IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 198 of 2013

BETWEEN	:	**SUN INSURANCE COMPANY LIMITED**
		PLAINTIFF
AND	:	**YONGSHAN STORE COMPANY LIMITED**
		FIRST DEFENDANT
AND	:	**JIANG PENG**
		SECOND DEFENDANT
AND	:	**LOUISA THERESA FONG** as the Administratrix of the **ESTAE OF ANDREA ANTOINETTE SWANN, SHARON CECELIA SWANN, SHUTAO SUN** and **ANDREW REGINALD SWANN**
BEFORE	:	The Hon. Mr Justice David Alfred
Counsel	:	Mr. F Haniff for the Plaintiff Mr R Naidu for the First and Second Defendants Mr Diven Prasad for the Third Defendants
Dates of Hearing	:	20, 21 and 22 April 2016
Date of Judgment	:	10 May 2016

JUDGMENT

1. This Originating Summons filed by the Plaintiff seeks the following Orders:

(1) A declaration that the Plaintiff is entitled to avoid liability to provide indemnity to the First and/or Second Defendants in respect of the claims by the Third Defendants under the specified Third Party Insurance Policy (the Policy) on the grounds that the Second Defendant was under the influence of alcohol at the material time - 23 December 2012 – in breach of clause 1(d)(i) of the Conditions of the Policy.

(2) A Declaration that the Plaintiff is not liable to satisfy any judgment that may be entered against the First and/or Second Defendants arising out of the said accident involving motor vehicles, registration numbers EF 905 and YOS 666, the subject of Suva High Court Civil Actions Numbers HBC 109 and 145 of 2013 (the said actions) or any further or other action relating to the said accident.

2. The Application is made under Section 11(3) of the Motor Vehicles (Third Party Insurance) Act (Cap 177).

3. The Pre-Trial Conference Minutes on 9 February 2015 (Minutes) record inter-alia, the following:

A. <u>Agreed Facts</u>

(1) The Plaintiff issued a Third Party Insurance Policy for the vehicle YOS 666 for the period 26 January 2012 to 26 January 2013.

(2) The First Defendant is the registered owner of the vehicle YOS 666 at the material time.

(3) The Second Defendant was at all material times authorited by the First Defendant to drive vehicle YOS 666.

(4) On 23 December 2012, the Second Defendant was driving vehicle YOS 666 along Laucala Bay Road towards Flagstaff when it collided with motor vehicle EF 905 in which the Third Defendants were occupants (the said accident).

B. <u>Issues to be determined between the Plaintiff and the First and Second Defendants</u>

(1) Was the Second Defendant under the influence of intoxicating liquor whilst driving vehicle No. YOS 666 on 23 December 2012.

(2) Whether the Plaintiff is entitled to avoid liability to provide indemnity to the First and/or Second Defendants in respect of the claims by the Third Defendants under the Policy on the grounds that the Second Defendant was under the influence of intoxicating liquor thereby causing the collision on 23 December 2012 in breach of clause 1(d)(i) of the conditions of the Policy.

4. At the commencement of the hearing, the Plaintiff's Counsel applied under Order 35 rule 6 of the Rules of the High Court for me to inspect the scene of the collision. After hearing all 3 Counsel, I stood down the matter to consider my decision.

5. I considered that this is a matter of judicial discretion. I did not need to inspect the scene to follow the case which was whether the Second Defendant was intoxicated at the material time. When I resumed sitting, I announced my decision not to visit the scene.

6. The 1st witness the Plaintiff called was Milika Mocelutu (PW1). The relevant part of his evidence was given under cross-examination by Mr Naidu, Counsel for the 1st and 2nd Defendant. He said he was coming close to the bus stop. The speed of vehicle YOS 666 was about 90-100 kmh. He did not know how to drive and had never driven a car before. He noticed the driver had difficulties negotiating the bend.

7. The next witness was Sunia Biumaiwai (PW2). Under cross-examination he said the 3 passengers in the car smelt of alcohol.

