THOMAS GORDON WALKER (*Plaintiff*) ..APPELLANT;

AND

SADIE COATES AND THE PUBLIC TRUSTEE OF ALBERTA, ADMINISTRATOR AD LITEM OF THE ESTATE OF BARRY ALAN COATES (*Defendants*) ..... RESPONDENTS.

1967
*Oct. 31
1968
Apr. 29

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Negligence—Motor vehicle accident—Liability to gratuitous passenger—Res ipsa loquitur—Application of rule to proof of gross negligence—The Vehicles and Highway Traffic Act, R.S.A. 1955, c. 356, s. 132(1).

The plaintiff, a gratuitous passenger, was asleep in the back seat of an automobile which was being driven southerly along a straight portion of a two-lane paved highway 36½ ft. in width when it crossed the centre double traffic line and crashed into the stone base of a large direction sign 18 ins. off the eastern edge of the highway. As a result of the accident, which occurred late at night, the driver was killed and the plaintiff suffered serious injuries. The driver had had very little sleep for a considerable period prior to the accident. The force of the impact indicated a speed of 60 m.p.h., and the absence of skid marks where the car approached the sign showed that no attempt was made to stop. The car was a year old; there was no evidence of malfunction and the tires were good. The plaintiff's action for damages for the injuries which he sustained in the accident was dismissed at trial and an appeal from the trial judgment was dismissed by the Appellate Division. The plaintiff then appealed further to this Court.

Held: The appeal should be allowed.

If the rule of *res ipsa loquitur* is accepted in cases where proof of "negligence" is in issue, there was no logical reason why it should not apply

*PRESENT: Cartwright C.J. and Martland, Ritchie, Hall and Pigeon JJ.

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with equal force when the issue is whether or not there was "very great negligence" provided, of course, that the facts of themselves afford "reasonable evidence, in the absence of explanation by the defendant, that the accident arose" as a result of "a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves".

On the evidence as a whole, the probable cause of this accident was that the driver fell asleep. He had continued to drive when he was feeling tired and had had very little sleep for thirty-six hours before the accident. He should have foreseen the danger that he might go to sleep at the wheel and his doing so under these circumstances involved a breach of duty to his passenger which constituted gross negligence. Consequently, the plaintiff was entitled to succeed under the provisions of s. 132(1) of *The Vehicles and Highway Traffic Act*, R.S.A. 1955, c. 356.

McCulloch v. Murray, [1942] S.C.R. 141, applied; *Ottawa Electric Co. v. Crepin*, [1931] S.C.R. 407; *Parent v. Lapointe*, [1952] 1 S.C.R. 376; *Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596; *Ball v. Kraft* (1967), 60 D.L.R. (2d) 35; *Kerr v. Cummings*, [1952] 2 D.L.R. 846, affirmed, [1953] 1 S.C.R. 147; *Ballard v. North British Railway Co.*, [1923] S.C. (H.L.) 43, referred to.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, affirming a judgment of Farthing J. dismissing an action for damages for personal injuries. Appeal allowed. . . . . .

W. K. Moore, Q.C., for the plaintiff, appellant.

W. R. Brennan, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta affirming the judgment rendered at trial by Mr. Justice Farthing whereby he dismissed the appellant's action for damages to compensate him for the injuries which he had sustained in an accident which occurred at 3:30 a.m. on September 22, 1963, when he was being driven as a gratuitous passenger in a Volkswagen motor vehicle owned by the respondent, Sadie Coates, and operated by the late Barry Alan Coates.

