

1955
 *Nov. 11,
 14, 15
 1956
 *Feb. 10

CAR AND GENERAL INSURANCE
 CORPORATION LIMITED (*Third*
Party) } APPELLANT;

AND

THELMA ISABELLE SEYMOUR (*Plain-
 tiff*) } RESPONDENT;

AND

EDWIN LEWIS MALONEY (*Defendant*) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA,
 IN BANCO

*Automobiles—Negligence—Gratuitous passenger injured—Intoxicated driver
 —Gross negligence—Whether assumption of risk—Whether contribu-
 tory negligence.*

The respondent (plaintiff) was injured through an accident while a gratuitous passenger in an automobile driven by the respondent (defendant) who had invited the plaintiff to ride in the automobile. The driver, to her knowledge, had started drinking intoxicating liquor at breakfast and had kept it up until the accident about an hour and a half later. The trial judge found gross negligence against the driver. This finding was affirmed in the Court of Appeal and was not questioned in this Court. The defences of *volenti non fit injuria* and of contributory negligence were raised. The trial judge found that the passenger had assumed the risk. The Court of Appeal reversed this judgment but found contributory negligence.

Held: The appeal should be dismissed.

The defence of *volenti non fit injuria* had not been established. However, there had been contributory negligence on the part of the passenger, and the apportionment of liability, made below, should not be disturbed.

APPEAL from the judgment of the Supreme Court of Nova Scotia, in banco (1), in an action by a gratuitous passenger for damages.

A. L. Thurlow, Q.C. and *J. W. E. Mingo* for the appellant.

N. D. Blanchard and *L. A. Bell* for the respondent.

RAND J.:—This action arises out of injuries to the young woman plaintiff through an accident while in an automobile driven by the respondent Maloney. Two defences are

*PRESENT: Rand, Kellock, Locke, Cartwright and Abbott JJ.

raised, assumption of risk, and contributory negligence. The risk lay in the fact that Maloney, at the time of and for some time prior to the occurrence, was, in some degree, under the influence of alcohol, and the question of its assumption in such circumstances comes before us directly for the first time. It is an important question and calls for an examination of that conception.

The form in which the principle has traditionally been stated is that if a person is aware of all the facts of a danger and voluntarily exposes himself to it, he is held to have accepted the risk of any resulting injury. It seems to have originated in matters between master and servant involving hazardous conditions, the simplest case being that of entering upon work inherently dangerous. The next step was taken in *Priestley v. Fowler* (1), which extended the risk to the negligence of a fellow servant. In the developing conceptions of duty, the scope of the assumption was reduced by the requirement of reasonably safe working conditions including statutory provision for machinery and other protection. Complications of the principle are presented by the multiplying risks of modern modes of carrying on business and of social life, and among them is that of the relation between a driver of an automobile and a gratuitous passenger. In several provinces the judgment of the legislature has been expressed in an absolute denial of any claim against the operator; but in Nova Scotia where gross negligence has, as here, been found, the question is at large.

The risk in this case arises out of a special relation which, in turn, results from an undertaking in the original sense of that word: Maloney accepts from the respondent Seymour a commitment of herself to a quasi-custody which he assumes for a purpose involving special hazards under his control or within his general responsibility on terms which include one relating to care in executing the purpose. The degree of care on his part engaged or the risk on hers assumed, qualified or unqualified, may be expressly stipulated, and if so, it would be as determinative during the course of the undertaking as if consideration had passed; but in the generality of cases this term including qualifications is to be implied from the total circumstances.

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The initial question is whether the undertaker is capable, as if it were in contract, of entering into such an engagement; if he is, what is to be implied as to continued fitness and ability to carry it out until the relation is ended or modified? If he is not originally capable, the passenger acts alone; if self-caused incapacity develops during the performance, its effect will depend on the original terms. No other aspects of the relation are brought into discussion; it is not argued, for instance, that there was a joint venture which would introduce new elements.

This stress upon the deduction of terms is made because whether we treat the duty of care as being an incident imposed by law or as an element of the understanding taken to be present between the parties, the actual implication of the facts as it would be inferred by the ordinary reasonable man should, in any event, constitute the legal imposition. The argument, therefore, proceeding on either basis, should reach the same result.

