PRISCILLA MAY BURKE (*Plaintiff*) ....APPELLANT;

1963

*May 27
June 24

AND

GEORGE PERRY AND IRENE PERRY (*Defendants*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Motor vehicle accident—Injuries sustained by gratuitous passenger—Whether negligent actions of driver constituted gross negligence—Opinion of appellate court as to quality of negligence not to be substituted for that of trial judge—Highway Traffic Act, R.S.M. 1954, c. 112, s. 99(1).

The plaintiff sustained injuries as the result of an accident which occurred while she was a gratuitous passenger in a motor vehicle owned by the male defendant and operated by the female defendant. In an action for damages, the trial judge found that the accident was occasioned by the gross negligence of the female defendant so as to give rise to liability under s. 99(1) of the *Highway Traffic Act*, R.S.M. 1954, c. 112. The trial judge was of opinion that no single act on the part of the female defendant amounted in itself to gross negligence, but that the cumulative effect of her negligent acts did constitute gross negligence. An appeal was allowed by the Court of Appeal where the majority held that while it was perfectly proper to consider a number of related acts or omissions which, taken cumulatively, might establish gross negligence, each or at least some of the related acts should possess a more flagrant quality than they had here if they were to be capable of being accumulated to show a pattern of behaviour amounting to gross negligence. An appeal from the judgment of the Court of Appeal was brought to this Court.

Held: The appeal should be allowed and the decision of the trial judge restored.

The defendant's behaviour was very near the borderline between simple negligence and gross negligence, but the difficult task of assessing the quality of the negligent actions of the driver of a motor vehicle immediately before and at the time of an accident in order to determine whether or not they are to be characterized as "gross negligence" involves a reconstruction of the circumstances of the accident itself including the reactions of the persons involved, and this was a function for which the judge who has seen and heard the witnesses is far better equipped than are the judges of an appellate court. Since the trial judge did not misdirect himself as to the law and as the main facts were not in dispute, this was not a case in which the opinion of an appellate court as to the quality of the negligence should be substituted for the opinion reached by the trial judge.

APPEAL from a judgment of the Court of Appeal for Manitoba, allowing an appeal from a judgment of Maybank, J. Appeal allowed.

*PRESENT: Taschereau C.J. and Martland, Judson, Ritchie and Hall JJ.

1963

BURKE v. PERRY AND PERRY

R. R. Brock, for the plaintiff, appellant.

C. R. Huband, for the defendants, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of Manitoba (Freedman and Schultz JJ.A. dissenting) setting aside the judgment of Mr. Justice Maybank at the trial of the action whereby he had awarded damages in the amount of $7,880.90 to the appellant in respect of injuries sustained by her as the result of an accident which occurred while she was being transported as a guest passenger without payment for transportation in a motor vehicle owned by the respondent George Perry and operated by the respondent Irene Perry. The learned trial judge found that the accident was occasioned by the gross negligence of Irene Perry so as to give rise to liability under s. 99(1) of the *Highway Traffic Act,* R.S.M. 1954, c. 112, and the appellant now appeals from the reversal of that finding by the Court of Appeal and also seeks to have the damages increased.

The accident in which Miss Burke was injured occurred at about 11:30 on the evening of July 17, 1961, when Mrs. Perry was driving her husband's motor vehicle over the Disraeli Freeway in the City of Winnipeg. It was dark and raining so heavily that the windshield wipers were not able to keep the windshield clear at all times, and as the car approached the slippery surface of the bridge it was required to round an ascending curve. At about this time, at least one passenger in the car asked Mrs. Perry to slow down but she continued at a speed of about 30 miles per hour and in so doing passed two other cars.

There is some evidence that the tires were worn smooth and due to a combination of this factor, the slippery surface of the bridge, and the speed at which she was travelling Mrs. Perry lost control of the vehicle. Once out of control, the car went across the travelled portion of the bridge and the left-hand sidewalk and barged into the iron railing substantially damaging the railing and the car, and causing the appellant to sustain the serious facial lacerations and other injuries in respect of which she has brought this action.

