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*May 10, 13
June 24

ROSEANN MARKLING (now CROOKS), an infant suing by her mother VIOLA BOURQUE as her next friend, (*Plaintiff*) ..... APPELLANT;

AND

JOHN EWANIUK, EVELYN KOLENDRESKI, and MORRIS EWANIUK (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Motor vehicle swerving off highway and crashing into embankment—Driver's vision impaired by headlights of approaching vehicle—Action by gratuitous passenger—Whether wilful and wanton misconduct on part of driver—The Vehicles Act, R.S.S. 1965, c. 377, s. 168(2).

The plaintiff was a gratuitous passenger in an automobile being driven by the defendant K, age 18, who was the holder of a learner's licence. The automobile was owned by the defendant JE who had entrusted it to his son ME. The latter was a licensed operator and was occupy-

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

ing a seat in the automobile beside the driver. While driving at an excessive rate of speed, K was dazzled by the headlights of a car approaching from the opposite direction and although her vision was thus impaired she failed to reduce her speed. After the other car had passed, the subject car swerved to the left and ran for some 75 yards with its left wheels off the pavement until it struck a culvert. It passed over the culvert and then crashed into an embankment. The car was completely demolished and the plaintiff was seriously injured.

The plaintiff's action for damages was dismissed by the trial judge who found that K's negligence was not in the wilful or wanton category. An appeal from the trial judgment was dismissed by the Court of Appeal and the plaintiff then appealed to this Court.

Held: The appeal should be allowed against the respondents JE and K; the appeal against the respondent ME should be dismissed.

No question arose as to the veracity of the appellant's witnesses and the question being one as to the proper inferences to be drawn from truthful evidence, this Court was in as good a position to decide as were the Courts below. Accordingly, considering the evidence as a whole, the Court was of the view that the appellant did establish that the driver K, in the manner in which she was driving at the time of the accident, showed "a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves", and thus there was on her part "wilful and wanton misconduct" within the meaning of s. 168(2) of *The Vehicles Act,* R.S.S. 1965, c. 377. The respondents JE and K were, therefore, liable under the said s. 168(2). No view was expressed as to the liability of ME. The question of liability, if any, of a licensed operator accompanying the holder of a learner's licence pursuant to s. 66(3) of the Act for the negligence or for the wilful and wanton misconduct of that person was left open.

McCulloch v. Murray, [1942] S.C.R. 141; *Studer v. Cowper,* [1951] S.C.R. 450, followed; *Walker v. Coates,* [1968] S.C.R. . . . , referred to, *Montgomerie & Co., Ltd. v. Wallace-James,* [1904] A.C. 73; *Dominion Trust Co. v. New York Life Insurance Co.,* [1919] A.C. 254, applied.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], dismissing an appeal from a judgment of MacPherson J.

Henry C. Rees, Q.C., for the plaintiff, appellant.

J. B. Goetz, Q.C., for the defendants, respondents.

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

HALL J.:—This is an appeal from the Court of Appeal for Saskatchewan[1] which upheld the judgment of MacPherson J. in the Court of Queen's Bench for Saskatchewan, dismissing an action by the appellant for damages sustained

[1] (1967), 62 W.W.R. 383.

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by Roseann Markling (now Crooks) in an automobile accident near Domremy in Saskatchewan at about 12:30 a.m. on June 2, 1963.

Roseann Markling was a gratuitous passenger in an automobile being driven by the respondent Evelyn Kolendreski, age 18, who was the holder of a learner's licence. Section 66 of *The Vehicles Act,* R.S.S. 1965, c. 377, which reads as it did in 1963 relating to learners, is as follows:

> (3) A person holding a learner's licence shall not drive a motor vehicle on a public highway unless accompanied by a licensed instructor, operator or chauffeur occupying a seat beside the driver.

The automobile was owned by the respondent John Ewaniuk who had entrusted it to his son Morris Ewaniuk. Morris was a licensed operator and was occupying a seat in the automobile beside the driver.

