1969
*Feb. 27
May 16

FANNY EID, Administratrix of the Estate of Ole Eid, Deceased, (*Plaintiff*);

AND

GILLES CHARLES DUMAS (*Defendant*).

BY AMENDMENT:

GLORIA HATHERLY, Administratrix *de bonis non* of the Estate of Ole Eid, Deceased, (*Plaintiff*) ..... APPELLANT;

AND

GILLES CHARLES DUMAS (*Defendant*) ..RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Negligence—Motor vehicle accident—Driver falling asleep—Passenger killed—Driver grossly negligent—Defence of volenti non fit injuria—Whether deceased guilty of contributory negligence.

E was the supervisor of a mining crew of which the defendant was a member. The latter, after having worked a 12-hour daytime shift at the bottom of a 600-foot shaft, was persuaded by E, with reluctance, to drive him to a dance, at a place some 30 miles from the mine. The party lasted until 2 o'clock the next morning, and, thereafter, E insisted on being driven to the home of a friend, where he remained until about 4 a.m. During the greater part of the evening and particularly during the last two hours, the defendant repeatedly suggested that they should go home and more than once pointed out he was tired. E was drinking throughout the evening but the defendant only had one drink which he consumed shortly after arriving. When E finally consented to leave, he got into the passenger seat of the car and "just said a few words and then fell asleep".

After he had been driving towards home for a little while, the defendant got out of the car to relieve himself and left the front window down and the air conditioning turned on. Later, he wanted to stop again for a rest but he dozed off before the vehicle was brought to a stop. The car left the road, went into a ditch and struck a culvert, and as a result of the accident E suffered injuries which caused his death.

In an action brought by the plaintiff under the *Fatal Accidents Act*, R.S.N.B. 1952, c. 82, as administratrix of the deceased, the trial judge found that the defendant's action in going to sleep at the wheel of his car and thus causing it to leave the road amounted to gross negligence. The trial judge found also that the circumstances under which E embarked on the drive were such as to give rise to the inference that he had voluntarily accepted the risk of the defendant going to sleep and that the rule embodied in the maxim *volenti non fit injuria* applied so as to preclude the plaintiff from bringing the

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

action. On appeal, the Court of Appeal affirmed the dismissal of the action. An appeal from the judgment of the Court of Appeal was then brought to this Court.

Held (Martland J. dissenting in part): The appeal should be allowed.

Per Cartwright C.J. and Ritchie, Hall and Pigeon JJ.: Neither when the defendant and E left the mine nor when E finally entered the car at 4 a.m., befuddled by alcohol, was the situation such as necessarily to lead to the conclusion that he had taken upon himself the whole risk of being injured as a result of the grossly negligent driving of the defendant, nor was the evidence such as to justify the conclusion that the defendant accepted him into his automobile on any such footing.

E did not actively contribute to the accident by any negligent act on his part; he was merely a passive victim and not responsible for the way the car was driven. He was incautious in embarking on the return journey with the defendant in the sense that it was 4 a.m. and he knew that his driver had been working for 12 hours on the day before, but no degree of fault could be attributed to E because the conscious act of the defendant in continuing to drive when he knew that he was sleepy was not conduct which could have been reasonably foreseen by his passenger.

Per Martland J., *dissenting in part:* The appeal should succeed only as to a portion of the damages involved. In the light of *Lehnert v. Stein, infra,* the defendant could not rely, successfully, upon the defence of *volenti non fit injuria.* However, there was contributory negligence on the part of E and he was responsible, in part, for the accident. By his own conduct, E had contributed to the physical condition of the defendant which led to the accident.

[*Yarmouth v. France* (1887), 19 Q.B.D. 647; *Lehnert v. Stein,* [1963] S.C.R. 38; *Car and General Insurance Corporation Ltd. v. Seymour and Maloney,* [1956] S.C.R. 322; *Nance v. British Columbia Railway Co. Ltd.,* [1951] A.C. 601; *Guay v. Picard,* [1964] B.R. 348, affirmed [1965] S.C.R. vi, referred to.]

