

CANADA / JUDGMENT

Studer v. Cowper

[1951] SCR 450

COURT

Supreme Court of Canada

DECIDED

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Studer v. Cowper

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Report

[1951] SCR 450

Judges

Kerwin, Patrick; Rand, Ivan Cleveland; Estey, James Wilfred; Locke, Charles Holland; Cartwright, John Robert

On appeal from

Saskatchewan

Subjects

Motor vehicles

Decision Content

Supreme Court of Canada

Studer v. Cowper, [1951] S.C.R. 450

Date: 1951-02-06

Raymond N. Studer and Gerald L. Studer and The Canadian National Railways (Defendants)
Appellants;

and

Bernice Avis Cowper, an Infant Suing by Frederick Cowper, Her Next Friend, and the Said Frederick Cowper (Plaintiffs) Respondents.

1950: October 19, 20; 1951: February 6.

Present:—Kerwin, Rand, Estey, Locke and Cartwright JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Automobiles—Injury to Gratuitous Passenger—"Gross Negligence or wanton and wilful misconduct"—Construction of phrase as used in The Vehicles Act, 1945 (Sask.) c. 98, s. 141 (2).

The terms "gross negligence" and "wilful and wanton misconduct" as used in s. 141(2) of The Vehicles Act, 1945 (Sask.) c. 98, do not mean the same thing. Each phrase is to be construed as standing alone and neither is to be taken as connoting criminal negligence.

Per: Kerwin J.—Where by statute the liability of a municipal corporation has been limited to cases of gross negligence, this Court has declined to define that expression other than to say that it might be given the meaning of "very great negligence". *Kingston v. Drennan*, 27 Can. S.C.R. 46; followed in *German v. City of Ottawa*, 56 Can. S.C.R. 80 and *Holland v. City of Toronto*, [1927] S.C.R. 242; 59 O.L.R. 628. This Court has also declined to define "gross negligence or wilful and wanton misconduct" in a case arising under legislation in Nova Scotia similar to s. 141(2) of the Saskatchewan Vehicles Act. In connection with the latter statute it is sufficient to say that gross negligence may be stated to be very great negligence and it must be left to the trial judge in each case to put the matter to the jury in that way with such reference to the evidence as may be necessary. The remarks of Duff C.J. in *McCulloch v. Murray* [1942] S.C.R. 141, approving the statement of Chisholm C.J. in the same case (16 M.P.R. 45), followed.

Short v. Rush [1937] 2 W.W.R. 191 at 200, followed in *Lloyd v. Derkson* [1937] 3 W.W.R. 504 and *Heck v. Braun* [1939] 2 W.W.R. 1, questioned by Kerwin J. and distinguished by Estey and Cartwright JJ.

Per: Estey and Cartwright JJ.—Whether conduct should be classified as "negligence", "gross negligence", or "wilful and wanton misconduct", is a question of fact to be determined in the circumstances of each case. It cannot however be said that a jury must find in every case that the driver's conduct amounts to a reckless disregard of consequences before they can find that conduct constitutes gross negligence.

Judgment of the Court of Appeal for Saskatchewan, [1950] 1 W.W.R. 780, affirmed.

APPEAL by the defendants from the judgment of the Court of Appeal for Saskatchewan 1, dismissing their appeal from a judgment by Thomson J. on a jury trial.

G. H. Yule K.C. for the appellants.

E. M. Hall K.C. for the respondents.

Kerwin J.:—This is an appeal by the defendants, Gerald L. Studer and Raymond N. Studer, the owner and operator, respectively, of an automobile, from a judgment of the Court of Appeal for Saskatchewan dismissing their appeal from the judgment rendered after a trial with a jury. The plaintiff respondent is Bernice Avis Cowper, an infant sixteen years of age, suing by her father as next friend, for damages for injuries received while she was in the motor vehicle driven by Raymond Studer. As a gratuitous passenger, Bernice is subject to the provisions of subs. 2 of s. 141 of The Vehicles Act, c. 98, of the 1945 Statutes of Saskatchewan:

141. (2). The owner or driver of a motor vehicle, other than a vehicle ordinarily used for carrying passengers for hire or gain, shall not be liable for loss or damage resulting from bodily injury to or the death of any person being carried in or upon, or entering, or getting on to, or alighting from such motor vehicle, 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.