8. The 3rd witness was Rupeni Lagilagi (PW3), who said there was no mechanical defect in vehicle EF 905.

9. The next witness was Seveci Tavaga (PW4) who said at the time of the breathalyzer test, the 2nd Defendant was heavily intoxicated. He did not put the mouthpiece into his mouth.

10. Under cross examination by Mr Naidu, PW4 said the 2nd Defendant was unsteady on his feet and was under the influence of alcohol.

11. The next witness was P.C Rishay Kaushik Singh (PW5). He said the 2nd Defendant could converse in English, could not stand properly because he was too drunk, and his breath smelt heavily of liquor.

12. Under cross examination by Mr Naidu, PW5 said the 2nd Defendant was taken to the Colonial War Memorial Hospital (CWM).

13. The next witness was Thomas Nawa, (PW6) the claims manager of the Plaintiff. He tendered the insurance policy as Exhibit P14 and the signed and stamped claim forms as Exhibit P15.

14. Under cross examination by Mr Naidu, PW 6 said the Plaintiff declined to indemnify the 1st and 2nd Defendants because the 2nd Defendant was under the influence of alcohol. The Plaintiff received no medical evidence of liquor or alcohol regarding him.

15. When cross examined by Mr Prasad, the Counsel for the 3rd Defendants, PW6 said they carried out an investigation and based on the findings, they declined the claim.

16. Under re-examination, PW6 said he sees alcohol as intoxicating liquor.

17. By consent of the other 2 Counsel, the Plaintiff's Counsel put in the Police Statement of the 2nd Third Defendant, Sharon Swann as Exhibit P16.

18. The next witness P.C. Laisiasa Boginivalu (PW7). He was at the scene and saw the 2nd Defendant stagger out of the car on his own.

19. Under cross examination by Mr Naidu, (PW7) said at the scene he was in civilian clothes. Anyone who had bloodshot eyes is investigated. The 2nd Defendant was aggressive because he was drunk. If a person is unsteady on his feet it means he had consumed alcohol.

20. The penultimate witness was Sgt. Jekope Rasaubale (PW8). He said he interviewed the 2nd Defendant on 24 December 2012 and the interview statement was tendered as Exhibit P20 A and B. The answers of the 2nd Defendant were accurately recorded by him. The statement recorded by him on 27 December 2012 is accurate and the 2nd Defendant's lawyer was present throughout. This was tendered as Exhibit P21 A and B.

21. When cross examined by Mr. Naidu, PW8 said at the 1st interview the lawyer was not present. He did not advise the 2nd Defendant of his right to a lawyer. The 2nd Defendant did not ask for a translator. PW8 asked him if he wanted to be interviewed in English and he said yes. After the interview, PW8 asked him to read the statement and he refused. In the 2nd interview his lawyer was present.

22. When cross examined by Mr Prasad, PW8 said when requested by a police officer to supply a sample of his breath, for the breath analysis machine to determine the level of alcohol in his breath, the 2nd Defendant refused to blow into the mouthpiece.

23. When re-examined by the Plaintiff's Counsel, PW8 said the 2nd Defendant's only response in Exhibit P21 A was no comment.

24. The final witness was WPC Laisa Beci Yalimaiwai (PW9). She was the operator of the breath testing machine. When she tested the breath of the 2nd Defendant

3 times there was an insufficient sample each time. He never put the pipe into his mouth. He was staggering and his breath smelt strongly of liquor.

25. PW9 went to the scene. The witnesses pointed out and she took the measurement and drew the sketch plan at the scene.

26. Under cross examination by Mr Naidu, PW9 said the 2nd Defendant was cooperative at the police station. Sometimes he was misbehaving. Her statement (Exhibit P23) was prepared by Teddy Matailevu who is a representative of the Plaintiff, and pointed to Matailevu's handwriting. The 2nd Defendant's breath was smelling heavily of liquor. He was taken to CWM Hospital, complaining of high blood pressure.

