HENRY A. THOMPSON (*Defendant*) ....APPELLANT;

AND

DAVID FREDERICK FRASER (*Plaintiff*) .RESPONDENT.

1955

*Feb. 8, 9
*Apr. 26

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Automobiles—Head-on collision on top of hill—Both on wrong side of road—Gratuitous passenger—Whether gross negligence—Vehicles and Highway Traffic Act, R.S.A. 1942, c. 275, s. 104(1).

Two approaching cars collided on the top of a hill so steep that a car approaching from the opposite direction would be hidden from view. Both cars were on the wrong side of the road. The respondent was a gratuitous passenger in the appellant's car. The trial judge found both drivers grossly negligent. His findings, with regard to the appellant, were that the latter immediately prior to the application of his brakes was travelling at a speed in excess of 35 m.p.h.; that he was driving with part of his car on the wrong side; and that he was not keeping a proper lookout for approaching traffic. The Court of Appeal divided equally and the judgment at trial was therefore affirmed. The appellant admits his negligence but denies the charge of gross negligence.

Held (Taschereau and Locke JJ. dissenting): that the appeal should be allowed. The appellant was not grossly negligent within the meaning of s. 104(1) of the *Vehicles and Highway Traffic Act,* R.S.A. 1942, c. 275.

Per Estey, Cartwright and Abbott JJ.: The evidence does not support the trial judge's findings that the appellant was proceeding at a speed in excess of 35 m.p.h. and that he did not maintain a proper look-out.

Per Estey J.: It would seem that the appellant, when confronted with an oncoming car which was more on the wrong side than he was and which was proceeding with such speed and in such proximity, followed a course that one cannot say would not, in the circumstances, have been followed by a reasonable man.

*PRESENT: Taschereau, Estey, Locke, Cartwright and Abbott JJ.

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Per Cartwright J.: The fact that the appellant's car was partly to the left of the centre line does not appear to have been a cause of the collision. Had the appellant turned his car completely to his right side of the centre line the evidence indicates that the impact would have been no less violent than it was.

Per Taschereau J. (dissenting): The trial judge reached the right conclusion. Both drivers were driving in a careless way and their negligence falls into the category called gross negligence.

Per Locke J. (dissenting): Whether the appellant was guilty of very great negligence was a question of fact (*McCulloch* v. *Murray* [1942] S.C.R. 141), and there are concurrent findings on that question. It cannot be properly said that such a finding was clearly wrong, and the appeal should accordingly fail.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), dividing equally and therefore affirming the trial judge's finding of gross negligence resulting from a collision between two automobiles.

J. D. Paterson and L. D. MacLean for the appellant.

J. Cohen for the respondent.

TASCHEREAU J. (dissenting):—This appeal arises out of an automobile accident. Although three actions were instituted, we are concerned only with the appeal of the appellant, in whose car, the respondent was a gratuitous passenger, and who suffered severe injuries. The trial judge found that the appellant had been guilty of *gross negligence*, and therefore liable in damages. The Court of Appeal (1), composed of four judges, divided equally, and the judgment was consequently confirmed.

The accident happened on the 22nd day of August, 1951. The appellant was driving East on the highway between Vulcan and Lomond, and on the top of a steep hill collided with the car of Gerald Gaetz and driven by Peter Langdon. The learned trial judge thought that both drivers were at fault, and that the appellant should bear 25% of the responsibility, and the others 75%. It is admitted by the appellant that he was negligent to a certain extent, but denies the charge of gross negligence, which is the essential element which can only be the foundation of the claim of a gratuitous passenger.

After a thorough examination of the evidence, the trial judge reached the conclusion that both cars were, in the circumstances, going at an excessive rate of speed, that they

(1) [1954] 11 W.W.R. (N.S.) 394.

were not, as they should have done, in view of the limited visibility, keeping the right side of the highway, and that they did not keep a proper look-out. Although he did, as admitted by both parties, commit some errors in his recital of the facts, I believe that he reached the right conclusion. Both drivers were driving in a careless way and their negligence, I think, falls into the category called "gross negligence".