After alleging gross negligence or wilful and wanton misconduct on the part of the driver, the statement of claim continues (para. 6):

6. The gross negligence or wilful and wanton misconduct on the part of the defendant Raymond N. Studer consisted of:
- (a) He knew, or should have known, that he was approaching the railway crossing referred to in Paragraph 4, hereof.
 - (b) He was driving the said Dodge Sedan at a speed of sixty (60) miles an hour or more northward on said Lome Avenue road as he approached said railway crossing at a time when the said road was, to his knowledge, covered with snow and/or ice and unsafe for driving at such speed or at any speed in excess of twenty (20) miles an hour.
 - (c) He knew, or should have known, that, at the speed at which he was travelling, he would not be able to bring the said Dodge Sedan to a stop in time to avoid a collision in the event that a train should come or be upon the said railway crossing.
 - (d) He was "showing off" and seeking to impress the infant plaintiff with his reckless handling of the Dodge Sedan.
 - (e) He failed to observe that a box freight car was on said railway crossing as he approached the said crossing.
 - (f) He was keeping no proper or any look-out as he approached the said railway crossing.
 - (g) He was not giving due attention to the driving of the said Dodge Sedan at the said time.
 - (h) He was driving the said Dodge Sedan with a reckless disregard of consequences.

With the consent of all parties, this paragraph was handed to the jury. The questions to be submitted to them had been agreed to by counsel for all parties, and the relevant questions, together with the answers thereto, given after a charge that is not objected to, read as follows:

1. Was there on the part of the Defendant Raymond Studer gross negligence, or wilful and wanton misconduct which caused the accident?

Answer: Yes.

2. If so, of what did such gross negligence, or wilful and wanton misconduct consist?

Answer: Statement of Claim sections a, c, f, g.

- (a) He knew or should have known, that he was approaching the railway crossing referred to in paragraph 4 hereof (The Statement of Claim).
- (c) He knew, or should have known, that at the speed at which he was travelling, he would not be able to bring the said Dodge Sedan to a stop in time to avoid a collision in the event that a train should come or be upon the said railway crossing. (f) He was keeping no proper or any look-out as he approached the said railway crossing.
- (g) He was not giving due attention to the driving of the said Dodge Sedan at the said time.

For the appellant, Mr. Yule argued that the jury must be taken to have negated the allegation in clause (h) of paragraph 6 of the statement of claim since no affirmative finding was made with reference to it. If one considered that clause by itself, that might be taken for granted but, in view of the charge and the answer to the first question, wherein the jury found that there was gross negligence or wilful and wanton misconduct on the part of the driver, and in view of the finding that particulars thereof were to be found in clauses (a), (c), (f) and (g), it may be confidently asserted that clause (h) is not exclusive of any idea fairly included in the other clauses specified by the jury. In my view such an idea is so included. Nor can it be said that none of these other clauses, or at any rate all of them together, are not capable in law of being gross negligence. In view of the fact that counsel for the respondent suggested that the two alternatives be put to the jury separately but bowed to the trial judge's ruling that the question be put as framed, and that all the questions were agreed to by counsel for the appellants, no objection may now be taken to the finding that Raymond N. Studer was guilty of gross negligence or wilful and wanton misconduct.

Mr. Yule then argued that the Court of Appeal for Saskatchewan had decided in *Shortt v. Rush and British American Oil Co. Ltd.* 2; *Lloyd v. Milton and Derkson* 3, reversed (1938) S.C.R. 315; *Heck v. Braun and Marchuk* 4; that the idea of criminality, in order to find a person guilty on a charge of criminal negligence, must exist before a driver of a gratuitous passenger could be found responsible under the relevant legislation. He then proceeded to argue that because these decisions were upon similar legislation which was re-enacted thereafter, it should be taken that the legislature adopted that construction—relying upon what was said by Anglin J. in *Canadian Pacific Railway v. Albin* 5, speaking on behalf of himself, Sir Louis Davies C.J., and Mignault J.:—

Although s.s. 4 of s. 12 of the "Interpretation Act" (R.S.C. ch. 1, in force since 1890 (53 Vict., ch. 7, s. 1) declares that

"Parliament shall not be re-enacting any Act or enactment or by revising, consolidating or amending the same be deemed to have adopted the construction which has, by judicial decision or otherwise, been placed upon the language used in such Act, or upon similar language."