27. Under cross examination by Mr Prasad, PW9 said there were other tests that could be conducted. One could get his blood tested, but they did not take the 2nd Defendant's blood. Only in remote areas where there was no machine, would the subject be asked to walk a straight line.

28. When re-examined, PW9 said before a blood test can be taken, the subject's consent has to be obtained. With that the Plaintiff closed its case.

29. The 1st and 2nd Defendants now opened their case. The 2nd Defendant (DW1) said in Mandarin that an accident happened on 23 December 2012 between his vehicle and another vehicle. He was the driver of vehicle No. YOS 666 and travelling from his home in Flagstaff to the China Club to pick up his friends. The accident occurred when he was returning from the club after picking up 2 friends. He had not taken any alcohol.

30. DW1 did not notice any other people at the scene. After the accident, a Fijian man approached his car and opened the door and tried to grab him. He was afraid. Before he had gone to the club, he was vomiting. The police arrived and took him in their car first to one station and then to another. There a test for

alcohol was carried out. He tried 3 times but there was no sound. After the test, the police took him to the first station and then to the hospital. He was dizzy and vomiting. He did not admit to the police that he had consumed 5 or 6 bottles of beer.

31. Under cross examination by the Plaintiff's Counsel, DW1 said he did not consume any alcohol. He drank no beer, no whiskey, no rum, no wine and no alcohol that whole day. With regard to question 7 in Exhibit P20 A, he did not understand the question. He did not remember admitting he had beer. (The policeman) asked him to read his statement but he did not know how to read. His English is not very good.

32. On 27 December 2012, his lawyer and an interpreter were present. The interpreter explained to him in the Chinese language so he was able to agree in English. At the first interview he was scared and did not understand what the policeman was saying. He denied he was smelling of liquor and said he had not been drinking. He did not refuse to put the pipe in his mouth. His driving was not impaired by the influence of alcohol. His faculties were not impaired. The accident could not be avoided. It was a no parking area. Bloodshot eyes were not because of alcohol.

33. The next witness was Bin Gong (DW2). He said on 23 December 2012 he was with his friends in the China Club for drinks. They went there by taxi. They were there for approximately 2 hours. As he could not find a taxi there, he called his boss to pick them up. His boss is the 2nd Defendant. He picked them up in his car and they were proceeding to the Supermarket in Flagstaff when the accident happened. As he was in the back he did not see how it happened. The boss did not drink in the club. He does not recall if the boss drank any alcohol.

34. Under cross examination by the Plaintiff's Counsel, DW2 said the boss did not drink any alcohol in the Club.

35. With that the 1st and 2nd Defendants closed their case. The Third Defendants did not call any witness.

36. The Plaintiff's Counsel now submitted. He referred to the policy and said the Second Defendant was under the influence of liquor. He then cited several cases. He said there was no doctor's evidence in the case. He asked the court to draw an adverse inference because the 2nd Defendant did not give a blood test. With regard to question 20 in Exhibit P 20A, Counsel said a lawyer was not necessary because it is a civil case. He said that the 2nd Defendant understood English. His behaviour after the accident was consistent with that of someone who had consumed alcohol. He was unsteady and the witness said he smelt of alcohol. His behavior was not of that of a sober person. His refusal to cooperate with the breath tester was the action of an intoxicated man who was avoiding putting it into his mouth.

37. Counsel concluded by saying if the Court was satisfied that the 2nd Defendant was not intoxicated, then he (Plaintiff's Counsel) will step in to defend the 1st and 2nd Defendants and the Plaintiff will indemnify them against the claims of the Plaintiffs (in the civil actions).

38. The Counsel for the 1st and 2nd Defendants now submitted. He said Ford's case required the driving ability of the driver to be impaired. The Plaintiff's evidence is that the 2nd Defendant smelt of alcohol. Police officers are not experts on the behavior of persons.

39. Counsel for the 3rd Defendants said he supported the submission of the Counsel for the other Defendants.

40. Counsel for the Plaintiff finally replied.

41. At the conclusion of the hearing, I stated I would take time to consider my judgment. In the course of reaching my decision I have perused:

(1) The several Affidavits filled herein.

