canada* v. *Lefebvre* (1), and, after careful consideration of all the elements involved, determine this proportion at seventy-five per cent (75%) for Dickson and at twenty-five per cent (25%) for Weir. As to the latter, it is shown that Cameron, in charge of Weir's automobile, was driving with the consent of the latter, who must be held to answer for the acts of his préposé.

Under the terms of the policy, the appellant agreed to indemnify the insured

against all loss or damage which the insured shall become legally liable to pay for bodily injury (including death resulting therefrom) caused to any person or persons, by the ownership, maintenance or use of the automobile.

By the judgment of the trial judge, Dickson's estate became "legally liable to pay" and as there has been no appeal on the principal action, it is not open to us to

(1) (1909) 42 Can. S.C.R. 402.

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reconsider this matter. But, the appellant submits that, under the terms of clause 5 of the policy, it is not bound to indemnify the insured, if the accident occurs:—

> while the automobile, with the knowledge, consent, or connivance of the insured, is being driven by a person under the age limit fixed by law, or in any event under the age of 16 years, or by an intoxicated person.

In view of the conclusion which I have reached, it would seem unnecessary to determine whether this section has any application, but I wish nevertheless to add, that I do not think that the words "intoxicated person" mean the owner of the automobile. This section applies and makes the policy void, when the "intoxicated person" is not the owner, but one who drives with the consent of the owner. We are bound, I think, by the decision of this Court, in *Home Insurance Company* v. *Lindal and Beattie* (1), where Mr. Justice Lamont speaking for the majority of the Court said:

> The exclusion from liability, under statutory condition 5, is only "while the automobile, with the knowledge, consent or connivance of the insured, is being driven by * * * an intoxicated person". This is not apt language to describe an act by the insured himself. It is, however, just the language one would expect to be used if the intention was to exclude liability where the automobile was being driven by a third person with the permission of the insured. Apart from the inaptness of the language there is, we think, another difficulty. To exclude liability, the automobile, when driven by an intoxicated person, must be driven with the knowledge of the insured. If statutory condition 5 is construed so as to include the insured himself, we should have this remarkable result: that, if the insured were so intoxicated as not to know what he was doing, the condition would not apply owing to the insured's want of knowledge; while, if he were but slightly intoxicated, he would know that he was driving and the condition would be applicable. In our opinion condition 5 is not to be construed as applicable to the insured.

But, the appellant says alternatively that even if the clause does not apply, the policy is still void on the ground of public policy: the intoxication of the insured, while operating his car, and his reckless driving on the highway in violation of the Criminal Code, being a bar to all claims against the appellant. I do not think that this Court can interfere with the findings made on the question of intoxication by the courts below. After carefully reviewing all the evidence, the learned trial judge who saw and heard the witnesses, and who had to deal with a question of credibility, came to the conclusion that:

(1) [1934] S.C.R. 33, at 36.

To reach a finding that Dickson was, in fact, intoxicated, and had become so affected in his mental, physical and nervous process that he lacked to an appreciable degree the ability to function properly in relation to the operation of his automobile, the Court would require more convincing proof.

In the Court of King's Bench, Mr. Justice Bond said:

The burden of proof has not been discharged by the appellant in the opinion of the trial judge and a careful review of the evidence leads me to the same conclusion.

Mr. Justice Barclay also said:

I have carefully considered all the evidence as to the intoxication and I find nothing to justify any interference by this Court with the learned trial judge's decision on this point.

And Mr. Justice Salvas sitting *ad hoc* expressed his views as follows:

Après avoir étudié attentivement toute cette preuve, je ne puis arriver à la conclusion que la Cour Supérieure a erré en rejetant, comme non prouvé, le premier moyen de l'appelante qui, encore une fois, ne soulève qu'une pure question de fait.

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.

