1962
*Dec. 5
1963
Jan. 22

RALPH HANES (*Defendant*) ..... APPELLANT;

AND

THE WAWANESA MUTUAL INSURANCE COMPANY (*Plaintiff*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Automobile—Action by insurer for reimbursement of payment in satisfaction of judgment against insured—Insured alleged to have been intoxicated in breach of statutory condition of policy—Standard of proof applicable—The Evidence Act, R.S.O. 1950, c. 119, s. 20—The Insurance Act, R.S.O. 1950, c. 183, s. 214.

The respondent company brought an action pursuant to the provisions of s. 214(8) of *The Insurance Act,* R.S.O. 1950, c. 183, for reimbursement of a certain sum paid by it towards satisfaction of a judgment against the appellant. The latter was insured with the respondent under a standard automobile policy and was the unsuccessful defendant in an action brought by several plaintiffs arising out of a motor vehicle accident. The respondent alleged that the said sum was one which it would not have been liable to pay except for the provisions of s. 214(1) and 3(ii) of the Act because the appellant at the time of the accident was "under the influence of intoxicating liquor to such an extent as to be for the time being incapable of the proper control of the automobile" within the meaning of the prohibition in statutory condition 2(1)(*a*) of the policy. The trial judge was of the opinion that on a reasonable balance of probabilities the appellant was under the influence of intoxicating liquor to the extent specified in statutory condition 2(1)(*a*), but he was also of the opinion that he was bound to be satisfied beyond a reasonable doubt as to the intoxication of the appellant.

The Court of Appeal allowed an appeal and directed a new trial on a different ground, *viz.,* that the trial judge had erred in his interpretation of the effect of s. 20 of *The Evidence Act,* R.S.O. 1950, c. 119 [now R.S.O. 1960, c. 125, s. 24] in refusing to declare two of the witnesses to be "adverse" within the meaning of that section and

*PRESENT: Kerwin C.J. and Taschereau, Cartwright, Martland and Ritchie JJ.

thereby excluding prior statements made by them which contradicted statements which they had made on the witness stand. The appellant appealed from the latter finding, and the respondent cross-appealed, saying that the trial judge erred in thinking himself to be bound to be satisfied beyond a reasonable doubt as to the intoxication of the appellant and that his finding, based on reasonable probability, was sufficient to entitle the respondent to judgment.

Held: (Cartwright J. dissenting): The appeal should be dismissed and the cross-appeal allowed.

Per Kerwin C.J. and Taschereau, Martland and Ritchie JJ.: The trial judge applied the wrong standard of proof and the question of whether or not the appellant was in a state of intoxication at the time of the accident was a question which ought to have been determined according to the "balance of probabilities". *Cooper v. Slade* (1858), 6 H.L. Cas. 746; *Doe dem. Devine v. Wilson et al.* (1855), 10 Moo. P.C.C. 502; *Clark v. The King* (1921), 61 S.C.R. 608; *Lek v. Mathews* (1927), 29 Lloyd's List Law Reports 141; *Earnshaw v. Dominion of Canada General Insurance Co.*, [1943] O.R. 385; *Bater v. Bater*, [1950] 2 All E.R. 458; *Smith v. Smith and Smedman*, [1952] 2 S.C.R. 312; *New York Life Insurance Co. v. Schlitt*, [1945] S.C.R. 289; *Harvey v. Ocean Accident and Guarantee Corp.*, [1905] 2 I.R. 1; *Industrial Acceptance Corp. v. Couture*, [1954] S.C.R. 34, referred to; *London Life Ins. Co. v. Trustee of the Property of Lang Shirt Co. Ltd.*, [1929] S.C.R. 117, discussed.

The trial judge, while applying the standard of proof applicable in criminal cases, nevertheless expressed his opinion that on a reasonable balance of probabilities the appellant was under the influence of liquor to such an extent as to be for the time being incapable of the proper control of his automobile. This opinion was based in large degree upon his assessment of the quality and credibility of the witnesses and there was evidence upon which he could make such a finding. The Chief Justice of the Court of Appeal did not dissent from this conclusion and one of the Justices of Appeal not only adopted it, but would have gone further and found intoxication to be proved even according to the standard by which the trial judge thought himself to be bound. That being so, the opinion as to the appellant's state of intoxication which was reached by the trial judge in accordance with "a reasonable balance of probabilities" should not be reversed (*Union Insurance Society of Canton Ltd. v. Arsenault*, [1961] S.C.R. 766 and *Prudential Trust Co. Ltd. v. Forseth*, [1960] S.C.R. 210) and as this was the proper basis on which to determine such a question in a civil case, the appeal should be disposed of in accordance with it with the result that the appellant was found to have been in breach of statutory condition 2(1)(*a*) so that the respondent was entitled to reimbursement of the sum paid by it in satisfaction of the judgment in accordance with s. 214(8) of *The Insurance Act*. In view of this decision, it was unnecessary to consider the question concerning the interpretation of s. 24 of *The Evidence Act*, raised in the main appeal.

Per Cartwright J., *dissenting:* While agreeing with the reasons and conclusion of the majority on the question of law as to the applicable standard of proof, a different view was held on the question of fact as to whether the evidence adduced at the trial was sufficient to satisfy the onus which rested upon the respondent.

1963

HANES v. WAWANESA MUTUAL INSURANCE CO.

The trial judge was correct in holding that "adverse" in s. 20 of *The Evidence Act*, R.S.O. 1950, c. 119 [now s. 24 of R.S.O. 1960, c. 125] means "hostile", and he was right in deciding not to look at prior statements made by two of the witnesses, which were inconsistent with the evidence they gave at the trial, for the purpose of forming his opinion as to whether the said witnesses were hostile.