We

cannot assume that the Dominion Legislature when they re-enacted the clause verbatim (in 1903 and again in 1906) were in ignorance of the judicial interpretation which it had received. It must on the contrary be assumed that they understood that (s. 92 of the Act of 1888) must have been acted upon in the light of that interpretation.

Casgrain v. Atlantic and North West Ry. Co. 6, at page 300.

He might have added to that citation what was said by Duff, J., speaking on behalf of himself, Mignault, New-combe, and Rinfret JJ., in Orpen v. Roberts 7, as at 374:

Although by sec. 20 of the Interpretation Act, R.S.O. (1914), the legislature is not to be presumed by reason merely of having re-enacted a statutory provision without changing its language to have adopted a previous judicial construction of that language, nevertheless, the history of the legislation, when read in light of the course of judicial decision and opinion touching the effect of it, may, independently of the intrinsic weight of such decisions and opinions, afford convincing evidence of the intention of the legislature. There appears to be little room for doubt that in this instance the Appellate Division has accurately interpreted that intention.

In view of these decisions, it must now be taken that subsection 4 of s. 24 of the Saskatchewan Interpretation Act, 1943, c. 2, which is the same as the ones referred to in the two cases mentioned, merely removes the presumption that existed at common law and, in a proper case, it will be held that a legislature did have in mind the construction that had been placed upon a certain enactment when re-enacting it. In the present case it is apparent that the Court of Appeal for Saskatchewan did not consider that it had laid it down that the same elements that are required in a charge of criminal negligence must be present under the Saskatchewan legislation here in question but, in order to dispel all doubts, it should be now stated unequivocally that the elements are not the same. That is implicit in the judgment of this Court in McCulloch v. Murray 8, so that it cannot be said that there was a course of judicial decision in the opposite sense.

In cases where claims are made for damages arising from ice or snow on a sidewalk where by virtue of statutory enactments a municipality is not to be liable except in the case of gross negligence, this Court has declined to lay down any rule defining that expression in any way except as great or very great negligence: Kingston v. Drennan 9; Holland v. Toronto 10, which contains merely a note of the decision, and 59 O.L.R. 628, where the reasons for judgment of this Court are printed. This Court has also declined to give a definition of gross negligence or wilful and wanton misconduct in a case arising under legislation in Nova Scotia similar to subsection 2

of s. 141 of the Saskatchewan Vehicles Act: *McCulloch v. Murray* supra. The same rule was followed by the British Columbia Court of Appeal under a statute referring only to gross negligence in *Murdoch v. O'Sullivan* 11, the decision in which was affirmed in this Court 12. In connection with the Saskatchewan statute, it is sufficient to say that gross negligence may be stated to be very great negligence, and it must be left to the trial judge in each case to put the matter to a jury in that way, with such references to the evidence as may be necessary.

Mr. Yule then contended that the two legs of the phrase mean the same thing but this Court has already held that that is not the proper construction by its approval in *McCulloch v. Murray* of the reasons for judgment of Sir Joseph Chisholm, speaking on behalf of the majority of the Court en banc in that case in (1941) 3 D.L.R. 42. The term "wilful and wanton misconduct" denotes something subjective on the part of the driver, whereas gross negligence may be found entirely apart from what the driver thought or intended. In such a case as this, the two alternatives should be put to the jury separately but for the reasons already given, it is now too late for the appellants to object that this was not done. I have not referred to the evidence because, on a review of it, it is impossible to say, as was contended on behalf of the appellants, that there was no evidence upon which the jury could find as it did, and it is also impossible to say that it was not a permissible view for the jury to take of the evidence that what it found to be gross negligence or wilful and wanton misconduct was not the former.

The appeal should be dismissed with costs.

Rand J.:—I agree that the phrase "gross negligence or wilful and wanton misconduct" does not imply equivalence and is not to be identified in either sense with criminal negligence; and that the determination in any case of the condemned conduct is an ascertainment of fact for the jury in the light of the meaning of plain words of description. It is a matter of the degree to which, in the circumstances, conduct lies below the reasonable in attention to consequences; and the legislature has taken as the determinant the common judgment of men in the sense of the terms employed. In this I respectfully adopt the views of Duff C.J. in *McCulloch v. Murray* 13, expressed in his observations on the corresponding section of The Motor Vehicle Act of Nova Scotia.

