1962
*Oct. 10, 11
Nov. 30

KURT WALTER LEHNERT (*Defendant*) ..... APPELLANT;

AND

STEPHANIE STEIN (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Driver under influence of liquor to extent unable to safely drive his car—Passenger injured in accident—Volenti non fit injuria not applicable—Distinction between physical and legal risk.

Quantum of damages—Trial judge's assessment varied by Court of Appeal—Amount fixed by Court of Appeal not interfered with by Supreme Court.

The defendant met the plaintiff and her lady friend in a downtown restaurant and invited them to accompany him to a suburban night club. The defendant had been drinking, but there was no evidence to indicate the plaintiff knew how much he had consumed prior to his arrival at the restaurant; before leaving the restaurant the plaintiff and her companion had a drink with the defendant. At the night club the defendant was served with approximately 10 ounces of liquor in less than two hours, and during that time his guests accepted one drink each. There was some discussion between the plaintiff and her friend before leaving the club as to ordering a taxi, but the defendant said he would drive them home and they went with him. While driving his car the defendant had an accident, as a result of which the plaintiff suffered serious personal injuries. In an action for damages, the trial judge found that the accident was caused by the gross negligence of the defendant and this finding was not questioned in the Court of Appeal or before this Court. The action was dismissed on the ground that the plaintiff was *volens*. The Court of Appeal, by a majority judgment, allowed the appeal holding that the plaintiff was not *volens* but was guilty of contributory negligence to the extent of 25 per cent. The defendant appealed to this Court.

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

Per Cartwright, Martland, Judson and Ritchie JJ.: The defence of *volenti non fit injuria* did not apply in this case. The plaintiff, although apprehensive that the defendant would drive negligently and that an accident might result, decided to take a chance and go with him; she thereby incurred physical as distinct from legal risk. There was nothing to warrant a finding that she decided to waive her right of action should she be injured or that she communicated any such decision to the defendant. *Car and General Insurance Corporation Ltd. v. Seymour and Maloney*, [1956] S.C.R. 322, applied; *Miller v. Decker*, [1957] S.C.R. 624, distinguished; *Slater v. Clay Cross Co., Ltd.*, [1956] 2 All E.R. 625; *Dann v. Hamilton*, [1939] 1 K.B. 509, referred to.

As to the quantum of damages, this Court is slow to interfere with the amount fixed by a provincial Appellate Court which, as in the present case, has varied the assessment made by the trial judge. The amount fixed by the Court of Appeal was not excessive. *Lang et al. v. Pollard et al.*, [1957] S.C.R. 858, referred to.

*PRESENT: Kerwin C.J. and Cartwright, Martland, Judson and Ritchie JJ.

Per Kerwin C.J., *dissenting:* The burden resting upon the defendant of proving that the plaintiff expressly, or by necessary implication, agreed to exempt the defendant from liability for any damages suffered by the plaintiff occasioned by the former's negligence was met.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], allowing an appeal from a judgment of Campbell J. Appeal dismissed, Kerwin C.J. dissenting.

F. D. Allen, for the defendant, appellant.

J. F. O'Sullivan and *S. I. Schwartz,* for the plaintiff, respondent.

THE CHIEF JUSTICE (*dissenting*):—The question of the applicability of the maxim of *volenti non fit injuria* is settled by the decisions of this Court in *Car and General Insurance Corporation Ltd. v. Seymour and Maloney*[2] and *Miller v. Decker*[3]. Difficulties arise in applying the maxim, as appears from the reasons for judgment in those two cases and in the present appeal. Upon a review of the evidence, I find myself in agreement with Mr. Justice Tritschler, who gives the testimony in detail applicable to the point. It might be noted that the Chief Justice of Manitoba was in error in deciding that the important stage at which the matter should be considered was when the plaintiff left the Ivanhoe and I understand that the other Members of this Court agree that the relevant time was when the plaintiff left the Rancho. For the reasons given by Mr. Justice Tritschler, I have concluded that the burden resting upon the defendant of proving that the plaintiff expressly, or by necessary implication, agreed to exempt the appellant from liability for any damages suffered by the plaintiff occasioned by that negligence has been met.

I would allow the appeal with costs here and in the Court of Appeal and restore the judgment at the trial, but there should be no costs of the motion before us to quash the appeal and of the motion for leave to appeal.

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

CARTWRIGHT J.:—This appeal raises questions of importance as to the applicability of the maxim *volenti non fit injuria* on which there has been divergence of opinion among the learned judges in the Courts below.

[1] (1962), 37 W.W.R. 267, 31 D.L.R. (2d) 673.
[2] [1956] S.C.R. 322, 2 D.L.R. (2d) 369.
[3] [1957] S.C.R. 624, 9 D.L.R. (2d) 1.