The driver Coates was killed in the accident and the appellant was asleep in the back seat of the car, but it is apparent from the evidence of Corporal Johnston of the R.C.M.P., which was recited by the trial judge, that the vehicle was being driven south towards Banff on a two-lane paved highway 36½ feet in width, and had crossed the centre double traffic line and struck a direction sign pointing to the entrance of Buffalo Paddock which was 18 inches

off the eastern edge of the highway. The wooden portion of the sign was 4 feet high and was set in a pile of Rocky Mountain stone which was mortared together and measured 6 feet 8 inches wide, 2 feet high and 4 feet 6 inches thick. In reviewing a portion of Corporal Johnston's evidence the learned trial judge said:

> Corporal Johnston said that there were no skid marks where the car approached the sign so no attempt was made to stop it. The force of impact was so great that it tore away three feet six inches from the stone base of the sign. He said that he thought the weight of the Volkswagen would be 1,700 pounds. It was a year old, the tires were good—one of them was damaged in the accident—and there was no evidence of malfunction in the car. The evidence of the force of the impact would indicate a speed of sixty miles an hour, though this estimate was admitted by the corporal to have been based partly on the speed at which he had seen Coates drive in the past. The damage to the front of the car was so extensive that the police couldn't tell much about it. North of the sign—whence the Volkswagen had come—the road is straight for half a mile.

As I have indicated, the appellant was being transported in the motor vehicle in question as the guest of the driver "without payment for transportation" and under the provisions of s. 132(1) of *The Vehicles and Highway Traffic Act*, R.S.A. 1955, c. 356, no such passenger "has any cause of action for damages against the owner or driver for injury, death or loss, in case of accident, unless the accident was caused by gross negligence or wilful and wanton misconduct of the owner or operator of the motor vehicle, and unless the gross negligence or wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought".

In spite of many judicial efforts to define "gross negligence or wilful and wanton misconduct" in precise terms, it appears to me that the test remains that which was outlined by Sir Lyman Duff C.J.C. in *McCulloch v. Murray*[1], where he said, at p. 145:

> All these phrases, gross negligence, wilful misconduct, imply conduct in which, if there is not conscious wrongdoing, *there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves.*

The italics are my own.

It is contended on behalf of the appellant that the circumstances of the accident speak for themselves and constitute *prima facie* evidence of the fact that in driving his

[1] [1942] S.C.R. 141.

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Volkswagen as he did, at a high rate of speed directly across the centre line of the highway so as to collide so forcefully with an obvious road sign, the driver, Barry Alan Coates showed a "very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves".

The application of the rule which is usually referred to as *res ipsa loquitur* to cases of negligence has been accepted in this Court in the cases of *Ottawa Electric Co. v. Crepin*[2], at p. 411 and *Parent v. Lapointe*[3], at p. 381, in the terms in which it was stated by the Exchequer Chamber in *Scott v. London and St. Katherine Docks Company*[4], where it was said:

> There must be reasonable evidence of negligence.
>
> But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

There can be no doubt in the present case that the motor vehicle was under the management of Coates and that the accident was one which in the ordinary course of things would not have happened if he had used proper care, but it is contended on behalf of the respondent that the rule does not extend to proof of gross negligence.

This proposition was advanced by Ruttan J. sitting at trial in the case of *Ball v. Kraft*[5], where he said, at p. 39:

> . . . *Kerr v. Cummings*, [1952] 2 D.L.R. 846, 6 W.W.R. (N.S.) 451 (affirmed on appeal to the Supreme Court of Canada, [1953] 2 D.L.R. 1, [1953] 1 S.C.R. 147) is authority for the principle that *res ipsa loquitur* does not apply to create a presumption of gross negligence. Negligence, as that authority holds, may be inferred when the circumstances "warrant the view that the fact of the accident is relevant to infer negligence". [[1952] 2 D.L.R. at p. 852]. But the plaintiff must still prove gross negligence. Robertson J.A. in our Court of Appeal in *Kerr v. Cummings*, [1952] 2 D.L.R. at p. 853, said:
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> "Unless the plaintiff in an action for gross negligence, when the cause of the accident is unknown, suggests a reason showing a greater probability that the accident may have happened from gross negligence than from the reason suggested by the defendant, the plaintiff must fail."

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[2] [1931] S.C.R. 407.

[3] [1952] 1 S.C.R. 376.

[4] (1865), 3 H. & C. 596, 159 E.R. 665.

