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SOUTHERN PACIFIC INSURANCE CO. LTD.

v.

SUBRAMANI

[COURT OF APPEAL, 1962 (MacDuff P., Marsack J.A., Knox-Mawer J.A.), 7th, 17th August]

Civil Jurisdiction

Appeal—civil appeal—evidence and proof—inferences of fact—Court of Appeal substituting own inferences for those of trial judge.

Evidence and proof—inferences of fact—Court of Appeal may in a proper case substitute own inferences for those of trial judge.

Insurance—claim—condition precedent to liability that no false statement be made in support of claim—whether statement false—whether made in support of claim.

Insurance—claim—Accident Report Form—whether amounting to formal claim.

A policy of insurance over a motor vehicle contained a provision, as a condition precedent to the liability of the appellant company, that, "No false declaration or statement shall be made in support of any claim under this policy." The appellant company repudiated liability under the policy on the ground that the respondent, in a document called an "Accident Report Form" had untruly answered in the negative the question, "Did driver consume any intoxicating liquor during 12 hours prior to the accident?" In the Supreme Court the trial judge held as a fact that the answer in question was untrue but that it was not a statement or declaration in support of any claim under the policy. On appeal —

Held: 1. On the question whether the respondent had consumed intoxicating liquor within twelve hours prior to the accident, it was open to the Court of Appeal to consider what inferences should properly be drawn from the evidence of the only two witnesses who gave relevant evidence, on the basis that they were honest witnesses.

Benmax v. Austin Motor Co. Ltd. [1955] A.C. 370; [1955] 1 All E.R. 326 and *Hicks v. British Transport Commission* [1958] 2 All E.R. 39; [1958] 1 W.L.R. 493, applied.

2. The trial judge's finding of fact on this question was not justified by the evidence tendered and the Court of Appeal would substitute its own inference that the falsity of the statement complained had not been proved.

3. (per MacDuff P. and Marsack J.A.) The Accident Report Form, which contained fifty-five questions, was on the face of it no more than a compliance with the obligation of the insured under the policy to give early notice of any accident. Even though treated as a claim, the construction of the document was a matter of law; it contained no formal claim and was not strictly a claim under the policy.

Cases referred to: *Hontestroom S.S. v. Sagaporack S.S.* [1927] A.C. 37; 136 L.T. 33: *Welch v. Royal Exchange Assurance* [1939] 1 K.B. 294; [1938] 4 All E.R. 289.

Appeal from a judgment of the Supreme Court allowing a claim under an insurance policy for damage to a motor vehicle. The facts appear from the judgment of Marsack J.A.

J. N. Falvey for the appellant.

K. C. Ramrakha for the respondent.

The following judgments were read [17th August, 1961]—

MARSACK J.A. :

This is an appeal against the decision of the Supreme Court giving judgment for the Respondent against the Appellant Company for the sum of £730, representing what was held by the Court below to be the amount payable under an insurance policy in respect of damage to a motor vehicle, the property of the Respondent, and covered by a policy issued by the Appellant Company.

There was no dispute as to the fact of the accident to the vehicle covered by the policy, and the amount awarded by the learned trial Judge was not questioned at the hearing of the appeal. The defence to the original claim was a purely legal one: namely, that the Company was entitled to repudiate liability because the insured, the Respondent, had committed a breach of Condition No. 2 expressed in the policy as a condition precedent to the liability of the Company. This reads:

> "2. No false declaration or statement shall be made in support of any claim under this policy."

In a written document dated 9th January, 1961, and referred to in the amended statement of defence as a "Claim Form", the Respondent answered in the negative the question:

> "Did driver consume any intoxicating liquor during 12 hours prior to the accident?"

The gist of the defence is that this statement was made in support of a claim under the policy; that it was untrue; that it amounted, therefore, to a breach of Condition No. 2 expressed in the policy; and that the Appellant Company was on this ground entitled to repudiate liability.

The learned trial Judge held as a fact that the answer was untrue, and that the Plaintiff had consumed intoxicating liquor during the 12 hours prior to the accident. He further held that the statement in question was not "a statement or declaration made in support of any claim under the policy".

