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QUEENSLAND INSURANCE COMPANY LIMITED

v.

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ABHAY CHANDRA AND ANOTHER

[COURT OF APPEAL, 1971 (Gould V.P., Marsack J.A., Richmond J.A.), 28th April, 4th May]

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Civil Jurisdiction

Evidence and proof—motor vehicle insurance policy—claim under—statement by assured in claim form—onus on company resisting claim to establish falsity of statement on balance of probabilities.

Insurance—claim—motor vehicle insurance policy—insurance company setting up false statement in claim form as ground for resisting claim—onus of proving falsity of statement on company on balance of probabilities.

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Where an insurance company seeks to avoid liability to pay a claim on a policy in respect of damage suffered by a motor vehicle on the ground that an answer given by the insured to a question in the claim form is false, the onus is upon the insurance company to prove the falsity of the answer upon a balance of probabilities.

E Case referred to :

Dawson Ltd. v. Bonnin [1922] 2 A.C. 413; 128 L.T.1.

Appeal from a judgment of the Supreme Court in an action to enforce a claim under an insurance policy.

K. A. Stuart for the appellant company.

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D. S. Sharma for the respondent.

The facts sufficiently appear from the judgment of Marsack J.A.

4th May 1971.

The following judgments were read:

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MARSACK J.A. :

This is an appeal against a judgment of the Supreme Court entered at Lautoka on the 11th December, 1970, in favour of the first respondent against the appellant for the sum of $1,750 and costs. The appeal is brought on the question of liability only; the quantum of the sum awarded is not in issue.

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The respondents' claim was based on an Insurance Policy issued by the appellant company covering motor car registered number V687, the property of first respondent. This car was involved in a violent collision with a trailer on the King's Road near Tavua on 21st June, 1969, and

was so extensively damaged as to be beyond repair. The parties agreed that, if liability on the part of the appellant company were established, judgment should be for the sum of $1,750 exclusive of costs. In the Court below the appellant company denied liability on the grounds: A

(a) that at the time of the accident the car was being driven by a person who was under the influence of intoxicating liquor;

(b) that at the time of the accident, the first respondent's car was engaged in racing another vehicle; B

(c) that the first respondent had made a false declaration or statement in support of his claim on the Policy by giving the answer "No" to the question "Had the driver consumed any intoxicating liquor during the six (6) hours prior to the accident?"

Under the terms and conditions of the Policy the Company would be relieved of liability if any one of these grounds were established. C

As to the first ground, the learned trial Judge held —

"Whilst I am satisfied that the driver of the car did consume liquor, I am unable to hold even on balance of probability after considering the whole of the relevant evidence that he was at the time of the accident under the influence of liquor."

On the second ground the trial Judge said: D

"As to the allegation that at the material time the insured car was engaged in racing, the most I can hold in this case is that the evidence justifies a finding that the insured car was endeavouring at the considerable speed to overtake the vehicle proceeding in front of it in circumstances when it was unsafe to do so and when the vehicle in front was not giving way. But this, in my view, does not establish E "racing" in the sense in which it is used in the insurance policy."

On the third ground the trial Judge held:

"There is no evidence whatsoever that the driver, Daya Prasad, had consumed liquor within six hours preceding the accident. There is evidence before this Court from which it is not impossible to draw such an inference, but it would be unsafe to do so because it would F be based rather more on conjecture than on facts . . . . . such an answer is both reasonable and understandable bearing in mind the small space provided for the answer and bearing in mind his own state of knowledge which I find as a fact is that he did not see Daya Prasad drinking any liquor."

Five grounds of appeal were set out in the notice of appeal against the G judgment. These were based substantially on the same contentions as those put forward in the Supreme Court. At the hearing of the appeal, however, counsel elected to rely solely on ground 5, which is in these words:

"That the learned Judge erred in law in holding that plaintiff was entitled to answer questions in the claim form on the basis of the space provided and the state of his own knowledge." H

Although in the Supreme Court it was contended on behalf of the appellant Company that another false statement had been made by the first respondent in support of his claim, namely that the oncoming trailer

A was unlighted, counsel for the appellant at the hearing of the appeal stated that he did not intend to pursue that point. The argument proceeded solely on the ground that the first respondent had made, in support of his claim, the false statement that the driver of the car, Daya Prasad, had not consumed any intoxicating liquor during the period of six hours prior to the accident.

B Counsel relied strongly on the decision of the House of Lords in *Dawson Ltd. v. Bonnin* [1922] 2 A.C. 413; All E.R. Rep. 88, in which it was held that where a document consisting partly of a statement of fact was made the basis of contract of insurance, it was the very foundation of the contract; so that, if the statement of fact were untrue, the policy was avoided and the risk did not attach, and any question as to the materiality or otherwise of the statement made inaccurately was irrelevant.

