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(3) First X

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1195/83

1663

BETWEEN MANNING ASHPHALT ROOFING LTD
a duly incorporated company having its registered office at Auckland and carrying on business (inter alia) as a roofing specialist

Appellant

AND MONARCH INSURANCE COMPANY OF NEW ZEALAND LTD
a duly incorporated company having its registered office at the local Government Building, 114 Lambton Quay, Wellington and carrying on business there and elsewhere as an insurer

Respondent

Hearing: 2 October 1984

Counsel: Hogan for Appellant
Gresson for Respondent

Judgment: 12 December 1984

JUDGMENT OF PRICHARD, J.

This is an appeal and cross appeal against a judgment of the District Court at Auckland. The Appellant was the Plantiff in an action against the Respondent insurance company. Under a policy of insurance the Appellant claimed the sum of $4,000 as the cost of repairs to the Appellant's motor vehicle damaged in a collision which occurred on 27 April 1981.

The policy includes the following:-

> "(c) (i) being driven by any person including the Insured whilst such person is under the influence of intoxicating liquor or a drug;
>
> (ii) being driven by any person including the Insured whilst the proportion of alcohol in the blood of such person is ascertained from an analysis of a specimen of blood exceeds the proportion referred to in section 58 of the Transport Act, 1962; and this exception shall apply notwithstanding that the driver may have died from injuries sustained in an accident while driving such vehicle."

And, as to exception (C)(ii):-

> "For the purposes of paragraph (c)(ii) of this exception where any such accident injury loss damage or liability occurred or arose in circumstances in respect of which a specimen of blood was provided by the driver under section 58B or 58D of the Transport Act 1962 or where a specimen of blood was taken from the body of any such driver who had died from injuries sustained in an accident, it shall be conclusively presumed that the proportion of alcohol in the driver's blood at the time of the accident or event giving rise to a claim under this policy was the same as the proportion of alcohol in the specimen of blood provided by or taken from the body of the driver. Provided further that in any proceedings in respect of any claim under this policy where paragraph (c)(ii) of this exception is invoked the presumptions contained in sub-sections (4), (5) and (9) of section 58B of the Transport Act 1962 shall apply as if such proceedings were proceedings for an offence under Part V of the said Act."

The only issue in dispute was whether or not the insurer could establish an affirmative defence in reliance on

either or both of the limbs of exception (C). Accordingly, the Defendant began.

At about 2 p.m. on 27 April 1981 the Respondent's Austin Morris van, travelling south, collided with a Corolla car being driven north along State Highway 22 on a straight stretch of road just south of Paerata College. The weather was fine and the visibility good. The driver of the Corolla said in evidence that without warning and without slowing down the van veered across the road in front of her. She braked but was unable to avoid colliding with the van, striking it on the passenger's side. The impact was on her correct side of the road.

Traffic Officer Robinson, who attended the scene at about 2.10 p.m., found the van on its incorrect side of the road facing into the driveway of a vegetable stall. He spoke to Mr Bishop, the driver of the van, who was still in the cab. The traffic officer formed the opinion that Mr Bishop "may have exceeded the legal limit of alcohol". The driver had sustained cuts around his head and face and appeared dazed - he "seemed to have lost his bearings". Indeed he claimed to have been travelling south when the accident occurred. He smelled of liquor and said he had consumed one or two bottles of beer at the Paerata Hotel in Pukekohe. Both drivers were despatched to Middlemore Hospital by ambulance.

On instructions from Traffic Officer Robinson, traffic officer J.L. Waters preceded the ambulance to Middlemore Hospital. When the ambulance arrived, Traffic Officer Waters requested the Surgical Registrar, Dr Fleischl, to obtain a blood specimen from Mr Bishop.

Dr Fleischl gave evidence of taking two blood samples which, he said, he handed to Traffic Officer Waters. He did not know what happened to the samples after that.

The evidence of Mr E.R. Cairns, an analyst with the D.S.I.R. in Wellington, was taken in Lower Hutt. He gave evidence that on 30 April 1981, his Department received two blood samples by registered post, that the identification labels stated that the samples were taken from Mr Graham John Bishop, water contractor, 36 Wallace Road, Papatoetoe and that, on analysis one of the samples was found to contain 92 milligrams of alcohol per 100 millilitres of blood. Mr Cairns produced in evidence a copy of the hospital blood specimen medical certificate received with the blood samples. The document (which is in part a carbon copy) is signed by Dr Fleischl and dated 27.4.81. According to the form, Dr Fleischl certifies that he took blood samples from Mr Graham John Bishop and that he handed them to "J.L. Waters". A panel on the reverse side of the document purports to record that the blood specimens to which it relates were sent to the Chemistry Division of the D.S.I.R. on 28.4.81 by "J.L.