The evidence, considered as a whole, was insufficient to discharge the burden which rested on the respondent of satisfying the Court by a preponderance of evidence that at the time of the accident the appellant was under the influence of intoxicating liquor to such an extent as to be incapable of the proper control of an automobile.

APPEAL and cross-appeal from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Wilson J. Appeal dismissed and cross-appeal allowed, Cartwright J. dissenting.

G. William Gorrell, Q.C., for the defendant, appellant.

Adrian T. Hewitt, Q.C., and *F. J. McDonald*, for the plaintiff, respondent.

The judgment of Kerwin C.J. and Taschereau, Martland and Ritchie JJ. was delivered by

RITCHIE J.:—This action was brought by the respondent pursuant to the provisions of s. 214(8) of *The Insurance Act*, R.S.O. 1950, c. 183, for reimbursement of the sum of $22,174.85 paid by it towards satisfaction of a judgment against the appellant who was insured with the respondent under a standard contract of automobile liability insurance and who was the unsuccessful defendant in an action brought by several plaintiffs arising out of a motor vehicle accident which occurred some time after 11:00 o'clock on the night of May 16, 1958. The respondent has alleged that the said sum was one which it would not have been liable to pay except for the provisions of s. 214(1) and (3)(ii) of the said *Insurance Act* because the appellant at the time of the accident was "under the influence of intoxicating liquor to such an extent as to be for the time being incapable of the proper control of the automobile" within the meaning of the prohibition in statutory condition 2(1)(*a*) of the said policy.

It is not seriously disputed that if the appellant was so intoxicated as to be in breach of the said statutory condition the respondent is entitled to succeed in this action.

[1] [1961] O.R. 495 28 D.L.R. (2d) 386.

Mr. Justice Wilson, who presided at the trial, made the following finding of fact concerning the condition of the appellant during the evening before and at the time of the accident:

The defendant, who is a driver of cattle, entered Willards Restaurant in Spencerville about 7:00 p.m. in company with one Earl. He had been drinking; his speech in the restaurant was not too clear in giving his order; his eyes were hazy looking. He ordered a bowl of soup and was served with it, and also with crackers. He was slovenly in the consumption of both, in that he left some mess on the counter. He appeared to be quite drowsy, and dozed a bit while sitting on a stool at the counter in the restaurant. About 7:30 p.m. the Defendant and Earl left the restaurant and proceeded southerly a short distance, in the direction of an hotel. About 10:30 p.m. Hanes and Earl came out of the hotel, which has an entrance on a side street, which leads to the main street Highway No. 16, and entered the blue Oldsmobile which was driven to the Highway, where it came to a stop, and then drove off north at a fast pace. The accident, to which reference has been made, occurred shortly afterwards. The Woodwark car, after the impact, was forced northerly, that is to say against the direction from which it was coming; it turned over and came to rest upside down on the westerly side of the road. The Hanes car proceeded north, beyond the point of impact, and came to rest facing in a north-easterly direction, I think it was, and with the door on the passenger side open, Earl lying outside the car and Hanes still in it. Hanes smelt of alcohol when he was found. He was unconscious. According to the evidence at the trial he had no memory from noon of the day of the accident. Neither Hanes nor Earl gave evidence at the trial.

After finding that the witnesses who testified as to the appellant's sobriety, with the exception of one who had seen him earlier in the day, ought not to be believed, the learned trial judge went on to say:

After long experience in trying both civil and criminal cases I am of the opinion, that on a reasonable balance of probabilities, that Hanes was under the influence of intoxicating liquor to such an extent as to be for the time being incapable of proper control of his automobile. However, the rule in civil cases, although this is a civil case, according to authority, which I interpret to be binding upon me, is not the rule to be applied, namely the rule as laid down in London Life Insurance Company v. Trustee of the Property of Lang Shirt Co. Ltd., [1929] S.C.R. 117, as interpreted in Earnshaw v. Dominion of Canada Insurance Company, [1943] O.R. 385.

and he proceeded to adopt the following statement made by Robertson C.J.O. in the latter case:

In a case of this nature, which is a civil action, but where it is necessary for the respondent to establish a breach of criminal law by the other side, the evidence must be substantially the same as would secure a conviction in the criminal courts.

1963

HANES v. WAWANESA MUTUAL INSURANCE CO.

Ritchie J.

In the Court of Appeal[1], Chief Justice Porter made no reference to the learned trial judge's opinion based "on a reasonable balance of probabilities that Hanes was under the influence of intoxicating liquor" to the extent specified in statutory condition 2(1)(*a*), but he agreed that the rule to be applied was the same as that necessary to secure a conviction in the criminal courts. Roach J.A. stated that he would hesitate to hold that as a matter of probability the defendant was under the influence of intoxicating liquor at the time of the collision to the extent prohibited by the statutory condition. MacKay J.A., on the other hand, concluded that even applying the standard of proof which was accepted by the trial judge the evidence would have justified a finding for the respondent.

The Court of Appeal, however, allowed the appeal and directed a new trial on a different ground, *viz.*, that the learned trial judge had erred in his interpretation of the effect of s. 24 of *The Evidence Act,* R.S.O. 1960, c. 125, in refusing to declare two of the witnesses to be "adverse" within the meaning of that section and thereby excluding prior statements made by them which contradicted statements which they had made on the witness stand. It is from this latter finding of the Court of Appeal that the appellant now appeals and the respondent cross-appeals, saying that the learned trial judge erred in thinking himself to be bound to be satisfied beyond a reasonable doubt as to the intoxication of the appellant and that his finding, based on reasonable probability and concurred in by MacKay J.A., was sufficient to entitle the respondent to judgment.

