1957

*Feb. 27, 28
June 26

JOHN LAVERNE MILLER (*Plaintiff*) ....APPELLANT;

AND

JOHN DECKER, DICK DECKER AND TRIEN DECKER (*Defendants*) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Defences—Volenti non fit injuria—What must be established—Implied assumption of risk with full knowledge of its nature and extent—Driver known to passenger to be intoxicated.

The plaintiff and the defendant J set out, according to the findings of the trial judge, to go "beering" and after that to go to a dance in J's car. After drinking beer for some two hours they embarked in the car, both of them being then intoxicated. An accident occurred as the result of J's gross negligence and the plaintiff sustained serious injury.

Held (Taschereau and Abbott JJ. dissenting in part): The plaintiff could not recover. The circumstances were such as to lead necessarily to the inference that he had impliedly, and with full knowledge of the nature and extent of the risk resulting from J's driving, agreed to assume that risk. *Car and General Insurance Corporation Limited v. Seymour and Maloney,* [1956] S.C.R. 322, distinguished and applied.

Per Taschereau and Abbott JJ., *dissenting in part*: The circumstances were not such as to establish a voluntary assumption of the risk by the plaintiff but he had been guilty of contributory negligence to the extent of 50 per cent. He was therefore entitled to judgment against J for one-half of the damages sustained by him.

Actions—Bars to relief—Ex turpi causa non oritur actio—Whether rule applicable.

Per Taschereau and Abbott JJ.: The circumstances above set out were not such as to make applicable the rule *ex turpi causa non oritur actio. Foster v. Morton* (1956), 38 M.P.R. 316 at 333, quoted with approval.

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

APPEAL from a judgment of the Court of Appeal for British Columbia (1) affirming a judgment of Wood J. (2) dismissing the action. Appeal dismissed. The defendants Dick Decker and Trien Decker were the parents of the defendant John Decker, an infant.

Alfred Bull, Q.C., for the plaintiff, appellant.

Douglas McK. Brown and *Raymond E. Ostlund,* for the defendants, respondents.

The judgment of Taschereau and Abbott JJ. was delivered by

ABBOTT J. (*dissenting in part*):—Appellant's claim is one in damages for personal injuries sustained while a gratuitous passenger in a car owned by the respondent John Decker and driven by him while he was under the influence of liquor. The facts, which are really not in dispute, are fully set out in the judgments in the Courts below and I need not recite them here. The accident in which the appellant was injured was caused by the gross negligence of the respondent.

The learned trial judge held that the defence of voluntary assumption of the risk had been established and dismissed appellant's action. That judgment was affirmed by the Court of Appeal for British Columbia, by Bird J.A. on the ground of voluntary assumption of risk, by O'Halloran J.A. on the ground that the parties were engaged in a common enterprise, and by Smith J.A. on the ground that appellant's action was barred by the rule *ex turpi causa non oritur actio.*

The principal defence argued before this Court was that of *volenti non fit injuria.* The general principles applicable to that defence were stated by the Judicial Committee in *Letang v. Ottawa Electric Railway Company* (3), in the following terms, quoted from the judgment of Wills J. in *Osborne v. The London and North Western Railway Company* (4):

> 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) 16 W.W.R. 97, [1955] 4 D.L.R. 92.
(2) (1954), 13 W.W.R. 642.
(3) [1926] A.C. 725, [1926] 3 D.L.R. 457, 32 C.R.C. 150, [1926] 3 W.W.R. 88, 41 Que. K.B. 312.
(4) (1888), 21 Q.B.D. 220 at 224.

1957

MILLER v. DECKER

Abbott J.

It might be noted in passing that the facts in that case are of little help since it was held that there was no evidence of either *volentia* or *scientia*.

The defence as applied to a drunken driver, known to his passenger to be under the influence of liquor, was recently considered by this Court in *Car and General Insurance Corporation Limited v. Seymour and Maloney* (1). In that case the learned trial judge (2) had applied the principle of voluntary assumption of the risk to relieve a drunken driver from responsibility for damages caused to a gratuitous passenger as a result of the driver's gross negligence. This finding was reversed by the Supreme Court of Nova Scotia sitting *in banco, sub nom. Seymour v. Maloney et al.* (3), and the driver was held to have been guilty of contributory negligence. That judgment was confirmed by this Court.