Waters". Attached to the document is a registered mail receipt No.745.

Traffic Officer Waters was not called.

At the conclusion of the insurance company's case, Mr Hogan, for the Appellant, submitted that the insurer had not made out a case entitling it to avoid liability under either limb of exception (C). He intimated to the Court that if the Judge sustained his submission in respect of exception (C)(i), he would not call evidence but that otherwise he intended to call evidence on the issue of whether the driver was under the influence of intoxicating liquor. The Judge upheld Mr Hogan's submission in respect of exception (C)(i). He said:-

> "If it is any help to you now I am not prepared to find the driver of the car was under the effect of intoxicating liquor to the extent it impaired his judgment. There was an accident and a quite serious accident. So far as the first defence is concerned, I rule against the defendant but I am wide open on the other matter..... There is no evidence under the first defence on which I can find the defendant (sic) was influenced by alcohol."

Accordingly the Appellant did not call evidence: following the Judge's finding Mr Hogan directed his submissions solely to the question whether the insurance company had proved its case under the second limb of exception (C).

In a reserved decision delivered on 8 August 1983, the learned District Court Judge found, on the balance of probabilities, that the Respondent (the insurer) had discharged the onus of proof under exception (C)(ii) and so entered judgment for the Respondent insurance company. Against that judgment the Appellant now appeals.

The Respondent cross-appeals against the finding that there was no case for the Appellant to answer under exception (C)(i).

I will deal first with the appeal in respect of exception (C)(ii).

Mr Hogan, for the Appellant, submits (as he did in the Court below) that there is a gap in the chain of evidence relied upon by the Respondent to identify the blood specimen analysed by Mr Cairns with the blood specimen taken from Mr Bishop at Middlemore Hospital. The Respondent seeks to invoke the evidential presumptions contained in the Transport Act, 1962. It is to be noted that condition (C)(ii) refers to the statutory presumptions of s.58B of the Act but not to the presumptions of s.58D. Section 58D is the section relating to blood specimens taken in a doctor's surgery or in a hospital; it provides that the presumptions contained in s.58B shall apply in the case of blood specimens taken in hospital or in a doctor's surgery but with certain modifications which are

obviously intended to allow for differences between the procedure when specimens are taken in a hospital or in a doctor's surgery and the procedure when specimens are taken in other circumstances.

Section 58D recognises that in the hospital situation, a blood specimen may not always be taken by the medical practitioner himself (he might, for example, instruct a nurse) and also that the specimen may be sent to the Government Analyst by the medical practitioner and not simply handed to an enforcement officer.

Mr Hogan submits that in the instant case, the blood specimen was taken in hospital pursuant to s.58D and that therefore, the s.58B presumptions are not available to the insurance company. I do not think this is necessarily so. It so happens that in the present case the blood specimen was taken by the medical practitioner himself and was handed by him to an enforcement officer. This is just what happens in a non-hospital situation. The certificate signed by Dr Fleischl meets all the criteria of s.58B. It is a certificate signed by a medical practitioner and certifies to the very acts and things which are the subject of the presumptions of s.58B(5). I can see no reason why those presumptions should not operate just because the blood specimen was taken in hospital.

But even though the insurance company has the benefit of all the presumptions of s.58B(5) and (6), there is still remains a break in the chain of direct evidence linking the Bishop blood specimen to the blood specimen analysed by Mr Cairns. By virtue of s.58B, Dr Fleischl's certificate is evidence, until the contrary is proved, that the specimens he took are specimens of the driver's blood. The certificate is proof, to the same degree, that Dr Fleischl handed the specimens to Traffic Officer Waters. Then there is a break in the chain. The next piece of evidence is that on 30 April 1981 two bottles arrived by registered post at the D.S.I.R. in Wellington. It is true that these are labelled as specimens of Mr Bishop's blood and that they are accompanied by a copy of Dr Fleischl's certificate. But there is no evidence from Traffic Officer Waters as to what he did with the specimens he received from Dr Fleischl: no evidence that the bottles he despatched by registered mail No.745 are one and the same as those he received from Dr Fleischl. If a certificate signed by Mr Cairns had been produced certifying that the specimen he analysed was from a person having the same name, address and occupation as Mr Bishop, the presumption of s.58B(9)(b) would have been prima facie evidence that the blood specimen analysed was taken from the driver. But the analyst's certificate was not produced. Instead Mr Cairns gave viva voce evidence and could say no more than that the sealed blood samples were received by registered post No.745 and that "the

identification labels stated that the samples were taken from Graham John Bishop, water contractor, 36 Wallace Road, Papatoetoe".