The question raised by the cross-appeal is one which warrants a consideration of the development of the authorities in England and in this Court. In England the most authoritative of the early decisions on this subject was that of the House of Lords in *Cooper v. Slade*[2], in which a quasi-criminal issue was clearly involved, the suit being for the recovery of a fine under the *Corrupt Practices Prevention Act* of 1854, and Willes J. nevertheless said:

> . . . I may be excused for referring to an authority in support of the elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict. I find such an authority referred to in Mr. Best's very able and instructive treatise on the Principles of Evidence (2 Edit. p. 114). So long since as the 14th of Elizabeth, Chief

[1] [1961] O.R. 495, 28 D.L.R. (2d) 386.
[2] (1858), 6 H.L. Cas. 746, 27 L.J.Q.B. 449.

Justice Dyer and a majority of the other Justices of the Common Pleas laid down this distinction between pleadings and evidence, "that in a writ or declaration or other pleading certainty ought to be shown, for there the party must answer to it, and the Court must adjudge upon it; and that which the party shall be compelled to answer to, and which is the foundation whereupon the Court is to give judgment, ought to be certain, or else the party would be driven to answer to what he does not know, and the Court to give judgment upon that which is utterly uncertain. But where the matter is so far gone that the parties are at issue, or that the inquest is awarded by default, so that the jury is to give a verdict one way or the other, there, if the matter is doubtful, they may found their verdict upon that which appears the most probable, and by the same reason that which is most probable shall be good evidence."

Of even more significance is the decision of the Privy Council in *Doe dem. Devine v. Wilson et al.*[1], where the issue turned on whether or not the signature to a deed had been forged and the trial judge had directed the jury that if they had a reasonable doubt the defendants would have the benefit of that doubt, and Mr. Justice Patteson, speaking for the Judicial Committee, at p. 532 said:

> Certainly, it has been the practice so to direct the jury in a criminal case; whether on motives of public policy or from tenderness to life and liberty, or from any other reason, it may not be material to inquire, but none of those reasons apply to a civil case. If, indeed, by the pleadings in a civil case, a direct issue of forgery or not, be raised, the *onus* would lie on the party asserting the forgery, and this would be more like a criminal proceeding, but even then the reasons for suffering a doubt to prevail against the probabilities, would not, in their Lordships' opinion, apply.

Earlier in the same decision Mr. Justice Patteson had defined the duty of a jury in such a case in the following terms:

> The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities.

It would not be accurate to suggest that this view of the matter was universally adopted by all the judges of 19th-century England because cases such as *Thurtell v. Beaumont*[2], are to the contrary effect, but it has long since been accepted by such authorities on the law of evidence as Phipson (see 9th ed. p. 9) and Wigmore (see 3rd ed. para. 2498 at p. 327) that the weight of authority favours the balance of probability as the proper test in such a case, and in 1921 in *Clark v. The King*[3], Duff J. (as he then was) quoted at length and with approval from the decision in *Doe dem. Devine v. Wilson et al., supra.*

[1] (1855), 10 Moo. P.C.C. 502. [2] (1823), 1 Bing. 339.
[3] (1921), 61 S.C.R. 608 at 616-7.

1963

HANES v. WAWANESA MUTUAL INSURANCE CO.

Ritchie J.

In 1927 the case of *Lek v. Mathews*[1], came before the House of Lords, and Lord Sumner had occasion to say at p. 164:

> With great respect to the Lords Justices it seems to me that what has really made both this forgery theory and this construction of the claim attractive has been a strong reluctance to say that Mr. Lek has tried to cheat and has backed his effort by perjury. This has been supported by a canon, new to me in the form employed, to the effect that such a man as Mr. Lek cannot be convicted of this so long as any reasonable possibility remains of explaining his conduct otherwise. I am afraid I look at it differently and think that this is wholly without authority. When prisoners could not give evidence, such an appeal might have passed muster with a jury, but on a civil issue I do not think more is required than a correct appreciation of the incidence and the shifting of the onus of proof and a reasonable estimate of the weight *pro* and *con* of the various parts of the evidence. Mr. Lek's reputation and wealth are material only as ground for considering the probability of such misconduct. The consequences of a verdict against him are quite immaterial. I am just as reluctant to make the underwriters pay Mr. Lek many thousands of pounds, if he has been guilty of making a false claim, as to find him guilty of it if he has not. The whole question is whether it has been proved; and I think it has.

It is against the background of these decisions that the reasons for judgment delivered by Mignault J. on behalf of himself, Anglin C.J. and Rinfret J. in *London Life Insurance Co. v. Trustee of the Property of Lang Shirt Co. Ltd.*[2], must be considered.

The passage in that judgment upon which Robertson C.J.O. in *Earnshaw v. Dominion of Canada General Insurance Company, supra,* placed the interpretation by which the trial judge in the present case felt himself to be bound does not, in my view, bear that interpretation when it is subjected to analysis. The first sentence of the passage reads:

> That there is, in the law of evidence, a legal presumption against the imputation of crime, requiring, before crime can be held to be established, proof of a more cogent character than in ordinary cases where no such imputation is made, does not appear to admit of doubt.

The fact that the words "proof of a more cogent character" are by no means synonymous with "proof beyond a reasonable doubt" is well illustrated by what was said by Denning L.J. in *Bater v. Bater*[3]:

> The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words

[1] (1927), 29 Lloyd's List Law Reports 141.
[2] [1929] S.C.R. 117, 1 D.L.R. 328. [3] [1950] 2 All E.R. 458 at 459.

than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

The same thought was expressed in different language by Cartwright J. in *Smith v. Smith and Smedman*[1], where he said:

> I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend upon the totality of the circumstances on which its judgment is formed *including the gravity of the consequences of the finding*.

(The italics are mine.)

