

CITATION: *Marriott v Australian Associated Motor Insurers Limited* [2010] NTMC 053

PARTIES: PAUL GEORGE MARRIOTT
Plaintiff

v

AUSTRALIAN ASSOCIATED MOTOR
INSURERS LIMITED
Defendant

v

JOANNE MARRIOTT
Third Party

TITLE OF COURT: Local Court

JURISDICTION: Civil

FILE NO(s): 20938328

DELIVERED ON: 1 September 2010

DELIVERED AT: Darwin

HEARING DATE(s): 8 & 9 July 2010

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

CONTRACTS – Insurance Contract – exclusion clause – driving under influence of intoxicating liquor – fraudulent claim within meaning of s56 of the *Insurance Contracts Act*

Sagacious Legal Pty Ltd v Westfarmers General Insurance Ltd (No 4) 2010 FCA 482
Mair and Railway Passengers Assurance Company Limited (1877) 37 LT 356.

Insurance Contracts Act Ss13, 54 and 56

REPRESENTATION:

Counsel:

Plaintiff: Mr Rowbottom
Defendant: Mr Adams

Solicitors:

Plaintiff:

Withnalls Barristers & Solicitors

Defendant:

Langes Lawyers

Judgment category classification:

C

Judgment ID number:

[2010] NTMC 053

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33

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20938328

[2010] NTMC 053

BETWEEN:

PAUL GEORGE MARRIOTT
Plaintiff

AND:

**AUSTRALIAN ASSOCIATED MOTOR
INSURERS LIMITED**
Defendant

AND:

JOANNE MARRIOTT
Third Party

REASONS FOR DECISION

(Delivered 1 September 2010)

Ms Sue Oliver SM:

1. This action concerns a claim for compensation for damage to a motor vehicle that was insured under a written comprehensive car insurance policy with the defendant. The vehicle in question was written off in an accident on 17 June 2008. At the time of the accident, the vehicle was being driven by Joanne Marriott who was joined as a third party in the proceedings. The parties agreed at hearing that Mrs Marriott should be treated as the insured for the purpose of the policy rather than proceed according to the original pleadings.
2. There is no dispute that the vehicle in question was insured with the defendant and that it was written off in the accident, nor is there any dispute as to the terms of the policy. The defendant says that it is entitled to refuse

payment for two reasons. First, the policy excludes coverage if the driver of the vehicle was under the influence of intoxicating liquor or a drug or whose blood alcohol level was in excess of the legal limit in force where the car was being driven. Section 54 allows an insurer to refuse a claim where there is a breach of the obligation or there is an excluded act provided that the act (or omission) is capable of causing or contributing to the loss. Consistent with the obligation pursuant to section 13 of the *Insurance Contracts Act* which requires that parties must act in the utmost good faith with respect to any matter arising under or in relation to the contract, section 56 allows an insurer to refuse a claim made fraudulently. In terms of the Act, a claim will be fraudulently made if a false statement is knowingly made to induce the insurer to meet the claim.

3. The issues are whether Mrs Marriott was under the influence of intoxicating liquor at the time that the car was being driven (an excluded act which is capable of causing or contributing to the loss) and/or alternatively, that there was a failure to provide information to the insurer that was honest, correct and complete as required by the policy such that the claim may be refused as one fraudulently made.

Was Mrs Marriott under the influence of intoxicating liquor at the time that the car was being driven?

4. Mrs Marriott denied being under the influence of intoxicating liquor. She said she had consumed a small alcoholic drink, a Bundaberg Rum and Dry Ginger Ale, with her dinner of spaghetti bolognaise at around 6.30pm on the evening in question. She said the amount of alcohol in the drink would have been around half a nip. Her friend, Laila Pederson, who also gave evidence, called her by telephone around dinner time to go to her house to look at a portrait she was painting for Mrs Marriott of Mrs Marriott's mother, which was intended to be a present for her birthday that Mrs Marriott was about to attend interstate. Mrs Marriott said that she would have arrived at Mrs

Pederson's home at around 7.50pm to 8.00pm. There, she consumed another drink of the same nature, Bundaberg Rum and Dry Ginger Ale. She could not recall whether she or Mrs Pederson made the drink. Mrs Pederson said that she was the one who prepared the drink and the amount of alcohol used would have been a standard nip. She had been a bar attendant and could judge the amount of a standard nip of spirits. Mrs Marriott said that this single drink was made about 20 minutes after her arrival and was consumed over a period of about half an hour. Mrs Marriott said she left Mrs Pederson's at around 9.30pm to 9.45pm. Although she felt tired, she was not intoxicated or under the influence of alcohol at the time.