On the other points, I agree that the appellant cannot succeed, and that the appeal must be dismissed with costs.

The judgment of Estey and Cartwright JJ. was delivered by

Estey J.:—The respondent Frederick Cowper, on behalf of himself and his infant daughter Bernice Avis Cowper, as plaintiff brought this action against the appellants as driver and owner respectively of a Dodge Sedan in which Bernice Avis Cowper was riding when she suffered the injuries for which damages are here claimed.

The driver, Raymond N. Studer, had invited Bernice Avis Cowper to accompany him upon this occasion and there is no dispute that in order that damages may be recovered the plaintiff-respondent must prove that the injuries were caused by the "gross negligence or wilful and wanton misconduct" on the part of Raymond N. Studer in driving the Dodge Sedan automobile. S.S. 1945, c. 98, s. 141(2). This section reads as follows:

141(2) The owner or driver of a motor vehicle, other than a vehicle ordinarily used for carrying passengers for hire or gain, shall not be liable for loss or damage resulting from bodily injury to or the death of any person being carried in or upon, or entering, or getting on to, or alighting from such motor vehicle, 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.

On March 13, 1949, the appellant Raymond N. Studer, 21 or 22 years of age, with the plaintiff respondent Bernice Avis Cowper, about 16 years of age, drove south from the city of Saskatoon in a Dodge Sedan owned by the appellant Gerald L. Studer. The highway upon which they were driving passes over the main line of the Canadian National Railways where there are double tracks. They passed over this crossing at 2 a.m. and returned to the same crossing at 4 a.m. The country is rolling and about 100 yards south of the crossing, Raymond Studer, driving north, came over a rise in the ground from which there is a gradual slope toward the crossing in question. As he came over the rise he saw the switch lights east of the crossing and box cars at the crossing. The road was slippery, the snow being hard packed. He immediately applied his brakes and skidded 210 feet where he hit the last box car upon the train proceeding westward at the crossing on the north track at about 2 miles per hour. The impact was such that the front of the automobile was badly damaged and the infant respondent thrown forward in a manner that caused her head to go through the windshield. Raymond Studer said the automobile, because of the impact, "bounced back." The evidence as to the speed of the automobile was most contradictory. Raymond Studer said he came over the rise at 35 miles per hour and was proceeding about 2 miles per hour when he struck the box car. The train was in the course of switching operations on the north track. The brakeman on the rear end had got off to adjust the switch when he heard the roar of an automobile and, looking up, could see it and estimated it to be 150 feet south. He thought it was coming at about 40 or 45 miles per hour. There was other evidence upon which the jury might have found that the automobile was proceeding at a much greater speed. The infant respondent was seriously and permanently injured.

The instructions of the learned trial judge with regard to negligence and gross negligence were so complete and thorough that no exceptions are taken thereto. In the course of his address the learned judge stated:

Now we will give to you, when you go to the jury room, all the exhibits, and also copies of paragraph 6 of the statement of claim.

This was with the concurrence of counsel for all parties. Paragraph 6 reads as follows:

6. The gross negligence or wilful and wanton misconduct on the part of the defendant Raymond N. Studer consisted of:
- (a) He knew, or should have known, that he was approaching the railway crossing referred to in Paragraph 4 hereof.
 - (b) He was driving the said Dodge Sedan at a speed of sixty (60) miles an hour or more northward on said Lome Avenue Road as he approached said railway crossing at a time when the said road was, to his knowledge, covered with snow and/or ice and unsafe for driving at such speed or at any speed in excess of twenty (20) miles an hour.
 - (c) He knew, or should have known, that, at the speed at which he was travelling, he would not be able to bring the said Dodge Sedan to a stop in time to avoid a collision in the event that a train should come or be upon the said railway crossing.
 - (d) He was "showing off" and seeking to impress the infant plaintiff with his reckless handling of the Dodge Sedan.
 - (e) He failed to observe that a box freight car was on said railway crossing as he approached the said crossing.
 - (f) He was keeping no proper or any look-out as he approached the; said railway crossing.
 - (g) He was not giving due attention to the driving of the said Dodge Sedan at the said time.
 - (h) He was driving the said Dodge Sedan with a reckless disregard of consequences.