The passage from the judgment of Mignault J. continues:

> In criminal cases this rule is often expressed by saying that the crime imputed must be proved to the exclusion of reasonable doubt. There is authority for the proposition that the same presumption of innocence from crime should be applied with equal strictness in civil as well as in criminal cases (Taylor, Evidence, 11th ed., vol. 1, par. 112, and cases referred to). Whether or not, however, the cogency of the presumption is as great in civil matters as in criminal law (*a point not necessarily involved here*), I would like to adopt the statement of the rule by Middleton J.A., in the court below, which appears entirely sound:
>
> > . . . While the rule is not so strict in civil cases as in criminal, I think that when a right or defence rests upon the suggestion that conduct is criminal or quasi-criminal, the Court should be satisfied not only that the circumstances proved are consistent with the commission of the suggested act, but that the facts are such as to be inconsistent with any other rational conclusion that the evil act was in fact committed. See Alderson, B., in *Rex v. Hodge,* (1838) 2 Lewin C.C. 227.
>
> I would also refer to the authorities cited by Riddell J.A., in the court below, dealing with the presumption against suicide.

(The italics are mine.)

With the greatest respect for the view expressed by Robertson C.J.O. in the *Earnshaw* case, *supra,* I do not think that the language above quoted establishes the rule that where

[1] [1952] 2 S.C.R. 312 at 331, 3 D.L.R. 449.

1963

HANES v. WAWANESA MUTUAL INSURANCE CO.

Ritchie J.

in civil cases it is necessary to establish a breach of criminal law "the evidence must be substantially the same as would secure a conviction in the criminal courts". In fact it appears to me that Mignault J. expressly dissociated himself from any such finding by saying that "the point is not necessarily involved here".

It is true that Mignault J. proceeded to adopt the statement of Middleton J.A. in the Court below which is phrased in much the same language as that employed in the famous judgment of Baron Alderson in *Rex v. Hodge, supra,* but Middleton J.A. was careful to preface his reference to that case with the words "While the rule is not so strict in civil cases as in criminal . . . ." and I think that in the light of the authorities then existing it must be taken that in adopting this paragraph Mignault J. was adopting the rule in *Hodge's* case, *supra,* modified for application to civil cases, and that the statement must be read as meaning that when a right or defence rests upon the suggestion that conduct is criminal or quasi-criminal the Court must be satisfied not only that the circumstances are consistent with the commission of the criminal act but that the facts are such as to make it reasonably probable, having due regard to the gravity of the suggestion, that the act was in fact committed. It appears to me that Mignault J.'s reference "to the authorities cited by Riddell J.A., in the court below" is indicative of his approach to the problem.

In dealing with the American cases on the subject, Riddell J.A. had said in 62 O.L.R. 83 at 90:

> In the Vermont case of *Walcott v. Metropolitan Life Insurance Co.* (1891), 64 Vermont 221, 33 Am. St. Repr. 923, it is said that if recovery upon a policy of life insurance is resisted on the ground that the assured committed suicide, the defendant must satisfy the jury, *by a preponderance of competent evidence,* that the injuries which caused death were intentional on the part of the assured; and I agree in that statement of the law. The cases cited fully support the proposition of the Vermont Court: . . . .

(The italics are mine.)

Any doubt about the meaning of Mr. Justice Mignault's statement seems to me to be further clarified by the observations of Newcombe J. who agreed with his conclusion and said at p. 133:

> The question is one of probabilities and inferences, and the Appellate Division was as well qualified to weigh and determine these as the learned trial judge.

In the case of *The New York Life Insurance Company v. Schlitt*[1], this Court was again required to decide the question of whether or not an insured had committed suicide and Taschereau J. adopted the language used in *Harvey v. Ocean Accident and Guarantee Corporation*[2], where it was held that:

> If a man is found drowned, and certainly drowned either by accident or by suicide, and there is *no preponderance of evidence* as to which of the two caused his death, is there any presumption against suicide which will justify a jury or an arbitrator in finding that the death was accidental and innocent, and not suicidal and criminal? In my opinion there clearly is such a presumption. (The italics are mine.)

In the same case, Rand J. said at p. 309:

> When a point has been reached at which suicide becomes a reasonable conclusion or counter-balances accident, the legal effect of the presumption is exhausted.

Although in the case of *Smith v. Smith and Smedman, supra,* the Court was considering the standard necessary for the proof of the commission of a marital offence, it is nonetheless significant to note that Locke J., speaking for the majority of the Court at p. 330, expressly recognized the authority of Sir John Patteson's decision in *Doe dem. Devine v. Wilson et al., supra.*

The effect of the above-noted cases decided in this Court was stated by Fauteux J., speaking on behalf of himself and Taschereau J. in *Industrial Acceptance Corporation v. Couture*[3], where he said at p. 43:

> Il se peut qu'accusé devant les tribunaux criminels d'avoir volé ce camion, Gagnon ait une défense ou des explications à offrir et qu'un jury ne soit pas, par la preuve ci-dessus, convaincu hors de tout doute de sa culpabilité. Mais, dans une cause civile où la preuve d'un crime est matérielle au succès de l'action, la règle de preuve applicable n'est pas celle prévalant dans une cause criminelle où les sanctions de la loi pénale sont recherchées, mais celle régissant la détermination de l'action au civil.

No other members of the Court in that case found it necessary to deal expressly with the question of burden of proof, but the acceptance of the rule adopted by Fauteux J. appears to me to be implicit in the conclusion of the majority that the automobile in question was stolen from the appellant.

[1] [1945] S.C.R. 289, 2 D.L.R. 209. [2] [1905] 2 I.R. 1 at 29.
[3] [1954] S.C.R. 34.

1963

HANES v. WAWANESA MUTUAL INSURANCE CO.

Ritchie J.

