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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.215/83

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BETWEEN JOHN PATRICK KANE and RAYMOND JOHN KANE both of No. 1 R.D. Mount Somers, Ashburton, Farmers

Appellants

A N D THE SOUTH BRITISH INSURANCE COMPANY LIMITED whose registered office is situated at 3-13 Shortland Street, Auckland, Insurance Company

Respondent

Hearing: 21 March 1984

Counsel: D.I. Jones for Appellant
A.A. Couch for Respondent

Judgment: 29 MAR 1984

JUDGMENT OF ROPER J.

This is an appeal from a decision of the District Court in civil proceedings in which the Appellants as Plaintiffs in the Court below sought to recover under a motor vehicle policy issued to them by South British. On the night of the 10th October 1980 Mr R.J. Kane was driving the Appellants' Holden Kingswood Utility and ran into the rear of a parked car, owned by a Mrs McCormick, causing severe damage to the utility and reducing the car to a burnt-out wreck. The Appellants sought indemnity under their policy in respect of both vehicles and

were met with the plea that Mr R.J. Kane was in breach of a General Exception in the policy which provided that South British would not be liable in respect of any accident or damage caused whilst the vehicle was "being driven by any person including the Insured whilst such person is under the influence of intoxicating liquor ....".

The accident occurred sometime after 11 p.m. in Alford Forest Road, Ashburton. Mrs McCormick's car was parked on the road outside her address "about a foot out from the gutter", and 20 feet from a street light. Her son gave evidence that he heard a bang, looked out of the window and saw that his mother's car had been struck by a utility. He went outside immediately and found the car half on the footpath with the utility behind it with its front hard up against the car. The car burst into flames on impact. The doors of the utility were shut but there was no sign of the driver. Traffic Officer Best arrived at the scene and finding no driver of the utility checked its ownership from the registered number by radio telephone. A day or two later Mr Kane called at the Ministry of Transport office and admitted that he had been the driver. He was subsequently convicted of careless driving.

Mr Kane did not give evidence but a statement made by him to an insurance assessor engaged by the South British was produced in evidence. It reads:-

"Raymond John Kane states

I am aged 29 years and reside with my parents at No. 1 R.D. Ashburton. I am making this statement with regard to a motor accident on Friday the 10th of Oct. 1980. I was driving a Holden Ute at the time.

On the day in question I had been working on the property all day. I left the property late in

the day to attend to business and see my father in Ashburton Hospital. I was at various stock firms during the day and in the foyer of the family solicitors office about 4.45 pm. I was at Stephensons Marine with Arthur and Brian with the second time at about 6.00 pm to 7.00. After there I was in the Longbeach Bar at the Somerset Hotel. I got there at about 8.00 or 8.30 pm. I was with John Fechney. I had approx. 10 beers - five ounces. I bought a jug when I first went in and I bought approx. 2 jugs during the evening. I would have consumed the 2 jugs - I wouldn't have consumed any more. I left the Somerset just before 11.00 pm - I would have been there about 3 hours. I only had beer - I had no spirits whatsoever. I then went to the food bar near the Ash River bridge and bought a hamburger and some paua patties and chips. I was by myself and left the food bar to drive home. I was eating the food as I was driving. As I was driving along Alford Forest Road I must have moved over too far to the left and hit a parked car in the rear. I got out of the car and checked the car and then got clear as the other car ignited on impact. I heard the sirens of the Fire Brigade and I immediately left the scene. I will not at this stage answer any question as to my movements following my leaving the scene of the accident unless my solicitor Brian Mee is present.

I have read this through and I have further to add at this stage.

Signed R.J. Kane

Witnessed

G. Mathieson
29.10.80"

Evidence was given by Dr K.J. O'Connor, a police surgeon of long experience, for the Respondent, and by Dr Metcalfe, a senior lecturer in chemistry and clinical processes at Canterbury University, on behalf of the Appellants, on the likely effect of two jugs of beer. Neither had seen Mr Kane on the night of the accident so both had to deal with the

problem in general terms and make certain assumptions. Dr O'Connor proceeded on the basis that the alcohol had been taken on an empty stomach and consumed at an even rate over the three hours Mr Kane was in the hotel. On that basis, and allowing for the fact that the accident occurred some 20 minutes after Mr Kane left the hotel, he concluded that he would have had a blood alcohol figure to the order of 70 milligrams as a conservative estimate. He then said:-

> "From my experience of examining a large number of people who have drunk alcohol, the clinical effects I would expect to see in a person with an alcohol level of some 70 milligrams of alcohol per 100 millilitres of blood would include: there is usually some change of mood, such as talkativeness or over-friendliness, perhaps aggression, depending on people's personality, but the points more relevant here are perhaps the heedlessness not just in relation to driving but in relation to an interview at whatever place I would happen to see a person - some degree of inco-ordination of speech - some degree of the inco-ordination of muscular tone, balance and so forth. In that case also the rather higher aspect of judgment reaction time and so forth. This same story is born out by D.J. Gee a forensic professor of Leeds who regards 50 milligrams as the level at which these factors come into play in a number of people."