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The action was brought by the respondent for damages for serious personal injuries suffered by her while being transported by the appellant in his motor vehicle as his guest without payment for the transportation. The accident happened at about 11.05 p.m. on May 7, 1959; the learned trial judge found that it was caused by the gross negligence of the appellant. This finding which, under the terms of s. 99(1) of *The Highway Traffic Act,* R.S.M. 1954, c. 112, was essential to the respondent's cause of action was not questioned in the Court of Appeal or before us.

The learned trial judge dismissed the action on the ground that the respondent was *volens.* He went on to say that had he held she was not *volens* he would have found her guilty of contributory negligence and apportioned seventy-five per cent of the responsibility to her. He made a provisional assessment of her special damages at $7,850.58 and of her general damages at $12,000.

The Court of Appeal, by a majority judgment, allowed the appeal holding that the respondent was not *volens* but was guilty of contributory negligence to the extent of twenty-five per cent and that her general damages should be assessed at $18,000. Judgment was accordingly entered in her favour for $19,387.93 and costs. Tritschler and Guy JJ.A., dissenting, would have dismissed the appeal.

The appellant asks that the judgment at the trial be restored; alternatively he asks that the findings of the learned trial judge as to the degree of contributory negligence and the quantum of damages be restored.

The respondent supports the judgment of the Court of Appeal and does not attack the finding that she was guilty of contributory negligence to the extent of twenty-five per cent.

The learned trial judge did not regard either the respondent or her companion, Mrs. Hartogsveld, as a convincing witness. The majority in the Court of Appeal did not vary any finding of fact as to the events preceding the moment of the accident on which there was a conflict of testimony, but took the view that the learned trial judge was mistaken in the inferences which he drew from the primary facts.

The defendant filed a statement of defence and was examined for discovery but at the time of the trial his whereabouts were unknown and his defence was conducted

by counsel instructed, pursuant to s. 154 of *The Highway Traffic Act*, R.S.M. 1954, c. 112, by the Provincial Treasurer who also instructed counsel on the appeals to the Court of Appeal and to this Court.

On the day of the accident the defendant was drinking at the noon hour and at dinner-time in the evening; after dinner he proceeded to the Ivanhoe Restaurant in downtown Winnipeg, where he had another drink. At that restaurant he met the plaintiff and her friend, Mrs. Hartogsveld, who were having dinner; he invited them to accompany him to the Rancho Don Carlos, hereinafter referred to as "the Rancho", a night club in the suburbs of the City of Winnipeg, where meals and alcoholic beverages were served and there was a floor show. The plaintiff and Mrs. Hartogsveld had a drink with the defendant before leaving the Ivanhoe and, having accepted his invitation, they left with him for the Rancho and arrived there about 9:00 p.m.

There is no evidence to indicate that the plaintiff knew how much drinking the defendant had done prior to his arrival at the Ivanhoe. It appears that the defendant, who is an architect, was a well-known habitué of the Rancho; the waitresses knew him and knew that he could "handle" a substantial amount of liquor; they served him four "doubles", totalling about 10 ounces of rye whiskey, in less than two hours. The plaintiff knew that the defendant was drinking. The plaintiff and Mrs. Hartogsveld accepted one drink each but refused any more. The waitresses realized that the defendant was getting noisy and thought he had had too much to drink but did not refuse to serve him liquor when he ordered it. The plaintiff did not know the defendant well but had been out with him before. The evidence is silent as to whether he consumed liquor on those occasions, but the plaintiff said on her examination for discovery, which the learned trial judge accepted in preference to her evidence at the trial, that the defendant always drove too fast, paid no attention to any protest, that driving with him made her sick, that she was always afraid of an accident when driving with him and that she was afraid on the drive from the Ivanhoe to the Rancho.

There was some discussion between the plaintiff and Mrs. Hartogsveld before leaving the Rancho as to ordering a taxi in which to go home but the defendant said he would

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drive them home and they went with him. The learned trial judge rejected the explanations of the plaintiff and Mrs. Hartogsveld that they did this because the defendant had their coat checks and they felt under a social obligation to go with him because of the entertainment he had provided for them. The learned trial judge said at this point:

> These excuses are of the weakest nature. Both of these women were sufficiently mature to stand up for themselves but obviously decided to take their chances.

The critical point of time is when the plaintiff got into the defendant's car to be driven home from the Rancho. The finding of the learned trial judge that the condition of the defendant at this point "was produced by a quantity of alcohol sufficient to cause him to lose control of his faculties to such an extent that he was unable to safely drive his car" was supported by the evidence and was not challenged before us.