Having regard to the above authorities, I am of opinion that the learned trial judge applied the wrong standard of proof in the present case and that the question of whether or not the appellant was in a state of intoxication at the time of the accident is a question which ought to have been determined according to the "balance of probabilities".

It has been noted that the learned trial judge, while applying the standard of proof applicable in criminal cases, nevertheless clearly expressed his opinion:

> . . . that on a reasonable balance of probabilities . . . Hanes was under the influence of intoxicating liquor to such an extent as to be for the time being incapable of the proper control of his automobile.

While I am unable to say from the evidence disclosed in the record before us that I would necessarily have reached the same conclusion, it is nevertheless clear from his reasons that the learned trial judge based this opinion in large degree upon his assessment of the quality and credibility of the witnesses whom he had the advantage of seeing on the witness stand and there was evidence upon which he could make such a finding. Furthermore, Chief Justice Porter in the Court of Appeal did not dissent from this conclusion, and MacKay J.A. not only adopted it, but would have gone further and found intoxication to be proved even according to the standard by which the trial judge thought himself to be bound. This being so, I do not think that the opinion as to the appellant's state of intoxication which was reached by Mr. Justice Wilson in accordance with "a reasonable balance of probabilities" should be reversed (see *Union Insurance Society of Canton Limited v. Arsenault*[1], and *Prudential Trust Company Limited v. Forseth*[2]) and as this seems to me to be the proper basis on which to determine such a question in a civil case, I would dispose of this appeal in accordance with it with the result that I find the appellant to have been in breach of statutory condition 2(1)(*a*) of the said policy so that the respondent is entitled to reimbursement of the sum paid by it in satisfaction of the said judgment in accordance with s. 214(8) of *The Insurance Act*.

[1] [1961] S.C.R. 766 per Martland J. at 769, 30 D.L.R. (2d) 573.
[2] [1960] S.C.R. 210, 30 W.W.R. 241, 21 D.L.R. (2d) 587.

In view of the above, it becomes unnecessary for me to consider the interesting question concerning the interpretation to be placed on s. 24 of *The Evidence Act,* R.S.O. 1960, c. 125, which is raised by the main appeal.

I would accordingly allow the cross-appeal and direct that the order of the Court of Appeal be varied and that the judgment of the trial judge be set aside and that judgment be entered for the plaintiff-respondent against the defendant-appellant for the sum of $22,174.85 together with the costs of the trial, of the appeal to the Court of Appeal, and of the cross-appeal to this Court.

CARTWRIGHT J. (*dissenting*):—The findings of fact made by the learned trial judge and the course of the proceedings in the Courts below are set out in the reasons of my brother Ritchie which I have had the advantage of reading. I agree with his reasons and conclusion on the question of law as to the applicable standard of proof but differ from his view on the question of fact as to whether the evidence adduced at the trial was sufficient to satisfy the onus which rested upon the respondent. This renders it necessary for me to examine the ground upon which the majority in the Court of Appeal proceeded, dealing with the interpretation of s. 20 of *The Evidence Act,* and also to say something about the evidence.

Section 20 of *The Evidence Act,* R.S.O. 1950, c. 119, is now s. 24 of *The Evidence Act,* R.S.O. 1960, c. 125, which reads as follows:

> 24. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or if the witness in the opinion of the judge or other person presiding proves adverse such party may by leave of the judge or other person presiding prove that the witness made at some other time a statement inconsistent with his present testimony, but before such last mentioned proof is given the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness and he shall be asked whether or not he did make such statement.

Hereafter, in these reasons, I shall refer to this section as s. 24.

The two questions as to the application of this section in the circumstances of the case at bar on which there has been a difference of opinion in the Courts below are (i) whether the word "adverse" as used in the section means hostile or merely unfavourable to the case of the party calling the witness, and (ii) whether in forming his opinion that the

1963

HANES
v.
WAWANESA MUTUAL INSURANCE CO.

Cartwright J.

witness does or does not prove adverse the judge may examine the statement inconsistent with his present testimony which the witness is said to have made.

In the case of two of the witnesses produced by the plaintiff counsel asked the learned trial judge to declare the witness adverse and to permit him to prove that the witness had made an earlier statement inconsistent with the evidence he had just given.

The witnesses in question were William Joseph Dake and Doctor Pember Alton MacIntosh. In the case of each application the learned trial judge said that nothing had occurred up to that point to cause him to think that the witness was hostile; counsel then asked the learned trial judge to look at the statement to assist himself in forming the opinion whether or not the witness was hostile. After hearing full argument the learned trial judge held, following *Greenough v. Eccles*[1], that adverse as used in the section means hostile and said:

> I should state it is my view of the law that a witness must be proved to be hostile and the hostility must be gathered by the judge from the demeanour, the language, the witness' manner in the witness box, and all those elements which are indefinable, but which nevertheless do convey an impression to the judge whether or not a witness is hostile. I am unable to find such hostility in this case.

The learned trial judge declined to look at the statements or consider their contents. In my opinion, both of these rulings were correct.

In the Court of Appeal, Porter C.J.O. was of opinion that "adverse" in s. 24 means "unfavourable" and not "hostile", that the prior statements should have been allowed to be introduced and that there should be a new trial. Mackay J.A. was of opinion that "adverse" means merely "unfavourable" but that on the assumption it means "hostile" the learned trial judge was entitled to examine the previous statements and to form his opinion as to the hostility of the witnesses on the basis of the contents of these statements even if there were no other *indicia* of hostility. He agreed with Porter C.J.O. that a new trial should be ordered.

[1] (1859), 5 C.B.N.S. 786, 28 L.J.C.P. 160.

Roach J.A. dissented. He agreed with the learned trial judge that "adverse" means "hostile" and held that he was right in deciding not to look at the statements for the purpose of forming his opinion as to whether the witnesses were hostile. He would have dismissed the appeal.