The Appellant Company appealed on the ground that the learned trial Judge erred in fact and in law in holding that this false statement was not a false statement or declaration in support of a claim under the policy, and was not a breach of condition expressed in the policy.

There was no cross-appeal as to the Judge's finding of fact. This Court intimated, however, that it wished to hear argument as to whether the finding of the learned trial Judge that the Plaintiff had consumed intoxicating liquor during the 12 hours prior to the accident could be supported having regard to — (a) the evidence; (b) the standard of proof required; and a further hearing of the appeal took place at which Counsel for the Respondent and for the Appellant argued the issue raised by the Court.

I propose to deal first with this last issue, as it seems to me to be decisive. It is a well established principle that a Court of Appeal will be extremely reluctant to interfere with the findings of fact made by the trial Judge who has had the advantage of seeing and hearing the witnesses and who, therefore, has been in a better position to assess the credibility of their evidence than the Appellate Court which must depend upon the written record. There are times, however, when an appellate tribunal must do so "as a matter of justice and of judicial obligation", to quote the judgment in *S. S. Hontestroom* [1927] A.C. 37 at p. 47. The duty of the Court of Appeal in such cases is made clear from the judgment of Viscount Simonds in *Benmax v. Austin Motor Co. Ltd.* [1955] 1 All E.R. 326 at p. 327 :

> "This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts."

In *Hicks v. British Transport Commission* [1958] 2 All E.R. 39 at p. 50, Parker L.J. says :

> "This court is loath to interfere with an inference drawn by a trial judge who has seen and heard the witnesses. With that, of course, I entirely agree; but at the same time, if this court is satisfied that the inference drawn is the wrong inference then not only has it the power but it is its duty to substitute its own inference for that found by the learned judge."

Applying this principle to the present case, it appears to me that it is our duty to consider exactly what is proved by the evidence of the two witnesses called by the Appellant Company in the Court below on the subject of consumption of intoxicating liquor by the Respondent. This must, I think, be done on the basis that they were honest witnesses who spoke what they believed to be the truth. That was what the trial Judge found, and full weight must be given to his finding. As to the probative value of the evidence and the inferences to be drawn from it, I think this Court is entitled to differ from the learned trial Judge if it is of opinion that the Judge's findings were not justified. It accordingly becomes necessary to examine carefully the evidence given by these two witnesses.

The first of these was Police Constable Filimone Kama :

> "I spoke to the plaintiff and asked him if he was a truck driver. He said yes. During our conversation I could smell liquor on the plaintiff's breath. I was just facing the plaintiff. I couldn't say if plaintiff smelt of fresh or stale liquor. It was merely a smell of liquor. Not a strong smell but just a whiff of it. I couldn't say how long before I had seen plaintiff he had been drinking."

That is the whole of the Police Constable's evidence on the point. The second witness was Assistant Medical Officer Benjamin Loma-loma :

> "I recall the night of 3rd January, 1961, at some time after 8.30 p.m. seeing the plaintiff in Lautoka Hospital. I treated him. He had an incised wound on front of the forehead just above the nose. From the smell of his breath I could smell liquor. In my opinion he must have been drinking alcohol. I treated the cut on his head. I think a sister was with me at the time.
>
> XXmn : From the smell of liquor on his breath I would say he had been drinking within the previous 5 to 10 hours.
>
> Q : Could it have been 5 to 12 hours?
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> A : I have never heard of a case that long. It was only his breath that made me think he had been drinking. He had the peculiar stale smell of beer after it has been drunk.
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> To Court : There was no question of the plaintiff being drunk. I tested him for this and he did the test very well. He was not drunk or near drunk or anything like that."

That is the whole of the evidence of the Assistant Medical Officer given at the trial.

As against that was the sworn evidence of the Plaintiff in the Court below, the present Respondent. He swore that he had had no liquor since the previous night when he had been drinking. The learned trial Judge held that this witness was not to believed, but appears to have based that finding on the evidence given by the Constable and the Assistant Medical Officer. He gives no other reason for his rejection of the Respondent's evidence.