While it is obvious that the plaintiff knew that the defendant had been drinking, the evidence does not establish that she was aware that he was intoxicated to the extent found by the learned trial judge. The plaintiff deposed that the defendant was not drunk and that he did not appear to have been affected by the liquor he had taken. The witness John Campbell who was with the plaintiff and the defendant during part of the time they were at the Rancho (but not when they left) said that he thought the defendant "was normal". It is of some significance that no one at the Rancho appears to have made any suggestion that the defendant ought not to drive. There is no evidence that the defendant had ever previously been involved in an accident.

After reading all the evidence with care, in the light of the observations made by the learned trial judge as to the reliability of the witnesses, it appears to me that the facts on which, in this case, the applicability of the maxim *volenti non fit injuria* depends may be summarized as follows.

When the plaintiff entered the defendant's car at the Rancho to be driven home she was under no compulsion, legal or practical, to do so. At that moment the defendant was in fact under the influence of liquor to such an extent as to increase the chances of a collision resulting from his negligence and, while I am doubtful whether the evidence establishes it, I assume for the purposes of this appeal that

the plaintiff was aware of this. The plaintiff was afraid to go with the defendant, primarily because on the previous occasions when she had done so he drove too fast and paid no attention to any remonstrance, but also (I will assume) because she knew he had been drinking. In spite of this she went with him because he urged her to do so and she lacked the resolution to refuse.

On these facts I agree with the conclusion of the majority in the Court of Appeal that the maxim has no application.

The decision of this Court in *Car and General Insurance Corporation Ltd. v. Seymour and Maloney*[1] renders it unnecessary to make any lengthy examination of the authorities, which were fully considered in the judgments delivered in that case, particularly in that of Doull J., in the Supreme Court of Nova Scotia (*in Banco*)[2]. 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 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?

There is nothing in the reasons delivered in this Court in *Miller v. Decker*[3] to throw any doubt on the principles enunciated in *Seymour's* case. In *Miller v. Decker* the majority were of the view that an agreement of the nature defined in *Seymour's* case should be implied from the active encouragement by the plaintiff of the defendant's conduct which resulted in disaster while the minority took the contrary view. The difference of opinion was not as to the applicable law but as to what inference of fact should be drawn from the primary facts.

[1] [1956] S.C.R. 322, 2 D.L.R. (2d) 369.
[2] (1955), 36 M.P.R. 337.
[3] [1957] S.C.R. 624, 9 D.L.R. (2d) 1.

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I share the view expressed by the Court of Appeal in England in *Slater v. Clay Cross Co., Ltd.*[1], that the judgment of Asquith J., as he then was, in *Dann v. Hamilton*[2] in so far as he decided that the doctrine of *volenti* did not apply was correct.

There is a most useful discussion as to when the defence of *volenti non fit injuria* is admitted in Mr. Glanville Williams' work Joint Torts and Contributory Negligence (1951). At p. 296 the learned author points out that "the scope of the defence has been progressively curtailed since the end of the last century, so that at the present day it is allowed only when there is a positive agreement waiving the right of action".

I wish to adopt the following passages at p. 308 of the last mentioned work:

> 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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> 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.

On the facts of the case at bar the plaintiff, although apprehensive that the defendant would drive negligently and that an accident might result, decided to take a chance and go with him, that is to say, employing the phraseology of the passages just quoted, she thereby incurred the physical risk. In my opinion, there is nothing to warrant a finding that she decided to waive her right of action should she be injured or that she communicated any such decision to the defendant.

It has already been mentioned that counsel for the respondent did not attack the findings made by the majority in the Court of Appeal that the plaintiff was guilty of contributory negligence because her decision to go with the defendant was a failure to take reasonable care for her own

[1] [1956]2 Q.B. 264, [1956] 2 All E.R. 625.
[2] [1939] 1 K.B. 509, [1939] 1 All E.R. 59.

safety and that twenty-five per cent of the responsibility for the accident should be attributed to her. I am unable to agree with the argument of counsel for the appellant that this percentage should be increased.

As to the quantum of damages, this Court is slow to interfere with the amount fixed by a provincial Appellate Court which has varied the assessment made by a trial judge. It is sufficient on this point to refer to the case of *Lang et al. v. Pollard et al.*[1] In the case at bar a perusal of the evidence brings me to the conclusion that the amount fixed by the Court of Appeal is not excessive.

At the opening of the appeal counsel for the respondent moved to quash the appeal and counsel for the appellant, *ex abundanti cautela,* moved for leave to appeal. Both of these motions were dismissed, the costs in each case being reserved. I would now direct that there be no order as to costs in either motion.

I would dismiss the appeal with costs.

Appeal dismissed with costs, KERWIN C.J. *dissenting.*

Solicitors for the defendant, appellant: Aikens, MacAulay, Moffat, Dickson, Hinch & McGivan, Winnipeg.

Solicitors for the plaintiff, respondent: Walsh, Micay, O'Sullivan, Bowman & Schwartz, Winnipeg.