It is clear from the judgments in this Court in the *Seymour* case that for a negligent driver to be completely relieved from liability, the plaintiff must have agreed expressly or by implication to exempt the defendant from liability for damages suffered by the plaintiff and occasioned by the negligence of the defendant during the carrying out of the latter's undertaking. In other words, to constitute a defence there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence. As was pointed out by Kellock J. at p. 331, the question in each particular case is, in the language of Lindley L.J. in *Yarmouth v. France* (4), "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".

No doubt there may be cases in which the defence of voluntary assumption of risk is available to a drunken driver to relieve him completely from responsibility to his passenger for the consequences of his own gross negligence. I am in agreement, however, with the view expressed by

(1) [1956] S.C.R. 322, 2 D.L.R. (2d) 369.
(2) 36 M.P.R. 337, [1955] 1 D.L.R. 824.
(3) 36 M.P.R. at 360, [1955] 4 D.L.R. 104.
(4) (1887), 19 Q.B.D. 647 at 660.

Doull J. in *Seymour v. Maloney, supra,* when, speaking for himself, Ilsley C.J. and Hall and MacQuarrie JJ., and referring to the *volenti* doctrine, he said (1):

> . . . in my opinion it is not in most cases an appropriate approach to the determination of the liability of the drunken driver. The person who accepts the drive may be negligent in doing so, but he seldom considers the risk or knows how drunk the driver is.

It is not without significance, I think, that we were referred to no case decided in England since the passing of the *Law Reform (Contributory Negligence) Act,* 1945, c. 28, in which the doctrine of voluntary assumption of risk has been applied to relieve a defendant completely from civil liability for the consequences of his own negligence, and Mr. Brown told us that he had not been able to find any such decision.

In the instant case I am of opinion that the proper point of time at which appellant might be said to have voluntarily assumed the risk was when the three young men set out in respondent's car to visit the beer parlour. At that time no drinks had been consumed and the respondent John Decker stated that, as he was the driver, he had only intended to take one or two drinks. These good intentions, as so often happens, were not lived up to, but to paraphrase the words of Kellock J. in the *Seymour* case, *supra,* at p. 332, I do not think that the situation was then such as *necessarily* to lead to the conclusion either that the appellant agreed to take upon himself the whole risk or that the respondent accepted him into his automobile on such a footing. Moreover, in my opinion the evidence established that after some two hours spent in the beer parlour appellant was in no condition to give such an undertaking.

With respect I cannot agree with the view expressed by Smith J.A. that the action is barred by the rule *ex turpi causa non oritur actio.* This ground does not appear to have been directly pleaded or argued in the Courts below but in any event in my opinion more must be proved than is evident in this case before this defence can be given effect to. The application of the rule in a case of this kind was recently considered by the Supreme Court of Nova Scotia sitting *in banco* in *Foster v. Morton* (2). The relevant

(1) 36 M.P.R. at p. 372, [1955] 4 D.L.R. at p. 115.

(2) (1956), 38 M.P.R. 316, 4 D.L.R. (2d) 269.

1957

MILLER v. DECKER

Abbott J.

authorities are reviewed at length in the judgment of MacDonald J. and I am in agreement with his statement at p. 333 where he says:

> There are, I think, weighty reasons why in principle this doctrine of illegality should not afford a general defence to civil actions of negligence arising out of automobile accidents, particularly in Canada where many kinds of conduct are prohibited by the Criminal Code and by many Provincial Acts of a penal nature. Accordingly, authority of the clearest kind should be required before concluding that the mere fact that the conduct of a party to a civil action was wrongful as being in violation of the Criminal Code or a penal act constitutes a defence. There is no such binding authority and such as exists is to the contrary effect. (Williams, Joint Torts and Contributory Negligence, pp. 333-5; Winfield on Tort, 6th ed., pp. 47, 520-1; Pollock on Torts, 15th ed., pp.125-7; *National Coal Board v. England,* [1954] 1 All E.R. 546 at pp. 552, 554-7, noted in (1954), 17 Mod. L. Rev. 365; 70 L.Q. R. 298-9; cf. *City of Vancouver v. Burchill,* [1932] S.C.R. 620—breach of highway legislation.) There is even less reason to hold that a passenger injured in a motor vehicle should be debarred from compensation merely because he was in law implicated in the criminal conduct of the driver as a constructive party thereto.