I also agree that the fault of both drivers was not in equal degree, and that Langdon, because of his higher speed and excessive drinking, must bear a larger share of responsibility. But this of course does not absolve the appellant who, in the circumstances, as it was said by this Court in *Murray* v. *McCulloch* (1) and *Cowper* v. *Studer* (2), showed "a very marked departure from the standards by which responsible and competent people in charge of motor cars, habitually govern themselves". In *Kerr* v. *Cummings* (3), Kerwin J. (as he then was) held:—

> This of course, is a civil case, but it is one where *something more* than negligence must appear. As was held by this Court in *Studer* v. *Cowper*, this means there must have been *very great negligence*.

I am of the opinion that in the present case, Thompson's negligence was not merely ordinary negligence, but amounted to a negligence of such a degree, that he cannot escape liability. I fully agree with what was said by the trial judge:—

> To approach a blind spot on the road, knowing, as Thompson did, because he was familiar with the danger of vehicles approaching blindly from the other direction, to approach that spot at a speed in excess of 35 miles an hour, to approach it driving on the wrong side of the road, to fail to observe the most careful lookout, and to proceed with the utmost caution, constitutes, in all the circumstances which exist here, a marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves, and is negligence of so high a degree that it falls within the category of *gross negligence*.

The appeal should be dismissed with costs.

ESTEY J.:—The appellant Thompson, owner of a Dodge automobile, on August 22, 1951, was driving it eastward from Vulcan, Alberta, when he collided with a Chevrolet automobile owned by respondent Gaetz and driven westward toward Vulcan by respondent Langdon. The learned

(1) [1942] S.C.R. 141. (2) [1951] S.C.R. 450.
(3) [1953] 1 S.C.R. 147 at 148.

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trial judge found both drivers grossly negligent. There were other actions arising out of this collision, but in this appeal we are concerned only with the claim of Fraser, a gratuitous passenger in appellant Thompson's automobile, against Thompson. Fraser, in order to recover, must establish that the appellant Thompson was grossly negligent within the meaning of s. 104(1) of R.S.A. 1942, c. 275.

The learned trial judge found that the appellant Thompson was grossly negligent and directed judgment in favour of the respondent Fraser. In the Appellate Division (1) the learned judges were equally divided and, therefore, the judgment at trial was affirmed.

The learned trial judge stated the facts, in part, as follows:

> The accident occurred on the Vulcan-Lomond road in Southern Alberta, at about 6:30 p.m. on August 22nd, 1951. Thompson was travelling east from Vulcan to his farm near Lomond; Langdon was travelling west from Armada to Vulcan. The road is a gravelled country highway about 21 feet wide, and, on the day in question, was dry and in good condition. As is not unusual on roads of this type, a single path had been beaten by traffic in the approximate centre of the highway, but the whole highway was easily passable, the gravel on the unbeaten part being about 1 inch in depth. The country is hilly, and the road follows the general contour of the surrounding country so that it has many hills, some of a substantial size and steepness. The day was slightly "murky" or hazy, but at the time of the accident it was still broad daylight but there was nothing to interfere with the vision of either driver.
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> At a point about 7 miles west of Lomond, both cars approached a fairly high hill which falls away both to the east and west, with a level area or "plateau" on top about 60 feet long. It was necessary for both cars to climb before reaching this plateau, and the driver of neither car could see the other car until at least one of them had reached the top of his hill and was actually on the plateau.

The learned trial judge, with respect to Langdon, stated as follows:

> I have no hesitation in finding that the negligence of Langdon was gross negligence. The combination of excessive speed under the circumstances, the driving on the wrong side of the road, the failure to keep a proper lookout or any lookout, combined with the evidence as to excessive drinking, leaves no doubt in my mind that Langdon's negligence falls into the category termed "gross" by the Statute.

His finding as to Thompson was as follows:

> . . . I have, after consideration, come to the conclusion that Thompson was guilty of gross negligence. In his conduct were all the elements, though in somewhat lesser degree, which constituted gross negligence in the case of Langdon, except the excessive use of alcohol. In my view, to

(1) [1954] 11 W.W.R. (N.S.) 394.

approach a blind spot on the road, knowing (as Thompson did, because he was familiar with this road) the danger of vehicles approaching blindly from the other direction, to approach that spot at a speed in excess of 35 miles per hour, to approach it driving on the wrong side of the road, to fail to observe the most careful lookout, and to proceed with the utmost caution, constitutes, in all the circumstances which existed here, a marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves, and is negligence of so high a degree that it falls within the category of gross negligence.