It was held by Chilwell, J. in an unreported judgment - Guardian Royal Exchange Assurance Co. of New Zealand Limited v. P. Busch (Auckland Registry, M.1068/79, judgment 28 July 1980) that an insurance company had failed to prove that the driver of the insured vehicle was under the influence of intoxicating liquor when the only evidence was that a Government Analyst had analysed a sample received by registered mail with a label purporting to indicate that the sample had been taken from the driver. Chilwell, J. held that the labels were hearsay, there being no evidence as to the author of the labels or the source of the information they contained. In that case the insurance policy did not import the statutory presumptions into the contract of insurance. In the present case, the statutory presumptions of s.58B(5) are applicable. There is thus a statutory presumption that the specimens handed by Dr Fleischl to Traffic Officer Waters were the specimens taken from Mr Bishop; but there is no statutory presumption to the effect that the samples despatched by Traffic Officer Waters were the samples he received from Mr Cairns.

In a recent judgment, also unreported, (SIMU Mutual Insurance Association v. Knoops - Dunedin Registry,

M.141/83, judgment 10 August 1984) Hardie Boys, J. held that it had not been proved that a blood sample collected by a constable from the Balclutha Hospital was the one taken from the driver of the insured vehicle. SIMU Mutual Insurance Assn. v. Knoops bears some resemblance to the present case. It was a case where the blood specimen was taken in hospital. It was a case in which the exception clause in the policy imported into the contract the presumptions made by s.58 of the Transport Act, 1962. It differed from the present case in that evidence was given by a police officer that he had uplifted two labelled containers from the hospital and posted them to the D.S.I.R.. It differs also in that it does not appear from the judgment that the doctor's certificate was produced, as in the instant case. The District Court Judge held that there was no proof that the bottles labelled with the driver's name and address and handed to the constable in fact contained blood taken from the driver. On appeal the judgment was upheld by Hardie Boys, J.

In the present case, because of the production of the medical officer's certificate, there is a presumption that the sealed bottles handed to Traffic Officer Waters contained the specimens of Mr Bishop's blood. What is lacking is any direct evidence from Traffic Officer Waters as to what he did with those bottles. He might, for example, have trampered with the bottles and substituted for their original contents a quantity of alcohol-laced

blood from another source - he even might have substituted different bottles.

If this were a prosecution of Mr Bishop on a charge of driving with an excessive proportion of alcohol in his blood, the gap in the evidential chain would, I suppose, be fatal to the prosecution case. But I remind myself that this is a civil action - I am bound to ask myself whether, on the balance of probabilities, the specimen received and analysed by Mr Cairns was one of the specimens taken from Mr Bishop by Dr Fleischl. The learned District Court Judge concluded that the evidence did satisfy that standard of proof and I am bound to say that I agree with him. To be sure, there is no direct evidence from Traffic Officer Waters that he duly despatched the bottles he received from Dr Fleischl to the D.S.I.R. without substituting other bottles and without tampering with them. What he did can only be a matter of inference. There is evidence, unless the contrary be proved, that the samples were given to him, in sealed and labelled bottles, and that they contained the specimens of Mr Bishop's blood taken by Dr Fleischl. In that respect, the present case is distinguished from SIMU Mutual Assurance Assn. v. Knoops. The question must be whether from their description and from the circumstances in which the bottles were received by the D.S.I.R. some three days after the blood specimens were taken, there is an inference that it is more likely than otherwise that these

were in fact the bottles which Dr Fleischl handed to Traffic Officer Waters.

The evidence is that when the bottles were received, they were sealed and labelled and that they were accompanied by the hospital blood specimen medical certificate completed by Dr Fleischl and identified by him as the certificate he signed at the time of taking the specimens from Mr Bishop. That is how the bottles received by the D.S.I.R. are described and those are the circumstances in which they were received. It is my view that it is more probable than otherwise that the bottles so received were those containing the blood specimens taken from the driver of the insured vehicle and which were handed by Dr Fleischl to Traffic Officer Waters - and that is enough to discharge the onus of proof which rested on the Respondent in this action.

It follows that this appeal must be dismissed and that there is no occasion for me to consider the cross-appeal in respect of the Judge's finding in relation to the first limb of exception (C).

The Respondent is entitled to costs which I fix in the sum of $350.

Solicitors:

Messrs Price Voulk Brabant & Hogan, Solicitors, Papatoetoe, by their agents Messrs Malloy Moody & Greville, Auckland, Solicitors for the Appellant;

Messrs Butler White & Hanna, Auckland, Solicitors for Respondent.