Upon the principle enunciated by the Judicial Committee in *Nance v. British Columbia Electric Railway Company Limited* (1), however, I am of opinion, upon the evidence, that appellant was guilty of contributory negligence. Under the *Contributory Negligence Act,* R.S.B.C. 1948, c. 68, and having regard to all the circumstances of the case, I would apportion the liability equally between the appellant and the respondent John Decker.

Nothing was established which could justify holding the respondents Dick Decker and Trien Decker responsible for the negligence of their son John Decker.

In the result, therefore, I would allow the appeal against the respondent John Decker, declare him liable for 50 per cent. of the damages suffered by appellant and refer the matter back to the Supreme Court of British Columbia for the assessment of damages. The appellant should have his costs here and in the Court of Appeal and one-half of his costs in the trial Court. The appeal should be dismissed as against the respondents Dick Decker and Trien Decker with costs throughout.

RAND J.:—In this case there is the extreme example of complementary relations considered in *Car and General Insurance Corporation Limited v. Seymour and Maloney* (2), in the circumstances that both driver and passenger at

(1) [1951] A.C. 601, [1951] 3 D.L.R. 705, 2 W.W.R. (N.S.) 665.
(2) [1956] S.C.R. 322, 2 D.L.R. (2d) 369

the time of the accident were so far under the influence of liquor as to be incapable of appreciating the dangers of their situation. The facts leading up to that condition can be shortly stated.

The driver, the respondent John Decker, and the passenger, the appellant Miller, with a friend Thistleton, young men of 19 years of age, had in the early evening of October 12, 1952, in Vancouver set out together to enjoy themselves. This was to be done first by indulging in the amenities of a beer parlour and following that those of a dance hall. The car was owned by Decker. Shortly before setting out, at a restaurant, a gathering place for the young men of the neighbourhood, they had met with others and in the course of talk the evening's entertainment was mentioned. Miller was undecided whether to go to a "show" with Decker and Thistleton or to "go beering with the rest of the fellows". Telling the others to wait for his return, he left the restaurant to go home for his clothes. After waiting 15 or 20 minutes Decker and Thistleton took the car and called at Miller's home to see what it was to be, and they were told that he would go along with them to the show. They drove past the restaurant just as the others were leaving it. The car was stopped and the discussion of plans was renewed. Miller indicated his preference for a "beer" party and finally Decker and Thistleton agreed to have a couple of drinks at a hotel in New Westminster and then "come straight back" to a dance hall. Miller described his purpose in going to the beer parlour as being "to drink a bunch of beers to get feeling good and then go to the dance hall". It was suggested by one of them, 7 or 8 in number, that all go in one car, but to this Decker demurred. At the hotel they gathered around a table and drank double rounds or more of beer from each one. Miller equally with Decker fully appreciated the condition to which they would be brought by the beer and the effect of that condition on the driving of the car as well as the risks entailed. Before leaving they decided to go not to a Legion dance they had in mind but to another, the place of which is not material.

About 11 o'clock they left the hotel and proceeded to the hall. Miller recalls getting into the car but is very vague about the journey or being at the dance; and the memory of Decker is not much clearer. About midnight the three set

1957

MILLER v. DECKER

Rand J.

out for home, but neither could recall the circumstances of getting into the car or of the ride. Later they passed another automobile at an estimated speed of 75 miles an hour and when their car struck railway tracks running across the street on which they were travelling it seemed, in the language of the witness who was watching it, "to take off in the air", and crashed on its side. Both suffered injuries.

From these facts the inference is clear that the three were acting together in a common purpose and that the drinking of each was an encouragement to the same act in the others. Being fully aware of the most likely consequences of this indulgence, each voluntarily committed himself to the special dangers which they then entered upon.

In that situation I cannot think that any difficulty arises in the application of the principles of liability for negligence. As between themselves there is no doubt of what would have been required by Decker in the interchange that is to be constructed between these young men as they sat down at the beer table to begin "to make an evening of it". That he would have required the other two to assume the risks all were able to foresee and would have participated in creating, to take the same risks that he was taking, is unquestionable. The conditions then existing, their inevitable development, and the obvious hazards were theirs equally and jointly; and one can imagine the reasonable response of Decker, had his mind still been clear enough, if either of them had let fall a suggestion that he would be responsible for their safety: they would have been told to get into another car.