The law relating to the liability of a driver and of an owner when any loss, damage or injury is caused by a motor vehicle is set out in s. 168(1) of *The Vehicles Act* of Saskatchewan and the law relating to liability to a gratuitous passenger is set out in s. 168(2). Section 168 reads as follows:

> (1) Subject to subsection (2), when any loss, damage or injury is caused to a person by a motor vehicle, the person driving it at the time is liable for the loss, damage or injury, if it was caused by his negligence or improper conduct, and the owner thereof is also liable to the same extent as the driver unless at the time of the incident causing the loss, damage or injury the motor vehicle had been stolen from the owner or otherwise wrongfully taken out of his possession or out of the possession of a person entrusted by him with the care thereof.
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> (2) The owner or driver of a motor vehicle, other than a vehicle ordinarily used for carrying passengers for hire or gain, is not liable for loss or damage resulting from bodily injury to or the death of a person being carried in or upon or entering, or getting onto, or alighting from the motor vehicle, unless there has been wilful and wanton misconduct on the part of the driver of the vehicle and unless the wilful and wanton misconduct contributed to the injury.

The liability of the owner John Ewaniuk and of the driver Evelyn Kolendreski is governed by s. 168(2) above. The appellant had, therefore, to establish that there had been "wilful and wanton misconduct on the part of the driver of the vehicle and that such wilful and wanton misconduct contributed to the injury".

It is now accepted that the statement by Sir Lyman Duff C.J.C. in *McCulloch v. Murray*[2], that:

> 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.

is the ruling definition or test of what can constitute wilful and wanton misconduct within the meaning of said s. 168 (2): *Studer v. Cowper*[3].

To succeed the appellant had to establish as against the driver and owner that at the time she was injured the automobile was being driven in a manner indicating "a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves".

The learned trial judge made the following findings of fact:

> This is an action for personal damages arising from an automobile accident which occurred at 12:30 a.m. on June 2, 1963. The plaintiff was a gratuitous passenger in an automobile owned by the defendant John Ewaniuk in the care of his son Morris Ewaniuk, who was in the car, and driven by Evelyn Kolendreski, a young lady with whom he was then keeping company. Another young lady, Darlene Youzwa, and a young man were also in the car at the time.
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> * * *
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> These young people got together in Wakaw in the early evening of Saturday, June 1, 1963. They first drove to Cudworth, a distance of about 11 miles, where 12 bottles of beer were purchased for them by a friend because they were too young to buy it legally for themselves. The boys apparently had some other beer in the car because they consumed 2 bottles on the way back to Wakaw without touching the dozen purchased. Having returned to Wakaw, they went to the home of Miss Youzwa where each of the 5 of them consumed 2 bottles of beer of the dozen purchased and the remaining 2 were left behind at Miss Youzwa's home. In the aimless sort of way that young people pursue pleasure they went to the centre of Wakaw and then decided to go to Hoey to a dance, it being then about midnight. There is little doubt in my mind that the suggestion that they go to Hoey came from the plaintiff who was looking for a particular young man. Having decided to go to Hoey they all got back into the car and Miss Kolendreski got behind the wheel as if to drive. The plaintiff and Miss Youzwa then suggested that Morris Ewaniuk should drive because of his greater experience and the fact that they were going on a main highway. To this Miss Kolendreski replied that she would drive only as far as the highway and turn over to Morris. In fact, she did not do this but arriving at the highway turned onto it and proceeded toward Hoey. The plaintiff and Miss Youzwa remonstrated with her

[2] [1942] S.C.R. 141 at 145.

[3] [1951] S.C.R. 450 at 451.

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concerning her speed but this had little effect. Eleven miles from Wakaw the car went into the ditch on the lefthand side of the road, rolled and the passengers were injured in varying degrees, the plaintiff most seriously.

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As she drove on the highway Miss Kolendreski remained quite properly in her own lane until shortly before the accident. Eleven miles from Wakaw a car coming from the opposite direction bore extremely bright lights which dazzled Miss Kolendreski and the plaintiff. Morris Ewaniuk who was sitting in the front seat between Miss Kolendreski and the plaintiff was either asleep or paying little attention because he has no vivid recollection of the lights as do the others. I am inclined to find, as the plaintiff and Miss Youzwa suggest, that both he, in the front, and the other young man in the back were asleep.

In order to encourage the approaching driver to lower his lights, Miss Kolendreski in accordance with well-known practise, raised and lowered her own two or three times but to no avail. After the other car had passed, the subject car swerved to the left, drove for at least 75 yards with the left wheels off the pavement and the right wheels on the pavement until it came to a culvert over an irrigation ditch. The car jumped the culvert and crashed into the embankment on the other side and was completely demolished. It ended up 30 or 40 feet northwest of the culvert in the left ditch.

