SUELEEN O. M. WALKER (*Plaintiff*) .....APPELLANT; 1954

*Oct. 27, 28
*Dec. 20

AND

JESS ENDERS (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL

Automobiles—Action by Gratuitous Passenger—Jury's finding set aside by Court of Appeal—"Gross Negligence" question of fact for jury—Where evidence will support such finding, it should not be disturbed.

The appellant, a gratuitous passenger, sued the respondent to recover damages for injuries suffered by her when an occupant of a motor car owned and driven by the respondent and arising out of a collision between the respondent's motor car and a motor truck. The accident occurred in winter time on the curve of a narrow mountain road with an icy, slippery surface. A jury having found negligence on the part of both drivers and that of the respondent to have amounted to gross negligence, judgment was entered against the respondent and the action against the other driver dismissed. The British Columbia Court of Appeal by a majority decision set the judgment aside on the grounds that the finding of the jury was perverse.

Held: Whether conduct falls within the category of gross negligence is a question of fact for the jury. Here there was evidence upon which a jury, if they chose to believe it, might find negligence on the part of the respondent and hold that this was very great negligence, in the circumstances.

Studer v. *Cowper* [1951] S.C.R. 450; *City of Kingston* v. *Drennan* 27 Can. S.C.R. 46; *Holland* v. *City of Toronto* [1927] S.C.R. 141 and *McCulloch* v. *Murray* [1942] S.C.R. 141, referred to.

Judgment of the Court of Appeal for British Columbia (1953-54), 10 W.W.R. (N.S.) 602, reversed and judgment at trial restored.

APPEAL by the plaintiff from the judgment of the Court of Appeal for British Columbia (1), Sidney Smith J.A. dissenting, which set aside the judgment of Wood J. (2) on a jury trial.

J. L. Farris, Q.C. for the appellant.

D. McK. Brown for the respondent.

The judgment of the Court was delivered by:—

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal of British Columbia which, by a decision of the majority, set aside the judgment entered following

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

(1) (1953-54) 10 W.W.R. (N.S.) 602.

(2) (1953) 9 W.W.R. (N.S.) 378.

1954

WALKER v. ENDERS

Locke J.

the trial of the action before Wood J. and a jury. Sidney Smith J.A. dissenting from the opinion of the majority, would have dismissed the appeal.

The appellant, a young married woman, was on February 27, 1952, driving with the respondent in his motor vehicle as a gratuitous passenger, en route from Avola, B.C. to Kamloops. She was sitting in the front seat to the right of the driver with her small child beside her.

The respondent left Avola at about 8.30 in the morning and had driven some 45 or 50 miles when the accident which gave rise to the action occurred. The road was narrow, winding and hilly, running approximately north and south. The snow had been removed by snow clearing equipment, the surface being, according to all of the evidence, icy and very slippery in spots. At the place where the accident occurred, the travelled or cleared portion of the highway was 14 ft. 8 ins. in width. As the car approached the brow of a hill where the road curved to the right, an oil truck proceeding in the opposite direction which was 8 ft. in width and 24 ft. long was coming up the hill and a collision occurred in which the appellant suffered personal injury. When the driver of the truck observed the respondent's car coming down the hill, he endeavoured to draw over to the extreme right of the travelled portion of the road and had brought his vehicle practically to a stop when the collision occurred. The respondent, on his part, observing the oncoming truck at a distance which he estimated at about 100 ft., attempted to pull over to the right and stop his car. There were icy ruts in the roadway from 3 to 5 inches deep and, according to him, the wheels of his car were in them and, while he put on the brakes, he was unable to bring the vehicle to a halt.

The evidence as to the speed of the respondent's car as it reached the top of the hill is conflicting and unsatisfactory. According to the appellant, they were travelling at about 30 miles per hour when the truck came into sight, but this was clearly merely a rough estimate on her part. An officer of the Mounted Police, who attended the scene of the accident after the cars had been removed, said that the marks found at the place of the collision indicated that the front wheels of the truck had been driven into the bank of snow on the east side of the road and that the right rear

dual wheels were up against the snow bank. He found the hill to have been very slippery. Asked as to the distance at which the drivers of vehicles approaching in opposite directions could see each other, he estimated this as about 150 ft, and said that, travelling at the rate of 15 miles an hour under the existing conditions, he considered a car going down the hill could be brought to a stop in 150 ft. Asked by the learned trial Judge if, after viewing the damage to the respondent's car, he could estimate the speed at the time of the collision, he expressed the view that it had been 25 miles an hour at least.