On this branch of the matter I agree with the conclusions of Roach J.A. and (subject to one reservation to be mentioned in a moment) I am so fully in agreement with his reasons that I wish simply to adopt them.

The reservation referred to is in regard to a reference made by the learned Justice of Appeal to s. 9 of the *Canada Evidence Act* in which he says:

> It will be noted that under the Canada Evidence Act a party calling a witness may not contradict by other evidence unless in the opinion of the court the witness proves adverse, while under the Ontario Act a party calling a witness may contradict him by other evidence regardless.

This observation was not necessary to his decision and does not affect it. With respect, I am of opinion that s. 9 of the *Canada Evidence Act* has been correctly construed as not restricting the right of a party calling a witness to contradict him by other evidence to cases in which in the opinion of the court the witness proves adverse.

It remains to consider whether the plaintiff discharged the burden resting upon it of satisfying the Court by a preponderance of evidence that at the time of the collision between the motor vehicles of Hanes and Woodwark which occurred shortly after 11 p.m. on May 16, 1958, Hanes was under the influence of intoxicating liquor to such an extent as to be for the time being incapable of the proper control of the automobile.

Since the learned trial judge and all members of the Court of Appeal felt themselves bound, by the decision of this Court in *London Life Insurance Co. v. Trustee of the Property of Lang Shirt Co. Ltd.*[1], as interpreted by the Court of Appeal in *Earnshaw v. Dominion of Canada General Insurance Co.*[2], to hold that in order to succeed the plaintiff was called upon to prove the fact of intoxication with substantially the same strictness as would have been required of the prosecution in the trial of a criminal charge it was not necessary for them to consider or decide the question set out in the preceding paragraph. However, the

[1] [1929] S.C.R. 117, 1 D.L.R. 328. [2] [1943] O.R. 385, 3 D.L.R. 163.

1963

HANES v. WAWANESA MUTUAL INSURANCE CO.

Cartwright J.

learned trial judge expressed the opinion quoted in the reasons of my brother Ritchie that he would have answered the question in the affirmative; Mackay J.A. indicated the same view; Porter C.J.O. expressed no opinion; Roach J.A. would have inclined to answer the question in the negative.

Turning to the evidence it may first be observed that the only items of direct evidence of the consumption of any intoxicating liquor by Hanes on the day in question are (i) the statement made by Hanes to an adjuster employed by the plaintiff on June 3, 1958. At the time of making the statement Hanes was still in hospital. The statement was written out by the adjuster and signed by Hanes. It reads as follows:

> My name is Ralph Hanes age 58 of Prescott, Ontario. On May 16, 1958, I was buying cattle till about noon and Mr. Jack Markham of Ingersoll was with me all morning and I let him off at Daniels Hotel in Prescott at about 12 noon. I do not remember what I was doing for the rest of the day or evening of this accident, and I cannot recall whether I was driving my car at the time this accident took place or if Mr. Earl was driving at the time. Since being in the hospital Mr. Earl's father was in to see me and advised me he thought his son had been driving at the time of this accident. As mentioned above, I cannot recall anything past noon on May 16, 1958, other than having some beer in the afternoon, I cannot recall where I had it, I cannot recall having any lunch or supper that day either.

(ii) a portion of the examination for discovery of Hanes in the action of *Woodwark v. Hanes* read into the record by counsel for the plaintiff which is as follows:

> 61. Q. Where did you spend all this intervening time between 2.30 and 6 o'clock? A. It was 5 o'clock when I was at the garage at Chesterville, and left there.
>
> 62. Q. How long had you stayed in Chesterville? A. About 2 hours or better.
>
> 63. Q. Were you at the garage all the time? A. No.
>
> 64. Q. Where were you in addition to being in the garage? A. I was over at the hotel, and I was at the restaurant.
>
> 66. Q. Did you have anything to drink? A. I had one pint of beer there.

Other questions and answers read in indicate that Hanes had to some extent informed himself, as it was his duty to do, of the circumstances surrounding the accident of which he had no memory when questioned in the hospital. For example, he stated definitely that he and not Earl was driving at the time of the accident. It is not an unreasonable

supposition that the "some beer" referred to in the statement was made up of the one pint he had at the hotel in Chesterville and the one pint to be mentioned in the item next following; (iii) the witness Blanchard deposed that Hanes had one pint of beer in the hotel at Spencerville shortly before 6.30 p.m. on the day in question.

There is, therefore, no direct evidence that Hanes had consumed more than a total of two pints of beer.

There is, however, the evidence of Betty Willard, the waitress in Willard's restaurant in Spencerville regarding Hanes' appearance and actions there at about 7 p.m. on the day in question. As it is on the evidence of this witness that the opinion of the learned trial judge quoted by my brother Ritchie is largely based it seems necessary to quote all of it that touches the question whether Hanes was then intoxicated. It was all given on examination in chief and is as follows:

Q. Do you know the defendant Ralph Hanes? A. Yes.

Q. How long have you known him? A. I would say about five years.

Q. And had he from time to time been a customer in your restaurant? A. Yes.

Q. Do you recall a day when an accident occurred on the main highway between Spencerville and Kemptville involving some people by the name of Woodwark and the defendant, Mr. Hanes? A. Yes.

Q. When did you learn about this accident occurring, or that it had occurred? A. The same evening.

Q. Had you that evening you heard the accident occurred seen the defendant Ralph Hanes? A. Yes.

Q. Where had you seen him? A. In the restaurant.

Q. What were you doing in the restaurant at the time? A. I was a waitress.

Q. Waiting on your customers? A. Yes.

Q. What was Hanes doing in the restaurant? A. He came in for lunch.

Q. To eat. What time of day was it when he was in the restaurant? A. Approximately 7 o'clock.

Q. In the evening or morning? A. In the evening.

Q. And do you know how long he was in your restaurant approximately? A. Half an hour.

Q. And was there anyone with him? A. Yes.

Q. Who? A. His name?

Q. Yes? A. Mr. Earl.

Q. Jesse Earl? A. I don't know.

Q. You don't know his first name? A. No.

Q. Were there other people in the restaurant during the time Hanes was there? A. Yes, a number of people.

1963

HANES v. WAWANESA MUTUAL INSURANCE CO.