It is perfectly clear that the evidence of the Police Constable does nothing to establish the fact that the Respondent had taken liquor within the previous 12 hours. The Court is not entitled to assume that "not a strong smell but just a whiff" of liquor on a person's breath necessarily indicates that the liquor responsible for the smell or whiff must have been imbibed within the previouse 12 hours. Unless such an assumption may be made, the Police Constable's evidence establishes precisely nothing on the point in issue.

The whole burden of the defence thus rests, in my opinion, on the evidence of the Assistant Medical Officer. His evidence in chief assists very little. On cross-examination, however, he did strengthen his evidence by expressing the opinion that the alcohol had been

taken within from five to ten hours previously. When asked could it have been five to twelve hours he made the meaningless reply "I have never heard of a case that long". As is pointed out by the trial Judge in his judgment, there is no evidence to show that the driver was under the influence of liquor at the time of the accident, and in fact the medical evidence is all to the contrary effect.

The question arises, what inference was the trial Judge entitled to draw from the evidence of the A.M.O.? It is common ground that he was not a fully qualified medical practitioner. No effort was made by Counsel for the Company to establish his qualification to express an opinion upon the question before the Court. He was not asked as to what experience he had had in cases of alcoholism, or what training he had received in the matter of the physical effects of alcohol upon the human body. He gives no reason whatever for setting the limit of ten hours during which consumption of the alcohol must have taken place. In the result I am unable to accept the evidence given—which was in any event evidence of opinion only —even upon a balance of probabilities and even without taking into account the sworn evidence of the Respondent to the contrary, as establishing the fact found by the learned trial Judge, namely that the Respondent had consumed alcohol within the previous twelve hours. It is possible that he had done so. It is equally possible that he had not; and as the onus of proof lay upon the Appellant, I am firmly of opinion that the Judge's finding of fact was not justified by the evidence tendered in support of it. I further think that in accordance with the principles laid down by the cases I have cited, it is the duty of this Court to substitute its own inference from the evidence given before the trial Judge, and to find that the falsity of the statement complained of had not been proved.

This would dispose of the appeal which, in my view, should be dismissed on this ground.

There is moreover another ground upon which, I think, the appeal must fail. Although some argument was directed to the proviso set out towards the end of the policy relieving the Appellant of liability in the event of the untruth of any statement made in writing by the insured for the purposes of the policy, yet this was not pleaded and was never made an issue at the trial. At the hearing in the Court below, Counsel for the Appellant Company expressly stated that the only issues raised by the defence were (a) the pre-accident value of the vehicle and (b) whether the policy was void as the result of a false statement made in support of a claim under the policy.

The first condition set out in the policy immediately before Condition No. 2 quoted above, reads as follows :

> "The insured or his legal personal representative shall give notice in writing to the Company of any accident, damage or loss as soon as possible after the occurrence thereof."

The form which the Respondent completed on the 9th January, 1961, Exhibit C1, is the common form, supplied by the Company, which the insured is required to complete in order to comply with Condition No. 1. In his careful analysis of this document the learned trial

Judge points out that there are altogether 55 questions requiring answers by the insured, and some of these are compound questions calling for more than one answer. He also finds that many, if not most, of the questions are not statements made in support of a claim at all. The document itself is called "Accident Report Form". The heading to the document reads :

> "This form is to be used to report occurrence to Southern Pacific Insurance Co. Ltd. which does not admit liability by the issue or acceptance of this form."

The document then proceeds :

> "I, Subramani . . . . hereby report to the Southern Pacific Insurance Co. Ltd. . . . . all relevant details and facts surrounding the collision, fire, theft which occurred to such insured vehicle on the 3rd day of January, 1961."

The word "claim" occurs only twice in the form. In the top right-hand corner of the first page appears the phrase :

"Claim No. 2404".

As a note to paragraph 16, practically at the end of the form, appears this sentence :

> "All foregoing items must be answered fully, and you will thereby avoid any possible delay in having the claim promptly considered."

