1961

*Oct. 10
Dec. 15

FRED HANDLEY (*Defendant*) .....APPELLANT;

AND

STANLEY LIONEL GEORGE ALLARDYCE (*Plaintiff*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Motor vehicles—Owner injured while riding as passenger—Driver negligent—Whether driver liable for injuries in absence of wilful and wanton misconduct on his part—The Vehicles Act, 1957 (Sask.), c. 93, s. 157.

The defendant was the driver of an automobile, owned by the plaintiff, in which the latter was riding as a passenger. Contrary to regulations, the defendant failed to stop before crossing a highway and a collision occurred, as a result of which the plaintiff suffered personal injuries. The trial judge held that the defendant had been negligent; it was also held that he had not been guilty of wilful and wanton misconduct. The question at issue in the appeal was whether, in view of the provisions of s. 157 of *The Vehicles Act, 1957* (Sask.), c. 93, the defendant could be held liable to the plaintiff in the absence of wilful and wanton misconduct on his part. The trial judge and the majority of the Court of Appeal having held that he could, the defendant appealed to this Court.

Held: The appeal should be allowed.

The restriction on liability in relation to passengers created by subs. (2) of s. 157 of *The Vehicles Act, 1957*, and also by subs. (2) of s. 41a of the Ontario *Highway Traffic Act* applied in respect of "any person being carried in . . . such motor vehicle". In the light of those words, neither subsection could be construed as preserving to an owner-passenger the same rights as against the driver of a vehicle, in case of the latter's negligence, which would have existed at common law. Here the defendant could only incur liability for the personal injuries to the plaintiff if he had been found guilty of wilful and wanton misconduct in the driving of the automobile.

This was not a proper case in which to hold that the Legislature, in re-enacting the predecessor of s. 157, had in mind the principle which had been laid down in *Koos v. McVey*, [1937] O.R. 369, to the effect that the words "any person being carried" etc. in s. 41a (2) of the Ontario *Highway Traffic Act* meant any person other than the owner or driver of the motor vehicle. The *Koos* case must be regarded as overruled. *Studer v. Cowper*, [1951] S.C.R. 450; *Canadian Acceptance Corporation Ltd. v. Fisher*, [1958] S.C.R. 546, referred to.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], affirming a judgment of Hall, C.J.Q.B. Appeal allowed.

*PRESENT: Locke, Cartwright, Martland, Judson and Ritchie JJ.

[1] (1961), 35 W.W.R. 97, 29 D.L.R. (2d) 550.

A. W. Embury, for the defendant, appellant.

D. G. McLeod, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This action arose as a result of an automobile collision which occurred about 4 p.m. on July 19, 1959. The appellant was the driver of an automobile, owned by the respondent, in which the latter was, at the time, riding as a passenger. The appellant was proceeding in an easterly direction on a road known as the Golf Club Road, which intersects with Saskatchewan Highway No. 1, which runs in a northeast to southwest direction. Vehicles travelling along the Golf Club Road are required to stop before crossing Highway No. 1. A collision occurred with a vehicle, travelling in a southeasterly direction, along Highway No. 1, and the respondent suffered injuries.

The learned trial judge found that the appellant had not stopped before crossing Highway No. 1 and held that he had been negligent. It was also held that the appellant had not been guilty of wilful and wanton misconduct.

There is no issue raised in this appeal regarding the finding of negligence. With respect to the second finding, McNiven J.A., who delivered the majority judgment of himself and Culliton J.A., said:

> In the record there is evidence to support the conclusion reached by the learned trial judge and nothing to indicate that he had either misdirected himself or taken any irrelevant matter into consideration.

Procter J.A., who delivered a dissenting judgment, agreed with the finding of the learned trial judge with respect to this point.

After considering the evidence in the case, I would not be prepared to disturb this finding.