The learned trial judge was careful to explain that no single act on the part of Mrs. Perry amounted in itself to "gross negligence" but he took the view that the cumulative effect of her negligent acts did constitute that "very marked

departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves" which characterizes "gross negligence" within the meaning attributed to that term by Sir Lyman Duff in *McCulloch v. Murray*[1].

Guy J.A., who delivered the reasons for judgment of the majority of the Court of Appeal, made an elaborate review of the evidence, and concluded by saying:

> While the authorities are clear that it is perfectly proper to consider a number of related acts or omissions which, taken cumulatively, might establish gross negligence, my own view is that each or at least some of the related acts should possess a more flagrant quality than they have here if they are to be capable of being accumulated to show a pattern of behaviour amounting to gross negligence.
>
> The general principle relating to cumulative acts of negligence amounting *in toto* to gross negligence was considered by my brother Freedman when he wrote the majority judgment of this Court in the case of *Wruck v. Krzuk* (1962) 37 W.W.R. 68. In that particular case, we dealt with a more aggravated speed than in the instant case, and the other aspects were regarded as incidental. Mr. Justice Freedman came to the conclusion that gross negligence had not been proved.

In *Wruck v. Krzuk, supra,* the appeal was against a finding that the conduct in question did not amount to gross negligence and in the course of his judgment, Freedman J.A. said at p. 72:

> Where as here the tribunal consists of a judge sitting without a jury it is entirely a question for him. An appellate court should be slow to substitute its opinion for his as to whether the defendant's conduct amounts to gross negligence.

In support of this proposition, the learned judge relied on the case of *Semeniuk v. Scoyoc*[2], in which Cartwright J., speaking for the majority of this Court, said:

> In my view, where the conduct of a party is clearly negligent and the Judge presiding at a trial without a jury has neither misdirected himself as to the law nor misapprehended the primary facts an appellate court should be slow to substitute its opinion for his as to whether such party's conduct amounts to gross negligence.

I am conscious of the fact that Mrs. Perry's behaviour was very near the borderline between simple negligence and gross negligence and I can readily understand the difference of opinion which existed in the Courts below, but the difficult task of assessing the quality of the negligent actions of the driver of a motor vehicle immediately before and at

[1] [1942] S.C.R. 141, 2 D.L.R. 179. [2] [1955] 4 D.L.R. 780.

1963

BURKE v. PERRY AND PERRY

Ritchie J.

the time of an accident in order to determine whether or not they are to be characterized as "gross negligence" involves a reconstruction of the circumstances of the accident itself including the reactions of the persons involved, and this is a function for which the trial judge who has seen and heard the witnesses is far better equipped than are the judges of an appellate court.

I am satisfied that the learned trial judge did not misdirect himself as to the law and as the main facts are not in dispute I am, with respect, unable to agree with the majority of the Court of Appeal that this is a case in which the opinion of an appellate court as to the quality of the negligence should be substituted for the opinion reached by the learned trial judge. Like Freedman J.A., I do not consider the award of general damages to be so inordinately low as to warrant interference by an appellate tribunal.

For these reasons as well as for those contained in the dissenting opinion delivered by Freedman J.A. on behalf of himself and Mr. Justice Schultz, I would allow this appeal and restore the decision of the learned trial judge. The appellant should have her costs in the Court of Appeal and in this Court but as she was granted leave to appeal to this Court in *forma pauperis* the costs of this appeal will be governed by the provisions of Rule 142 of the Rules of the Supreme Court of Canada.

Appeal allowed with costs; Supreme Court rule 142 to apply.

Solicitors for the plaintiff, appellant: Thompson, Dilts, Jones, Hall, Dewar & Ritchie, Winnipeg.

Solicitors for the defendants, respondents: Richardson, Richardson, Huband & Wright, Winnipeg.