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division[1], affirming a judgment of Dickson J. Appeal allowed, Martland J. dissenting in part.

P. A. A. Ryan, for the plaintiff, appellant.

D. M. Gillis, Q.C., and *J. T. Jones,* for the defendant, respondent.

The judgment of Cartwright C.J. and of Ritchie, Hall and Pigeon JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of New Brunswick[1] affirming the dismissal of an action brought by the appellant under the *Fatal*

[1] (1968), 68 D.L.R. (2d) 261.

1969

EID
v.
DUMAS

HATHERLY
v.
DUMAS

Ritchie J.

Accidents Act as administratrix of the late Ole Eid for funeral expenses and on behalf of the estate of his widow and his minor and dependent son for compensation for the pecuniary loss suffered by them as a result of his death while he was being driven by the respondent in the respondent's motor vehicle.

The judgment appealed from dismissed an appeal from the judgment rendered at trial by Dickson J., whereby he found that the respondent's action in going to sleep at the wheel of his car and thus causing it to leave the road in the manner hereinafter described while driving the late Mr. Eid home from a dance at 4 a.m. on July 9, 1966, amounted to gross negligence. The learned trial judge found also that the circumstances under which Eid embarked on the drive were such as to give rise to the inference that he had voluntarily accepted the risk of the respondent going to sleep and that the rule embodied in the maxim *volenti non fit injuria* applied so as to preclude the appellant from bringing this action.

The circumstances surrounding and immediately preceding the accident which resulted in Mr. Eid's death, when the car left the road, have been fully described both by the trial judge and by the Chief Justice of New Brunswick who rendered the judgment on behalf of the majority of the Court of Appeal, but as I take a somewhat different view of their legal effect than that which was entertained by the Courts below, it will be necessary to review them briefly.

Mr. Eid was a man of 56 years of age and the respondent, who was only 29, was a shaftsman employed by a mining development company where he was a member of a crew working under the supervision of Mr. Eid on a 12-hour daytime shift at the bottom of a 600-foot shaft. On several occasions during the first week in July, 1966, Eid had approached the respondent asking him to drive him over to a dance at a Legion Hall about 30 miles from the mine on the night of Friday July 8 and the respondent finally, although reluctantly, consented to do this with the result that, after having put in a full day's work, he found himself attending a party which lasted until 2 o'clock in the morning, after which the older man insisted on being driven to the home of a friend where he had more to drink and from which he would not agree to go home until about 4 a.m. It should be stressed that during the greater part of the

evening and particularly during the last two hours, the respondent repeatedly suggested that they should go home and more than once pointed out that he was tired. Mr. Eid was drinking throughout the evening while the learned trial judge found that the respondent only had one drink which he consumed shortly after arriving. When Mr. Eid finally consented to leave, he got into the passenger seat of the car and "just said a few words and then fell asleep".

After he had been driving towards home for a little while, the respondent got out of the car to relieve himself and left the front window down and the air conditioning turned on. I am persuaded that the respondent had a forewarning of sleep because he made a statement to the police which was admitted in evidence in which he said:

> I wanted to go home but Ole wanted to stay. Finally we left this house and headed back towards the Mine, the same road we came on. Ole was asleep on the right side of the front seat. I got sleepy and wanted to stop for a rest, but I dozed off before I got stopped and I woke when the car hit the culvert. I was travelling maybe 30 or 40 M.P.H. I had been drinking maybe one or two glasses of rum but not enough to affect my driving.

In giving evidence at the trial, the respondent stated that he had at no time felt tired or experienced any premonition of being tired, and although at one point the learned trial judge appears to have accepted this statement, he later reconsidered this finding and said:

> Even though he disclaims awareness of premonitory signals of fatigue, it is inconceivable to me that they were not present and there for him to regard plainly if he so chose.