He then made it clear that his conclusions were based on the assumptions that the subject had been drinking on a relatively empty stomach and was about 11 stone in weight. (Mr Kane is actually over 13 and 1/2 stone.) He later explained that the difference in weight only means that a lighter person becomes affected by liquor more quickly but not to a greater extent.

Dr O'Connor was cross-examined at length. In the course of it he agreed that he knew nothing of Mr Kane's

metabolism, his ability to handle liquor, or whether he had eaten anything while in the hotel. He was then asked his definition of "under the influence", and thereafter there was a measure of confusion during which the doctor and counsel appeared to be at cross purposes. Dr O'Connor referred to the provisions of the Transport Act but then said that in his opinion a person with a blood alcohol figure of 75 milligrams would be impaired from a driving point of view, although his faculties would be affected at a lower figure. This passage followed:-

> "So on your figures based on an 11 stone person with a relatively empty stomach you have reached the figure of I think 70? Yes. Does it therefore follow as a matter of logic if that was the case so far as Mr Kane is concerned, he would not within your opinion as being a person whose faculties were affected in the context of driving to the extent of being under the influence of drink because 70 is lower than 75? I think that would in all honesty that would be too close for variation for me to say one way or the other and the differences we have found in correlating blood alcohols and clinical features has almost invariably pointed out that we have under-estimated the blood alcohol level compared to the clinical finding. My question based on your general evidence which I accept can only be in the circumstances if the level is 70 on your calculation which is a mathematical exercise and the figure you have told us is the level at which you considered a person's faculties to become affected in the context of driving? Yes. Therefore it would follow would it not in this case that Mr Kane did not, or his faculties were not, affected to the extent that you would consider he was under the influence of drink? Not within the terms of the Act no, that is correct."

There was then this passage in re-examination:-

> "Perhaps I should ask you Doctor just putting the considerations of the Transport Act out of your

> mind and thinking of the term 'under the influence of alcohol' in its normal everyday meaning, would you say that a person with an alcohol level of lower than 75 milligrams could be under the influence of alcohol? To impair some of his faculties, yes. I think when we first discussed this level of 75 with Mr Jones you referred to mostly coordination and reaction time, now what about other faculties, at what level in your experience or in your reading are other factors affected? Round about the 50 milligrams per 100 millilitres the authorities quoted record heedlessness, which includes weaving to the middle of the road, to the side of the road, failing to see a pedestrian crossing or stop signs, these sort of general things are evidenced at about 50 milligrams and between there and 150."

Dr Metcalfe, after referring to a standard work used by psychiatrists "How to Control Your Drinking" by William A. Miller and R. Malmo gave his calculations and concluded that at the relevant time Mr Kane would have had a blood alcohol level of somewhere between 50 and 62 milligrams which on the authorities he cited was at the upper end of the social drinking stage where the effect of the alcohol is principally as a relaxant. There would be "a separation of inhibitions" with the adoption of a jovial attitude, but in Dr Metcalfe's opinion the alcohol level would not generally be regarded as bringing a person to the stage where he was "under the influence". This was his definition of that term:-

> "A definition of 'under the influence'. A person is "under the influence of liquor' when the effect is to distort the quiet calm intelligent exercise of his faculties and causes him to lose control of his faculties, particularly his faculty of judgment when controlling the ordinary movements of his limbs and extremities. I do not consider in my expert opinion that the level of 60 milligrams per 100 millilitres would bring a person within that definition - no person at all. I realise it is at variance with the commonly held opinion."

The last sentence in that passage suggests that Dr Metcalfe's opinion was out of step and would not be generally accepted but he explained his remark in cross-examination:-

> "You said yourself Doctor that your opinions regarding the effect or the clinical effect of alcohol were at variance with those commonly held? Yes, that's right. So when you said that a person with less than 60 milligrams per 100 millilitres of blood would be unaffected this was your personal view? I am sorry, the opinions I said were at variance with those commonly held were the opinions concerning the fact that people of different makeup would be dramatically differently affected by the same quantity of alcohol, a point to which His Honour referred to earlier."

He agreed that he had not examined people affected by liquor and based his opinions on the writings of others.

In short Dr Metcalfe concluded that Mr Kane would not have been "under the influence of liquor" giving that term the definition presented to him by Counsel and which is referred to earlier.

Mr Jones submitted that the Trial Judge had been unduly critical of Dr Metcalfe and had failed to give his testimony objective appreciation. He relied in particular on this passage from the judgment:-

> "All that evidence, of course, was very interesting but as I said at the time of the hearing, there was an air of unreality about it; firstly, there is no certainty about the quantity of alcohol that Mr Kane had drunk; how the drinking was spread over the evening; what food he had consumed or what his temperament was. There is a possibility he may well be an excitable man who

> would be more quickly affected by alcohol than a less emotional person and, of course, there was no clinical examination made of Mr Kane at the time of the accident."

The Trial Judge was rather short with Dr Metcalfe at one point but I am satisfied that Mr Couch was right when he submitted that the passage just cited referred to the evidence of both Dr O'Connor and Dr Metcalfe for the Judge had just finished reviewing the evidence of both and later passages in his judgment indicate that the expert testimony played little part in his conclusion that Mr Kane had been "under the influence". The factors that weighed with the Trial Judge were that Mr Kane had spent 2 and 1/2 to 3 hours in a hotel, run into the back of a car parked 20 feet from a street light on a fine night, and on a road that was of above average width and then left the scene of the accident in haste and later declined to explain why.

