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C865770

Vancouver Registry
CA008908

Court of Appeal

ORAL REASONS FOR JUDGMENT:

Before:

The Honourable Mr. Justice Anderson
The Honourable Mr. Justice Hutcheon
The Honourable Mr. Justice Macfarlane

May 24, 1989

Vancouver, B.C.

BETWEEN:

JOHN WILFRED CAISSIE

PLAINTIFF
(APPELLANT)

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

DEFENDANT
(RESPONDENT)

Miss S.L. Hamilton — appearing for the Appellant
D. Byl, Esq. — appearing for the Respondent

MACFARLANE, J.A.: This is an appeal from the decision of Mr. Justice Taylor pronounced January 27, 1988 dismissing the plaintiff's action. The claim was against the Insurance Corporation of British Columbia (I.C.B.C.) by an insured for "no fault" disability benefits and "collision" coverage arising out of

an accident which the insurer says happened while the insured was under the influence of alcohol and drugs to such an extent that he was incapable of proper control of his vehicle. The action was dismissed because the trial judge found that I.C.B.C. had established that the plaintiff was in breach of regulation 55(8)(a) of the Revised Regulations (1984) made pursuant to the *Insurance Motor Vehicle Act*, R.S.B.C. 1979 C.204 which provides:

> (8) An insured shall be deemed to have breached a condition of section 49 and of Parts 6 and 9 where
> (a) his claim arises out of or is related to his operation of a vehicle while he is under the influence of intoxicating liquor or a drug to such an extent that he is incapable of proper control of the vehicle.

The facts are that at approximately 5:41 a.m. on July 24, 1986 the plaintiff was injured and his car damaged beyond repair in a motor vehicle accident. It was a single car accident. The plaintiff was driving his vehicle down a highway. The road was straight at that point and the car went off the road and went into the ditch. The plaintiff was not able to give any explanation as to how the accident occurred other than he might have dozed off and had driven off the road.

The plaintiff had worked a shift of ten hours on July 23, 1986 and had finished work at about 2:00 p.m. He had then driven from the work site to Prince George where he met friends.

From about 7:30 p.m. on July 23rd until about 4:00 a.m. on July 24th he was drinking with these friends. The evidence as to how much alcohol was consumed was conflicting but it appears that the judge found that the plaintiff consumed five to nine beers between 7:30 p.m. and 4:00 a.m. and that he joined with others in smoking a joint of hashish at about 2:30 a.m.

He was seen by his brother during the course of the evening and by a friend, Wesley Chumm. Both the brother and Wesley Chumm did not think that the plaintiff was intoxicated. Wesley Chumm saw the plaintiff at about 4 - 4:30 a.m. on July 24, 1986. He said he was not drunk and he did not observe any signs of impairment. The trial judge rejected that evidence.

Police officers observed the condition of the plaintiff at the scene of the accident and soon afterwards. His symptoms, as observed by one police officer, were consistent with injuries sustained in the accident. He was taken to the hospital. The ambulance attendants who took him there noticed that there was an odour on his breath. He spoke to a nurse in the hospital at about 6:25 a.m. She thought that there was a heavy odour on his breath, and he admitted that he had been pretty drunk earlier in the evening. The trial judge placed quite a lot of weight on that statement in considering whether to accept the evidence of his brother and his friend Wesley Chumm.

No breathalyser test was taken and no blood was examined for the presence of alcohol but at the trial an alcohol absorbtion/elimination expert was called by the plaintiff and she was cross-examined. During cross-examinations he conceded that the pattern of alcohol consumption disclosed by the evidence would have placed the plaintiff's blood alcohol reading at .109. She testified that the plaintiff would not have the capacity to operate a motor vehicle had he consumed alcohol at the rate stated. Her evidence did not take into account the hashish that the plaintiff had smoked. Nor did the evidence of his friend Wesley Chumm take that into account.