5. If this evidence is correct then at the absolute most she had consumed two standard drinks over a period of three hours. According to the evidence of Dr Edward Ogden who was called as an expert witness¹ by the Defendant, her blood alcohol content would be zero at the time of the accident. In that case she could not be said to be under the influence of intoxicating liquor at the time the car was being driven and the accident occurred.
6. Mrs Marriott said that she had no recollection of the motor vehicle accident, other than that she remembered driving the car and that she wanted to have a cigar. She reached over to the passenger seat to get the packet and that was the last thing she remembered. The next thing that she remembered was standing back looking at the car from a distance and thinking "what's happened?". She said that she had no recollection of getting out of the vehicle or of anyone else being around. Her next recollection was being in the back of a vehicle and realising that the people in the front of the vehicle were Indigenous. She said she touched her head and realised that she was bleeding. Her next recollection was said to be standing at the bedroom door of her friend, Mrs Pederson. She did not remember talking to Mrs Pederson after the accident. She slept the rest of the evening in Mrs Pederson's spare

¹ See [17]

room and on waking the next day, called the Police at around 7.30am. She was taken to the Police Station by her ex-husband somewhere between 9.50am-10.30am. She was also taken by her ex-husband on his insistence, to a doctor, later in the day.

7. Under cross-examination, Mrs Marriott agreed that prior to the accident she and Mrs Pederson would generally catch up about once a week and that they were known to have “drinking sessions” together, after which she would sleep over at Mrs Pederson’s or alternatively, Mrs Pederson would sleep at her place if they had been together there. She denied taking a bottle of rum to Mrs Pederson’s and said that she had a bottle of Bundaberg Rum, which is her favoured drink, at Mrs Pederson’s. She said she took that bottle and some Dry Ginger Ale with her when she left Mrs Pederson’s, intending to take the alcohol to Newcastle, where she was travelling to the following day, to save some money. She agreed that her mobile phone which was found in the vehicle had a half finished text message on it and said that a girlfriend had sent her a message whilst she was at Mrs Pederson’s, which she started responding to but didn’t finish. She denied making the text message whilst she was driving.
8. Mrs Marriott said she did not recollect any persons, other than those in the vehicle that she had mentioned, being at the scene of the accident, nor did she recollect any conversations with those persons. She agreed that the car had come to rest perpendicular to the roadway, but said it did not occur to her that leaving the vehicle in that position posed a risk of public safety.
9. Mrs Pederson gave evidence. She confirmed that she had rung Mrs Marriott and asked her to come over to view the portrait that she had been finishing off during the day. She said she thought she had arrived not long after dark and stayed a couple of hours. She said that she had been drinking during the afternoon whilst she was drawing. Mrs Pederson said that she poured the drink for Mrs Marriott which was Bundaberg Rum, but she could not

remember whether the mixer was Dry Ginger Ale or Coke. She agreed that they were accustomed to having drinking sessions, sometimes at her place and sometimes at Mrs Marriott's. She said that after Mrs Marriott left her home, she was next aware of her when she woke up and found her standing at the end of her bed. She said she had blood on the side of her face and a cut on her head, which she cleaned up to check how deep it was. She said Mrs Marriot did not seem intoxicated but was the same as when she left. She agreed that she herself was under the influence of alcohol, as she described it, too drunk to drive but not smashed. She cleaned Mrs Marriott up and then Mrs Marriott went to her spare room to sleep. Mrs Pederson was quite certain in her evidence that Mrs Marriott did not drink more than one drink during the time she was at her home and agreed that the left over Bundaberg Rum in the bottle was given to her to take home.

10. Mrs Pederson was under the impression from what Mrs Marriott said to her when she returned after the accident that she had dented the vehicle in a ditch and that someone had given her a lift home. She said Mrs Marriott was speaking normally and said that she was reaching for cigarettes and something about a kangaroo. She had the impression that it was a relatively minor accident and only realised the extent of it when her husband rang her because the Police were looking for Mrs Marriott.
11. The defendant called a number of witnesses who had arrived at the scene of the accident. Daniel Fisher gave evidence that he and his partner Julie Boughton were taking three friends to the Airport that evening at around about 10.30pm. They came across the vehicle facing directly across the road with the tip just touching the edge of the road. They pulled off to the opposite side. He got out and asked if anyone was in the vehicle. He said there were two men hovering about and that a blonde haired lady approached him. He identified that person as Mrs Marriott. He said that she said to him "I hit a kangaroo alright. I'm pissed, I gotta get out of here". She repeated that statement. He said he didn't want any part of that, assuming that she

wanted him to assist her to leave, and so he went back to his own vehicle. He said he could smell alcohol on her. She had a smear of blood down her face. Her speech seemed to be easily understood. He did not see any dead animals. He called Police from his vehicle.