* * *

There are two factors of negligence, therefore, which have been proved. Firstly, her failure to slow down significantly when her vision was impaired by the brilliance of the approaching lights; secondly, her swerve to the left.

and he concluded:

In my view the accident was due to the inexperience of Miss Kolendreski in handling what to experienced drivers is a not unusual situation, namely, the negligence of another driver failing to dim glaring lights. Her negligence was due to inexperience and is not in the wilful or wanton category.

As to credibility, he said:

At the time of the accident the plaintiff was 16, Miss Youzwa was 17, Miss Kolendreski and Morris Ewaniuk were 18. There was considerable conflict in the evidence between the plaintiff and Miss Youzwa on the one hand and Miss Kolendreski and Morris Ewaniuk on the other. The former were very clear and definite whereas the latter were extremely vague and uncertain and for this reason in determining the facts I have chosen to accept the evidence of the plaintiff and Miss Youzwa where it is in conflict with that of the defendants, except in the instances mentioned below. These defendants seemed unable to recall even the principal facts of the evening.

The appellant accepts these findings, but contends that the learned trial judge erred in certain other findings of fact as follows:

(1) When he said:

I have difficulty in accepting the plaintiff's statement that Miss Kolendreski was driving the car at 70 miles an hour and faster. It is

difficult enough for an experienced person to determine the speed of a car in which he is travelling. At that time the plaintiff was 16 years of age and quite inexperienced. She says she looked from her position on the extreme righthand side of the driver's seat and saw the speedometer needle at 70 m.p.h. I have no doubt that she looked but I do not believe that the angle of her view would give her an accurate reading. I have no doubt that the car which was a new one of the current year, and powerful, was capable of considerable speed but I cannot accept the evidence of great speed which comes from the plaintiff alone. If I have her evidence noted correctly, Miss Youzwa felt that Miss Kolendreski was driving too fast but did not attempt to estimate the speed.

As to this, it must be noted that there was no evidence as to the location of the speedometer or as to what a person in the position of Roseann Markling could see, and consequently nothing which would justify the learned trial judge in rejecting her evidence. Then, as to the witness Miss Darlene Youzwa, he was in error in stating that she had not attempted to estimate the speed. Her evidence on this point is as follows:

Q. Said nothing. Well now from there on what speed did you attain in your estimation on that trip?
A. I don't know, I'd say at least 70, 75 even, you know to me this is what I thought it was at least.

THE COURT: How old were you at that time?
A. I was 17.

THE COURT: Did you have any particular experience in judging speed of vehicles?
A. Not really no but I don't know I still feel that you can more or less feel the speed you are going at if you are speeding, I think you can more or less tell that you are speeding, that you don't have to look at a speedometer in order to see if you are going over 60 or whatever it is.

(2) That the accident appears to have occurred some 75 yards north of where the vehicles met.

The learned trial judge did not make a finding as to where the automobile being driven by the respondent Evelyn Kolendreski met the southbound vehicle with the bright lights. The evidence appears to establish quite conclusively that the vehicles met just south of the railway crossing. Miss Youzwa testified that they met "about a car length before the tracks". Roseann Markling testified that the vehicles met right at the railroad crossing. There was no other evidence on the point. The accident occurred some 450 yards north of the railway crossing so that the vehicle with the bright lights had gone its way and disappeared southwards before the Ewaniuk automobile continuing northward

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eventually went across the centre of the highway and ran for some 75 yards partly in the west ditch and partly on the pavement and then struck a culvert, passing over the culvert and crashing into the embankment on the other side. The impact was a severe one, for as the learned trial judge said, the automobile was completely demolished.

The appellant contends that the circumstances established in evidence which may be summarized as set out below speak for themselves and constitute *prima facie* evidence that the driver Evelyn Kolendreski showed "a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves". The circumstances relied on in this regard by the appellant are:

(1) The driver was inexperienced and possessed only a learner's licence;

(2) She was driving at an excessive speed;

(3) She continued to drive at an excessive speed when asked to slow down by her passengers Roseann Markling and Darlene Youzwa;

(4) She continued to drive at an excessive speed when it must have been apparent to her that the licensed operator who, by s. 66 of *The Vehicles Act* of Saskatchewan was required to be beside her, was asleep;

(5) She continued to drive after reaching the highway when she had undertaken to drive only to the highway;

(6) She failed to slow down significantly when her vision was impaired by the lights of the approaching vehicle, but instead increased her speed, saying "I must speed up to get away from these lights".