It is equally clear that Miller is to be taken to have accepted that requirement. This would have been obvious if he had remained sober and in command of his faculties; and having, by his voluntary acts, co-operated in creating and placing himself in the midst of the mounting dangers, his intoxication does not qualify his acceptance.

In this case, to treat either the question whether the assumption of the risk was a requirement of Decker or whether it was accepted by Miller as to be decided at the moment of setting out from the dance hall, would, in view of their condition, be futile: one could not then rationally propose terms nor the other accept them: and only from

the circumstances in which they moved to the fulfilment of their purpose around the beer table is the answer in either case to be drawn. The terms are to be inferred, then, on the understandings which the ordinary persons of their age, aware of their situation and as it would develop, as reasonable and prudent young men, would have proposed and accepted. That standard is imposed on those whose minds are clear and those who deliberately commit themselves to the vortex of such risks can claim no greater indulgence.

I would, therefore, dismiss the appeal with costs.

The judgment of Kellock and Locke JJ. was delivered by

KELLOCK J.:—In *Car and General Insurance Corporation Limited v. Seymour and Maloney* (1), this Court held the defence of *volenti* to be available in actions of the type here in question, provided, of course, that defence was made out as a matter of evidence. The question for the Court in such cases was variously formulated by the members of the Court but with no difference in essence.

At p. 324, Rand J. said:

> 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 p. 326:

> . . . 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.

Kellock J., at p. 332:

> . . . 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?"

The word "latter" above should obviously have been "former". And lower down on the same page, with reference to the facts then before the Court:

> . . . 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.

(1) [1956] S.C.R. 322, 2 D.L.R. (2d) 369.

1957

MILLER v. DECKER

Kellock J.

At p. 334, Locke J.:

> 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,* [1926] A.C. 725, 731, was one of fact.

And lower on the same page:

> 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.

Cartwright J. at p. 335:

> 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 . . .

Under the relevant statute law of British Columbia the respondent driver is rendered liable to a passenger for gross negligence only. It is common ground between the parties that the finding of gross negligence at the trial must stand and that the further finding that the accident, as a result of which the plaintiff sustained injuries, occurred as a result of the defendant's intoxication.

The learned trial judge (1) upheld the defence of *volenti,* as did Bird and O'Halloran JJ.A. in the Court of Appeal (2). The judgment of Sidney Smith J.A. dismissing the appeal was put on another ground.

The learned trial judge (3) found that

> The two young men involved, aged about 19, were members of a group of similar age and proclivities living in Vancouver who on the evening in question had nothing to do so they all decided to go "beering" and for such purpose drove in three cars to the Russell Hotel in New Westminster where they sat drinking beer for two hours or more. Some time during the evening they decided to go to a dance and it seemed appropriate that they should qualify themselves to enjoy that dance for the plaintiff says on his examination for discovery:
>
> "Q. What you were to do actually was to drink a bunch of beers to get feeling good and then go out to this dance hall, isn't that right? A. That's right."

(1) (1954), 13 W.W.R. 642.
(2) 16 W.W.R. 97, [1955] 4 D.L.R. 92.
(3) 13 W.W.R. at p. 642.

This plan was ultimately carried out. In my opinion, the relevant time when the question of consent or no consent is to be determined is the time, as above, to which the learned trial judge directed his mind.

The relevant evidence of the appellant is as follows:

Q. You knew as you were drinking these beers that you were gradually becoming under the influence of liquor, didn't you? A. That is right.

And further:

Q. I suppose you knew when you were in the beer parlour that if Decker would be drinking beer his ability to drive might not be as good as otherwise? A. Yes.

Q. You knew that, didn't you—did you tell him to quit drinking at all? A. No.

Q. I suppose you knew, too, that the more beer he drank the greater would be the risk if he would drive the car? A. No, I wasn't bothering with any—

Q. You know that is so? A. Yes.

Q. In other words, if you are sitting by with me and we are both drinking and you see me drinking a lot and know I am going to drive a lot, you know there is additional risk to be incurred if you drive with me? A. Yes.

Q. You know that, don't you—and you knew when you were in the beer parlour drinking he was drinking with you, that the plans were to go to the dance hall? A. Yes.