In its application to such a situation, I demur to the usual form of the question by which the principle is raised: did the injured person assume the risk that has brought about the injury? The injured person is generally the passenger but it might be the operator not only of automobiles but of airplanes and other machines. So put, the question tends to disguise the governing fact that the other party is setting up in defence the acceptance of the risk as a term of the undertaking, the burden of proving which lies upon him. In such commitments the question ought, I think, rather to be, can the defendant reasonably be heard to say, as an inference from the facts, that the risk of injury from his own misconduct was required by him to be and was accepted by the complainant, as such a term? At common law an undertaking of this species, regardless of consideration, was pleaded in the sub-form of case called *assumpsit* (he undertook), originally in tort but possibly developing into an independent category: Maitland, *Forms of action at Common Law* p. 68-9; its essence was the commitment of an interest of one person to a course of action by another; and its terms were to be gathered as an interpretation of the total circumstances on the footing of which the commitment was made and accepted.

That the risk should be so dealt with follows from what was said by Lord Watson in *Smith v. Baker* (1). That was a case of master and servant in which a workman, engaged in an employment which was not in itself dangerous, was exposed to danger arising from an operation in another department over which he had no control. At p. 355 Lord Watson, in his speech, says:

The maxim, "Volenti non fit injuria," originally borrowed from the civil law, has lost much of its literal significance. A free citizen of Rome who, in concert with another, permitted himself to be sold as a slave, in order that he might share in the price, suffered a serious injury; but he was in the strictest sense of the term volens. The same can hardly be said of a slater who is injured by a fall from the roof of a house; although he too may be volens in the sense of English law. In its application to questions between the employer and the employed, the maxim as now used generally imports that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform, and from which he has suffered injury. The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that, if injury should befall him, the risk was to be his and not his masters. When, as is commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence, and appreciated or had the means of appreciating its danger. But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case.

Whether, in any event, the parties could engage that the risk might extend to such recklessness as would likely cause maiming or death would depend on considerations of policy mentioned later in dealing with contributory negligence; but for the generality of cases, the circumstances may present such variety in particulars that a reference to typical situations may clarify what is intended.

If A is driving an automobile for private purposes from X to Y and is hailed on the road by B who requests a lift toward Y, what would most likely be said by A if the question of misconduct of either during the trip was at that moment raised? I think he would ordinarily say, or at least it could reasonably be found that he implies—as he does when asked to allow a licensee to pass over his land—"You may come along, but you must take my skill and care and

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the risk of my ordinary conduct as I myself am doing, from which I am not likely to but might have a minor lapse". At the same time it would equally be understood that he would not engage in reckless or grossly careless driving. This is not in conflict with the holding in *Harris v. Perry & Company* (1), in which other elements were present.

If, on the other hand, A, for his own purpose, takes the initiative by inviting B—assuming always the absence of any special circumstances or notice—then it could be deemed to be unreasonable for A to urge that he did not intend to assure B that he could expect the ordinary care of prudent drivers to be exercised in operating the machine. The question, as before, is what conditions as terms can A reasonably claim to have laid down, and B reasonably held to have accepted. If the driver was a beginner, that, again, would be a special circumstance. These examples illustrate the fact that the basic understanding must be reduced to an actual or constructive exchange of terms under which the commitment of the interests of both is brought. To this we have an analogy in Bailment the exposition of which is given by Holt C.J. in *Coggs v. Bernard* (2).

The evidence shows that on Sunday morning the respondent Maloney started drinking at breakfast and in some measure kept it up until the fatal event which was estimated to be about an hour and a half later. There is no serious complaint of reckless or even excessive speed until the last mile or so. Maloney was apparently able to stand considerable liquor and still to retain much, at least, of his ability as a competent driver. Some minutes before the accident an argument between him and his brother had arisen over the year of make of a car that had just then passed them and a bet was made. Speeding ahead and drawing to the side of the road, he waved the other car to a stop. Going back and calling in a curt manner upon the driver, a Mrs. Sweeney, to lower the window, he mentioned the bet and asked her the model of her car and upon being informed returned to his own. Mrs. Sweeney in her testimony did not mention any indication that he was unfit through drink to be driving; his shirt collar was unbuttoned, his necktie loose, he was perspiring and was ill-mannered, but nothing else was referred to. On the other hand, one

(1) [1903] 2 K.B. 219.