The first question submitted to the jury read: "Was there on the part of the defendant Raymond Studer gross negligence or wilful and wanton misconduct which caused the accident?" The jury answered this question "Yes" and, therefore, as instructed, were required to state of what did such gross negligence or wilful and wanton misconduct consist, and as to this the learned trial judge instructed them as follows:

But if you find there was gross negligence, or wilful and wanton misconduct, then it is necessary to explain why you come to that conclusion. That is rather to give the reason on which that conclusion is based, to say what it consists of and that is where these particulars I will give you come into effect * * * If you can pick out any one, or a combination of them, or the whole of them, if you find they have been established—my suggestion to you is, that if you come to the conclusion that if there has been gross negligence or wilful and wanton misconduct and you answer the first question in the affirmative, then you can look at these particulars and decide which of them are the cause of the negligence—(a), (b), (c), (d) or whichever it is, of paragraph 6 of the statement of claim. You can put into there all of these items which you think have been proven, and leave out any you think have not been proven.

The jury selected sub-paragraphs (a), (c), (f) and (g) as the particulars of the gross negligence. I think, having regard to the foregoing instructions of the learned trial judge, particularly that sentence that the jury should "leave out any you think have not been proven," it must be taken as contended by counsel for the appellant, quite apart from authority (*Andreas v. The Canadian Pacific Railway Co.* 14), that the jury negatived sub-paragraph (h) of the foregoing paragraph 6 to the effect that Studer was driving the automobile "with a reckless disregard of consequences."

The jury assessed in favour of Frederick Cowper, in his own right, special damages in the sum of \$1,492, and as next friend of Bernice Avis Cowper the sum of \$17,500. The learned trial judge directed judgment accordingly and that judgment was affirmed by the Court of Appeal.

The appellant submits that the jury, in not including sub-paragraph (h) in the particulars of gross negligence, negatived the allegation that Raymond Studer was driving "with a reckless disregard of consequences" and that being an essential of gross negligence, as that term has been construed in the foregoing s. 141(2), the judgment should be reversed. The appellant also contended that the foregoing construction has been adopted by the Legislature of Saskatchewan and, therefore, must be accepted in the courts.

The first case counsel for the appellant relies upon in support of his contention that the Court of Appeal in Saskatchewan has construed this section is *Shortt v. Rush and British American Oil Company Limited*¹⁵. It was there held an instruction to the jury "that in order to hold the defendants liable they should find that the driver's conduct was intentional or on purpose" was erroneous in law, but, though objectionable, it did not invalidate the verdict because, in an alternative charge, "which engaged the ultimate attention of the jury," the learned judge, in reply to their inquiry as to what kind of indifference could be held to constitute gross negligence, emphasized this alternative by stating "that in the circumstances the driver was careless of the consequences and 'took a chance.' " In these circumstances the Court of Appeal held that, while "the instructions of the learned trial judge to the jury were not altogether free from error, since no substantial wrong or miscarriage of justice had been occasioned in the trial on that account" the appeal should be dismissed. In the course of the judgment the words "gross negligence" and "wilful and wanton misconduct" were discussed at some length and views expressed which, though unnecessary to the decision, are entitled to the greatest possible respect. At p. 199 it was stated:

that the term "gross negligence" in the enactment in question connotes criminal negligence which differs materially from civil negligence because objectively, it implies a want of care which may endanger human life while subjectively it implies a state of mind which is indifferent to consequences.

It follows that in order to substantiate his allegation that Rush was grossly negligent in his operation of the truck on the occasion in question it was incumbent on the plaintiff to satisfy the jury, (1) that he failed to take that care without which he knew or ought to have known that he might endanger the plaintiff's life; (2) that with such failure he exhibited a reckless disregard or indifference as to the consequences.

In the second case, *Lloyd v. Milton and Derkson*, 16, the court held that the facts established gross negligence within the statements made in *Shortt v. Rush*, *supra*. Upon the owner appealing to this court that conclusion was reversed 17.

In the third, *Heck v. Braun and Marchuk*, 18, it was held that the driver Braun was negligent "but it was nothing more than inadvertence" and not gross negligence within the meaning of the Vehicles Act 1935.