(2) The Written submission of Counsel for the First and Second Defendants.

(3) The Closing Submission of Counsel for the Third Defendants.

(4) The Bundle of Authorities for the First and Second Defendants.

(5) The Motor Vehicles (Third Party Insurance) Act (Cap 177).

(6) The authorities cited by the Plaintiff's Counsel.

(7) The Exhibits tendered in Court.

42. I now proceed to deliver my judgment.

43. I shall deal with the first issue for my determination *viz.* whether the 2nd Defendant was under the influence of alcohol at the time of the accident. The words 'alcohol' and 'liquor' are used interchangeably.

44. The leading case today, even after all these years on the issue at hand is the decision of Lord Coleridge, C.J in: *Mair (Administratrix) v Railway Passengers Assurance Co. (Limited)* [1877] 37 LT 356. Lord Coleridge, with whom Denman J agreed, had to construe the words of a proviso in an insurance policy which stated the assurance shall not extend to any death or injury happening while the assured is under the influence of intoxicating liquor. The Chief Justice decided "these words would be satisfied when the influence of intoxicating liquor is found in point of fact to be such as to disturb the quiet and equable exercise of the intellectual faculties of the man who has taken the liquor." The other words used by Lord Coleridge were "under such influence of intoxicating liquor as disturbs the balance of a man's mind."

45. In: *Louden v British Merchants Insurance Co. Ltd* [1961] 1 All E.R. 706, Lawton J. adopted this construction although "expressed in mid-nineteenth century

idiom," because no confusion had "existed amongst insurance and policy holders during the past eighty-four years."

46. The judge was satisfied on the medical evidence that the blood alcohol of the deceased, at the material time was at least 268 milligrammes per 100 millilitres and that there was a high probability that his brain centres had been so affected by the alcohol which he had consumed as to cause him to lose control of his faculties particularly his faculty of judgment and of controlling the movements of his limbs. In Lawton J's judgment, he was under the influence of intoxicating liquor within the meaning of the exemption clause of the policy. The insurance company was not liable.

47. I have no difficulty in accepting Lord Coleridge's construction as applicable to the instant case 55 years after Lawton J adopted them. I have also perused the following cases to assist me in arriving at my finding.

48. In *Forbes v Australian Associated Motor Insurers Limited* [1990] TASSC 60; A 58/1990, in the Supreme Court of Tasmania, Cox J, accepted "Mair" and "Louden" and stated that the onus of proving the driver was under the influence of intoxicating liquor is on the defendant insurer. In this case the judge found that the driver "had consumed a minimum of seven 8oz glasses of stout."

49. In *Ford v SGIC General Insurance Limited* [2000] SASC 206, in the Supreme Court of South Australia, the driver admitted to an ambulance officer and a police officer at the scene of the accident, "he had been drinking." Debelle J at para 17 of the Judgment said "It was not open to the magistrate to endeavour to calculate the appellant's blood alcohol level at the time of the accident." There was no "substitute for expert evidence."

50. In *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd* (No. 4) [2010] FCA 482, Rares J in the Federal Court of Australia at para 111 of the Judgment, found the driver of a car, "had drunk at least six and, possibly more, double whiskies over the two hours before the accident."

51. Earlier at para 74 Rares J noted that at the Hospital, the driver was placed under the care of Dr Debbie Chan, whom the judge found to be "an impressive and careful witness and I accept her evidence."

52. At para 79, Dr Chan said that while (the driver) was in her care, she (driver) was yelling that she was in pain, sometimes very rude, obstructive and screaming. Dr Chan explained that such behaviour is common in people who are hysterical, irrespective of whether they are intoxicated. Dr Chan said "that some car accident victims can behave very bizarrely."

53. It is therefore inexpedient to refer to any of the other case cited by Counsel on both sides.

54. At the end of the day, the question remains whether Plaintiff has proved on a balance of probabilities that the Second Defendant was driving under the influence of alcohol at the material time.