12. Ms Julie Boughton gave similar evidence about the position of the vehicle across the road. She also got out of the vehicle and stood in front of their vehicle around about the centre of the bonnet. Mr Fisher walked over to the lady and asked if anyone else was there. She said Mrs Marriott was waving her arms around and saying “I’m pissed, I hit a kangaroo, I need to get out of here”. She believed this was directed to Mr Fisher. She described Mrs Marriott as being clearly upset, waving her arms about and walking on the debris from the accident without any shoes on. Both Mr Fisher and Ms Boughton denied that what Mrs Marriott had said to them was that she was pissed off as opposed to being pissed.
13. The other witness at the scene of the accident was Jacqueline Kemp. Ms Kemp was driving back from Palmerston and stopped when she realised there was an accident. She said that she saw a lady standing there and that the vehicle was half in the ditch and up across the road. The woman was standing in front of the car and she had a conversation with her. She asked if she was alright and she said she was fine and something like she just walked out of there. She said that she said “don’t call the cops, I’m totally smashed”. Ms Kemp said that she said to her “you can’t leave all this crap (referring to the debris on the road), someone will get hurt”. She returned to her vehicle and she rang the Police to tell them of the mess. In cross-examination she agreed that Mrs Marriott’s speech was coherent, but disagreed that Mrs Marriott was pacing around and couldn’t stand still although she did agree that she was not there very long.
14. The defendant also called evidence from an insurer assessor, Graham Willoughby and from an attending Police Officer, Brendan Hogan. Mr

Willoughby's photographs of the accident scene and of the damage to the vehicle were tendered. The photographs show the road in question, Girraween Road, to be a bitumen road, perfectly straight, with wide dirt verges on either side. The photographs of the vehicle show it to be extensively damaged, particularly to the front of the vehicle and to the rear of the vehicle. It is clear from the photographs that the vehicle has rolled.

15. Acting Sergeant Brendan Hogan gave evidence that he attended the accident scene about 10.40pm. There were two other vehicles there together with the Commodore which was extensively damaged and sitting across the inbound lane. It was his view that the vehicle had rolled after hitting the soft shoulder of the roadside. He did not see any dead kangaroos. In the vehicle he found a business card of Mrs Marriott's ex-husband, whom he rang. He also found a half consumed bottle of Bundaberg Rum on the floor on the passenger side and two bottles of soft drink. He found a Nokia mobile phone with a message still on the screen of the phone.
16. The issue is whether, at the time that she was driving the vehicle and at the time that it was involved in an accident, Mrs Marriott was under the influence of intoxicating liquor. It is not necessary to show a nexus between the affect of the alcohol and the accident. What is required is to show that the driving **ability** of the driver was impaired at the time of the accident by the affect of intoxicating liquor *Sagacious Legal Ltd v Westfarmers General Insurance(No 4)* [2010] FCA 482 at [112]. The defendant must prove that "[the driver] consumed such a quantity of intoxicating liquor as disturbs the balance of his mind for the quite calm intelligence exercise of his faculties." *Mair and Railway Passengers Assurance Company Limited* (1877) 37 LT 356.

The evidence on the affects of alcohol

17. The defendant called Dr Edward Ogden with a view to giving expert evidence and tendering a report he had prepared. Counsel for Mrs Marriott

raised objection to the tendering of Dr Ogden's report on the basis that part of it contained material in relation to amnesia over which Dr Ogden could not be said to be an expert. However, in relation in to calculation of blood alcohol levels and the effects of alcohol on capacity, in my view having considered his impressive *curriculum vitae*, Dr Ogden is undoubtedly well qualified to provide expert opinion.

