CHARLES KERR (PLAINTIFF) .....APPELLANT;

AND

ALEXANDER CUMMINGS (DEFENDANT) RESPONDENT.

1952
*Oct. 29
1953
*Jan. 27

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Automobile—Negligence—Injury to gratuitous passenger—"Gross Negligence"—Proof of—Res ipsa loquitur—Motor Vehicles Act, R.S.B.C. 1948, c. 227, s. 82.

By section 82 of the British Columbia *Motor Vehicles Act*, R.S.B.C. 1948, c. 227, no action lies by a gratuitous passenger in a motor vehicle for injury sustained by him by reason of the operation of such vehicle unless there was gross negligence on the part of the driver that contributed to the injury.

Held: (1) it is not necessary that such gross negligence be proven conclusively as if there were a prosecution for criminal negligence; (2) very great negligence on the part of the driver must be shown (*Studer* v. *Cowper* [1951] S.C.R. 450), and it was impossible to say in the present case that the mere happening of the occurrence gave rise to a presumption that it had been caused by very great negligence.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming, O'Halloran J.A. dissenting, the dismissal of an action for injuries suffered by the appellant as gratuitous passenger in an automobile.

Alfred Bull Q.C. for the appellant.

Douglas McK. Brown for the respondent.

The judgment of the Court was delivered by

KERWIN J.:—The appellant was a gratuitous passenger in an automobile owned by the respondent and driven by one Brentzen from Nanaimo northerly towards Port Alberni in the province of British Columbia. About fifteen miles from Nanaimo the car rammed a concrete abutment of a highway bridge on the west side of the road. Brentzen and another passenger were killed while a third passenger was so badly injured that he remembers nothing of the accident. The appellant had fallen asleep when the car was about seven miles out of Nanaimo and he does not know what happened. He was seriously injured and brought the present action to recover damages for such injuries. By virtue of section 81 of the British Columbia *Motor Vehicles*

*PRESENT: Kerwin, Estey, Locke, Cartwright and Fauteux JJ.

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Act, R.S.B.C. 1948, chapter 227, the respondent is liable for such damages if it can be shown that Brentzen was grossly negligent as provided by section 82 of the Act:—

> 82. No action shall lie against either the owner or the driver of a motor vehicle . . . by a person who is carried as a passenger . . . for any injury, loss or damage sustained by such person, or for the death of such person by reason of the operation of that motor vehicle . . . while such person is a passenger . . . unless there has been gross negligence on the part of the driver of the vehicle and unless such gross negligence contributed to the injury, loss or damage in respect of which the action is brought . . .

The trial judge and the majority of the Court of Appeal (1) decided that the appellant had failed to show such gross negligence. I can find nothing to suggest, as is intimated in the reasons of the dissenting judge in the Court of Appeal, that the case proceeded on the basis that gross negligence is not shown unless it is proven conclusively as if it were a prosecution for criminal negligence in a criminal Court and, in any event, I do not proceed on any such basis. This, of course, is a civil case but it is one where something more than negligence must appear. As was held by this Court in *Studer* v. *Cowper* (2), this means there must have been very great negligence. Without referring to any of the decisions where the maxim *res ipsa* was applied in cases of claims for damages caused by the operation of a motor car, 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 on the part of Brentzen.

It was argued that the proper inferences from the evidence are that he had no sleep the night before, and that starting out from Nanaimo about seven o'clock in the morning of a November day he had fallen asleep at the wheel. I cannot read the evidence as indicating either of these things, which in my view are mere suppositions. It is further said that the marks on the left shoulder of the road indicate that the automobile must have been driven from the right to the left side of the centrally paved portion of the highway, because there are tire marks showing that for 66 feet the car proceeded along the shoulder and into the concrete abutment. However, these circumstances do not indicate what caused the auto to go from the right to

(1) [1952] 2 D.L.R. 846; 6 W.W.R. (N.S.) 451. (2) [1951] S.C.R. 450.

the left side of the road. There was a governor on the car which precluded a speed exceeding forty miles per hour. We know nothing of what the actual speed was but, even if it were much lower than that permitted, it would not take long to cover the 66 feet.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Bull, Houser, Tupper, Ray, Guy & Merritt.*

Solicitor for the respondent: *A. E. Branca.*