1968
*May 29, 30
Oct. 1

IDA RUCH and WILLIAM RUCH (*Plaintiffs*) ..... APPELLANTS;

AND

COLONIAL COACH LINES LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Standard of care—Passenger reclining on rear seat of bus—Injuries sustained when bus passed over bump—Whether carrier negligent in failing to warn of danger in using rear seat in reclining position.

The female plaintiff suffered injuries while she was a passenger on an overnight trip in a bus owned by the defendant company. The plaintiff stated that at the time she was injured she was "reclining" with her back propped against the side of the bus and her legs stretched out across the three rear seats when the vehicle went over a bump and she was bounced around, causing her to hit her hip and back on the window ledge. The jury found no negligence on the part of the driver, but found that the defendant was negligent in failing to warn the plaintiff of the hazard inherent in using the back seats of the bus in a reclining position. No such negligence had been pleaded but after the verdict the trial judge permitted an amendment to the statement of claim whereby such negligence was alleged. The judgment rendered at trial was reversed on appeal to the Court of Appeal. An appeal from the Court of Appeal's judgment was then brought to this Court.

Held (Spence J. dissenting): The appeal should be dismissed.

Per Martland, Judson, Ritchie and Hall JJ.: In the circumstances of this case no duty lay upon the carrier to warn its passengers not to recline on the back seat of its bus. Nor was it in any other way in breach of its undertaking to take all due care of its passengers and to carry them safely as far as reasonable care and forethought could attain that end.

Per Spence J., *dissenting*: The amendment to the statement of claim was proper and the plaintiffs were entitled to recover on the basis of negligence found by the jury. The company's driver and its depot employees, realizing that passengers almost inevitably would doze or sleep as the bus proceeded during the night, should have warned the passengers that they might recline safely in the seats on either side of the aisle but that it was most dangerous to lie along the unprotected rear seat. Failure to do so was failure to meet the standard of care set by this Court in *Day v. Toronto Transportation Commission*, [1940] S.C.R. 433.

[*Kauffman v. Toronto Transit Commission*, [1960] S.C.R. 251, applied; *De Courcey v. London Street Railway*, [1932] O.R. 226, distinguished.]

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

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APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from, and setting aside, a judgment of Costello Co.Ct.J. Appeal dismissed, Spence J. dissenting.

Edward J. Houston, Q.C., and *Gordon P. Killeen*, for the plaintiffs, appellants.

E. Peter Newcombe, Q.C., and *John I. Tavel*, for the defendant, respondent.

The judgment of Martland, Judson, Ritchie and Hall JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] allowing an appeal from, and setting aside, the judgment rendered at trial by Costello Co.Ct.J., pursuant to the verdict of a jury whereby the female appellant was awarded $15,000 and the male appellant $6,093.85 in respect of damage suffered by Mrs. Ruch when she was a passenger in a bus owned by the respondent Colonial Coach Lines Limited.

At the time when she was injured, Mrs. Ruch has stated that she was "reclining" with her back propped against the side of the bus and her legs stretched out across the three rear seats when the bus went over a bump and she was bounced around, causing her to hit her hip and back on the window ledge. By its verdict the jury found that the plaintiff's injuries were not caused by any negligence on the part of the bus driver, but gave the following particulars of the negligence which they found against the appellant:

> The defendant Colonial Coach Limited was negligent in not warning Ida Ruch of the danger inherent in using the back seats of the bus in a reclining position. This warning could have been given by a suitable sign posted over the seats or by other means.

No such negligence had been pleaded by the appellants but after the verdict they were given leave to amend the statement of claim by adding para 5(*a*) in the following terms:

> In the further alternative the plaintiffs say that the defendant Colonial Coach Limited was negligent in not warning its passengers of the danger inherent in using the back seats of the bus when in a reclining position.

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[1] [1966] 1 O.R. 621, 54 D.L.R. (2d) 491.

