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The London and Lancashire Guarantee and Accident Co. of Canada v. Canadian Marconi Co., [1963] S.C.R. 106

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Is the presence of a high amount of alcohol in a blood sample taken from the deceased enough to discharge the burden resting on the appellant of proving that the deceased was intoxicated? What is the burden of proof in civil cases? Should the Supreme Court of Canada disturb "concurrent findings" of two lower courts on a question of fact? Is the right to appeal to the Supreme Court for any matter involving more than ten thousand dollars a sound policy?

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1 *Clark v. The King* (1921), 61 S.C.R. 608; *Smith v. Smith Smidman*, [1952] 2 S.C.R. 312; *New York Life Insurance Co. v. Schlett* [1945] S.C.R. 289; *Industrial Acceptance Corporation v. Couture*, [1954] S.C.R. 34; *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154.

Some of the above issues were dealt with by the Supreme Court of Canada in this short case. However, no penetrating analysis was attempted by that Court, which seemed to be content to adopt holus bolus the reasoning of Owen J. in the Quebec Queen's Bench, Appeal side.[1]

The Marconi Company claimed under a travel accident insurance policy, issued by the insurance company, in respect of the accidental death of one of its employees covered by the policy. He 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 the victim was in a state of intoxication within the meaning of the policy. The evidence disclosed that he had been drinking about an hour previously and a blood test made three days after the death disclosed a high content of alcohol.

Despite this apparently damaging evidence the trial judge (influenced by contrary expert testimony) found that the insurance company had not discharged the onus of proof which was on it.

On appeal, Owen J. speaking for the majority upheld the trial judge by stating that he had not erred and did not apply the burden of proof in criminal matters, but had used the "balance of probabilities test," the proper one in civil cases.[2]

Considering whether or not the insurance company had proved on a balance of probabilities that the deceased was intoxicated, Owen J. agreed with the trial judge again. He too, felt that the presence in the blood of such a high content of alcohol does not necessarily prove intoxication. He accepted Dr. Rabinovitch's explanation for the high content of alcohol and laid stress on the evidence of the deceased's acts and movements before the accident which showed he was not intoxicated. Owen J. also doubted the reliability of the blood sample. The body was not removed from the scene of the accident for one and a half hours, the autopsy was performed by a medical student and the blood sample test was made by a police officer.

The learned judge indicated that to be intoxicated one must be affected "to a considerable or marked degree by the consumption of alcohol".[3]

Tremblay C.J. and Choquette J. dissented from the majority view of the Quebec Appeal Court. The dissent is a weak one since they didn't have the benefit of testing the credibility of the witnesses (like

[1] *The London & Lancashire Guarantee &Accident Co. of Canada v. Canadian Marconi Company* [1963] S.C.R. 106.
[2] *Ibid.*, at p. 399.
[3] *Ibid.*

Rabinovitch), so they accepted the evidence of alcohol in the blood as the best evidence that the deceased was intoxicated. Furthermore, neither judge doubted that the deceased had drunk enough alcohol in one hour and ten minutes to induce intoxication in the average man.

The Supreme Court of Canada simply adopts unanimously the reasoning of Owen J. in dismissing the appeal. The court apparently felt that since it did not have the benefit of testing the credibility and quality of the witnesses at trial, and since the majority on appeal had agreed with the findings of the trial judge, there was no reason to disturb these "concurrent findings." Therefore, the court reaffirms their long held position on concurrent findings with reference to *American Automobile Insurance Company v. Dickson.*[4]

The issue of clause three of the contract is summarily dealt with by the court. Reliance on clause three indicates the despair of counsel when faced with the failure of clause five.

Owen J. in the first appeal clearly stated that he did not think that the company had established the evidence required for the application of this exclusion."[5] Yet, counsel persisted in focussing on a statement by Owen J. that the deceased may have felt "ill or faint." However, a brief glance at the case report shows that Owen J. was just speculating about what *might* have caused the deceased's car to zigzag. The possibilities of fainting or illness are only two of a number of explanations offered by Owen J. by way of obiter dicta. Thus, it is easy to understand the Supreme Court's impatience with this ground of appeal.

This case points up the need for amendment of the Supreme Court of Canada Act.[6] The five judges reaffirmed unanimously the decision of the appeal court of Quebec, which had affirmed the trial judge. In fact, the Supreme Court of Canada thought so little of the issues in this case that they adopted the reasons of Owen J. and imply that the issues have been long settled.[7]

The fact that an insurance company was the appellant in this case is pertinent. Without the financial resources of this appellant, it is unlikely that anyone else, with the well settled principles discussed in this case in mind would have gone further than the Appeal Court deciion on the slight chance that the Supreme Court of Canada might decide to ignore these principles.

Does this not point up a flaw? Section 2 of the Supreme Court Act allows anyone as of right to appeal to the Supreme Court of Canada where the amount or value of the matter at issue exceeds ten thousand dollars. Parliament apparently thought that the dollar

4 [1943] S.C.R. 149.
5 *Supra*, footnote 2 at p. 397.
6 R.S.C. 1952, c. 259, as am., by 1956, c. 48.
7 [1963] S.C.R. 106.
8 R.S.C. 1952, c. 259.

figure was one effective test for cases which the Canadian Supreme Court should hear.

It is submitted this subsection ought to be deleted. Section 38(8) affords ample protection to litigants who, in the opinion of the highest court of their province, have a point of law which should be adjudicated by the court of final appeal for our country. At the same time it would eliminate this type of case and free our judges to consider thornier points of law more deeply and expeditiously.

With regard to the main issue of the case—the balance of probabilities has been entrenched in the Common law for years as the test to be applied in civil matters,[9] although our Canadian Supreme Court did not finally settle it authoritatively until *Hanes v. Wawanesa Mutual Insurance Co.*[10] which is discussed elsewhere in this review.

The decision was a proper one and indeed could not have been otherwise. The law is in a satisfactory state and it was left undisturbed by this case. T.A.S.