The main issue in the appeal is one of law, the question being whether, in view of the provisions of s. 157 of *The Vehicles Act, 1957* (Sask.), c. 93, the appellant can be held liable to the respondent, in the absence of wilful and wanton misconduct on his part. The learned trial judge and the majority of the Court of Appeal[1] have held that he could.

[1] (1961), 35 W.W.R. 97, 29 D.L.R. (2d) 550.

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Section 157 provides as follows:

157. (1) Subject to subsection (2), when any loss, damage or injury is caused to any person by a motor vehicle, the person driving it at the time is liable for the loss, damage or injury, if it was caused by his negligence or improper conduct, and the owner thereof is also liable to the same extent as the driver unless at the time of the incident causing the loss, damage or injury the motor vehicle had been stolen from the owner or otherwise wrongfully taken out of his possession or out of the possession of any person entrusted by him with the care thereof.

(2) The owner or driver of a motor vehicle, other than a vehicle ordinarily used for carrying passengers for hire or gain, is not liable for loss or damage resulting from bodily injury to or the death of any person being carried in or upon or entering, or getting on to, or alighting from such motor vehicle, unless there has been wilful and wanton misconduct on the part of the driver of the vehicle and unless such wilful and wanton misconduct contributed to the injury.

In holding that the appellant was not entitled to the protection afforded by subs. (2) of this section, the Courts below have followed the reasoning of Macdonnell J.A., who delivered the judgment of the Court of Appeal of Ontario in *Koos v. McVey*[1]. The relevant sections of the Ontario statute there under consideration were subss. (1) and (2) of s. 41a of *The Highway Traffic Act*, R.S.O. 1927, c. 251, as amended by 1930 (Ont.), c. 48 and 1935 (Ont.), c. 26. The section, as amended, read as follows:

(1) The owner of a motor vehicle shall be liable for loss or damage sustained by any person by reason of negligence in the operation of such motor vehicle on a highway unless such motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner shall be liable to the same extent as such owner.

(2) Notwithstanding the provisions of subsection 1 the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, shall not be liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from such motor vehicle.

It was decided in that case that the words "any person being carried" etc. meant any person other than the owner or driver of the motor vehicle. Macdonnell J.A., at p. 372, said:

The subject matter of secs. 41 and 41a is the liability of owners or drivers for violations of the Act and for loss resulting from negligence. But liability to whom? Liability as between themselves, or liability towards others? The answer seems clear from an examination of the sections. First, certain liabilities are imposed upon an owner; then the driver is made liable to the same extent; on the other hand, in certain circumstances, both

[1] [1937] O.R. 369, 2 D.L.R. 496.

owner and driver are declared not to be liable. So far as is possible, owner and driver are fixed with identical responsibility. This would not be so if the intention were to deal with their rights and liabilities as between each other. The conclusion is irresistible that what is dealt with is the rights and liabilities of owner and driver, regarded as one, towards other persons. In short, the words "any person being carried in, or upon" etc., mean any person other than the owner or driver.

The provisions of the Ontario *Highway Traffic Act,* which were under consideration in that case, are not identical with those of *The Vehicles Act, 1957,* under consideration here. In particular, subs. (2) of s. 41a of the Ontario Act eliminated the liability of the owner or driver of a motor vehicle (other than one engaged in the business of carrying passengers for compensation) to passengers in the vehicle. Section 157(2) of the Saskatchewan Act restricted the liability to that class of persons to cases in which the driver of the motor vehicle had been guilty of wilful and wanton misconduct. However, the reasoning in *Koos v. McVey,* if sound, would, I think, apply to the Saskatchewan statute as well as to the Ontario Act, but, with respect, I do not agree with it.

The purpose of s. 41a(1) of the Ontario Act and s. 157(1) of the Saskatchewan Act (each of which was enacted earlier in point of time than the provisions which later became subs. (2) of each of those sections) was to extend the vicarious liability of the owner of a motor vehicle beyond what it had been at common law. In each case the owner was to be responsible for the negligence of any driver of his motor vehicle, unless such driver was wrongfully in possession of it.