It was shown that the respondent was familiar with the road, having driven on it on several occasions, and that he was aware that large vehicles like the truck might be met along the way. According to his evidence, he had put his car into second gear as he approached the hill and the speed on the hill had not exceeded 15 miles when he saw the oncoming truck. He had then put on the brakes and put the car into low gear, but it had skidded in the ruts and he had been unable to avoid the collision. He admitted that the road was in a dangerous condition and said that he thought that he should not have been driving on it with the woman and her child.

Both the respondent and the driver of the truck were found by the jury to have been guilty of negligence which contributed to the accident. In the case of the former, the negligence found was "failure to have his car under proper control" and this they held to have been gross negligence.

The learned trial Judge upon the jury's findings directed that judgment be entered against the respondent but dismissed the action against the owner and the driver of the truck. The present appellant appealed to the Court of Appeal from that portion of the judgment dismissing the action as against the last named defendants but that Court dismissed the appeal and they are not parties to the present appeal.

Section 82 of the *Motor Vehicle Act* of British Columbia R.S.B.C. 1927, c. 227, provides that no action shall lie against either the owner or driver of a motor vehicle by a person who is carried as a passenger for any damage sustained by reason of the operation of the vehicle, unless there

1954

WALKER v. ENDERS

Locke J.

has been gross negligence on the part of the driver which has contributed to the damage in respect of which the action is brought. The exceptions in the case of a person transporting a passenger for hire and in the case of a person to whose business the transportation of passengers is normally incidental do not apply in the present case where the respondent was carrying the appellant without reward.

In *Studer* v. *Cowper* (1), the meaning to be attributed to the expression "gross negligence" in *The Vehicles Act, 1945* of Saskatchewan was considered and the cases reviewed in the judgments delivered. While the section of the British Columbia statute does not include the words "or wilful and wanton misconduct" after the words "gross negligence" as does s. 141(2) of the Saskatchewan Statute, I think the same meaning is to be assigned to the words "gross negligence" in each.

In *City of Kingston* v. *Drennan* (2), Sedgwick J., delivering the opinion of the majority of the Court, construed the expression as it appeared in the Consolidated Municipal Act of Ontario as very great negligence, and in *Holland* v. *City of Toronto* (3), Anglin C.J.C. said that this was a paraphrase which, for lack of anything better, had been generally accepted.

In *McCulloch* v. *Murray* (4), Sir Lyman Duff C.J.C. said that he did not consider that it was any part of the duty of this Court in applying the provisions of *The Motor Vehicle Act* of Nova Scotia to define gross negligence and that it was undesirable to attempt to replace by paraphrases the language which the Legislature had chosen to express its meaning. Having said this, he continued by saying that the expression implied conduct in which there was a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually governed themselves. I think this view is the same as that expressed in *Drennan's* case and in *Holland's* case.

In the present matter, there was evidence upon which the jury might find, if they chose to believe it, that the respondent had driven his car to the brow of the hill at a speed of from 25 to 30 miles an hour at a time when the narrow winding road was partially covered by ice, rendering

(1) [1951] S.C.R. 450.
(2) (1896) 27 Can. S.C.R. 46.
(3) [1927] S.C.R. 242.
(4) [1942] S.C.R. 141.

it impossible for him to control his car and bring it promptly to a halt in the event of a truck or other large vehicle being met upon the hill. In *McCulloch's* case, the learned Chief Justice said that he considered it to be entirely a question of fact for the jury whether conduct falls within the category of gross negligence, a conclusion with which I respectfully agree.

The finding of the jury that the negligence of the respondent was the failure to have his car under proper control should, in view of the nature of the evidence given at the trial, be construed as meaning that that failure was due to the excessive speed at which the car was being driven as it commenced the descent of the hill. There was evidence, in my opinion, upon which the jury might properly find negligence on the part of the respondent and hold that this was very great negligence, in the circumstances.

I think the judgment entered at the trial should not have been set aside and I would allow this appeal with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *E. G. Silverton.*

Solicitors for the respondent: *Russell & Dumoulin.*