The charge approved of, in the first of these cases, the finding of fact in the second and that "nothing more than inadvertence" was established in the last, did not, with great respect, require that the phrase "gross negligence" be construed to connote "criminal negligence", nor necessarily to include the essentials numbered (1) and (2) in the first case, nor, as stated in the last, "There must be conduct showing a reckless disregard, a complete indifference to the safety and rights of others."

The analyses made and the conclusions intimated by the learned judges are entitled to the greatest possible respect but, in the circumstances, do not constitute such a judicial construction of an enactment as to warrant the application of the common law rule that a re-enactment of words judicially construed discloses a legislative intention to adopt that construction. This is particularly true in the circumstances because of the modification of that rule enacted in Saskatchewan by s. 24(4) of the Saskatchewan Interpretation Act (S.S. 1943, c. 2, s. 24(4)).

When, therefore, the Legislature in 1945 considered this section which it then rephrased and enacted as sec. 11 (S.S. 1943, c. 59, s. 11), which is now s. 141(2) above quoted, it cannot be said to have done more than to have appreciated the effect of the three foregoing decisions and left the phrases as enacted to be further construed in the courts.

The words "gross negligence or wilful and wanton misconduct" as enacted in s. 141(2) must be construed as if these phrases stood alone. Such was the view of the learned judges in Nova Scotia, where there is a similar statutory provision. *Murray v. McCulloch* 19. Their judgment was affirmed in this court 20, where Sir Lyman Duff C.J. stated at p. 145:

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.

The Legislature, by the enactment of s. 141(2) above quoted, effected a change in the common law and, therefore, some assistance may be found in ascertaining the intent and purpose of this enactment by considering the position of such a passenger prior thereto. Before the adoption of this provision (s. 141(2)) such a passenger could recover from the driver or owner for any injuries suffered by reason of the driver's failure to use that care which a reasonable man would have exercised in the same or similar circumstances. *Armand v. Carr* 21. One who fails to use such care is negligent and what, in given circumstances, will constitute such failure is a question of fact.

Lord Wright, in *Caswell v. Powell Duffryn Associated Collieries, Limited* 22, stated:

The degree of want of care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury or the Court in lieu of a jury. It is not a matter of uniform standard. It may vary according to the circumstances from man to man, from place to place, from time to time. It may vary even in the case of the same man.

In *Read v. J. Lyons & Co. Ltd.* 23, Lord Macmillan stated:

The more dangerous the act the greater is the care that must be taken in performing it.

There are, therefore, varying degrees of care and the failure to exercise that degree of care required in the circumstances constitutes negligence. In this view, which would appear to have ultimately prevailed at common law, there are no degrees of negligence. *Giblin v. Mc-Mullen* 24; *Moffatt v. Bateman* 25; *Beven—Negligence*, 4th Ed., at p. 25.

The term "gross negligence" appears often in statutory provisions and almost invariably it has been difficult to define its precise meaning. Indeed, Anglin C.J. in writing the judgment of this court in *Holland v. City of Toronto* 26, reported in full in 59 O.L.R. 628 at 631-37, in dealing with a statutory provision respecting the presence of snow and ice on sidewalks, stated:

The term "gross negligence" in this statute is not susceptible of definition.

Chief Justice Duff, in *McCulloch v. Murray* supra, pointed out, at p. 144, that he did not think it was

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.

He did, however, recognize that learned judges at trial must instruct juries and did go on to state:

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. The Legislature of Saskatchewan, while it relieved the driver and owner from the common law liability when the driver's conduct constitutes negligence, by the enactment of sec. 141(2) intended that these parties should remain liable for the driver's gross negligence or wilful and wanton misconduct. There is no reason to conclude that the Legislature intended there should be any hiatus between negligence and gross negligence and, therefore, whenever the conduct of the driver, in the opinion of the jury, was in excess of negligence it would be gross negligence within the meaning of sec. 141(2). Then, by the inclusion of the words "or wilful and wanton misconduct" after the words "gross negligence" the Legislature has evidenced an intention to include that conduct more reprehensible than gross negligence and for this also the above-named parties should remain liable to a passenger within the meaning of that section. Whether conduct should be classified as "negligence," "gross negligence," or "wilful and wanton misconduct," is a question of fact to be determined in the circumstances of each case. It may well be, as evidenced by the authorities above quoted, that what in one circumstance may be

negligence may, in another, be gross negligence, or vice versa. It cannot, however, be said that a jury must find in every case that the driver's conduct amounts to a reckless disregard of consequences before they «an find that conduct constitutes gross negligence.