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I am in complete agreement with the reasons for judgment rendered on behalf of the Court of Appeal by Mr. Justice MacGillivray and I have very little to add to those reasons.

It does, however, seem to me to be desirable to adopt the clear statement regarding the duty of carriers to their passengers which is to be found in the reasons for judgment rendered by Kerwin C.J., on behalf of himself and Mr. Justice Judson in this Court in *Kauffman v. Toronto Transit Commission*[2], where he said:

> While the obligation upon carriers of persons is to use all due, proper and reasonable care and the care required is of a very high degree, *Readhead v. Midland Railway Co.* (1869), L.R. 4 Q.B. 379, such carriers are not insurers of the safety of the persons whom they carry. The law is correctly set forth in Halsbury, 3rd ed., vol. 4, p. 174, para. 445, that they do not warrant the soundness or sufficiency of their vehicles, but their undertaking is to take all due care and to carry safely as far as reasonable care and forethought can attain that end.

Like Mr. Justice MacGillivray, I do not feel that in the circumstances of this case any duty lay upon the carrier to warn its passengers not to recline on the back seat of its bus, or that it was in any other way in breach of its undertaking to take all due care of its passengers and to carry them safely as far as reasonable care and forethought could attain that end, but the appellant's counsel has laid great stress on one passage in the reasons for judgment of Fisher J.A. in *De Courcey v. London Street Railway*[3], where it was held that the carrier was liable to a passenger who fell forward from the front seat of a bus when it came to a sudden stop and it was found that there was a lack of care and foresight on the part of the carrier in not having a rail or guard in front of the unprotected front seat. The passage from Mr. Justice Fisher's decision upon which the appellant relies reads as follows:

> The fact that the passenger was thrown from the seat on which she was invited to sit without negligence on her part is proof that the seat was not safe, and under the cases the onus was on the company to show it could not have been made safer than it in fact was.

This appears to me to be tantamount to saying that whenever a passenger is thrown from one of the seats of a

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[2] [1960] S.C.R. 251 at 255.

[3] [1932] O.R. 226, 2 D.L.R. 319.

public vehicle without negligence on his part, the rule embodied in the maxim *res ipsa loquitur* applies so as to place upon the carrier the burden of proving that the seat could not have been made safer than it in fact was, and if the learned judge intended to give expression to any such general proposition, then with all respect I feel it desirable that such a proposition should be rejected. It was proved through the respondent's general manager that the bus seats in the present case were up to date and of a type in general use in the industry and I do not think that the mere fact of a passenger being thrown from such a seat through collision or sudden stop necessarily affords proof that the seat itself was unsafe.

The facts of the *De Courcey* case were, in my opinion, clearly distinguishable from those with which we are here concerned because the unguarded front seat in the London Street Railway bus did obviously present a hazard to a passenger occupying it when the bus came to a sudden halt, but it should also be remembered that in the *De Courcey* case there was a finding that the driver was negligent whereas in the present case the jury has absolved the driver from any negligence whatever.

As I have indicated, I adopt the reasoning of Mr. Justice MacGillivray in the Court of Appeal and would therefore dismiss this appeal with costs.

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Court of Appeal for Ontario[4] pronounced on October 20, 1965, whereby that Court allowed the appeal of the defendants from the judgment of the County Court of the County of Carleton delivered on November 23, 1964, after a trial in that Court with a jury. By such judgment of the County Court, the plaintiff William Ruch recovered from the defendant the sum of $6,093.85 and the plaintiff Ida Ruch recovered from the defendant the sum of $15,000.

The plaintiff Ida Ruch had purchased from Allan's Travel Service in Ottawa a ticket for a return trip from Ottawa to New York City by bus and for a two-day stop

[4] [1966] 1 O.R. 621, 54 D.L.R. (2d) 491.

