EDWARD McCULLOCH (DEFENDANT) ....APPELLANT;

AND

SARAH J. MURRAY (PLAINTIFF) .....RESPONDENT.

1941
* Oct. 24.
1942
* Feb. 3.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Motor vehicles—Negligence—Accident causing injury to guest passenger in motor car—Action by her against driver for damages—Motor Vehicle Act, Nova Scotia, 1932, c. 6, s. 183—Question whether accident caused by "gross negligence or wilful and wanton misconduct" of driver—Findings by jury—Sufficiency of and justification for findings.

Respondent sued appellant for damages for injury caused to her by an accident occurring while she was being transported as appellant's guest without payment in a motor car driven by appellant. By s. 183 of *The Motor Vehicle Act,* Nova Scotia (1932, c. 6), she had a cause of action only if the accident was caused by "the gross negligence or wilful and wanton misconduct" of appellant which contributed to the injury. At the trial the jury found (*inter alia*) that there was on appellant's part gross negligence which caused the accident and that it consisted of "reckless driving."

* PRESENT:—Duff C.J. and Crocket, Kerwin, Hudson and Taschereau JJ.

(1) [1934] O.R. 326.

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Held, affirming the judgment of the Supreme Court of Nova Scotia *en banc,* 16 M.P.R. 45, that the jury's said findings were sufficient and had sufficient certainty of meaning, and that on the evidence the jury was entitled to make said findings and that respondent should recover.

Per the Chief Justice: Comment as to attempting to define or replace by paraphrases the phrases "gross negligence" or "wilful and wanton misconduct", and observations as to a trial judge's duty in assisting a jury in an action based upon said enactment. The said phrases imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves. Subject to that, it is entirely a question of fact for the jury whether conduct falls within the category of one or other of said phrases.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc* (1).

The respondent sued the appellant for damages for injuries to her caused by an accident which occurred while she was being transported as appellant's guest without payment in a motor car driven by the appellant. She alleged that the accident was caused by the manner in which the appellant was driving, which she alleged was careless, negligent and reckless and in wilful and wanton disregard of the rights and safety of others. The appellant denied such allegations, and alleged that the accident was caused by the motor car striking a piece of wood on the roadway, and without any negligence or want of care on his part.

The parties lived in the province of Nova Scotia and the accident occurred on a highway in that province.

Sec. 183 of *The Motor Vehicle Act* of Nova Scotia, c. 6 of the Acts of 1932, provides:

> No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or operator of such motor vehicle and unless such gross negligence or wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought.

The action was tried before Archibald J. and a jury. The questions submitted to the jury and their answers thereto were as follows:

(1) 16 M.P.R. 45; [1941] 3 D.L.R. 42.

1. Was there on the part of the Defendant McCulloch gross negligence which caused the accident?
A. Yes.
2. If so, of what did such gross negligence consist?
A. Reckless driving.
3. Was there on the part of the Defendant McCulloch wanton and wilful misconduct which caused the accident?
A. Yes.
4. If so, of what did such wanton and wilful misconduct consist?
A. Not exercising proper care.
5. Was the accident caused by the automobile (driven by the Defendant McCulloch) striking a piece or block of wood on the highway?
A. No.
6. Was the accident, under the circumstances an inevitable accident?
A. No.
7. What damages did the Plaintiff sustain?
A. $2,632.

The trial judge later gave a written judgment dismissing the plaintiff's (the present respondent's) claim with costs. He held that it was impossible to give effect to the jury's answers to questions 1 and 2, because the answer to question 2 could not be interpreted with sufficient certainty; to interpret the answer "reckless driving" the judge would have to speculate as to what conduct (or misconduct) constituted reckless driving; careful attention to the evidence failed to indicate to him such conduct on the part of the driver of the car (the present appellant) as would constitute gross negligence or reckless driving; and speculation as to what the jury had in mind was not helpful. As to the answers to questions 3 and 4, he held that it was impossible to be certain, from the answer to question 4, in what respect or particular the driver of the car did not exercise proper care; but more serious than that was the fact that failure to exercise care is not in itself sufficient to constitute wilful and wanton misconduct. He remarked that the answers to questions 5 and 6, though not to his mind justified by the evidence, did not clear up the uncertainty and insufficiency of the answers to questions 2 and 4; these answers might be equally as consistent with negligence as with gross negligence or wilful and wanton misconduct. Therefore on the jury's answers he was unable to direct judgment for the plaintiff; the jury may have intended to make such findings that the plaintiff would succeed, but they failed to give such answers as would make this possible, and on their findings the action should be dismissed.

