CA 004155
Vancouver Registry

Court of Appeal

ORAL REASONS FOR JUDGMENT

Before:

The Honourable Mr. Justice Carrothers
The Honourable Mr. Justice Anderson
The Honourable Madam Justice McLachlin

VANCOUVER, B.C.

JUNE 20, 1986.

BETWEEN:

ROBERT GARFIELD ONDRIK
and
JOHN ONDRIK

PLAINTIFFS
(APPELLANTS)

AND:

JEROME T. COLEMAN, Representative Ad Litem
of the Estate of RICHARD JOHN GOODWIN,
and
INSURANCE CORPORATION OF BRITISH COLUMBIA

DEFENDANTS
(RESPONDENTS)

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

THIRTY PARTY
(RESPONDENT)

D.E.M. Jenkins, Esq. and
D. Byl, Esq.
appearing for the Appellants

K.C. Jarvis, Esq.
appearing for the Respondents

ORIGINAL

(On appeal from the judgment of Meredith, J.)

CARROTHERS, J.A.: Madam Justice McLachlin will give the first judgment.

McLACHLIN, J.A.: This is an appeal from the judgment of Mr. Justice Meredith, pronounced May 16, 1985, ordering that the Goodwin Estate is liable to pay to the plaintiffs 60% of the damages for injuries suffered as a result of a motor vehicle accident, and further ordering that the Third Party, Insurance Corporation of British Columbia, is not liable to indemnify Goodwin Estate for that judgment.

The facts arise out of a motor vehicle accident which happened on June 29th, 1983. Robert Garfield Ondrik was a passenger in a motor vehicle owned by himself and driven by Richard John Goodwin at the time of the accident. As a result of the accident Goodwin died and Ondrik was rendered a quadriplegic.

On the day of the accident Ondrik had spent the afternoon and evening with Goodwin. They had been drinking from approximately 4:00 p.m. to approximately 8:40 p.m. at the Crystal Lake campsite, a few miles north of the area of the Hart Highway where the accident occurred.

At 8:00 p.m. Ondrik and Goodwin left the campsite together

in Ondrik's car. Ondrik drove the first distance from Crystal Lake campsite to Hart Highway and thereafter turned the operation of the vehicle over to Goodwin, having decided, as he put it, that he was "borderline impaired" and should not himself be driving.

The accident occurred when the vehicle left the road, proceeded through the ditch, struck a road sign, and ultimately landed on its roof.

Afterward, Constable Wolney, an R.C.M.P. officer, attended the scene of the accident. He attempted to get Ondrik and Goodwin out of the vehicle. He detected an odour of liquor inside the vehicle.

Subsequently, a pathologist took a blood sample from the driver, then deceased, and found that it contained 212 milligrams of alcohol per 100 millilitres of blood.

At trial, the plaintiffs called two witnesses who had spent part of the afternoon with Ondrik and Goodwin. Paul Eugene and Lawrence Isackson were members of the park maintenance crew responsible for clean-up of several campsites that day, one of which was Crystal Lake. They had arrived at Crystal Lake campsite at about 5:00 p.m., where they met Ondrik and Goodman. Eugene and Isackson spent from approximately 5:00 to 7:00 p.m. with Ondrik and Goodwin drinking beer. However, for more

than half an hour of that time Mr. Eugene was not in the presence of the other two, as he was completing his work duties at another location in the campsite.

At trial, Eugene testified that on the day of the accident he had drunk about two bottles of beer. He also testified that Ondrik and Goodwin had only had a few beer to drink and that they appeared to be sober. Isackson gave similar evidence. On cross-examination both Eugene and Isackson admitted that they had not kept count of the number of beer that either Ondrik or Goodwin had consumed. At the trial, Carolyn Kirkwood, an expert alcohol analyst gave evidence that everyone is impaired with regard to their abilities to operate a motor vehicle with a reading of 212 milligrams of alcohol per 100 millilitres of blood. In cross-examination she testified that 90% of persons with this reading would show overt signs of impairment. She said, however, that persons with a very high tolerance for alcohol would not necessarily show overt signs of impairment at this reading.

There are two issues on the appeal. The first is whether the trial judge erred in holding that the plaintiff, Mr. Ondrik, allowed or connived in the use of his motor vehicle by letting Mr. Goodwin drive it in a manner contrary to regulation 6.24A of the Insurance Motor Vehicle Act Regulations.