55. **In my view, the mere repetition ad nauseam of a supposition, that the 2nd Defendant smelt of alcohol, does not convert it into a fact. A supposition only comes to be accepted as a fact when the court is satisfied, that it is more probable than not that the supposition is true. In the instant case there was no cogent evidence provided by the Plaintiff to show that the 2nd Defendant was intoxicated.**

56. The Plaintiff's witnesses PW5 and PW9 said the 2nd Defendant had been taken to CWM Hospital. The cases cited show the judges relied on medical and admitted evidence to find the respective drivers had satisfied the test in "Mair". Here the Plaintiff's Counsel stated they had no medical evidence to bolster their stand. No explanation was given to why no such evidence was forthcoming.

57. Surely the expert evidence of a doctor or some other medical staff at the CWM Hospital would have been the cogent evidence required for me to reach a decision.

58. Instead, the only evidence that the Plaintiff has provided is via its witnesses. But none of them are medically qualified nor are they experts to confirm that the 2nd Defendant had the necessary amount of blood alcohol to be considered as intoxicated.

59. With regard to the two statements given to the police investigating officer, PW8, I need now to refer to the Constitution and in particular to Chapter 2 - Bill of Rights. Under Section 13(1) the Second Defendant had the right to remain silent, to communicate with a legal practitioner of his choice and not to be compelled, to make any confession or admission that could be used in evidence against him.

60. Contrary to Plaintiff's Counsel's submission that a lawyer was not necessary at the first interview because it was a civil case, Exhibits P20 A and P21 A make it crystal clear that criminal prosecutions would result.

61. In his Record of Interview (Exhibit P20 A) the Second Defendant, on 24 December 2012 in the English language, said he had been drinking 5 or 6 bottles of beer, that that was the first time he had driven while being drunk, and that the accident happened because he was drunk and driving.

62. Three days later on 27 December 2012, in his Record of Interview (Exhibit P21 A), the Second Defendant had his lawyer present. Now, he answered no comment to the relevant questions relating to his driving, his alleged drunkenness and how the accident was caused.

63. At the hearing of this action, there was a Chinese interpreter throughout to interpret for the Second Defendant.

64. In his evidence the 2nd Defendant said he did not admit to the Police that he had consumed 5 or 6 bottles of beer. In fact, under cross examination by Plaintiff's Counsel, he was most emphatic he had not drunk any alcohol whatsoever at all.

65. Therefore based on all the above reasons, I find that the Second Defendant's first statement cannot be accepted as evidence.

66. I am also unable, for obvious reasons, to accept the testimonies of the Plaintiff's witnesses as cogent evidence of the Second Defendant's alleged intoxication at the time of the accident.

67. It is for me to make a finding whether the 2nd Defendant was under the influence of liquor. After hearing the 2nd Defendant and the other witnesses on both sides, I am unable to made a finding as to the amount of beer he had drunk. Even less, am I able to make a finding that the 2nd Defendant was intoxicated to the "Mair" extent.

68. In these circumstance, I have to find and I so find and I so hold that the Plaintiff has failed to prove on a balance of probabilities, the requisite standard of proof, that the Second Defendant was under the influence of intoxicating liquor whilst driving Motor Vehicle No. YOS 666 on 23 December 2012.

69. It therefore follows, that the Plaintiff is NOT entitled to avoid liability to provide indemnity under the Policy to the First and Second Defendants in respect of the claims of the Third Defendants on the grounds that the Second Defendant had breached clause 1(d(i) of the Conditions of the Policy.

70. Consequently, the Plaintiff is liable to satisfy any judgment entered against the First and/or Second Defendants in the said actions and any further or other action relating to the said accident.

71. I hereby dismiss the Originating Summons filed on 27 June 2015, decline to grant the Declarations sought and order the Plaintiff to pay costs which I summarily assess at $2,000.0 to the First and Second Defendants and at $1,000.00 to the Third Defendants.

Delivered at Suva this 10th day of May, 2016.

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DAVID ALFRED
JUDGE
High Court of Fiji