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over in the latter city. The plaintiff testified that she was assigned a seat in the bus, when it was departing from Ottawa for New York City, by an office employee of Allan's Travel Service. That seat was the one which was situated across the rear end of the bus and was capable of bearing three passengers. The seat was a straight seat with no arm rests and it ran from the one side wall of the bus to the wall of the powder room in the other corner of the bus. A small aisle which the plaintiff said was about two feet in width ran across the front of that seat and then the main aisle of the bus ran forward to the front with seats on each side of it, in rows, for two persons each. Those seats running up the bus had arm rests on the outside, that is, close to the wall of the bus, and also on the side next to the aisle, but no arm rests between the two passengers occupying the seats.

The bus left Ottawa at about 8:00 p.m. on Friday and, driving all night, arrived at New York City early the next morning. At the end of the holiday weekend on October 11, 1960, at about 8:00 p.m., the bus left the New York terminal for its return overnight trip to Ottawa. The plaintiff Ida Ruch, although she sat in another seat in the bus for the first half-hour or so after leaving New York, returned to her original seat at the back of the bus and sat in that seat until about 2:00 a.m. when, according to the evidence of the driver one Lewis Shane, the bus developed a defective tire and the driver was forced to make a stop of about one hour while the tire was changed. The bus then proceeded on its way. This occurred near Booneville in the State of New York.

The plaintiff, when she retired to the rear seat of the bus, stretched out along the length of the seat. It being for the accommodating of three persons was too short to permit her to lie at full length on the seat so she occupied a semi-reclining position with her back against the opposite wall of the bus and her legs and feet along the seat her feet being toward the powder room. According to her evidence at trial, she was dozing but more awake than asleep when the bus struck either some obstruction in the road or some

pothole, and she was thrown in the air coming down with her back and side against the side wall of the bus, and thereby sustaining the injury which was the basis of her action.

The bus driver, giving evidence at trial in November 1964, had no memory whatsoever of the bus having struck any such object.

It was the plaintiff's evidence that no one and particularly not the driver Shane had given her any instructions or advice or suggestion as to how she should occupy the seat in the bus. Of course, this bus and for that matter no other bus had any seat belts and there was no protection whatsoever to prevent the passengers on the rear seat of the bus falling forward or in any other direction. The passengers who sat in the seats at either side of the main aisle, of course, were sitting only a very short distance behind the seat of the row in front and if tossed forward or upward by the motion of the bus had means of steadying themselves by grasping the upholstered seat in front of them or by grasping the arm rests, one being available to each such passenger. Neither of these protections was available to any passenger occupying this rear seat. In addition, of course, the rear seat being at the end of the bus body any motion of the bus upward due to unevenness of the road would have its maximum effect there. The seats on either side of the aisle were so arranged that the occupant of each seat could place the back of the seat in a sloping position and then the passenger occupying such seat would recline in an angle which was said to be even as much as 45 degrees, and yet be sitting in the seat facing forward, so that a tossing motion would leave such passenger able to protect himself in any of the fashions which I have outlined. The passenger stretched along the rear seat, that is, lying at right angles to the line of travel of the bus, with no protection by way of arm rests or the back of the seat in front of him, would be in the very hazardous position of having no opportunity to protect himself if the bus made a sudden stop or if the rear of the bus were tossed in the air as it went over any kind of a

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bump in the road. In travel on a highway, the necessity of making a rapid decrease in the speed of the vehicle may occur on many occasions. No highway is so perfect that there may not occur occasions when the vehicle receives a heavy bump when passing over the road such as will inevitably cause passengers to be tossed around. In either of those cases, the passengers in the seats to each side of the aisle have a considerable measure of protection available to them. The passenger stretched out on the rear seat, as was the plaintiff, has none.