(2) 92 E.R. 107.

of the occupants of her car, a Mr. Sterne, spoke of glassiness of eyes and that he talked thickly. But neither mentioned any staggering or swaying in his walk although they had noticed earlier the car as "weaving" or "zigzagging" over the centre line of the road.

Following this incident, the Sweeney car again passed Maloney. He seems to have been annoyed at the "snootiness" of Mrs. Sweeney, and immediately set out to overtake her. In doing so he is said to have reached a speed estimated by the witness Sterne at 70 or more miles an hour, and by Mrs. Sweeney at between 40 and 50. In the course of this career the car went out of control at a curve, jumped the ditch, crashed into a high embankment, skidded back to the other side of the road and ended overturned in the reverse direction. One of the young women occupants was killed and serious injuries were caused the respondent.

The latter is a young woman of 19 years of age whose home was in Windsor and who, for some months, had been engaged as a waitress at Halifax. We have very little of her history, but there is sufficient to conclude that her sophistication was not of the deepest sort. Maloney seems, toward those with him, to have been somewhat dominating and aggressive. We have no more than general circumstances surrounding the original decision to make the journey; but there is enough to enable me to infer that the weight of the proposal and persuasion came from him. Neither at that point, Halifax, from which they originally set out nor at Chester can his capacity to engage for the journey and for careful driving to the destination, Windsor, be successfully challenged; is it then to be implied that he did so engage? Or was the engagement subject to the condition that he should not render himself incapable through liquor either of reaching Windsor or of driving safely or, put conversely, that the respondent would take the risk of any negligence which could be attributed to that eventuality?

The road they were travelling led from Chester to Halifax from which they were still over 30 miles distant, and Windsor is about 45 miles northwest of Halifax. They had originally tried out a gravelled road from Chester in a more direct line to Windsor but after going some miles turned back to the paved road and the route via Halifax. The

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young woman was, therefore, in a section of country with which she was not familiar and in surroundings by which she was most likely to be intimidated. The answer to her request to him to let the brother drive is significant: it was to the effect that he knew what he was doing and did not want to be interfered with.

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In that situation the prima facie implication of reasonable care in the original undertaking—subject to the provisions of the statute—is confirmed and that of any such qualifying condition rebutted.

These considerations are, in my opinion, substantially the same as those underlying *Dann v. Hamilton* (1), where Asquith J. on facts almost identical found against the driver. The decision has been the object of some criticism. In *Insurance Commissioner v. Joyce* (2), Dixon J., dissenting, after an analysis of the principle in terms of relations, observes,

If he knowingly accepts the voluntary services of a driver affected by drink he cannot complain of improper driving caused by his condition, because it involves no breach of duty.

That conclusion depends on the terms of the undertaking and so far as it implies the determination to be unilateral I am unable to agree with it. Of the judgment in *Dann v. Hamilton* he says:

No doubt the issue his Lordship propounded for decision was one of fact, but, with all respect, I cannot but think that the plaintiff should have been precluded. Every element was present to form a conscious and intentional assumption of the very risk from which she suffered.

For the reasons already given, I cannot concur in the validity of that criticism. It fails, in my opinion, to give sufficient emphasis to the original undertaking in which the passenger has primarily the interest and the driver, the responsibility, and in the performance of which itself the risk resides. The unilateral formula, adequate to the early situations, is both inadequate and inappropriate to a bilateral relation in which two persons are co-operating in complementary action. It confines the enquiry into the fact sought to the external conditions evident to the passenger, paying—apparently—no regard to the elements of the undertaking or the governing role of the driver. In the other view the court starts with his original acceptance

(1) [1939] 1 K.B. 509.

(2) (1948) 77 C.L.R. 39.

of responsibility, whatever it may have been, and from the subsequent circumstances finds whether the undertaking has been carried out according to its terms.

In the light of these considerations, Maloney has not established his case that the passenger at any time accepted the continuing journey, or gave him any reason to infer that she did, on the terms that she released him from responsibility for care and would take the risk of any consequences resulting from the effects on him of liquor. Nor has he shown that any condition arose which modified that responsibility within the terms of the original undertaking.