After the vicarious liability of the owner had been expanded by subs. (1), subs. (2) of s. 41a of the Ontario Act was enacted to eliminate any liability which had previously existed toward passengers being carried in a motor vehicle, either on the part of the owner or the driver, save in those cases in which the vehicle was engaged in carrying passengers for hire. Similarly, subs. (2) of s. 157 of the Saskatchewan Act was later enacted to restrict the liability which might arise with respect to a passenger to cases in which the driver had been guilty of wilful and wanton misconduct.

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I do not understand the purpose of either s. 41a of the Ontario Act or s. 157 of the Saskatchewan Act as being to create an identity of responsibility between the owner and the driver, which would be applicable to all other persons, and not to deal with their responsibility as between themselves. The restriction on liability in relation to passengers created by subs. (2) of each of these sections is applicable in respect of "any person being carried in . . . such motor vehicle". In the light of those words, I cannot construe either subsection as preserving to an owner-passenger the same rights as against the driver of the vehicle, in case of the latter's negligence, which would have existed at common law.

It was contended by the respondent that, as the predecessor of s. 157 of the Saskatchewan *Vehicles Act* had been re-enacted from time to time subsequent to the judgment in *Koos v. McVey,* the Saskatchewan Legislature should be understood thereby to be adopting the legal interpretation which had been placed on the similar section of the Ontario Act by the Court of Appeal of that Province in that case. The respondent acknowledged that the common law presumption to that effect was removed by subs. (4) of s. 24 of *The Interpretation Act,* R.S.S. 1953, c. 1, which reads as follows:

> (4) The Legislature shall not, by re-enacting an Act or enactment, or by revising, consolidating or amending the same, be deemed to have adopted the construction which has by judicial decision or otherwise been placed upon the language used in such Act or enactment or upon similar language.

It may be observed that *The Interpretation Act* of Ontario has for many years contained a similar provision, which is now s. 19 of c. 191 of the R.S.O. 1960.

The respondent relied, however, on the statement as to the effect of this provision made in this Court by Kerwin J., as he then was, in *Studer v. Cowper*[1], approved by the judgment of this Court in *Canadian Acceptance Corporation Limited v. Fisher*[2]. That statement is as follows:

> In view of these decisions, it must now be taken that subsection 4 of s. 24 of the Saskatchewan Interpretation Act, 1943, c. 2, which is the same as the ones referred to in the two cases mentioned, merely removes the

[1] [1951] S.C.R. 450 at 454, 2 D.L.R. 81.
[2] [1958] S.C.R. 546 at 554, 14 D.L.R. (2d) 225.

presumption that existed at common law and, in a proper case, it will be held that a legislature did have in mind the construction that had been placed upon a certain enactment when re-enacting it.

In my opinion, this is not a proper case in which to hold that the Legislature, in re-enacting the predecessor of s. 157, had in mind the principle which had been laid down in *Koos v. McVey.*

With the greatest respect for the learned Justices of Appeal who took part in that decision, I am of opinion that it must be regarded as overruled.

In my opinion, the appellant could only incur liability for the personal injuries to the respondent, in the circumstances of the present case, if he had been found to have been guilty of wilful and wanton misconduct in the driving of the vehicle.

There is included in the respondent's claim the sum of $200 in respect of damage to his automobile, which amount was admitted by the appellant. It is clear that s. 157 does not protect the appellant in respect of this kind of claim and that his negligence makes him liable for it.

In my view, the appeal should be allowed and the action of the respondent should be dismissed, save as to the sum of $200. The appellant should be entitled to the costs of this appeal and his costs in the Courts below.

Appeal allowed with costs throughout.

Solicitors for the defendant, appellant: Noonan, Embury, Heald & Molisky, Regina.

Solicitors for the plaintiff, respondent: Pedersen, Norman, McLeod & Pearce, Regina.