

---

DERKSON v. LLOYD

1938

\* April 29.  
\* May 2.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

*Negligence—Motor vehicles—Appeal—Motor car accident—Action by passenger against driver and owner of the car for damages for injuries—Appeal by owner to Supreme Court of Canada from judgment of Court of Appeal which had reversed judgment of trial Judge dismissing action—Restoration of judgment of trial Judge on ground that there were no adequate grounds for reversing his finding that there was no “gross negligence or wilful and wanton misconduct” by driver (The Vehicles Act, Sask., 1934-35, c. 68, s. 85, as amended)—Respondent’s contention for confinement of appeal to point mentioned in reasons for granting leave to appeal (as to whether owner’s car was “wrongfully taken out of his possession,” within s. 85 of said Act).*

APPEAL by the defendant Derkson from the judgment of the Court of Appeal for Saskatchewan (1) allowing the plaintiff’s appeal from the judgment of Maclean J. (on motion for non-suit) dismissing the plaintiff’s action, which was brought to recover damages for injuries alleged to have been sustained by her in a motor car accident while she was a passenger in the motor car, which was driven by the defendant Milton and was owned by the defendant (appellant) Derkson. The Court of Appeal gave judgment to the plaintiff against the defendants for \$1,393.40 and costs.

---

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

(1) [1937] 3 W.W.R. 504.

1938  
DERKSON  
v.  
LLOYD.

Special leave was given by the Court of Appeal to the defendant Derkson to appeal to the Supreme Court of Canada (1).

Section 85 of *The Vehicles Act, 1935, Sask.*, (1934-35, c. 68), provided that:—

In all cases when any loss, damage or injury is caused to any person by a motor vehicle, the person operating it at the time shall be liable for the loss, damage or injury, if it was caused by his negligence or improper conduct, and the owner thereof shall also be liable to the same extent as the operator unless at the time of the injury the motor vehicle had been stolen from him or otherwise wrongfully taken out of his possession or out of the possession of any person entrusted by him with the care thereof.

Subsection 2 of that section, added by c. 106 of the statutes of 1936, provided that:—

(2) Except only in the case of motor vehicles which are ordinarily used for carrying passengers for hire or gain, no action shall lie against either the owner or the driver of a motor vehicle by a person who is, after the date on which this subsection comes into force, carried as a passenger in that motor vehicle or by his personal representative or next-of-kin for any injury, loss or damage sustained by such person by reason of the operation of that motor vehicle by the driver thereof, unless there has been gross negligence or wilful and wanton misconduct on the part of the driver of the vehicle and unless such gross negligence or wilful and wanton misconduct contributed to the injury, loss or damage in respect of which the action is brought.

On the hearing of the appeal to the Supreme Court of Canada, on Friday, April 29, 1938, at the conclusion of the argument of counsel for the respondent, the members of the Court retired for consultation, and, on their returning to the Bench, the Chief Justice announced as follows:—

“We have come to the conclusion that in this case there are really no adequate grounds for reversing the finding of the learned trial Judge that there was no gross negligence or wilful and wanton misconduct. On that ground, the appeal must be allowed.”

As to the contention by counsel for the respondent that the appeal should have been confined to the point mentioned in the reasons given by the Court of Appeal as warranting its granting leave to appeal, namely, whether or not, on the facts and circumstances in evidence, the appellant's motor car was wrongfully taken out of his possession within the meaning of s. 85 of *The Vehicles Act, Sask.*, 1934-35, c. 68—the Court held that the juris-

diction is not so limited; while there was no reported decision, the practice was decisive upon the point.

1938  
DERKSON  
v.  
LLOYD.  
—

On Monday, May 2, 1938, the following judgment was announced: This appeal is allowed and the judgment of the trial Judge restored with costs throughout; and the cross-appeal [which asked for increase of damages] dismissed without costs.

*Appeal allowed with costs.*

*T. N. Phelan K.C.* for the appellant.

*G. H. Yule K.C.* for the respondent.

---