There remains the question of contributory negligence. The theory underlying that defence is not as clear as it might be. In recent times the idea of a breach of duty owing to one's self has been introduced: the injury suffered by A has been caused by the breach of duty toward A by B and the joint or concurrent breach of a duty toward A by A himself. But if B at the same time suffered injury, is it to be taken as caused by a breach of duty on the part of A towards B and a similar breach of duty towards himself by B, so that the same act in each case becomes a breach of one of two different duties depending on which claim for injury is being considered? The self-duty would seem to be a rationalization for the purpose of logical consistency and completeness of the theory of a several duty toward an injured party as against a generalized duty to be prudent in every situation and in all directions. These contrasting conceptions have their clearest statement in *Palsgraf v. Long Island Railway Company* (1). There Cardozo C.J. gave that of the former and Andrews J. of the latter, in the setting of which causation becomes the determinant of liability. In the illustration just put it seems clear that the so-called duty to one's self is of the same standard and content as that toward another and is identical with the duty under the second or generalized principle.

The rule that courts will not assist a claimant to recover damages to person or property which he could reasonably have mitigated is analogous to, although, as regards the character and extent of measures required to be taken, perhaps not identical with the duty involved in contributory negligence; and both seem cognate with the principle

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(1) (1928) 248 N.Y. 339.

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that a person may ordinarily injure his person or damage or destroy his property or allow others to injure him or damage or destroy his property as he pleases, except that, in the aspect of criminal law at least, leave and licence do not extend to maiming, much less killing, and attempted suicide is a crime.

On either principle injury or damage to one's own interest attributable to failure to observe the standard of care of ordinary prudence, and conceived either as having been so caused or as having been licensed or suffered, will be given no redress by courts. In this case the failure charged against the plaintiff is that she maintained herself in a situation fraught with too great possibility of danger. On that question I am unable to say that the finding of either the fact or the degree of fault by the trial judge and by the Appeal Division is wrong.

I would, therefore, dismiss the appeal with costs.

KELLOCK J.:—The question in this appeal is as to whether or not upon the evidence the appellant is entitled to invoke the maxim *volenti non fit injuria*. The learned trial judge, having found Maloney (the defendant) guilty of gross negligence, applied the maxim and dismissed the action of the respondent Seymour (the plaintiff). Had he not been of that view, the learned judge would have held the defence of contributory negligence established and the plaintiff entitled to recover seventy-five per cent of her loss. The full court (1) considered the latter to be the correct view, the plaintiff's appeal being allowed accordingly.

The defendant, having invited the plaintiff to ride in his automobile to her home in Windsor, thereby placed himself in the position of a person "who undertakes to provide for the conveyance of another" and although he did so gratuitously, he was "bound to exercise due and reasonable care"; per Parke B. in *Lygo v. Newbold* (2). This statement of the law was adopted by the Court of Appeal in *Harris v. Perry* (3). In the course of his judgment in the latter case, the Master of the Rolls referred to the statement of Blackburn J. in *Austin v. G. W. Ry. Co.* (4), namely: "I think

(1) [1955] 36 M.P.R. 337;
 4 D.L.R. 104.

(2) 9 Ex. 302 at 305.

(3) [1903] 2 K.B. 219 at 226.

(4) L.R. 2 Q.B. 442 at 445.

that what was said in the case of *Marshall v. York, Newcastle and Berwick Ry. Co.* (1), was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely."

A finding of *volenti* involves the consequence that no such duty existed, the onus of establishing which lay upon the defendant.

In *Smith v. Baker* (2), Lord Halsbury points out at p. 338 that a person who relies upon the maxim must show that the plaintiff consented to the "particular thing being done and consented to take the risk upon himself." While such consent may be inferred from a course of conduct as well as proved by express consent, it is not established merely by showing that the plaintiff knows there is a risk of injury to himself. The question in each particular case is, in the language of Lindley L.J., in *Yarmouth v. France* (3), "not simply whether the plaintiff knew of the risk, but whether the circumstances are such as *necessarily* to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff." As put by Lord Watson in *Smith's* case at p. 355, the question "is not whether he (the plaintiff) voluntarily and rashly exposed himself to injury, but whether he *agreed* that, if injury should befall him, the risk was to be his and not his master's."