Did the insured commit any other criminal offence that would void the insurance contract, on the ground of public policy? It has not been suggested that Dickson if living could be prosecuted for manslaughter; but it is submitted that he had the care of a thing susceptible of endangering human life, that he did not fulfil his legal duty to take reasonable precautions to avoid such danger, that by doing negligently or omitting to do any act which it was his duty to do, he caused grievous bodily injury to other persons, and that on a highway, he was driving recklessly. These three offences are embodied in sections 247, 284 and 285 of the Criminal Code.

I cannot agree with these contentions.

In my opinion, the evidence fails to reveal any characteristics of criminality in the conduct of Dickson. It is only by a process of reconstruction that the learned trial judge reached his conclusions. The evidence, although

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on the border line between conjectures and inferences drawn from proven facts, was sufficient for him to say that there was civil liability; but in my judgment, these findings are far from sufficient to lead me to the conclusion that there has been a criminal act.

We do not know what really happened, and what is the extent of Dickson's negligence, if any. Was his conduct such that it amounted to a complete disregard for the safety of others? Was he driving furiously, having regard to all the circumstances? I do not think that these questions are satisfactorily answered.

In order to allow a court to see in Dickson's acts the distinguishing marks of criminality, there should be proved a high degree of negligence, and a "moral quality carried into the act" before it becomes culpable. (*Rex.* v. *Greisman* (1).)

In this case the burden was upon the appellant. If I did come to the conclusion that the necessary ingredients of a crime are to be found in the evidence, I feel that I would rest my judgment on mere speculation and hypothesis.

This appeal, and the two others argued at the same hearing, should be dismissed with costs.

The judgment of Davis and Hudson JJ. was delivered by

DAVIS J.—The appellant company seeks to avoid payment under a public liability indemnity policy. Two motor cars met in a head-on collision at two or three o'clock in the morning on a paved highway leading out of Montreal. In one car was Dickson, alone. He was owner and driver. In the other car was Weir, who was driving, with three passengers in his car. It was a very bad accident; both the drivers were killed; none of the passengers had any recollection of the accident, all having been injured; and there were no other eye-witnesses. These suits were brought on the Dickson policy and the insurance company put its defence on three grounds:

(1) That Dickson was an intoxicated person at the time of the accident and that therefore,

(*a*) because of a special provision in the policy the company is not liable; and

(1) (1926) 46 C.C.C. 172, at 178.

(*b*) alternatively, that public policy would in any event lead the Court under the circumstances not to assist the plaintiff in recovering.

(2) That assuming intoxication is not proved, the excessive speed at which Dickson's car was being driven was wanton recklessness and manifest wrong-doing, and public policy is again relied on.

Errol McDougall J. tried the cases; he came to the conclusion that there was not sufficient evidence to justify him in finding that Dickson was in a state of intoxication at the time of the accident. The only evidence of intoxication was the amount of liquor Dickson had taken that evening and the results of blood tests made from the body of the dead man a few hours after his death. On this branch of the cases, three of the five judges of the Court of King's Bench agreed with Mr. Justice McDougall that intoxication had not been proved.

On the question of speed the trial judge found there must have been excessive speed but that it was not such a wrong-doing as would invoke the rule of public policy. Here again the majority of the Court of King's Bench agreed with this conclusion. The actions stand dismissed. The insurance company appeals to this Court.

Notwithstanding the able and exhaustive argument addressed to us by Mr. Beaulieu, I do not think that the question of public policy so much stressed by him really arises on the evidence in the case. As might well be expected under the circumstances, if the evidence at the trial ever got beyond the region of conjecture in the efforts of the parties to determine the fault that caused the unfortunate collision, there was no proof of what might be called, for want of a better term, criminal misconduct on the part of Dickson as the cause of, or as a contributing cause to, the collision. That being so, there is no ground for invoking what was contended to be a rule of public policy which under some circumstances might disentitle a plaintiff to recover on a policy of indemnity insurance.

I should dismiss the appeals with costs.

Appeals dismissed with costs.

Solicitors for the appellant: *L. E. Beaulieu* and *Gérald Fauteux.*

Solicitors for the respondent: *Campbell, Weldon, Kerry* and *Bruneau.*