Cartwright J.

Q. Are you able to say who they were? A. No, I don't remember.

Q. Did you observe the conduct of the defendant Hanes when he was in your restaurant that evening? A. Yes.

Q. Would you describe as far as you can recall it? A. I was under the impression that he had been drinking.

Q. Why? A. He was quiet.

Q. Did you speak to him? A. Yes.

Q. Did he speak to you? A. He gave me his order.

Q. What was his manner of speech? A. Not too clear.

Q. Did you observe his face and his eyes? A. Yes.

Q. What was the condition of his face and eyes? A. Well, his appearance was not very good.

Q. What was the matter with it? A. Well, it, I would say . . .

Q. Describe as best you can? A. I notice his eyes were not—did not look very good.

Q. What was wrong with them? A. Just a little hazy looking.

Q. Do you recall what he had to eat? A. Yes, I do, yes a bowl of soup he ordered.

Q. Was there anything else? A. I don't remember. I remember the soup.

Q. Why do you remember the soup? Perhaps I should ask you, did you serve anything with the soup? A. Soup and crackers.

Q. Is there any reason why you would recall this specifically? A. There was a bit of a mess on the counter when he left.

Q. A bit of a mess. If I had soup and crackers perhaps I would leave some crumbs and perhaps spill a little soup. How would the mess you referred to compare with what you would expect from the average customer? A. There were crackers around his plate and on the counter and soup had been spilled also.

Q. Did you observe him eat the soup? I am not quite sure whether you eat or drink soup? A. I beg your pardon.

Q. Did you see him consume the soup? A. No, I was busy.

Q. Did you observe anything else about his conduct? A. I remember that he became quite drowsy.

Q. Where did he sit? Did he sit? A. He was just in the door, on the first or second stool, just inside the door.

Q. At the counter? A. Yes.

Q. And you say he became quite drowsy. When, in reference to when you served him the soup? A. After he had the soup, a few minutes.

Q. What happened then? A. I would say he dozed a bit.

Q. Sitting on the stool? A. Yes.

Q. What happened to him when he dozed? Did he remain seated upright? A. Yes.

Q. What happened after that? A. I don't remember too clearly.

Q. Did you see him leave? A. I did not see him walk out, no.

Q. You saw him walk in? A. No, I was in the kitchen when he came in.

Q. Did you observe anything else about his conduct which would be other than ordinary? A. No.

* * *

Mr. HEWITT: You said you knew the defendant. Had you seen him on other occasions? A. Yes, I had.

Q. How did his appearance on the evening you have described compare with the appearance on other occasions—I do not mean on every other occasion? A. A little the worse on this occasion.

Q. A little worse in what sense? A. As far as drinking is concerned.

Q. I see.

HIS LORDSHIP: Did he come into your restaurant when he had not been drinking? A. Oh, yes.

Mr. HEWITT: I will ask you to make a comparison of the condition of the defendant on the evening the accident occurred to when you had seen him in your opinion when he had not been drinking. A. Would you repeat that?

Q. You had seen him on occasions when you had thought he was not drinking, or you felt that he had not been drinking? A. Yes.

Q. How did that condition compare with his condition on the evening of the accident as to the condition we should refer to, perhaps, as normal? A. I do not know how to answer.

Q. Are you able to answer at all? A. No, I don't think so.

HIS LORDSHIP: Whether he had been drinking or not he was always the same, is that what you are saying? He would come in and after having soup would leave crackers around, and soup, and would go to sleep? A. It did not happen very often, no. Any time he came in he pretty well behaved himself.

Mr. HEWITT: Are you suggesting on this occasion he did not pretty well behave himself? A. He was quiet.

HIS LORDSHIP: We are trying to ascertain this man's condition, having in mind the claim by the insurance company that at the time of the accident he was so intoxicated as not to be capable of driving his car. Mr. Hewitt is trying to get at what he is like when he is sober. Do you know? A. No, I just see him coming in—he used to come in the restaurant quite often.

Q. Had he always been drinking when he came in? A. No, I would not say that, not always.

Mr. HEWITT: Can you say on the night of the accident that his condition was something different than on the occasions when he was perfectly sober and had not been drinking? A. Well, that night I was under the impression that he had been drinking.

Q. I don't want to ask you how much he had had to drink, but can you put as to what extent he had been drinking in comparative terms? Do you understand? A. Well, err, well.

Q. Let me take you back to something you said, that on the night of the accident he was a little worse than on other occasions. Worse in what sense? A. There were lots of times he came in when you never thought he had been drinking or you didn't notice, but I notice on this night that he had been drinking.

The witness Dake testified that he saw Hanes in Willard's Restaurant around 7 or 7.30. His evidence continues as follows:

Q. What did you observe as to the conduct of Hanes during the time you were in the restaurant and he was in there. A. I thought he was drinking a little bit. I can't say how much.

1963

HANES v. WAWANESA MUTUAL INSURANCE CO.

Cartwright J.

Q. What was there about him? What did you observe to lead you to believe that he had been drinking? A. Well, the way he acted.