This bus had been travelling all night from Ottawa to New York City and was returning to Ottawa from New York City by night. Such a course was not unusual. The driver, Lewis Shane, swore that he had taken the trip about ten times a year and that about half of those trips had been night trips. A fellow passenger, Mrs. Warren, giving evidence for the plaintiff swore that she had taken seven such previous trips to New York and that they were usually at night. One occupant after another of the bus gave evidence that the lights were dimmed and that nearly everyone in the bus appeared to be asleep. In short, it was the regular course of the defendant Colonial Coach Ltd. to encourage occupants of the bus during this all night trip to recline and to sleep. The seats along the aisle were designed to permit such reclining. The lights in the bus were dimmed for this reason and it was the usual thing for the passengers to board and then sleep or doze as the bus drove through the night between the two cities.

The learned trial judge submitted to the jury the following questions:

1. Were the injuries to the Plaintiff caused by any negligence on the part of the Defendant Colonial Coach Lines Limited. Answer "yes" or "no".

ANSWER: Yes.

2. If your answer to question one is "yes", state fully in what such negligence consisted.

ANSWER: The Defendant, Colonial Coach Limited was negligent in not warning Ida Ruch of the hazard inherent in using the back seats of the bus in a reclining position. This warning could have been given by a suitable sign posted near the seats or by other means.

3. Were the injuries to the Plaintiff caused by any negligence on the part of the Defendant's driver, Lewis Shane? Answer "yes" or "no".

ANSWER: No.

4. If your answer to question three is "yes" state fully in what such negligence consists.

ANSWER:

Therefore, the jury's answers were that there was negligence on the part of the defendant Colonial Coach Limited and the jury outlined that negligence in their answer to question 2 in the fashion I have set out. The jury, however, negatived any negligence on the part of the driver. The allegations of the plaintiff that the driver drove negligently and caused the vehicle to bump over some obstruction or pothole in the road having thus been negatived by the jury need not be further considered, and the sole question this Court has to determine is whether the plaintiffs are entitled to recover upon the jury's answers to questions 1 and 2 on its finding against the defendant Colonial Coach Limited.

In the Court of Appeal, McGillivray J.A., giving the reasons for judgment of the Court, accepted the grounds for appeal cited by the appellant as follows:

4. The finding of negligence was not a proper one.

5. The finding of negligence made was not supported by the evidence.

Although McGillivray J.A. cited many English authorities, I think it may be said that he relied on the decision of the Court of Appeal for Ontario in *Kauffman v. Toronto Transit Commission*[5], as later affirmed in this Court in [1960] S.C.R. 251. Although, of course, general principles as enunciated in the reasons for judgment in that case are applicable, the case must be understood as being one upon the facts there in issue. Those facts were very different from those which are present in this appeal. In the *Kauffman* case, the plaintiff had been a passenger on an escalator in one of the local subway stations in Toronto and immediately ahead of her was a man preceded by two

[5] [1959] O.R. 197.

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boisterous youths. The latter engaged in some juvenile horseplay with the result that they fell against the man riding up the escalator behind them and then all three tumbled against the plaintiff with the result that the four fell to the bottom of the escalator. The issues considered in all Courts in the *Kauffman* case were the sufficiency of the handrail on the side of the escalator and the necessity or non-necessity of having a guard posted at each escalator. I do not regard the circumstances in that case as having the slightest resemblance to those in the present appeal, and I am of the opinion that the question the Court must determine here is as to whether there should be liability upon the carrier if that carrier provides equipment for overnight travel, encourages sleeping and reclining during that overnight travel, and then fails to warn passengers of the danger of taking any such extremely hazardous position in the vehicle as was occupied by the plaintiff in the present case.

I am of the opinion that the liability of the carrier is supported by some of the authorities to which McGillivray J.A. referred in his reasons. McGillivray J.A. quoted and adopted Morden J.A.'s judgment in the *Kauffman* case, and that learned justice in turn relied on the words of Lord Dunedin in *Morton v. Dixon*[6], at p. 809, as follows:

> Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of the fault of omission should be one of two kinds, either—to shew that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to shew that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it.