It is rather remarkable that in no place in the document is there any formal claim or demand on the Company by the insured, or any phrase or sentence indicating that the insured is in fact making such a claim. On the fact of it the document is nothing more than a compliance with the obligations of the insured under Condition No. 1, that is to say, to give early notice in writing to the Company of any accident, damage or loss to the vehicle covered by the policy. In giving this notice the insured is requested to fill in the form, Exhibit C1, which is handed to him by the Company. Counsel for the Appellant pointed out that the document, Exhibit C1, had in fact been treated by both parties as a formal claim. In paragraph 1 (a) of the amended defence occur the words "in a Claim Form dated 9th January, 1961". In the course of his evidence at the trial the Respondent stated :

> "On the 9th January, 1961, I lodged a formal claim in unity (sic) with the Defendant Company's agents in Lautoka on the Company's printed form. This is the claim I made."

Notwithstanding this statement of the Respondent in the course of his evidence, I am of opinion that the construction of the document, Exhibit C1, is a matter of law and I do not think the Respondent can be bound by what I consider a loose employment of the word "claim" in what is really a highly technical matter. If the Company wished to insist on the use of what they call "Accident Report Form" for the making of a formal claim under the policy, then it would have been easy for the Company to make this clear to the insured; to inform him that although it was on the face of it merely a report of an accident, it would be treated also as a claim under the policy; and to

indicate to him beyond the possibility of mistake that any incorrect statement made in answer to a question in the form, whether such incorrect statement was deliberately false or inadvertently inaccurate, would entitle the Company to repudiate liability under the policy.

Where the insurer's liability is made to depend upon the accuracy of all statements made in support of any claim under the policy, the truth of each and every such statement would be a condition precedent to the Company's liability. As I understand the law, it would not matter whether the inaccurate statement was made fraudulently or innocently; or whether the untrue statement was of any materiality whatsoever. There is thus a very heavy burden cast on the insured party to ensure the strict accuracy of all statements made in support of a claim. The "Accident Report Form" which the Appellant Company requires completed by the insured or his legal personal representative as soon as possible after the occurence does not appear to me to be strictly a claim against the Insurance Company, despite the filing reference "Claim No. 2404" in the top right-hand corner. To construe it as a formal claim would be to place a very heavy onus on the insured personally, whether the form was completed by him or by his legal representative; and I would not be prepared to hold that such a document is a claim against the Company unless the document itself makes that unequivocally clear. In my view the "Accident Report Form" is a report of an accident and nothing more, and statements made in the course of that accident report are not "declarations or statements made in support of any claim under the policy".

Counsel for the Appellant strongly relies on the case of *Welch v. Royal Exchange Assurance* [1938] 4 All E.R. 289. But that case concerned the interpretation of a totally different clause. Under one of the conditions under the policy the insured was to give the Insurance Company all such proofs and information with respect to any claim as might reasonably be required. The insured was repeatedly asked for information regarding his bank accounts; but by what MacKinnon L.J. refers to as "his stupid obstinacy over an immaterial matter" he refused to supply the information when required. I am unable to draw any inference from the decision in Welch's case impelling me to come to the conclusion that this "Accident Report Form", Exhibit C1, is in law and in fact a claim under the policy, and that is the point in issue in these proceedings.

In the course of his careful judgment the learned trial Judge has held that many of the questions in the "Accident Report Form" are separable from the others, in that while some of the statements may be regarded as made in support of a claim many more are not. He concludes that the incorrect answer to which exception is taken by the Appellant is not a declaration or statement in support of a claim, as a correct answer to that question would not in any way have affected the liability of the Appellant under the policy. Liability can be repudiated only if the Respondent had at material times been under the influence of intoxicating liquor; and it was made clear from the evidence that the Respondent was not under the influence of intoxicating liquor when the accident accurred. It appears to me quite

definite that if all the fifty or sixty answers required under the "Accident Report Form" were to be held to be declarations or statements made in support of a claim, then the filling in of the form would be a real trap for the insured. Very few lorry-drivers would be able to complete the form without some legal or technical assistance. In the instance quoted by the learned trial Judge the insured would be placed in an impossible position if the Company were entitled to repudiate liability because the insured inadvertently stated that his age was 28 when it was in fact 29. There is, I think, ample justification for the view of the learned trial Judge that only a small proportion of the questions contained in the "Accident Report Form" can be considered relevant to a claim under the policy. I prefer, however, to base my view on the matter on a finding that the "Accident Report Form" is not strictly a claim under the policy .