When the respondent dozed off the car was proceeding along a straight piece of paved highway 20 feet wide with a 3-foot gravelled shoulder on either side and it went off the pavement onto the right shoulder, tipped over sideways as its right wheels entered an appreciable ditch beside the road, knocked down a mailbox post located near the edge of the shoulder, snapped off a guy wire supporting a telephone pole near a culvert, and brought up with sudden force against the culvert which extended across the ditch. The wheels of the car left no mark on the pavement but the left wheels left an impression on the shoulder and in the ditch which extended 142 feet from where they entered on the shoulder. The tracks of the wheels did not suggest that the brakes had been applied.

1969

EID v. DUMAS

HATHERLY v. DUMAS

Ritchie J.

In the Province of New Brunswick, by virtue of s. 242(1) of the *Motor Vehicle Act*, 1955, c. 13, no gratuitous passenger has a cause of action for damages against the owner or driver of a motor vehicle

> ...for injury, death or loss, in case of accident, unless the accident was caused by the gross negligence or wilful and wanton misconduct of the owner or driver 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.

Having regard to the way in which the motor vehicle was operated immediately before and at the time of the accident, and to the fact that the respondent fell asleep as he did while driving, I agree with the finding of the learned trial judge that his conduct amounted to gross negligence, and that he is therefore deprived of the defence which would otherwise have been available to him under the last-quoted section of the *Motor Vehicle Act*

In the present case the defence of *volenti non fit injuria* is pleaded in the following form:

> In the alternative, the Defendant says that if the Defendant was negligent as alleged (which is not admitted but expressly denied), that the said deceased OLE EID voluntarily assumed the risk of injury from such negligence by requesting the Defendant to wait for him until a late hour and the Defendant pleads and relies on *volenti non fit injuria.*

With respect to this defence, it was said many years ago by Lindley L.J., in the case of *Yarmouth v. France*[2], that:

> The question in each case must be, 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.

As pointed out by Bridges C.J.N.B., the rule embodied in the maxim *volenti non fit injuria* was discussed by the present Chief Justice speaking on behalf of the majority of this Court in *Lehnert v. Stein*[3], where he said, in reference to the case of *Car and General Insurance Corporation Ltd. v. Seymour and Maloney*[4]:

> That decision establishes that where a driver of a motor vehicle invokes the maxim *volenti non fit injuria* as a defence to an action for damages for injuries caused by his negligence to a passenger, the burden lies upon the defendant of proving that the plaintiff, expressly or by

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[2] (1887), 19 Q.B.D. 647 at 660.
[3] [1963] S.C.R. 38.
[4] [1956] S.C.R. 322.

necessary implication, agreed to exempt the defendant from liability for any damage suffered by the plaintiff occasioned by that negligence, and that, as stated in *Salmond on Torts*, 13th ed., p. 44:

> The true question in every case is: 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?

I think it proper to point out also that in the same case the majority of the Court adopted the following passages from Mr. Glanville Williams' work Joint Torts and Contributory Negligence (1951), at p. 308:

> It is submitted that the key to an understanding of the true scope of the *volens* maxim lies in drawing a distinction between what may be called physical and legal risk. Physical risk is the risk of damage in fact; legal risk is the risk of damage in fact for which there will be no redress in law.
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> * * *
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> To put this in general terms, the defence of *volens* does not apply where as a result of a mental process the plaintiff decides to take a chance but there is nothing in his conduct to show a waiver of the right of action communicated to the other party. 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 has been indicated, the project of driving to the Legion dance was born in the mind of Mr. Eid and the respondent was persuaded against his will to make himself and his car available for the trip, but with the greatest respect for the opinion of the trial judge and the majority of the Court of Appeal, I do not think it can be said that, either when they left the mine or when Mr. Eid finally entered the car at 4 a.m., befuddled by alcohol, the situation was such as necessarily to lead to the conclusion that he had taken upon himself the whole risk of being injured as a result of the grossly negligent driving of the respondent, nor do I think that the evidence is such as to justify the conclusion that the respondent accepted him into his automobile on any such footing. Although the respondent had complained of being tired during the evening, he stated in cross-examination that the true situation was that he was "fed up" with the party and that his complaints were "only an excuse so we could go". His own assessment of his condition before leaving at 4 a.m. was: "I was outside for quite a while and I was feeling all right." I take it from this evidence that when he started on the journey home the respondent had no