And then Morden J.A. continued at p. 203:

> After quoting these words, Lord Normand said in *Paris v. Stepney*, [1951] A.C. 367 at p. 382:—
>
> > The rule is stated with all the Lord President's trenchant lucidity. It contains an emphatic warning against a facile finding that a precaution is necessary when there is no proof that it is one taken by other persons in like circumstances. But it does not detract from the test of the conduct and judgment of the reasonable and prudent man.

[6] [1909] S.C. 807.

> If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in the like circumstances. Failing such proof the test is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it.

It is true that in the present case there was no proof that a precaution such as warning signs or some other means was used customarily in other examples of bus travel, but even in the absence of any such evidence surely the second test, as put by Lord Normand in *Paris v. Stepney,* quoted above, is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it as applicable. Surely the driver of this bus, and surely the employees in the bus depot in Ottawa before the first overnight trip had commenced, realizing that passengers almost inevitably would doze or sleep as the bus proceeded during the night, should have warned the passengers that they might recline safely in the seats on either side of the aisle but that it was most dangerous to lie along the unprotected rear seat. In my view, failure to do so was failure to meet the standard of care set by this Court in *Day v. Toronto Transportation Commission*[7], in the words of Hudson J. at p. 441:

> Although the carrier of passengers is not an insurer, yet if an accident occurs and the passenger is injured, *there is a heavy burden on the defendant carrier to establish that he had used all due, proper and reasonable care and skill to avoid or prevent injury to the passenger.*

(The italicizing is my own.)

That statement was adopted by this Court in *Harris v. Toronto Transportation Commission*[8], *per* Ritchie J. at p. 464.

I am further of the opinion that the respondent Colonial Coach and its driver Shane could not rely on any employee of Allan's Travel Service to discharge the respondent's duty to warn its passengers of such a hazard.

Therefore, subject to what I shall say herein as to the form of the pleadings, it would seem to me that the finding of negligence as against the defendant Colonial Coach Lim-

[7] [1940] S.C.R. 433.

[8] [1967] S.C.R. 460.

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ited is the proper finding of negligence, that is, a finding of a breach of its duty toward its passenger the plaintiff Ida Ruch and that is fully supported by the evidence.

The endorsement of the writ of summons issued by the plaintiff reads as follows:

> The plaintiffs claim from the Defendant damages representing personal injuries sustained by the Plaintiff, Ida Ruch, and out-of-pocket expenses sustained by the Plaintiff, William Ruch. The Plaintiffs say that the said damages were the result of the failure of the Defendant to carry the Plaintiff, Ida Ruch, safely in one of its motor vehicles on a voyage between the City of New York, in the State of New York and the City of Ottawa, in the Province of Ontario. In the alternative, the Plaintiffs claim is for negligence on the part of the operator of the said motor bus, in the manner in which the said motor bus was being operated.

The plaintiffs in their statement of claim in paragraphs 4 and 5 said:

> 4. The female Plaintiff says, as the fact is, that the injuries which she sustained which are more particularly hereinafter set forth, were caused by the negligence of the operator of the bus acting within the scope of his employment and whose negligence the Defendant is responsible in law in that:
>
> (a) He was operating the said bus at a high and improper rate of speed;
>
> (b) He was not keeping a proper lookout;
>
> (c) He failed to apply his brakes in a timely and proper manner or at all.
>
> 5. In the alternative, the Plaintiffs say that the Defendant was guilty of a breach of its contract with the female Plaintiff for the safe carriage of her in the said bus.

Counsel for the plaintiffs in his opening remarks to the jury said:

> We expect to prove to your satisfaction that these injuries were sustained on this bus and arose from the negligence of the Defendant carrier and through the breach of this contract for safe carriage of Ida Ruch. We will lead evidence of fellow passengers on the Colonial Coach Lines bus to establish how that accident happened of which she sustained her injuries and we have to show by a balance of probabilities, or a preponderance of evidence, which His Honour will explain to you as a matter of law, we have to show to you that the Defendant company is fully responsible for those injuries sustained by the Plaintiff, Ida Ruch, and we hope to show you by way of the evidence of the female Plaintiff and her husband and some of the other witnesses I have indicated, she has suffered substantial damages and we will ask you to award substantial damages to her on the basis of the evidence led in this case.