A reading of the learned judge's charge, to which no exception was taken, makes it abundantly clear that there could be no doubt in the jury's mind but that it was their duty to consider whether the conduct of the accused constituted negligence and, if so, could it properly be described as gross negligence. The jury found that the conduct of the driver constituted gross negligence and there is abundant evidence to support that finding. In addition to the general verdict of gross negligence, the jury were asked to give particulars thereof, not in their own language, as already stated, but by the selection of "any one, or a combination of them, or the whole of them," from subparagraphs (a) to (h) inclusive above quoted. These were all pleaded as particulars of gross negligence and neither prior to nor throughout the trial was there any objection to them as such. The learned judge told the jury, and no exception was taken thereto, in express terms or language from which they would necessarily conclude that if these respective sub-paragraphs or any of them were proved such would constitute gross negligence.

It was in these circumstances that the jury selected subparagraphs (a), (c), (f) and (g) to indicate what they, upon the evidence, regarded as gross negligence. These particulars as found must be read and construed in relation to the pleadings, the evidence and the charge of the learned trial judge.

In *British Columbia Electric Railway Co. v. Dunphy* 27, the jury found negligence causing the accident on the part of the defendant and, as particulars thereof, stated "insufficient precaution on account of approaching crossing and conditions on morning in question." It was contended they did not, in effect, specify the negligence. Mr. Justice Anglin (later C.J.) stated at p. 271:

Meticulous criticisms of a jury's findings are not admissible and they must always be read with and construed in the light of the issues presented by the pleadings, the evidence and the charge of the trial judge.

Mr. Justice Anglin went on to state that while the particulars might have been more specifically stated, it did appear that the meaning of the jury was "sufficiently certain." Mr. Justice Duff, (later C.J.) stated that, when read with the charge, the particulars became "perfectly intelligible."

In *Pronek v. Winnipeg, Selkirk and Lake Winnipeg Railway Company* (2) 28, Lord Wright stated:

But the language of a jury in explaining the reasons for their verdict ought not to be construed too narrowly.

Jamieson v. Harris 29, emphasized by the appellant, is distinguishable from the case at bar. There death was caused during the construction of bins in an elevator by the falling of a plank. Though many of the 26 questions submitted to the jury were answered, they did not, upon any reasonable construction, include a finding that the falling of the plank was due to negligence on the part of the appellant (defendant). Moreover, the one question specifically asking such was not answered and, therefore, the essential fact that the negligence of the defendant caused the injury for which

damage was asked was not proved.

Moreover, the remarks of Mr. Justice Anglin, in *Wabash Railway Co. v. Follick*³⁰, where the finding of the jury was described as vague, are pertinent to the position in this case. At p. 384 he stated:

No objection to the findings seems to have been made when they were brought in. If counsel were not satisfied that they were sufficient and responsive to the questions submitted they might have called the attention of the trial judge to the matter and he might have directed the jury to bring in a more specific finding.

The language of these particulars, when read and construed in the light of the pleadings, evidence and charge, constitutes particulars of gross negligence.

The appeal should be dismissed with costs.

Locke J.:—It is unfortunate that, when it was decided by a number of the Provincial Legislatures in Canada that the liability of the driver of a motor vehicle to a passenger carried gratuitously should be restricted to cases where the negligence complained of was of a different character to that which had before been sufficient, some more definite term than gross negligence was not adopted. The meaning to be assigned to the expression has been a matter of discussion and disagreement in the courts since, in referring to the liability of one type of bailee, Holt C.J. in *Coggs v. Bernard* 31, said that he was only liable for some gross neglect.

By an amendment to the Consolidated Municipal Act 1892, enacted by the Ontario Legislature in 1894 (s. 13, c. 50), the liability of a municipal corporation for accidents to persons falling, owing to snow or ice upon sidewalks, was restricted to cases where there was gross negligence by the corporation, and the meaning to be assigned to the term was considered by this Court in *City of Kingston v. Drennan* 32. Sedgewick J. in delivering the opinion of the majority of the Court, after saying that he was not bold enough to enter upon a detailed investigation as to the difference between gross and other kinds of negligence, said that (p. 60):

We must, I suppose, give some meaning to this expression of the legislative will and the meaning I give to it is "very great negligence."