1969

EID
v.
DUMAS

HATHERLY
v.
DUMAS

Ritchie J.

reason to expect that there was any risk of his going to sleep at the wheel and I do not think that any such expectation can be attributed to his passenger.

Although the learned trial judge found that Mr. Eid must be considered to have been *volens,* he went on to consider the question of contributory negligence in case his first finding should be "the subject of consideration in subsequent proceedings". The learned trial judge's finding in this regard is as follows:

> ...I am of the opinion that the accident and the resultant death were caused in substantial measure by the deceased delaying, when he should have appreciated the possible consequences, the defendant in returning home. The deceased was particularly aware of the hours the defendant had worked, not only that day but through the whole week. He also knew that the defendant's duties in his work were most onerous, carried out as they were at the bottom of a 600-foot mine shaft with a heavy apparatus hauling excavated material to the surface over his head. Further, once in the car, instead of assisting the defendant in getting them safely back to camp by engaging in conversation or otherwise assisting in keeping him awake, the deceased immediately went to sleep and left the defendant on his own. The deceased must therefore be considered guilty of contributory negligence and I would apportion the fault two-thirds against the deceased and one-third against the defendant.

I do not think that any duty rested upon Mr. Eid to engage the respondent in conversation while they were driving and although he was aware of the hard work done by the respondent from day to day, I am, with the greatest respect, unable to agree that the delays for which Eid was responsible can be classified as negligence which contributed to the accident.

In my view Eid cannot be said to have actively contributed to the accident by any negligent act of his; he was merely a passive victim and not responsible for the way the car was driven, but the doctrine of contributory negligence is not confined to cases in which the plaintiff actively participates in the result; it is equally applicable where a plaintiff fails to take reasonable steps to protect himself from the consequences of the defendant's negligence. This appears to me to have been recognized in this Court in *Car and General Insurance Corporation Ltd. v. Seymour and Maloney, supra,* at p. 332, and also in the well-known judgment of Viscount Simon in *Nance v. British Columbia Electric Railway Co. Ltd.*[5] I think, therefore, that the question to be determined in this case is whether, when Mr. Eid

[5] [1951] A.C. 601 at 611.

allowed himself to be driven home by the respondent at 4 a.m., he showed such a disregard for his own safety as to relieve the respondent from a proportion of the responsibility for the tragic consequences which ensued.

It might perhaps be said that Eid was imprudent to expose himself to the possibility of his driver being tired and dropping off to sleep, but although the hour was late, the respondent was sober and the contemplated drive was a short one of 30 miles. Under all the circumstances, I do not think that there was any reason for Eid to foresee that Dumas would continue to drive after he knew that he was sleepy and when he "wanted to stop for a rest". I do not think that gross negligence of this kind can be said to be a reasonably foreseeable risk against which the passenger is required to protect himself at the risk of being found to have been guilty of contributory negligence.

I am fortified in this opinion by the case of *Guay v. Picard*[6], which was affirmed without reasons in this Court[7], in which the driver, who was 28 years of age, started out from Quebec at 3 a.m. with two others, drove to St. Simeon arriving at 6:30, and spent the entire day fishing, commencing the return journey at 8:30 in the evening. On the drive home he fell asleep and lost control of the car which went off the road, injuring the plaintiff. The defence of *volenti non fit injuria* and contributory negligence were both raised and after somewhat unsatisfactory answers had been given by the jury, the passenger plaintiff was awarded 55 per cent of the amount found by the jury. This award was set aside in the Court of Queen's Bench for the Province of Quebec where it was found there was no contributory negligence.