18. The facts supplied to Dr Ogden for the purpose of his report are, on the relevant issues, consistent with the evidence given by Mrs Marriott and Mrs Pederson about what alcohol was consumed save that he understood this to be two half nip drinks whereas Mrs Pederson's evidence would suggest that the total amount was one and 1/2 nips. The report also relies on an assumption that Mrs Marriott is a woman of average build. That assumption was correct based on her appearance in court.
19. Dr Ogden's report details the way in which alcohol is absorbed into the blood system and how it is metabolised and eliminated from the system. He concludes that at the time of the collision, if Mrs Marriott's account of consumption is correct, she would not have had a measurable blood alcohol concentration. The 1/2 nip difference between the evidence of Mrs Marriott and Mrs Pederson seems unlikely to affect that conclusion assuming that estimate by Mrs Pederson to be accurate. Therefore if the evidence of Mrs Marriott is accepted she could not be said to be under the influence of intoxicating liquor at the time of the accident.
20. Dr Ogden's report details various studies that show the effect of alcohol at particular levels on driving skills. His report also considered the subjective view of impairment and states "There is a common misconception that if a person does not look obviously impaired then they are not affected by alcohol". The evidence that Mrs Marriott's speech was coherent following the accident and that Mrs Pederson did not think she looked affected by alcohol either on leaving or return does not therefore necessarily point to

her being unaffected by alcohol. In relation to Mrs Pedersen's evidence as to the amount of alcohol consumed, it may be the case that either her evidence is not truthful and is given in support of Mrs Marriott's claim as to how much alcohol was consumed or alternatively, that Mrs Marriott did only have one drink at her place, but had consumed far more than the single drink she claimed prior to arriving there.

21. If Mrs Marriott's evidence is accepted she was entirely sober and unaffected by alcohol at the time of the accident. There is however significant and substantial evidence contrary to this view.

Evidence in relation to an alcohol level affecting driving capacity

22. The accident was a straight stretch of road. There is no support for what Mrs Marriott said to witnesses at the scene and to Mrs Pederson, that she had hit a kangaroo. No animal body was seen by anyone present immediately after or by the attending Police Officer. The vehicle had rolled after hitting the soft edge of the roadside. No external factors are apparent that would account for the loss of control of the vehicle in the way that occurred.
23. Mrs Marriott asked two separate carloads of people who stopped to give assistance to help her get away. She did so in terms that were a clear acknowledgment that she had been drinking and was affected by alcohol. To Mr Fisher she said "I'm pissed" and to Mrs Kemp "I'm completely smashed". Ms Boughton confirmed what she said to Mr Fisher. I do not think that any of the three witnesses were mistaken as to what was said to them. Mrs Marriott did leave the scene with the assistance of unknown persons who took her to Mrs Pederson's.
24. Mr Fisher smelt alcohol on her. I reject the submission that effectively I should take judicial notice that Bundaberg Rum is an alcohol with a very high odour. I do not accept that this is a matter that is notorious. In any

event her evidence was that she had one half nip around 6.30pm with a substantial meal (Spaghetti Bolognese) and another possibly full nip at 8-8.30pm, both well diluted with Dry Ginger Ale. She said she did not like her drinks to taste strong. The possibility that someone could smell of alcohol with that limited in take and level of dilution seems to me to be extremely remote. The bottle in the car was not open or broken. Nothing else would account for her smelling of alcohol than that she had consumed far more than she has admitted.

25. The car was left in a dangerous position on the road. Not only should this have been obvious to Mrs Marriott but it was something that Mrs Kemp specifically pointed out to her. She was walking on the debris from the accident without any shoes on. Neither of these actions are indicative of a person who is acting in a responsible state of mind.
26. Mrs Marriott and Mrs Pederson were accustomed to getting together for drinking sessions over the time period in question. Mrs Pederson said she had been drinking consistently during that day and agreed she was intoxicated at the time Mrs Marriott left. The one areas of inconsistency in the accounts given by Mrs Marriott and Mrs Pederson is of the time of Mrs Marriott's arrival at Mrs Pederson's. Mrs Pederson thought it was not long after dark. It is common knowledge that in June, sunset is around 6.30pm in the Top End. Mrs Marriott said that she was called by Mrs Pederson at dinner time to come over to her place. She said she had dinner around 6.30pm. However she estimated that she arrived at around 10 minutes to 8 or 8 o'clock. Travel time between the two places was said to be around 20 minutes. It seems to me highly unlikely that having received the call to come over to inspect the painting Mrs Marriott was having done for her mother's birthday that she was travelling interstate to the next day that she would wait for over an hour before leaving to go to Mrs Pederson's. It is inconsistent with her evidence that she wanted to get home to finish packing for the trip. It is more likely that, as Mrs Pedersen said, she arrived just

