Fawcett v. Bigley.

(*Pittsburgh Legal Journal.*)

An agent's narrative of a past occurrence cannot be received as proof against the principal, of the existence of such occurrence.

Mellon for plaintiff in error.

Acheson contra.

Error to the District Court of Allegheny County.

Agnew, J.—The offers to prove the declaration of John West, made after the accident, that it was caused by the omission of Bigley to furnish proper lines and assistance to secure the boats, was properly rejected. Clearly they were but the statements by West of a past transaction, and not declarations made in the course of Bigley's business, contemporaneous with and qualifying or explaining the acts in which he was engaged as the agent of Bigley. They came clearly within the rule that the narrative of an agent of a past occurrence cannot be received as proof, against the principal, of the existence of such occurrence: 1 Green's Ev., sec. 110; *Patton* v. *Minsinger*, 1 Casey 393; *Hann y* v. *Stewart*, 6 Watts 487.

If West knew the facts, he could be called to prove them. But after the accident he stood in antagonism to his employer. The boats were in his charge, and if they were lost by his negligence he might be held responsible by Bigley for the loss he had caused. It was now his interest to lay the fault at Bigley's door for not furnishing proper lines and help.

The error assigned to the rejection of the alleged rebutting evidence is not sustained. The plaintiff in error has furnished neither the declaration showing the nature of the alleged negligence, nor the evidence given by him under it. We are not in a situation to judge whether the evidence offered as rebutting was really so, or was only cumulative to that given in chief. We must therefore take the statement of the judge in the bill of exception as true that the plaintiff had gone fully into this part of his case in chief, and had called and examined this witness twice as well as many others, and that the evidence offered was not rebutting.

Judgment affirmed.

SUPREME COURT OF WISCONSIN.

Emma Schneider v the Provident Life Insurance Co.

An "accident" within the meaning of a policy of insurance means an event which happens from some external violence or *vis major*, and which is unexpected, because it is from an unknown cause, or is an unusual result of a known cause.

Negligence of the person injured does not prevent it from being an accident.

Therefore in an action on a policy of insurance against accident, the negligence of the insured is no defence.

A policy of insurance against accident contained a clause against liability for injury resulting from the assured "wilfully and wantonly exposing himself to any unnecessary danger." The assured attempted to get on a train of cars while in slow motion, and fell and was killed.

Held, that the negligence was not wilful or wanton, and the company were liable.

This was an action on a policy, by which Bruno Schneider was insured against injury or death by accident. The policy contained a clause that the company should not be liable for any injury happening to the assured by reason of his "wilfully and wantonly exposing himself to any unnecessary danger or peril."

The assured attempted to get on a train of cars after it had started, but was moving slowly, but fell and was killed. On the trial the plaintiff was nonsuited, on the ground that the evidence showed the case to be within the exception as to wilful exposure to danger.

The opinion of the court was delivered by

Paine, J.—The position most strongly urged by the respondent's counsel in this court, was that inasmuch as the negligence of the deceased contributed to produce the injury, therefore the death was not occasioned by an accident at all, within the meaning of the policy. I cannot assent to this proposition. It would establish a limitation to the meaning of the word "accident" which has never been established either in law or in common understanding. A very large proportion of those events which are universally called accidents happen through some carelessness of the party injured, which contributes to produce them. Thus men are injured by the careless use of firearms, of explosive substances, of machinery, the careless management of horses, and in a thousand ways, when it can readily be seen afterwards that a little greater care on their part would have prevented it. Yet such injuries having been unexpected and not caused intentionally or by design, are always called accidents, and properly so. Nothing is more common than items in the newspapers under the heading, "Accidents through carelessness."

There is nothing in the definition of the word that excludes the negligence of the assured party as one of the elements contributing to produce the result. An accident is defined as "an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause; or is an unusual effect of a known cause, and therefore not expected."

An accident may happen from an unknown cause. But it is not essential that the cause should be unknown. It may be an unusual result of a known cause, and therefore unexpected to the party. And such was the case here, conceding that the negligence of the deceased was the cause of the accident.

It is true that accidents often happen from such kinds of negligence. But still it is equally true that they are not the usual result. If they were, people would cease to be guilty of such negligence. But cases in which accidents occur are very rare in comparison with the number in which there is the same negligence without any accident. A man draws his loaded gun toward him by the muzzle—the servant fills the lighted lamp with kerosene, a hundred times without injury. The next time the gun is discharged, or the lamp explodes. The result was unusual, and therefore unexpected. So there are undoubtedly thousands of persons who get on and off from cars in motion without accident, where one is injured. And therefore when an injury occurs it is an unusual result, and unexpected, and strictly an accident. There are not many authorities on the point. The respondent's counsel cites *Theobald* v *The Railway Passengers' Assurance Co.*, 26 E. Law & Eq. 432, not as a direct authority, but as containing an implication that