The learned trial judge, as to Thompson's speed, stated:

I find as facts on the evidence available, that Thompson, prior to the application of his brakes, was travelling at a speed considerably in excess of 35 miles per hour, and that Langdon, up to the moment of impact, was travelling at a speed greatly in excess of 40 miles per hour.

The effect of Thompson's evidence is that he was driving at about 35 miles per hour on his way from Vulcan; that in the collision he was rendered unconscious and had no recollection of his speed as he proceeded up the hill or of the events up to the moment of the accident. Respondent Fraser deposed that he was sitting in the back seat and that Thompson was driving at about 30 to 40 miles per hour, but, when asked if Thompson continued at that speed until he applied his brakes, he replied: "Well, that I do not know. I would imagine so. I imagine he was getting down pretty slow, although I do not know." In other words, there is no evidence as to the speed at which Thompson's automobile was being driven up the hill, or when he applied his brakes. With great respect, the evidence does not support a finding of fact that he was proceeding, at any relevant time, at a speed in excess of 35 miles per hour.

I quite agree with the learned trial judge that one ought to observe a high degree of care in proceeding up a hill such as that with which we are here concerned, and to do so in the middle of the highway is clearly a failure to use reasonable care. However, it may well be that such negligence was not a direct cause of the accident, an issue we do not have to here consider. Moreover, and with great respect, there does not appear to be any evidence that, as he proceeded up the hill and at the top thereof, he did not maintain a reasonably careful lookout. It is admitted that until he reached the crest he could not see a vehicle approaching from the east. At the crest there is a plateau of 60 feet and it is clear that he put on his brakes and skidded a distance of 50 feet close to the eastern edge of the crest. This is

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established by the presence of skid marks for 50 of the 60 feet and which ended at the place of impact. When one has regard to the time which is often described as the reaction period, appellant must have seen the Langdon automobile approaching as he reached the crest and immediately applied his brakes. It would seem, with great respect, that the evidence does not support the view that he was not maintaining a careful lookout.

The skid marks were straddle the centre line and straight, indicating that Thompson, from the moment he put on his brakes, had not altered his direction. Moreover, these skid marks show that Thompson's automobile was approximately 9 inches more on the south side than on the north side of the centre line. The learned trial judge concluded that he had reached the top of the hill straddle of the centre line and in much the same position. Inasmuch as he was apparently following what was a well marked portion of the road, I am in respectful agreement with the conclusion of the learned trial judge. However, once at the crest of the hill he was confronted with an oncoming automobile that was apparently more to the south of the centre line than he was and proceeding with such speed and in such proximity that he had to instantly elect whether to turn toward the north and be still further on the wrong side, or to turn to the south and, if the respondent Langdon continued, to crash head on, or to apply his brakes and stop as quickly as possible. In the emergency he elected to follow the latter course. It would seem that the appellant Thompson, faced with this circumstance, followed a course that one cannot say would not, in the circumstances, have been followed by a reasonable man.

It may be pointed out that respondent Langdon, on his part, did not see the Thompson automobile until it was right upon him and did not change his direction. It is true respondent Fraser says he did, but the learned trial judge did not accept that evidence.

The learned trial judge adopted the description of gross negligence as stated by Sir Lyman Duff C.J. in *McCulloch* v. *Murray* (1), where he stated at p. 145:

> All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrong doing,

(1) [1942] S.C.R. 141.

there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves.

My Lord the Chief Justice (then Kerwin J.) in *Studer* v. *Cowper* (1), when referring to a corresponding provision in the Saskatchewan statute, described gross negligence as "very great negligence" and used the same phrase in *Kerr* v. *Cummings* (2), in arriving at a decision under the British Columbia statute. Negligence is the failure to use the care a reasonable man would have exercised under the same or similar circumstances and the degree of care required depends on the danger or risk involved. What, therefore, may be negligence in one case may not be in another and, by the same token, what may be gross negligence under some circumstances may be but negligence under others. That the appellant Thompson was negligent is not disputed in this appeal, but it is contended that his conduct was not within the language of Chief Justice Duff "a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves," nor was his conduct in the circumstances "very great negligence," to adopt the phrase of my Lord the Chief Justice. It is, of course, a question of fact to be determined in each case and one hesitates to overrule the finding of a learned trial judge. Where, however, the evidence does not support at least some of the important factors upon which the learned judge bases his finding it would seem to be the duty of an appellant court to review that finding and, in an appropriate case, to either modify or reverse it according as the circumstances may dictate. This would appear to be such a case and one in which the appellant, by his conduct, was negligent, but not grossly negligent within the meaning of s. 104(1) *supra*.