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Upon appeal by the plaintiff to the Supreme Court of Nova Scotia *en banc* that Court (1) allowed the appeal and held that the plaintiff should recover against the present appellant the amount of damages found by the jury at the trial to have been sustained by the plaintiff, and also the costs of the action and of the appeal. In the reasons for judgment in the Court *en banc,* the meanings of the phrases "gross negligence" and "reckless driving" were dealt with, reference was made to what was said in the trial judge's charge to the jury, and it was held that the jury's answer to question 2 was sufficient and had sufficient certainty of meaning, and that on the evidence the Court could not say that the jury as reasonable men could not make the findings which they did in answer to questions 1 and 2 and 5, 6 and 7, and on those findings the plaintiff was entitled to judgment.

Beverley V. Elliott for the appellant.

F. D. Smith K.C. for the respondent.

THE CHIEF JUSTICE—This appeal is concerned with the construction and application of sec. 183 of *The Motor Vehicle Act,* being chap. 6 of the Acts of Nova Scotia, 1932, as amended.

The Court of Appeal unanimously held that the findings of the jury entitled the respondent to a verdict against the appellant for the damages found by the jury. I am content, myself, to rest upon what was said in the Court below upon that subject, and particularly by the Chief Justice, Sir Joseph Chisholm. I concur also with the view of the full Court as to the effect of the findings.

I do not think it is any part of the duty of this Court, in applying the enactment before us, to define gross negligence, or to define wilful and wanton misconduct. It is necessary, of course, that the judge trying an action based upon the enactment should assist the jury by suggesting to them such tests as may seem to be appropriate in the circumstances of the case for determining whether gross negligence, or wilful or wanton misconduct has been established, and paraphrases may be useful for the purpose of dealing with the particular case, but, generally speaking, I think, it is undesirable that the courts should attempt

(1) 16 M.P.R. 45; [1941] 3 D.L.R. 42.

to replace by paraphrases the language which the legislature has chosen to express its meaning. A paraphrase which may in a particular case be valuable, may, in a case involving different facts, be misleading.

I am, myself, unable to agree with the view that you may not have a case in which the jury could properly find the defendant guilty of gross negligence while refusing to find him guilty of wilful or wanton misconduct. All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves. Subject to that, I think it is entirely a question of fact for the jury whether conduct falls within the category of gross negligence, or wilful misconduct, or wanton misconduct. These words, after all, are very plain English words, not difficult of application by a jury whose minds are not confused by too much verbal analysis.

In this case the jury found gross negligence and stated that the gross negligence consisted in reckless driving. I have no doubt that the jury were entitled on the evidence to find that the appellant's driving was reckless, and, that having been found, there was, I think, a sufficient basis for their finding that this reckless driving constituted gross negligence.

The appeal should be dismissed with costs.

CROCKET J.—I agree with my brother Taschereau that this appeal should be dismissed with costs.

I think there was ample evidence to warrant the finding of the jury that the appellant was guilty of such reckless driving in the circumstances as to constitute gross negligence within the meaning of s. 183 of the Nova Scotia *Motor Vehicle Act*.

The judgment of Kerwin, Hudson and Taschereau JJ. was delivered by

TASCHEREAU J.—In this case, the plaintiff, respondent before this Court, brought action to recover damages for personal injuries sustained while she was a passenger transported without payment in a motor car operated by the appellant.

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Taschereau J.

Section 183 of *The Motor Vehicle Act* of Nova Scotia determines the liability of the operator of an automobile towards a gratuitous passenger. It reads as follows:—

> No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or operator of such motor vehicle and unless such gross negligence or wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought.

The jury reached the conclusion that the appellant McCulloch was guilty of gross negligence and said in one of its answers that such gross negligence consisted in "reckless driving". It said also that the appellant was not "exercising proper care", and completely rejected the theory of the appellant who claimed in his defence that the accident was caused by the automobile striking a piece or block of wood on the highway. The damages were assessed at $2,632.

After the trial, the learned Judge gave his decision, and dismissed the action with costs. He thought that it was impossible to give effect to the answers to questions 1 and 2 because the answer to question 2, where the jury said that the gross negligence consisted of "reckless driving", could not be interpreted with sufficient certainty. He also said that a careful attention to the evidence failed to indicate such conduct on the part of the appellant as would constitute gross negligence or reckless driving.

The Court of Appeal unanimously reversed this decision and directed that judgment be entered for the respondent with costs. I fully concur in this conclusion reached by the Court of Appeal. The questions put to the jury were clear and unequivocal. They were agreed to by counsel for both parties and approved by the Judge, and the answers given by the jury are in no way uncertain. Furthermore, no objection was taken to any of these answers before the jury had been discharged.

As to the finding of the trial Judge that there was no gross negligence or reckless driving, I am unable to agree. The evidence justifies the jury to say that there was; and it is not my duty, nor do I feel in any way disposed

after reading the evidence, to alter the views which have been expressed by a properly instructed jury as to the legal meaning of the words "gross negligence".

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I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. E. Rutledge.*

Solicitor for the respondent: *W. T. Hayden.*