The test to be applied in determining whether or not

there was a violation of this regulation is set out in Cooperative Fire and Casualty Co. v. Ritchie (1983) 150 D.L.R. (3d) p.1, a decision of the Supreme Court of Canada, where Mr. Justice Ritchie adopted the following passage with approval. He stated:

> "If the insured knew, or ought to have known under all the circumstances, that the person he permitted to operate his vehicle would operate it in a manner that was not permitted by his insurance policy, he would be liable to reimburse his insurer for any amount it was required to pay but would not otherwise have been liable to pay under the policy ..."

The question then is whether the insured knew or ought to have known under all the circumstances that Mr. Goodwin was not capable of operating a motor vehicle in accordance with the insurance policy.

The trial judge on this issue said:

> "... the plaintiff knew, or would have known but for his own intoxication, that the deceased was a bad risk indeed. The plaintiff saw the deceased consume a good deal of alcohol that afternoon, and in any event the probable appearance and conduct of the deceased, as shown by the evidence, given a .212 reading should have been warning enough."

The appellants' contention on this point is that there was insufficient evidence before the trial judge to permit him to

arrive at the conclusion that the plaintiff Ondrik ought to have known that Mr. Goodwin was incapable of operating a motor vehicle.

In my opinion, the appellants' contention in this respect must succeed.

I.C.B.C. relies on four factors which it says establish sufficient evidence to support the trial judge's conclusion. It says first, the plaintiff and defendant had been drinking in each other's presence from 4:00 p.m. to 7:30 p.m. It says, secondly, the plaintiff and defendant had a discussion about at least the plaintiff's ability to drive, after which the defendant was permitted to drive. I.C.B.C. says, thirdly, that it is clear that the accident was caused by the defendant's impairment. Fourthly, it says that the evidence of Kirkwood is sufficient to establish that the plaintiff, Mr. Ondrik, ought to have been aware of the degree of this impairment.

The first three points, while established, do not show that the plaintiff should have known Mr. Goodwin was too impaired to drive. On the fourth point, I.C.B.C. has failed to make out its contention. There was evidence from Mrs. Kirkwood, as I have said, that most people with Mr. Goodwin's degree of impairment will manifest symptoms, but there was also evidence that some people would not; that is, people with a high tolerance to alcohol.

In my opinion there is insufficient evidence to show

that Mr. Goodwin would not have fallen into the category of a person with high tolerance to alcohol. The evidence establishes that apparently he was not much of a drinker. It does not go beyond that. Mrs. Kirkwood's evidence establishes that one can develop a tolerance through habituation. That evidence does not, in my view, satisfy me and should not have satisfied the trial judge on the balance of probabilities that there would have been symptoms evident to the plaintiff in this case which should have led him to conclude that the defendant was incapable of driving a motor vehicle. That being the case, and the onus of establishing statutory breach being on I.C.B.C., I conclude that the appeal on this point should be allowed.

The second issue is whether the trial judge erred in his finding as to contributory negligence.

The appellant takes two points on this issue: first, that there was no evidence supporting a finding of contributory negligence at all and, secondly, if there was, an apportionment of 40% contributory negligence for the plaintiff is too high. In fact, the appellant's main point is the first one since, if there was evidence to support a finding of contributory negligence, it would be very unlikely that this court, barring extraordinary circumstances, would interfere, providing that that allocation was within the accepted range, which it is conceded this allocation was.

The real question I must answer then was whether there

was evidence capable of supporting contributory negligence.

The appellants' argument on this point is the same as it was on the point which I have just discussed, namely, breach of the Motor Vehicle Insurance Act regulations. The contention is that the defendants in this case and I.C.B.C. failed to adduce evidence that the plaintiff, Mr. Ondrik, should have known in all the circumstances that Mr. Goodwin was incapable of properly driving a motor vehicle.

In my view, having disposed of the first issue as I have, it follows that there was also insufficient evidence to support the conclusion of the trial judge as to contributory negligence.

For these reasons I would allow the appeal.

CARROTHERS, J.A.: I agree.

ANDERSON, J.A.: I agree.

CARROTHERS, J.A.: The appeal is allowed.

B.M.M.
J.A.