C Before this principle can be made to apply, however, it is necessary that the falsity of the statement in question must be proved; and the onus of proving it lies on the party setting it up, here, the appellant company.

The evidence undoubtedly, in my opinion, raises a strong suspicion that the driver had consumed intoxicating liquor. In this respect I am in com-
D plete agreement with the learned trial Judge. That suspicion is perhaps strengthened by the fact that the driver, Daya Prasad, was not called as a witness for the purpose of rebutting it; but even so, in my view, the evidence does not go so far as to prove, upon a balance of probabilities, that the driver had consumed intoxicating liquor within this six-hour period prior to the accident.

E In this respect the evidence of Dr. Raniga, the only professional witness called, is not helpful. The accident took place at about 9.30 p.m., and the driver was medically examined by Dr. Raniga some four hours later. He deposed that at the time of his examination, Daya Prasad was in a stupor — "i.e., semi-conscious" — and his breath smelt of liquor. When asked how long would this smell of liquor subsist, the doctor replied that
F he was not able to say definitely. He said that his first reaction was that the patient's state of stupor may have been due to the alcohol he had consumed; but he stated in the course of cross-examination, that the stupor may have been brought about by the injuries. Accordingly he was not in a position to say that the stupor was caused either by the injuries or by the liquor. His final answer was to the effect that the patient's state of stupor may have been due to the injuries or to the liquor
G or to a combination of the two; he was unable to give a firm opinion as to which was the effective cause.

This evidence was directed, in the Supreme Court, towards the issue of whether or not the driver had been under the influence of liquor at the time of the accident. This point was not relevant at the hearing of the appeal, which was concerned only with the question of whether
H or not the driver had consumed intoxicating liquor within six hours prior to the accident.

There is no direct evidence as to the state of the driver immediately prior to the accident. It appears clear that he was driving the car in a manner which could properly be descrbed as both reckless and dangerous.

There was or had been liquor in the car, and some of the passengers showed signs of intoxication. Mr. D. B. Waite, who was a passenger in the pilot car travelling ahead of the trailer with which the first respondent's car collided, gave evidence to the effect that the occupants of the car smelt strongly of liquor and were unsteady, aggressive and argumentative; but he did not identify any particular one of them as having been the driver of the car. The evidence of the first respondent was not helpful in that he merely stated that he had not seen the driver take any liquor during the six-hour period; and further, that he was unable to smell liquor on the breath of the driver as he had been drinking and smelt strongly of liquor himself.

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There is accordingly no direct evidence as to whether or not the driver had consumed intoxicating liquor during the six hours in question. Any finding that he had, must be a matter or inference only, drawn from the fact that his breath smelt of liquor when he was medically examined some four hours after the accident. In this respect the possibility must not be overlooked that he may have been given a drink or drinks after the collision and before he was taken to the hospital. No expert evidence was called as to the period during which a smell of intoxicatng liquor will persist after its consumption. This period may well vary from person to person, or according to the surrounding conditions.

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In my opinion the learned trial Judge — who was in a much better position than this Court to assess the weight of the evidence — was right when he refused to base on the evidence given, a finding of fact that the driver had consumed liquor within six hours prior to the collision. Although such a finding must be on a balance of probabilities only and not beyond reasonable doubt, I do not think that the evidence put before the Court justifies such a finding.

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Accordingly it cannot, in my view, be said that the trial Judge was in error in holding that that particular statement, made in support of a claim under the policy, had not been proved to be false.

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In his judgment the learned trial Judge held that in order to exclude liability, the false statement must :

"(a) be material to the claim;

(b) be factually incorrect; and

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(c) be known to the maker that it is incorrect or at least he had reasons to believe that it is incorrect."

Although some reference was made to this opinion of the trial Judge in the argument before us, and though as to the materiality of the false statement it does not appear consistent with the decision of the House of Lords in *Dawsons Ltd. v. Bonnin* (supra), I do not think it necessary for this Court to express any view on this part of the judgment. The finding that the relevant statement in support of the claim was not proved to be false is all that is necessary to dispose of the appeal.

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A For these reasons I would dismiss the appeal, with costs to respondents.

GOULD V.P. :

I have had the advantage of reading in draft the judgment of Marsack J.A. and agree with his reasoning and conclusions and the order proposed by him. All members of the Court being of the same opinion the appeal
B is dismissed with costs to the respondents.

RICHMOND J.A. :

I also am in agreement with the judgment of Marsack J.A. and with the order proposed by him.

C *Appeal dismissed.*