The claim of the respondent Fraser should be dismissed and this appeal allowed with costs.

LOCKE J. (dissenting):—The evidence upon which the learned trial judge found the appellant to have been guilty of gross negligence contributing to the accident in which the respondent suffered injury may be summarized as follows:—During the early evening of August 22, 1951, the appellant was driving east upon the highway between

(1) [1951] S.C.R. 450 at 455.
(2) [1953] 1 S.C.R. 147 at 148.

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Vulcan and Lomond, proceeding to his farm to the east of the last mentioned place, when a collision occurred on the summit of a hill with a car proceeding west driven by the defendant Langdon. The respondent was a gratuitous passenger in the rear seat of the car. Giving evidence, the appellant said that he could not remember the collision. As to his speed, he said that when about a quarter of a mile back he had been driving at 35 miles an hour approaching the hill, which he described as "very steep." The roadway was 21 feet in width, with a gravel surface which was dry. The appellant drove up the hill in the middle of the road and said that the collision with Langdon's car occurred "right at the crest." He was very familiar with the road in question and was well aware that, as you proceeded up the hill from the west, a car approaching from the opposite direction would be hidden from view. A passage from his examination for discovery reads:—

Q. And until you got to the top of that crest neither could see the other, is that correct?

A. It would be pretty near impossible.

There was, according to the appellant, gravel about one inch in depth on the hard surface of the road and the traffic had made tracks in this, approximately in the center of the road upon which he was driving as he approached the crest.

Constable Hacking and Corporal Hurst of the Royal Canadian Mounted Police attended within about two hours of the occurrence of the accident and took measurements and prepared a plan of the roadway at the crest of the hill. The vehicles had collided at almost the center of the road upon the level surface of the crest which was some 60 feet in length. Constable Hacking, in describing the hill, said that it was quite a steep hill which was level on the top and fell away both to the west and the east for 300 feet. He fixed the point of collision as being 10 feet from the easterly limit of the level top of the hill and said that there were two skid marks plainly visible for a distance of 50 feet to the west of the point of impact, which had been made by the appellant's car. These skid marks were 4 feet apart and almost in the center of the road, the most northerly being 9 feet from the north edge of the road and the most southerly 8 feet and 3 inches from the south limit. As to the visibility of traffic coming from the opposite direction up the hill, he said that

it was his practice, when approaching the crest from either direction, to keep over to the right of the road "for the simple reason you cannot see what is coming on the other side." Corporal Hurst agreed that, as you approach the hill, vehicles would be within 75 feet of each other before they could see each other. In saying this, it is apparent that he meant vehicles approaching from the opposite direction in such a manner that they would arrive at the crest at the same time.

Photographs taken by the constable which were put in evidence at the trial support this statement of the constable, in my opinion.

I do not think this view of the matter is affected by an answer made by the appellant when examined for discovery when, after saying that he did not remember seeing Langdon coming, he said that if he had been looking he "imagined" that he could have seen him "possibly about 200 feet". He was not asked and did not say from what point he could have seen the other car at that distance. This was, obviously, mere speculation and not intended as evidence as to the distance the cars were from each other when he first saw Langdon's car. As to that, as I have said, he remembered nothing.

The finding of negligence made at the trial against the appellant was expressed by the learned trial judge in these terms:—

> With these decisions, and the numerous decisions pronounced both before and since in mind, I have, after consideration, come to the conclusion that Thompson was guilty of gross negligence. In his conduct were all the elements, though in somewhat lesser degree, which constituted gross negligence in the case of Langdon, except the excessive use of alcohol. In my view, to approach a blind spot on the road, knowing (as Thompson did, because he was familiar with this road) the danger of vehicles approaching blindly from the other direction, to approach that spot at a speed in excess of 35 miles per hour, to approach it driving on the wrong side of the road, to fail to observe the most careful lookout, and to proceed with the utmost caution, constitutes, in all the circumstances which existed here, a marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves, and is negligence of so high a degree that it falls within the category of gross negligence. It must be kept in mind that Thompson's conduct was not a mere momentary lapse or oversight, such as a too sudden cut-in while passing another vehicle, but was wrongful conduct which persisted for some period of time while he was approaching the crest of the hill, and from which it should have been apparent to him, as a normal, prudent person, what a situation of danger was likely to be created.