(7) She ran off the left side of the road and into the west ditch on a straight stretch of road without the intervention of any other traffic, obstacle or object some 375 yards north of where the vehicles met.

This case is similar in many respects to the case of *Walker v. Coates et al.*[4] The facts in *Walker v. Coates* were that Barry Alan Coates was driving his Volkswagen automobile when, at about 3:30 a.m. on September 22, 1963, when the vehicle was being driven south towards Banff on a two-lane paved highway 36½ feet in width, 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 or left edge of the highway. There were no skid

[4] [1968] S.C.R. 599.

marks where the car approached the sign and the force of the impact was evidently very great. The driver Barry Alan Coates was killed and the passenger Walker injured. Walker was asleep in the back seat of the car at the time and could give no evidence as to how the accident had happened. It was contended on behalf of the appellant Walker that the circumstances of the accident spoke for themselves and constituted *prima facie* evidence of the fact that in driving his Volkswagen as he did at a high rate of speed across the centre line of the highway and across the left lanes so as to collide forcibly with the 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". Speaking for the Court, Ritchie J. said in this regard:

> 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*, [1931] S.C.R. 407 at p. 411 and *Parent v. Lapointe*, [1952] 1 S.C.R. 376 at p. 381, in the terms in which it was stated by the Exchequer Chamber in *Scott v. London and St. Katherine Docks Company*, (1865), 3 H. & C. 596, where it was said:
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> > There must be reasonable evidence of negligence.
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> > 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 defendant, that the accident arose from want of care.
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> 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.
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> This proposition was advanced by Ruttan J. sitting at trial in the case of *Ball v. Kraft*, (1967), 60 D.L.R. (2d) 35, where he said, at p. 39:
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> > . . . *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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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,* [1933] P. 154, where Langton J., sitting alone, approved the dissenting judgment of Lord Dunedin in the Scottish case of *Ballard v. North British Railway, Co.,* [1923] S.C. (H.L.) 43 at 54. 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.

In the *Walker v. Coates* case it was established in evidence that Barry Alan Coates knew he was tired and sleepy when he set out for Banff, and it was established that he had had very little sleep for 36 hours before the accident.

I am aware that this is an appeal in which neither the trial judge nor the Court of Appeal for Saskatchewan was prepared to draw an inference of wilful and wanton misconduct, but as no question arises as to the veracity of the appellant's witnesses this is, I think, a case which is governed by the language of Lord Halsbury in *Montgomerie*

& Co., Ltd. v. Wallace-James[5], which was affirmed by the Privy Council in *Dominion Trust Co. v. New York Life Insurance Co.*[6] 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.

Accordingly, considering the evidence as a whole, I am of the view that the appellant did establish that the driver Evelyn Kolendreski, in the manner in which she was driving at the time of the accident, showed "a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves".

The respondents John Ewaniuk and Evelyn Kolendreski are, therefore, liable under s. 168(2) of *The Vehicles Act* of Saskatchewan. I express no view as to the liability of Morris Ewaniuk. The question of the liability, if any, of a licensed operator accompanying the holder of a learner's licence pursuant to s. 66(3) of *The Vehicles Act* of Saskatchewan for the negligence or for the wilful and wanton misconduct of that person is left open.

The appeal should, therefore, be allowed against the respondents John Ewaniuk and Evelyn Kolendreski with costs here and in the Courts below and judgment should be entered against them in favour of the appellant for the amount fixed by the learned trial judge, namely, the sum of $12,000. The appeal and the action against the respondent Morris Ewaniuk should be dismissed without costs here or in the Courts below.

RITCHIE J.:—I have had the advantage of reading the reasons for judgment of my brother Hall and I fully agree that this appeal should be disposed of in the manner which he suggests, but I would like to make it plain that I do not consider this to be a case to which the maxim *res ipsa loquitur* is applicable. Here there is direct evidence of the negligence which forms the basis of the finding of liability

[5] [1904] A.C. 73 at 75.

[6] [1919] A.C. 254 at 257.

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against Evelyn Kolendreski and it is therefore unnecessary to have resort to the rule which is embodied in the maxim to which I have referred.

Appeal allowed against owner and driver with costs; appeal against licensed operator accompanying driver dismissed without costs.

Solicitors for the plaintiff, appellant: Rees, Shmigelsky, Angene & Carey, Saskatoon.

Solicitors for the defendants, respondents: Goetz & Murphy, Regina.