As I have indicated, I take the view that the act of Eid in embarking on the return journey with the respondent was an incautious one in the sense that it was 4 o'clock in the morning and he knew that his driver had been working for 12 hours on the day before, but I do not think that any degree of fault can be attributed to Eid because the conscious act of the respondent in continuing to drive when he knew that he was sleepy was not conduct which could have been reasonably foreseen by his passenger.

I would accordingly allow this appeal, set aside the judgments of the Courts below and give judgment for the

[6] [1964] B.R. 348.

[7] [1965] S.C.R. vi

1969

EID
v.
DUMAS

HATHERLY
v.
DUMAS

Ritchie J.

appellant in her capacity as administratrix of the late Mr. Eid and on behalf of the estate of his widow and of his minor and dependent son in the amount of the damages assessed by the learned trial judge.

The appellant will have her costs in this Court and in the Courts below.

MARTLAND J. (*dissenting in part*):—The facts of this case have been outlined in the reasons of my brother Ritchie. I am in agreement with him that, in the light of the decision of this Court in *Lehnert v. Stein*[8], the respondent cannot rely, successfully, upon the defence of *volenti non fit injuria*. With respect, however, I am unable to concur in the conclusion that there was no contributory negligence on the part of the deceased, Ole Eid.

The learned trial judge has found that the gross negligence of the respondent was "in dozing off and driving off the road." The reason why this occurred is clear. The respondent, after working a 12-hour, daytime shift at the bottom of a 600-foot shaft, with reluctance, had been persuaded by Eid, who was his supervisor at the mine, to drive him to a dance, at a place some 30 miles from the mine. The party lasted until 2 o'clock the next morning, and, thereafter, Eid insisted on being driven to the home of a friend, where he remained until about 4 a.m. The drive to return to the mine did not commence until then.

In my opinion, the drowsy condition of the respondent, which ultimately resulted in the accident, was caused, at least in part, by Eid himself, as a result of his demands upon the respondent. This is not a case in which the defendant seeks to impose part of the responsibility for an accident on the basis that, although himself negligent, the plaintiff failed to exercise reasonable care for his own safety. This is a case in which the plaintiff himself was a participant in actually causing the accident, and, if that is so, such conduct is clearly contributory negligence. I do not see how it would lie in the mouth of Eid, having helped to create the drowsy condition of the respondent, to say that, when that condition resulted in the respondent's dozing off and driving off the road, the responsibility for the accident rested solely with the respondent.

[8] [1963] S.C.R. 38.

With respect, I do not agree that the question to be determined in this case is whether, when Eid allowed himself to be driven by the respondent at 4 a.m., he showed such a disregard for his own safety as to relieve the respondent from a proportion of the responsibility for the accident. The question is rather whether Eid, by his own conduct, contributed to the physical condition of the respondent which led to the accident. This is not the simple case of a passenger accepting a lift from someone who, he knows, is short of sleep. It is a case in which a passenger, having caused that condition, seeks to recover 100 per cent of the damage which ultimately results from it.

Nor am I in agreement with the conclusion that there was a conscious act on the part of the respondent in driving when he knew that he was drowsy. The evidence on this point is only that:

> I got sleepy and wanted to stop for a rest, but I dozed off before I got stopped.

The respondent had become too drowsy to be able to make the conscious effort of will necessary to bring his car to a stop.

In my opinion, therefore, there was contributory negligence on the part of Eid and he was responsible, in part, for the accident. Because of the views of the other members of the Court as to liability, there is no point in my expressing any opinion as to what would be the appropriate division of responsibility.

In my opinion the appeal should succeed only as to a portion of the damages involved.

Appeal allowed with costs, MARTLAND J. *dissenting in part.*

Solicitors for the plaintiff, appellant: Ryan & Graser, Fredericton.

Solicitors for the defendant, respondent: Gilbert, McGloan & Gillis, Saint John.