Upon the jury returning the verdict which I have outlined above, counsel for the plaintiffs moved for leave

to amend the statement of claim by the addition of paragraph 5(a). After some considerable argument, that motion was allowed and the said para. 5(a) was added, reading as follows:

> 5(a) *In the further alternative, the Plaintiffs say that the Defendant Colonial Coach Lines Ltd. was negligent in not warning its passengers of the hazards inherent in using the back seats of its bus in a reclining position.*

That amendment was the subject of serious objection in the Court of Appeal and again in this Court, and it was said that the plaintiffs by such amendment were in effect introducing a new cause of action and that such new cause of action was in fact introduced after the limitation period provided by the Ontario *Highway Traffic Act* had elapsed.

I am of the opinion that in view of the terms of the endorsement on the writ of summons which I have quoted above, the plaintiffs were not introducing any new cause of action but were simply outlining a new particular of negligence. The plaintiffs could not rely on para. 5 of the statement of claim as originally delivered as that paragraph alleges a contract of carriage between the plaintiffs and the defendant and the contract was made between the plaintiffs and Allan's Travel Service, which latter entity was not a party to the action. I am of the opinion that the plaintiffs, therefore, require the allegation in the amendment to the statement of claim wrought by para. 5(*a*) of the statement of claim in order to be permitted to recover against the defendant. It is true that that allegation was only added after the verdict but it is difficult to see how the defendant was in any way prejudiced. If the proof of the allegation had depended on the production of evidence of what was customarily done by way of warning then I am ready to agree that it has not been clearly demonstrated that the defendant had notice and opportunity to produce such evidence. The fact was noted by McGillivray J.A. in his reasons for judgment in the Court of Appeal for Ontario. In my view, however, the defendant's liability is established not on the basis of what was customary in other cases but on the basis of what was lacking was a precaution which a reasonable and prudent man would think so obvious that it was folly to omit it. Such a finding

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needed no demonstration by evidence and was in fact made by the jury simply acting as persons of ordinary common sense.

For these reasons, I would allow the amendment as did the learned trial judge.

It is true that in this Court, counsel for the appellants sought to put the appellants' case on the basis of the maxim *res ipsa loquitur* pointing out in the words of Hudson J. in *Day v. Toronto Transportation Commission, supra,* what was a heavy burden on the defendant carrier to establish the use of the necessary skill and care and that the defendant had failed to discharge such a burden. I am, however, of the opinion that counsel for the respondent supplied an adequate answer to that submission when he pointed to the opening to the jury made by counsel for the plaintiffs where the counsel did not purport to rely in any way on the maxim and on the other hand assumed the burden of proof. In *Spencer v. Field,*[9] Davis J. said at p. 42:

> It is unnecessary for us in this case to consider whether or not that doctrine has any application to this case. It is sufficient in our view to observe that the case for the respondents was formulated in the pleadings and developed at the trial as an action of negligence against the appellant without any reference to the rule of *res ipsa loquitur*. And the case went to the jury, without any objection, on the basis of an action for negligence in which the burden lay upon the respondents. That being so, the respondents are not entitled upon an appeal to recast their case and put it upon a basis which had not been suggested at the trial.

However, having come to the conclusion that the amendment to the statement of claim was proper, I am of the opinion that the plaintiffs are entitled to recover on the basis of the negligence found by the jury and I would, therefore, allow the appeal with costs in this Court and in the Court of Appeal and restore the judgment of the County court.

Appeal dismissed with costs, SPENCE J. *dissenting.*

Solicitors for the plaintiffs, appellants: Soloway, Wright, Houston, Galligan & McKimm, Ottawa.

Solicitors for the defendant, respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.

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[9] [1939] S.C.R. 36.