[5] (1967), 60 D.L.R. (2d) 35.

And in the Supreme Court of Canada, [1953] 2 D.L.R. at p. 2, Kerwin J., in giving the judgment of the Court said:

> " . . . it is impossible, in my view, to say that the mere happening of the occurrence in the present case gives rise to a presumption that it was caused by very great negligence . . . "

It is, in my view, clear that Mr. Justice Kerwin intended his observations to be limited, as he says himself, to the facts of the case with which he was dealing, and although those facts were similar to the facts in the present case, there were marked differences amongst which was the fact that in the *Kerr* case, *supra,* there was "a governor on the car which precluded a speed exceeding 40 miles per hour". In the *Kerr* case Mr. Justice Kerwin also made an express finding to the effect that he could not read the evidence as indicating either that the driver had been without sleep during the previous night or that he had fallen asleep at the wheel.

The passage from the judgment of Robertson J.A. in the Court of Appeal of British Columbia in *Kerr v. Cummings* to which Ruttan J. referred in *Ball v. Kraft* is based on the authority of an English Admiralty case *The Kite*[6], where Langton J., sitting alone, approved the dissenting judgment of Lord Dunedin in the Scottish case of *Ballard v. North British Railway Co.*[7] The passage which he approved reads, in part, as follows:

> I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence. But what is the next step? I think that, if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion.

If the rule of *res ipsa loquitur* is accepted in cases where proof of "negligence" is in issue, I can see no logical reason why it should not apply with equal force when the issue is whether or not there was "very great negligence" provided, of course, that the facts of themselves afford "reasonable evidence, in the absence of explanation by the defendant, that the accident arose" as a result of "a very marked departure from the standards" to which Sir Lyman Duff C.J.C. referred in the *McCulloch* case.

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[6] [1933] P. 154.

[7] [1923] S.C. (H.L.) 43 at 54.

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In my view, the circumstances here disclosed "warrant the view that the fact of the accident is relevant to infer" "very great negligence". The driver himself was killed and there were no witnesses who could suggest a way in which the accident may have occurred without such negligence, but this is not the end of the matter if there are any other reasonable inferences which could be drawn from the circumstances themselves and which make it more probable than not that the accident occurred without gross negligence.

It is conceivable, as the respondent's counsel suggested, that an animal ran across the road and the car swerved to avoid it or that there was a blow-out in the damaged tire or the sudden appearance of another vehicle and it appears that the reasons for judgment of the Court of Appeal are based in large measure on an acceptance of these suggestions, but there is no evidence whatever of an animal having run in front of the car or of the car having swerved to avoid it and no witnesses related the severely damaged condition of the front wheel of the car which hit the road sign, to a blow-out, nor was there any evidence of another car. In my opinion, the evidence as a whole makes it more probable that this accident happened because the driver went to sleep and I am also of the opinion that he should have known that he was likely to be overcome by sleep having regard to the fact that he had had so little sleep for such a long time.

The activities of Barry Alan Coates from 12 noon on Friday, September 20 until the time of the accident at 3:30 a.m. on the following Sunday, are conveniently summarized in the factum compiled on behalf of the appellant and I think it convenient to reproduce that summary:

Friday, September 20, 1963.	
12:00 noon	Coates reports for work
1:00 p.m.	Coates at work
2:00 p.m.	"
3:00 p.m.	"
4:00 p.m.	"
5:00 p.m.	"
6:00 p.m. to 10:00 p.m.	No direct evidence
10:40 p.m.	Coates at work
11:00 p.m.	"
12:00 midnight	Coates out with Walter Royle