Q. And as far as you were concerned you were going with Decker? A. That is right.

Q. And in his car? A. Yes.

.....

Q. And these other boys were all your age approximately? A. Yes.

Q. I don't suppose you thought drinking beer like that would make any of them sober or more sober, did you? A. No.

Q. You know enough about drinking to know that it might affect them the same as it affected you, isn't that right? A. Yes.

Q. "Yes", did you say? A. Yes.

The appellant says that all he can recall as to leaving the beer parlour was getting into the front seat of the respondent's car. He also has some vague recollection of his conduct at the dance. The accident took place after the respondent driver and the appellant had left the dance. Its occurrence is thus described by the learned trial judge (1):

At any rate, both the plaintiff and the defendant became very intoxicated and in that condition they, together with another young man, drove to a dance. They seem to have very little recollection as to what happened there but on returning Decker drove along Scott Road at 75 to 80 miles per hour passing other traffic until a railway crossing was reached. At that point, according to the evidence of the driver of one of the cars which was passed, the defendant's car seemed to take to the air. It landed off the road on its side as a result of which the infant plaintiff suffered his injuries.

(1) 13 W.W.R. at p. 643.

1957

MILLER v. DECKER

Kellock J.

There is no doubt that Decker's driving was not only dangerous but reckless and amounted to gross negligence. Had there been a fatality he might well have been successfully prosecuted for manslaughter. As it was he pleaded guilty to dangerous driving before a magistrate and was fined $50.

In my opinion, the question whether the evidence establishes that the appellant consented to assume the risk without compensation in the event of injury must be answered in the affirmative. I adopt what was said by Bird J.A. in the Court below (1), that

> It is I think inconceivable that anyone, even of the most limited intelligence, would not realize the danger of being driven by another thus fortified. Miller was party to the plan, realized that he himself was becoming intoxicated and that the others, drinking as he was, were likely to be similarly affected; nevertheless he elected to ride with Decker in the latter's car. In those circumstances I do not think that Miller's conduct in so doing reasonably can be interpreted otherwise than as a free and voluntary acceptance of the risk involved in being driven by one who he knew was intoxicated.

It is further contended for the appellant that as the respondent driver committed a breach of s. 285(6) of the 1927 *Criminal Code* as well as that he was driving in excess of the statutory speed limit at the time of the accident, the defence of *volenti* is rendered inapplicable.

In my opinion, this objection is not well taken. There is a substantial difference between the breach of such statutory provisions as those laying down safety requirements in factories for the protection of persons employed therein, and a breach of such statutory provisions as the above.

Such statutes as the *Factory Acts* were enacted to create an absolute duty on the employer to protect his employees by the installation of the safeguards called for by the enactments, breach of which duty would give to an injured employee a cause of action against which even the express consent of the employee to dispense with the statutory requirements would afford no defence. On the other hand, statutes of the character of those here in question were not enacted from any such standpoint or with any such object. Accordingly, there is no public policy attaching to their breach which would provide any basis for giving effect to such a contention as that put forward by the appellant in the case at bar.

(1) 16 W.W.R. at p. 106.

1957

MILLER v. DECKER

Kellock J.

As to the contention put forward on behalf of the respondents other than the driver, based on s. 48 of the *Motor-Vehicle Act*, R.S. B.C. 1948, c. 227*, our view as to its untenable nature was sufficiently indicated on the argument.

I would dismiss the appeal with costs.

Appeal dismissed with costs, TASCHEREAU and ABBOTT JJ. *dissenting in part.*

Solicitors for the plaintiff, appellant: Bull, Housser, Tupper, Ray, Guy & Merritt, Vancouver.

Solicitor for the defendants, respondents: Angelo E. Branca, Vancouver.

*48. In case a minor is living with or as a member of the family of his parent or guardian, the parent or guardian shall be civilly liable for loss or damage sustained by any person through the negligence or improper conduct of the minor in driving or operating on any highway a motor-vehicle entrusted to the minor by the parent or guardian; but nothing in this section shall relieve the minor from liability therefor. In every action brought against the parent or guardian of a minor in respect of any cause of action otherwise within the scope of this section, the burden of proving that the motor-vehicle so driven or operated by the minor was not entrusted to the minor by the parent or guardian shall be on the defendant.