It is perfectly true, as is stated in 22 Halsbury, 3rd Ed. p. 253 para. 494 :

> "In practice the claim is made upon a printed form supplied by the insurers and indicating the nature of the particulars required."

I do not think, however, that a Company is entitled, by virtue of this practice, to maintain as a matter of law that what is called an "Accident Report Form", containing questions on all subjects upon which the Company requires information in order to make its own investigations, must be held to be a formal claim under the policy. In many instances of insurance against accident a distinction is drawn in the policy between the notice of accident which must be given as soon as possible after the occurrence, and a formal notice of claim which must be given to the Company at a later date : 7 Encyclopaedia of Forms and Precedents, 3rd Ed. 525.

In my view, therefore, the answer to the question regarding the consumption of intoxicating liquor within twelve hours of the time of the accident would not have been, even if untrue, a false declaration or statement made in support of a claim under the policy, and consequently a breach of Condition No. 2.

Accordingly I am of opinion that on both grounds to which I have referred in the course of this judgment, the appeal must fail. Consequently I would dismiss the appeal with costs to the Respondent.

MACDUFF P. : I have had the advantage of reading the judgment prepared by Marsack J., and am in complete agreement that this appeal should be dismissed on the two grounds on which he has relied.

In regard to the first of those grounds, that is to say that the finding of the learned trial Judge that the Respondent had consumed intoxicating liquor during the twelve hours prior to the accident could not be supported on the evidence, I would add that, in my view, the learned trial Judge failed to take into account two facts in assessing whether the Respondent was to be believed or not. The first was that providing the Respondent was not under the influence of intoxicating liquor at the time of the accident, which he was obviously not,

then there was no inducement for him to answer the question asked incorrectly. The second was that the question asked is included in a form that was intended to be a statutory declaration which ends in these words :

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> "I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of an Act of Parliament of this State, (sic), rendering persons making a false declaration punishable for wilful and corrupt perjury."

I forbear to comment on this wording or on the fact that the declaration was taken before someone who described his authority to take it as being a "clerk". The fact remains that the Respondent was presumably warned of the dire penalties to be attached to a false statement in the declaration. This also should, in my view, have weighed in the Respondent's favour as a presumption that his answer would be a correct one.

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In view of my agreement that the finding of fact by the learned trial Judge could not be supported, it is unnecessary for me now to consider the second point argued, that is to say the standard of proof to be required to establish the falsity of a statement relied on by an insurer to avoid liability in circumstances as in the present case. It appears to me that it should be of a higher standard than that of a bare balance of probabilities. In the first place, what the insurer is really objecting to is a claim based on some fraud by the insured. To hold otherwise would be to enable the insurer to avoid payment on the most trivial of technicalities. In the second place, if as in the present case, an insured is expected to complete a claim form, including a number of questions, the answers to which are entirely irrelevant to the issue of the insurer's liability, by way of statutory declaration, the falsity of any answer which may also give rise to criminal proceedings should be subject to a stricter standard of proof than is required in ordinary civil proceedings. However, in view of the fact that this question was not thoroughly argued, I do not express any firm opinion on the point.

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The appeal will be dismissed with costs.

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KNOX-MAWER J.A. : I have enjoyed the advantage of reading the learned judgments of MacDuff, President, and Marsack, J. In my view the Appellant Company cannot be held to have discharged the onus of proving, upon the balance of probabilities, that the Respondent had consumed intoxicating liquor within the twelve hours prior to the accident. I consider, therefore, that the appeal should be dismissed upon this ground.

Appeal dismissed.