Saturday, September 21, 1963.	
1:00 a.m.	
2:00 a.m.	
3:00 a.m.	No direct evidence
4:00 a.m.	Coates arises from bed
4:45 a.m.	Coates reports for work
5:00 a.m.	Coates at work
6:00 a.m.	"
7:00 a.m.	"
8:00 a.m.	"
9:00 a.m.	"
10:00 a.m.	"
11:00 a.m.	"
12:00 noon	"
12:30 p.m.	Coates at Banff Pool Hall
1:00 p.m.	"
2:00 p.m.	"
3:00 p.m.	Coates still in Pool Hall Walker and Christou depart
4:00 p.m.	Time unaccounted for—but Coates did not
5:00 p.m.	go to bed
6:00 p.m.	Coates at Muskrat Street for dinner
7:00 p.m.	Coates at Muskrat Street watching football
8:00 p.m.	game on television
9:00 p.m.	Coates leaves Muskrat Street
9:30 p.m.	Coates at Christou's house
10:00 p.m.	Coates leaves for dance
11:00 p.m.	Coates at dance
12:00 midnight	
Sunday, September 22, 1963.	
12:30 a.m.	Coates seen at Christou's party
1:00 a.m.	
2:00 a.m.	Coates leaves party to drive to hospital
2:30 a.m.	Coates leaves hospital for Town of Canmore
3:30 a.m.	Collision on return trip from Canmore.

There is evidence that before leaving the hospital for his drive to Canmore at 2:30 a.m., Coates indicated by his words and actions that he was tired and in my view the whole record of his activities from noon on Friday, September 20 until the time of the accident, when taken together with the circumstances of the accident itself, justifies the inference that Coates fell asleep at the wheel.

The case of *Parent v. Lapointe, supra,* was one in which the driver of a vehicle had gone to sleep but it did not in-

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volve proof of gross negligence. In the course of his reasons for judgment, Rand J., however, had occasion to say, at p. 387:

> Operating such a dangerous agency, an automobile moving at high speed, a speed which, judging from the position and condition of the car, was probably greater than that mentioned, with the lives of four sleeping men in his keeping, the driver was under the highest degree of duty toward them. There is nothing to qualify the simple fact of falling asleep at the steering wheel; and ordinarily, drowsiness sends out its premonitory signals, a warning which in such circumstances is disregarded by a driver at his peril.

I do not adopt this passage in its entirety because I am not prepared to found any inference of negligence on the basis that there is ordinarily a forewarning of the approach of sleep, but, as I have indicated, I do think that a driver like Coates who continued to drive when he was feeling tired and who had had very little sleep for thirty-six hours before the accident, should have foreseen the danger that he might go to sleep at the wheel and that his doing so under these circumstances involved a breach of duty to his passenger which constituted gross negligence.

In any event, I do not think that the inference of gross negligence to which the circumstances of the accident itself give rise is in any way weakened by the fact that the evidence as a whole makes it more probable than not that the driver went to sleep. It accordingly appears to me that even applying the test suggested by Mr. Justice Robertson in the *Kerr* case, *supra,* there are circumstances here "showing a greater probability that the accident may have happened from gross negligence than from the reasons suggested by the defendant".

I appreciate that this is an appeal in which neither the trial judge nor the Appellate Division of the Supreme Court of Alberta was prepared to draw an inference of gross negligence, but no question arises as to the veracity of the witnesses and this is accordingly a case which is governed by the language used by Lord Halsbury in *Montgomerie & Co. Ltd. v. Wallace-James*[8], at p. 75, which was affirmed by the Privy Council in *Dominion Trust Co. v. New York Life Insurance Co.*[9], at p. 257. Lord Halsbury said, in part:

> . . . where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an Appellate Court.

[8] [1904] A.C. 73.

[9] [1919] A.C. 254.

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In view of all the above, I would allow this appeal and direct that the appellant should have his costs throughout. The appeal being in *forma pauperis* the costs in this Court will be taxed in accordance with the provisions of Rule 142 of the Rules of the Supreme Court. The appellant is accordingly entitled to his special damages and general damages in the amount of $40,000 as assessed by the trial judge.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: MacDonald, Moore, Atkinson, McMahon & Tingle, Calgary.

Solicitors for the defendants, respondents: Fenerty, McGillivray, Robertson, Prowse, Brennan, Fraser, Bell & Code, Calgary.