The trial judge gave oral reasons for judgment. He carefully reviewed the evidence and the issues. He said this:

> I find that the plaintiff was intoxicated at least during the last two or three hours before he set out for the journey back to the camp, and that he was still to a significant extent under the influence of alcohol and hashish when the accident occurred 30 to 45 minutes later. One of the well-known effects of alcohol is to induce drowsiness and thus to accentuate the effects of any existing fatigue. Hashish is known to be capable of having similar effects. I am compelled to the conclusion that but for his ingestion of alcohol and hashish the plaintiff would probably have safely completed the remaining few miles back to the work camp. A person of his age without sleep for 24 hours might, of course, doze off in the way that the plaintiff did, but is not normally likely to do so. A person who consumes significant quantities of intoxicants so as to become, as the plaintiff said he was, "pretty drunk" is however very likely to do that. The effect of drunkenness and drug taking on pre-existing fatigue will

> likely to do that. The effect of drunkenness and drug taking on pre-existing fatigue will at least be to hasten the time at which dozing off occurs.
>
> In the circumstance of this case, I conclude that the insurer has met the burden which lies on it of showing that the accident occurred while the plaintiff was under the influence of alcohol and a drug, and that it was that influence which caused him to doze off when he did, so as to be incapable of control of his vehicle and that the accident resulted from that incapacity. It follows that the action must be dismissed.

The plaintiff submits that the trial judge applied the wrong test in interpreting the regulation. It is submitted that the correct test was stated by McKenzie, J in *Schedeger v. Insurance Corporation of British Columbia,* (1982) I.L.R. 1-1480 (B.C.S.C.) as follows:

> Negligence on his part might be of such a nature and degree that, in conjunction with independent evidence of impairment, it might provide proof on a balance of probabilities that incapacity to exercise proper control in fact existed. The question here is whether the evidence demonstrates, on a balance of probabilities, that the negligent acts were of such a nature and degree as to be explainable only by compelling the inference that the influence of alcohol caused the negligent acts and that the effect of the alcohol was to render him incapable of proper control. <u>This can be tested by asking whether the collision would have been avoided if the plaintiff had been sober.</u>

Mr. Justice Taylor, in my opinion, applied that test and in particular he tested his findings in the way suggested by Mr. Justice McKenzie. He said:

> I am compelled to the conclusion that but for his ingestion of alcohol and hashish the plaintiff would probably have safely completed the remaining few miles back to the work camp.

Secondly, the plaintiff submits that Mr. Justice Taylor did not apply as strict a test as the authorities require and failed to appreciate, in reviewing the evidence, the difference between simple impairment and incapacity to properly control an automobile. (See *State Farm Mutual Automobile Insurance Company v. Rose*, [1981] 2 W.W.R. 703 (B.C.C.A.) and *Kim v. Insurance Corporation of British Columbia*, (1980) 21 B.C.L.R. 18 at 20.) I do not understand that Mr. Justice Taylor assumed that simple impairment was enough. He directed his attention to and found incapacity caused by alcohol and drugs. In short, he found that the plaintiff became incapable, that is he fell asleep at the wheel of his car and allowed it to go off the road because of the ingestion of alcohol and hashish. He said that without that ingestion that the accident would probably not have occurred.

The final submission made by the plaintiff is that the evidence was not sufficient to support a finding of the degree of incapacity necessary to breach the regulations. In part this submission was a repetition of what counsel had already said with respect to the strictness of the test to be applied and the need to examine the evidence carefully to ensure that the degree of capacity was of the high order required by the regulation.

There was evidence before the trial judge upon which he could have found on a balance of probabilities that the plaintiff was incapacitated to the extent required by the regulation. He did, as he had the discretion to do reject much of the evidence of the plaintiff and his witnesses. But he accepted the evidence of the plaintiff as to his maximum drinking pattern. He relied upon the statement made by the plaintiff at the emergency ward of the hospital and the evidence of the expert in order to come to his conclusion. He had the opportunity to observe the witnesses, and his findings of fact ought not be interfered with by an appellate court unless it is satisfied that his findings were manifestly wrong: - see *Stein v. the "Kathy K" (Storm point) [1976] 2 S.C.R. 802, 682 D.L.R. (3d) 16 N.R. 359 and* Lewis v. Todd (1980 14 C.C.L.T. 294 (S.C.C.), both decisions of the Supreme Court of Canada.

There was evidence here upon which it was open to the trial judge to conclude as he did that the plaintiff was incapable of the proper control of his vehicle owing to the combined affect of the consumption of alcohol and drugs. I would not interfere with the judgment below and would dismiss the appeal.

ANDERSON, J.A.: I agree.

HUTCHEON, J.A.: I agree.

A.B.M.
J.A.