It is useful also to refer to the language of Lord Herschell in the same case at p. 362, where, in speaking of the particular facts there before the House, his Lordship said:

It was a mere question of risk which might never eventuate in disaster. The plaintiff evidently did not contemplate injury as inevitable. . . .

The principle of these judgments was formulated by the Judicial Committee in *Letang v. Ottawa Electric* (4), per Lord Shaw of Dunfermline, in the language of Wills J., in *Osborne v. London & North Western Railway* (5):

. . . if the defendants desire to succeed on the ground that the maxim "*Volenti non fit injuria*" is applicable, they must obtain a finding of fact "that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly *agreed* to incur it."

(1) (1851) 11 C.B. 655.

(3) 19 Q.B.D. 647 at 660.

(2) [1891] A.C. 325.

(4) [1926] A.C. 725 at 731.

(5) 21 Q.B.D. 220 at 223.

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In my opinion, these authorities establish that the true question is that stated in Salmond, 10th ed., at p. 34, "Did the plaintiff give a real consent to the assumption of the risk without compensation; did the consent really absolve the defendant from the duty to take care?" Having regard to the statute law in force in Nova Scotia, that question becomes in the case at bar, "Did the plaintiff agree, expressly or by implication, to exempt the defendant from liability for any damage suffered by the plaintiff during the carrying out of the undertaking of the latter, occasioned by the gross negligence of the defendant?"

In his finding as to the applicability of the maxim in the case at bar, the learned trial judge said:

That when the final phase of the journey (from Ingramport) began, the plaintiff was aware of the intoxicated condition of the defendant and of the character of his driving; she appreciated the risk of proceeding with him under those circumstances; and she knew that he was likely to continue his dangerous mode of driving and would not be deterred therefrom by protests from his passengers; and that with such knowledge of his condition and appreciation of the risk obviously incident to the driver's manner of driving, she freely and voluntarily accepted that risk by continuing with him as driver.

In my opinion, the learned trial judge does not address his mind to the proper point of time, namely, the inception of the defendant's undertaking which, at the latest, was the commencement of the journey at Chester on the morning of the accident. I have had the advantage of reading the opinion of my brother Rand and agree with him that that was the relevant time. In this view, I do not think it arguable that the situation was then such as *necessarily* to lead to the conclusion either that the plaintiff agreed to take upon herself the whole risk or that the defendant accepted her into his automobile on such a footing.

If this be so, then, again in agreement with my brother Rand, I do not understand how the defendant has established that, by reason of anything thereafter occurring, the terms of his undertaking were altered. The result is, as was the view of the court below, that the present is a case of contributory negligence on the part of the plaintiff, who "did not in her own interest take reasonable care of herself and contributed, by this want of care, to her own injury," to adapt the language of Viscount Simon delivering the

judgment of the Judicial Committee in *Nance v. B.C. Electric Railway Co.* (1). The plaintiff had full opportunity to leave the car while it was stopped at Ingramport and she then had the knowledge of the facts and an appreciation of the risk to herself in continuing, which the learned trial judge has above described.

I would therefore dismiss the appeal with costs.

LOCKE J.:—The learned trial judge found that the accident in which the respondent Thelma Seymour, to whom I will refer hereinafter as the respondent, suffered the grave injuries giving rise to this action, was caused by the gross negligence of the respondent Maloney, and this finding has been affirmed by the unanimous judgment of the Supreme Court *in banco* and is not questioned on this appeal.

Upon the issue as to whether the respondent had voluntarily assumed the risk attendant upon driving with Maloney when he was under the influence of liquor, the learned trial judge made the following finding:—

That when the final phase of the journey (from Ingramport) began, the plaintiff was aware of the intoxicated condition of the defendant and of the character of his driving; she appreciated the risk of proceeding with him under those circumstances; and she knew that he was likely to continue his dangerous mode of driving and would not be deterred therefrom by protests from his passengers; and that with such knowledge of his condition and appreciation of the risk obviously incident to the driver's manner of driving, she freely and voluntarily accepted that risk by continuing with him as driver.