after dark. There is also some disparity in the time suggested by Mrs Marriott that she left Mrs Pederson's (9.30 or ¼ to 10pm) and Mrs Pederson's (10 or 11 – “well before midnight”). The time of the accident seems likely to have been after 10.00pm. Mr Fisher and Ms Boughton came across the accident scene around 10.30pm. Mrs Kemp estimated that she left Palmerston around 10.00pm. It seems likely to me that Mrs Kemp was the first to arrive. She called Police when she got home. When Mr Fisher called the Police after he stopped, they already knew of the accident. This evidence places the time of the accident some time after 10.00pm, and much closer to 10.30pm than to 10.00pm. It was only a very short distance from Mrs Pederson's to the accident scene. In my view Mrs Marriott's evidence as to time seems designed to minimise the amount of time she was at Mrs Pederson's with a view to making her story that she consumed only one small drink there over half an hour more likely to be believed.

Could there be an alternative explanation for her conduct at the accident scene?

27. In cross examination, counsel for Mrs Marriott explored with the defendant's witnesses matters that might support her behaviour being attributable to a head injury. Her evidence was that she had no recollection of speaking to people at the scene other than looking at the wrecked car and then being in the backseat of a car.
28. It is the case that Mrs Marriott has a small wound to her head after the accident. However, she was apparently capable of giving instructions to go back to Mrs Pederson's. The persons who took her there appear not to have been concerned about her medical/physical state because they did not accompany her inside.
29. She did not call the Police on arriving at Mrs Pederson's although according to Mrs Pederson she appeared fine. Again there is no evidence of anything that would account for that failure. If she was so shaken up by the accident

or the effects of her head being struck in some way in the accident that it impaired her thoughts that she should contact Police, then it would be expected that Mrs Pederson would not think she looked all right. It is not the case that Mrs Pederson gave her injury only a cursory look. They talked and Mrs Pederson cleaned up the small wound.

30. She was taken to see a medical practitioner the following day and no evidence has been produced to support any head injury or trauma that would account for that failure or for the statements made to persons at the scene of the accident regarding intoxication and the need to get away. Nothing in my view supports a finding that her behaviour at the scene and in leaving could be attributed to a head injury or trauma.

Conclusion

31. I do not discount that there would have been considerable trauma arising out of the accident itself, however combined with the observations of her demeanour and conduct that I have mentioned above, these matters point almost entirely in the direction of intoxication not injury.
32. In my view they point to much more alcohol being consumed by Mrs Marriott than she has admitted. Rather it is more likely than a departure from her accustomed drinking habits with Mrs Pederson, that there was a consumption of a considerable amount of alcohol but because she was going away the next day she departed from the usual practice of sleeping over. I reject her evidence that she had consumed only 2 small alcoholic drinks over that evening.
33. I am satisfied, on the balance of probabilities, that the evidence of her demeanour, including her statements to those who stopped and her subsequent actions are sufficient to show on the balance of probabilities that she had “consumed such a quantity of intoxicating liquor as disturb[ed] the balance of [her] mind for the quite calm intelligence exercise of [her]

faculties” as required for determining whether a person was under the influence of intoxicating liquor as stated in *Mair and Railway Passengers Assurance Company Limited* (1877) 37 LT 356. I do not accept Mrs Pederson’s evidence that she was fine on both departure and arrival back. Either Mrs Pederson’s observations of intoxication were affected by her own alcohol intake or her recollection is not accurate. Dr Ogden’s evidence is that a person looks or feels impaired (by alcohol) then the skills related to driving were seriously impaired. All three independent persons at the scene of the accident point to erratic actions consistent with alcohol impairment. I am satisfied that her driving ability was impaired at the time of the accident by the effect of intoxicating liquor.

34. That being the case the defendant was entitled to refuse the claim on the basis of an excluded act which was an act was one capable of causing or contributing to the loss. That being the case the defendant was also entitled to refuse the claim because it was based on a false statement with regard to the amount of consumption of alcohol which was knowingly made to induce the insurer to meet the claim.
35. Judgement is entered for the defendant.
36. Costs reserved with liberty to apply to make submissions on costs.

Dated this 1st day of September 2010.

Sue Oliver
STIPENDIARY MAGISTRATE