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The only evidence from which an inference may be drawn as to the speed at which the appellant had driven as he approached the crest, other than his own estimate to which I have referred, is the fact that the skid marks made by his car commenced just at the westerly limit of the crest, showing that he had obviously seen the other car and applied the brakes just before reaching that point and that the car had skidded 50 feet on the dry gravel roadway. In drawing the inference that he had been driving at a higher rate than 35 miles, the learned trial judge relied, in part, upon his belief that after the collision the appellant's car had continued to the east for a distance of 20 feet after the impact, whereas, in fact, the car had been driven backward to the southwest for a distance of some 12 or 14 feet.

That the appellant was guilty of negligence contributing to the occurrence of the accident is not disputed in the argument addressed to us. There was the clearest evidence of negligence, in my opinion. The danger of driving in the center of a highway when approaching the crest of a hill, where the view of traffic coming from the opposite direction is obscured, is manifest. On well marked highways in various parts of this country, the center line is marked on the approaches to hills and warnings against passing are posted to protect against this very danger. Whether the speed of the appellant's car was 35 miles per hour or more as he neared the crest, it was at such a high rate that it was impossible for him to bring the car to a halt, though the wheels skidded on the dry surface for 50 feet. The width of the crest of the hill was, to the appellant's knowledge, only about 60 feet, a distance which, at 35 miles per hour, he would travel in slightly more than one second, so that he was well aware of the fact that he could not stop his car in from the opposite direction, or change his direction in time from the opposite direction, or change his direction in time to prevent a collision.

It has been pointed out in this Court on more than one occasion that it is impossible to accurately define the expression "gross negligence" which appears in various Highway Acts in Canada. The cases are reviewed in the

judgment delivered in *Studer* v. *Cowper* (1). The meaning assigned to the expression by Sir Lyman Duff C.J., in *McCulloch* v. *Murray* (2), does not appear to me to differ from that given to it earlier by Sedgwick J. in delivering the opinion of the majority of the Court in *City of Kingston* v. *Drennan* (3), which was "very great negligence." In *McCulloch's case,* it was pointed out by the Chief Justice that it is a question of fact for the jury whether conduct falls within the category of gross negligence.

In the present matter, it was a question of fact for the learned judge by whom the action was tried. The appeal from his finding that the appellant had been guilty of very great negligence in the circumstances which I have narrated was dismissed by an equal division of the Appellate Division and there are thus concurrent findings.

It cannot, in my opinion, be properly said that the finding was clearly wrong. On the contrary, with respect, I think it was clearly right.

I would dismiss this appeal with costs.

CARTWRIGHT J.:—The sole question in this appeal is whether the appellant was guilty of gross negligence. Egbert J., before whom the action was tried without a jury, held that he was and his judgment was upheld by the Appellate Division on an equal division. It is not suggested that the learned trial judge misdirected himself as to what in law amounts to gross negligence and the question we are called upon to determine is one of fact.

The relevant facts are fully set out in the reasons of Clinton Ford J.A. and need not be repeated. The learned trial judge found (i) that the appellant immediately prior to the application of his brakes was travelling at a speed "considerably in excess of 35 miles per hour"; (ii) that he was driving with part of his car to his left of the centre line of the highway and (iii) that he was not keeping a proper look-out for approaching traffic. For the reasons given by Clinton Ford J.A. I agree with his conclusion that neither the first nor the third of these findings is supported by the evidence. As to the second finding, in the peculiar circumstances of this case the fact that the appellant's car was

(1) [1951] S.C.R. 450. (2) [1942] S.C.R. 141.
(3) (1896) 27 Can. S.C.R. 46.

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partly to the left of the centre line does not appear to have been a cause of the collision. Had the appellant turned his car completely to his right side of the centre line the evidence indicates that the impact with Langdon's car would have been no less violent than it was.

For the reasons given by Clinton Ford J.A. I agree with his conclusion that gross negligence on the part of the appellant was not established.

I would allow the appeal and direct that the respondent's action be dismissed with costs throughout.

ABBOTT J.:—For the reasons assigned by Clinton J. Ford, J.A., of the Supreme Court of Alberta, with which I am in respectful agreement, I would allow the appeal and dismiss the action of the respondent Fraser against appellant, with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Rice, Paterson, Cullen & Ives.*

Solicitor for the respondent: *J. Cohen.*