The Trial Judge referred to this passage from the judgment of Henry J. in Public Trustee v. N.I.M.U. Insurance Company [1967] N.Z.L.R. 530 at page 533:-

> " In view of much of the argument in this case which seemed to suggest that the present judgment would settle the meaning of the words in the instant policy, I think it is important to be precise in stating what the function of the Court is and what the Court is or is not deciding. Its task is certainly not to translate the words 'while (he) is under the influence of intoxicating liquor' into other words, then to say those other words are the 'meaning' of the provision and then to go on to say whether or not they apply to the facts proved in this case: Griffiths v. J.P. Harrison Ltd [1962] 1 All E.R. 909, 914 per Lord Reid. I do not intend to embark upon a definition or construction of the instant clause so that its 'meaning' will appear in words which the parties have not chosen. I see no occasion to do so. The correct approach, in my respectful view, is to find the facts in

> this case and then to consider whether or not the fact situation so found is within the ordinary meaning of the actual words of the contract. Any other fact situation is irrelevant to the instant problem and can be determined when it arises. A comprehensive and all-embracing definition of the 'meaning' of the words is not a matter which this Court desires to engage in. Accordingly, I turn to the questions: (1) what has the defendant proved concerning the state of the insured in relation to the influence on him of intoxicating liquor at the time when the accident occurred? and (2) does that state come within the words used by the parties in their contract?"

And then said:-

> "In the light of those tests I have to find whether the defendant company has been justified in invoking the exclusion clause. As I have said, when the company invoked that exclusion clause, it was aware of the following factors: Firstly, Mr Kane, on his own admission, had been in the hotel for 2 and 1/2 hours and although he admitted the consumption of two jugs, or alternatively 10 5oz glasses, he would have had the time or the opportunity to have consumed a greater amount of alcohol; secondly, the accident itself, which took place on a fine night and which involved a vehicle being driven by Mr Kane, hitting with considerable force, a car which was correctly parked and within 20 feet of a street light and the accident took place on a road of either average or possibly slightly above average width and there was no reason for the accident. The only reason which has been given by implication is set out in Mr Kane's statement where he said 'I was eating the food as I was driving'. If I accept that as being the reason for the accident, it would seem that Mr Kane's ability to drive and his judgment was affected to the extent whereby he placed such importance on the eating of the food in the car that he then failed to keep a proper look out for parked traffic on the road."

In short the Trial Judge drew an inference from the facts before him.

Mr Jones submitted that the Trial Judge was not entitled to draw the inference that Mr Kane might have had more to drink than 2 jugs, and I think there is something in that point. He also argued that it was equally open to find that it was the distraction of eating food that caused the accident; and that there was no evidence to suggest that Mr Kane's hurried departure from the scene had anything to do with the consumption of liquor. Mr Jones suggested concussion or panic as the cause. Mr Kane made no mention of either to the insurance assessor - he just wouldn't discuss it.

I think there was force in Mr Couch's submission that the Appellants in the Court below, and Mr Jones in his submissions on the appeal approached the matter as though it was a criminal trial where Mr Kane was entitled to remain silent with no adverse inference to be drawn from his silence. Mr Jones did indeed refer to Hall v. Dunlop [1959] N.Z.L.R. 1031, a criminal case, where Henry J. said at page 1037:-

> " I have drawn attention to the above matters since it is important that no unwarranted onus ought to be placed upon an accused person and the Courts should not lightly disregard his right to assert a privilege of silence without comment by using his silence as a ground to support inculpation. In coming to a decision in the instant case, I have been careful not to draw any adverse inference from the appellant's failure to give evidence, but have come to a conclusion upon evidence which is entirely uncontradicted and which inevitably, in my view, points to guilt of its own weight."

I agree with Mr Couch that the more appropriate quote is this from the judgment of Rich J. in Insurance Commissioner v. Joyce (1948) 77 C.L.R. (H.C.) 39 at page 49:-

> "Obviously the question was one to be decided on circumstances. But when circumstances are proved indicating a conclusion and the only party who can give direct evidence of the matter prefers the well of the court to the witness box a court is entitled to be bold."

And I would add the words of Lord Diplock in British Railways v. Herrington [1972] A.C. 877 at page 930 in a case where the defendant called no evidence:-

> "... this is a legitimate tactical move under our adversarial system of litigation; but a Defendant who adopts it cannot complain if the Courts draw from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold."

I am satisfied that on the totality of the evidence, and adopting the approach advocated by Henry J. in Public Trustee v. N.I.M.U., it was established on balance that Mr Kane was under the influence of intoxicating liquor at the relevant time and that the Trial Judge did not err in so finding.

The appeal is therefore dismissed with costs to the Respondent of $250.

Solicitors:
Kennedy Mee & Co., Ashburton, for Appellants
Weston, Ward & Lascelles, Christchurch, for Respondent