Q. How did he act? A. Slumped over the counter, and he spilled his soup.

Q. He spilled his soup, how much? A. Well, not very much.

Q. You spill soup sometimes? A. Yes.

Q. How much soup did he spill in comparison to what you might spill ordinarily when eating soup? A. Not too much.

Q. What else did he do that you observed? A. Nothing else.

Q. Did you hear him speak? A. No, I can't say I did.

Q. Did you observe how—whether or not Mr. Hanes consumed the soup? A. Yes.

Q. How did he do that? A. Drinking it out of the bowl.

Q. When drinking it out of the bowl what can you say as to his position in reference to the counter? A. He was standing up.

Q. Was he standing up all the time he was in there? A. No.

Q. When did he stand up? A. He was standing up quite a while after he came in.

Q. Had he been sitting any time before he drank his soup? A. I cannot—I am not sure.

Q. Did you see him walk into or out of the restaurant? A. I saw him walk in and out.

Q. How did he walk? A. Ordinary.

Q. I beg your pardon? A. Ordinary.

Q. Anything unusual about it? A. No.

Q. Did you see him when he left the restaurant? A. Yes.

Q. Where were you then? A. I left right behind.

Q. Where did he go? A. Up towards the street, towards the hotel.

Q. What hotel? A. The Spencerville Hotel.

Q. What kind of progress did he make from the restaurant to the hotel? A. Normal.

Q. I beg your pardon? A. Normal, he walked pretty normal.

Q. He walked what? A. Normal, just ordinary. He didn't stagger or nothing.

This was all given on examination-in-chief.

The witness Piche described the conduct of two men in Willard's Restaurant at about 7 p.m. on the day in question. He could not identify either of them as being Hanes but the witness Dake was recalled and said that one of the two men described by Piche was Hanes. The evidence of Piche was as follows:

Q. What did you observe of the men while you were there? A. When they came in I was under the impression they were drinking.

HIS LORDSHIP: Q. Were drinking, or had been drinking? A. Had been drinking. They staggered a bit and made conversation with the one in the restaurant.

Mr. HEWITT: Q. What kind of conversation? A. Just friendly, sort of—I can't remember now what they said.

Q. What was their manner of speech? A. It was not as if the soberest, or as if they were the drunkest.

Q. What do you put on the limits of soberest and the drunkest? A. Well, I don't know—I don't know—they made me feel that they were drinking, that is all.

There was no evidence adduced by the plaintiff as to the condition of Hanes at any time after he left Willard's Restaurant between 7 and 8 p.m. until he was found in his car after the collision by the witness Hudson, an officer of the Ontario Provincial Police Force who had had some years experience in investigating accidents.

Hudson stated that he believed Hanes was unconscious although shortly he started yelling about the passenger in his car. Hudson said he was "right up beside him" and smelt "a faint smell of alcohol on his breath".

It was argued for the plaintiff that the evidence set out above considered with the fact that Hanes' car at the moment of collision appears to have been on the wrong side of the road was sufficient to satisfy the onus resting upon it and stress was laid on the failure of Hanes to testify.

It appears to me that the plaintiff having adduced evidence as part of its case that Hanes had no memory "past noon on May 16" has furnished an explanation of his not being called as a witness in his own defence. There is no evidence to suggest he had had anything intoxicating to drink before noon on the day in question.

In dealing with the facts the learned trial judge said:

> I find that those witnesses who testified as to his sobriety, with the exception of Markham, who had seen him earlier in the day, and whom I find to be a truthful witness, ought not to be believed.

After a careful perusal of the whole record I have some difficulty in understanding this statement. For example, one witness, the Deputy Reeve of the Township of Oxford, who had seen Hanes at 1 p.m. on the day of the accident in connection with cattle business testified to his complete sobriety at that time and was not cross-examined on this point. There is nothing in the written record to suggest that this witness was not frank and straight-forward. However, the learned trial judge had the advantage of seeing him which

1963

HANES v. WAWANESA MUTUAL INSURANCE CO.

Cartwright J.

we have not and consequently I shall refer only to the evidence of Markham whom the learned trial judge found to be a truthful witness.

The significance of Markham's evidence is that, while he parted from Hanes at 11 a.m. on the day of the accident at which time Hanes had had nothing to drink, Hanes called him by long distance telephone between 8.30 and 9.00 p.m., pursuant to an agreement made during the morning, with regard to the arrangements that Hanes was to make for the picking up by trucks of the cattle which Markham had purchased. Markham said that Hanes had made these arrangements and that their long-distance conversation in which he reported on them was a normal one.

On a careful consideration of all the evidence, I have reached the conclusion that, while it might have been open to the tribunal of fact to find that at the moment he left Willard's Restaurant Hanes was under the influence of intoxicating liquor to such an extent as to be incapable of the proper control of an automobile (although I would have hesitated to find so) the evidence is insufficient to discharge the burden which rested on the plaintiff of satisfying the Court by a preponderance of evidence that at the time of the accident some four hours later Hanes was still incapable. As is pointed out by Roach J.A. the food he had consumed and the lapse of time would both have had a sobering effect; the long-distance telephone conversation with Markham indicates that between 8.30 and 9.00 p.m. Hanes was in a normal condition; there is no evidence of his having taken any more liquor after leaving the restaurant and he had none at the restaurant.

In reaching the conclusion stated above I am accepting everything said by the learned trial judge as to the credibility of the witnesses and as to the evidence which he accepted and that which he rejected. I differ from him as to the inferences which should be drawn therefrom.

I would allow the appeal, set aside the order of the Court of Appeal and restore the judgment of the learned trial judge with costs throughout. It follows that the cross-appeal fails and should be dismissed with costs.

Appeal dismissed with costs, cross-appeal allowed with costs, CARTWRIGHT J. *dissenting.*

Solicitor for the defendant, appellant: G. William Gorrell, Morrisburg.

Solicitors for the plaintiff, respondent: Hewitt, Hewitt & Nesbitt, Ottawa.