The unanimous judgment of the Court *in banco* has reversed this finding, the learned judges being all of the opinion that the defence *volenti non fit injuria* had not been made out.

Under Order LVII, Rule 1, of the Supreme Court of Nova Scotia, all appeals to the court are by way of rehearing, the rule being a replica of Order LVIII, Rule 1 of the Supreme Court in England. Rule 5 of the same Order declares that on the appeal the court shall have power to draw inferences of fact and to give any judgment and make

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(1) [1951] A.C. 601 at 611.

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any order which ought to have been made. The corresponding rule in England is Rule 4 of Order LVIII. In *Powell v. Streatham Manor* (1), Lord Atkin, speaking of the English Rules referred to, said in part:—

I wish to express my concurrence in the view that on appeals from the decision of a judge sitting without a jury the jurisdiction of the Court of Appeal is free and unrestricted. The Court has to rehear, in other words has the same right to come to decisions on the issues of fact as well as law as the trial judge.

This statement which expresses the opinion of the House was followed by a statement as to the considerations which apply when the findings at the trial turn on the conflicting testimony of witnesses and their credibility.

In the present matter, the question as to whether or not the respondent “freely and voluntarily, with full knowledge of the nature and extent of the risk” she ran “impliedly agreed to incur it”, the test approved by the Judicial Committee in *Letang v. Ottawa Electric Railway Company* (2), was one of fact. As to the veracity of the respondent, the learned trial judge said that, having observed her closely at the trial and having since scrutinized her evidence with great care, he had come to the conclusion that she was a truthful witness in the main, but that her evidence as to the character of the various protests as to the speed of the car made by herself and the other passengers was not too reliable. In my opinion, the question as to whether the evidence showed that the plaintiff had given a real consent to the assumption of the risk, absolving the defendant from the duty to take the limited degree of care imposed upon him by s. 183 of the *Motor Vehicles Act* (c. 6, 1932), did not in this case depend upon the views of the trial judge as to the respondent’s veracity, but rather upon the inferences to be drawn from facts which were not in dispute.

In exercising the powers vested in the learned judges who heard this appeal to draw inferences of fact, they have unanimously concluded that the necessary agreement to support the plea had not been made out. This conclusion, as is indicated by the reasons for judgment delivered, has been reached after the most careful examination and consideration of the evidence and is not based upon the opinion of the members of the court as to the credibility of the

(1) [1935] A.C. 243 at 255.

(2) [1926] A.C. 725, 731.

plaintiff on any matter which would, in my opinion, affect the issue. In these circumstances, I think that finding should not be interfered with in this Court.

Upon the issue of contributory negligence, I agree that it was shown that the respondent did not, in her own interest, take reasonable care of herself and had contributed by this want of care to her own injury, to adopt the language of Viscount Simon in *Nance v. British Columbia Electric Railway* (1). I think we should not interfere with the apportionment of liability made by the judgment appealed from.

I would dismiss this appeal with costs.

CARTWRIGHT J.:—The relevant facts are stated and the applicable authorities are collected and discussed in the reasons of other members of the Court, all of which I have had the advantage of reading, and I propose only to state shortly the conclusions at which I have arrived.

I agree with my brother Rand that the question to be answered in deciding whether the defence of *volenti non fit injuria* was established in this case is whether the defendant can reasonably be heard to say, as an inference from the facts, that the risk of injury from his own misconduct was required by him to be and was accepted by the complainant as a term of his undertaking to carry her gratuitously; and I agree that, on the evidence, the answer should be in the negative and that accordingly the defence mentioned should be rejected.

As to the defence of contributory negligence, it will be observed that the respondent plaintiffs do not question the decision of the Court en banc attributing 25% of the responsibility for the accident to the infant plaintiff. I can find nothing in the evidence to warrant interference with the apportionment made by the learned trial judge and concurred in by the Court en banc.

I would dismiss the appeal with costs.

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ABBOTT J.:—There is nothing that I can usefully add to the very able reasons for judgment delivered by Mr. Justice Doull in the Court below, and with which I am in respectful agreement. I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *H. P. MacKeen.*

Solicitor for the respondent (plaintiff): *N. D. Blanchard.*

Solicitor for the respondent (defendant): *R. A. Kanigsberg.*