In *German v. City of Ottawa* 33, Anglin J. with whom Davies J. agreed, referred to and adopted the statement of Sedgewick J. in *Drennan's* case, and in *Holland v. City of Toronto* 34, 35, Anglin C.J.C. again referring to the matter said (p. 634):

The term "gross negligence" in this statute is not susceptible of definition. No *a priori* standard can be set up for determining when negligence should be deemed "very great negligence," a paraphrase suggested in *Drennan v. City of Kingston* 36, which, for lack of anything better, has been generally accepted.

The amendment to the Saskatchewan Vehicles Act, 1935 (c. 68) was made to introduce the expression to be considered in this appeal. The words "gross negligence" appear in conjunction with the words "wilful and wanton misconduct", so that in a case such as this the driver of the

vehicle is only liable if there has been gross negligence or wilful and wanton misconduct on his part. When the legislation was first considered by the Saskatchewan Court of Appeal in *Shortt v. Rush* 37, Mackenzie J.A. (p. 199) while referring to what had been said by Sedgewick J. as to the expression "gross negligence" came to the conclusion that, by reason of its association with the term "wilful and wanton misconduct", a different meaning was to be assigned to it and that it connoted criminal negligence and, accordingly, it was incumbent upon the plaintiff to satisfy the jury that the defendant had failed to take that care without which he knew or ought to have known that he might endanger the plaintiff's life, and that with such failure he exhibited a reckless disregard or indifference as to the consequences. This interpretation was adopted ' by that court in *Lloyd v. Milton* 38, and again in *Heck v. Braun* 39. These decisions cannot, in my opinion, be reconciled with the judgment of this Court in *McCulloch v. Murray* 40. The words "gross negligence" or "wilful and wanton misconduct" are not to be interpreted as if they read "gross negligence and wilful and wanton misconduct." While the trial judge in charging the jury in that case had, in endeavouring to assist the jury to appreciate the meaning to be assigned to the expression "gross negligence", said that the adjective that most fittingly described such conduct was the word "reckless", there was no suggestion made to the jury that it was necessary to prove fault which could be properly characterized as criminal negligence. Nor do I think that the judgment of Sir Joseph Chisholm C.J. on the appeal is to be construed as adopting the expression "reckless conduct" as synonymous with "gross negligence", but as saying merely that reckless conduct may in some circumstances properly be described as gross negligence. I think the language there used by the learned Chief Justice, which was approved and adopted by Sir Lyman Duff, was not intended to express a view differing from that of Sedgewick J. in *Drennan's* case.

The reference in the judgment of Taschereau J. who delivered the judgment of the majority of the Court to the views of a properly instructed jury obviously proceeded upon the footing that the charge to the jury, when read as a whole, did not depart from that statement of the law. The learned Chief Justice of this Court in turn declined to attempt to define "gross negligence" and expressed the view that it was undesirable that the Court should attempt to replace by paraphrases the language which the Legislature had chosen to express its meaning. With great respect, I think it was error in *Shortt's* case to construe the expression "gross negligence" in any other manner than as indicated by the judgment of this Court in *Drennan's* case. It cannot be said that this leaves the matter in a satisfactory state but, unless and until the meaning of the expression is clarified by legislation, the courts administering justice must, in my opinion, treat the question to be decided, whether by a judge or a jury, as whether or not there has been very great negligence in the circumstances of the particular case. In the present matter there was, in my opinion, evidence to go to the jury upon that issue and I respectfully agree with Mr. Justice Gordon that the answers made are properly to be construed as finding gross negligence.

Mr. Yule, in his able argument for the appellant, contended further that since the Saskatchewan Legislature had re-enacted the amended section 85 of *The Vehicles Act*, 1935, after the decision of the Court of Appeal in *Shortt v. Rush*, in *The Vehicles Act*, 1939, and in the Revised Statutes of 1940, it should be held that it had adopted the interpretation of the expression "gross negligence

or wilful and wanton misconduct" propounded in that case. The principle upon which the argument is based is stated by the Earl of Halsbury in *Webb v. Outrim* 41, as being that when a particular form of legislative enactment which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound principle of construction to hold that the words were intended by the Legislature to bear the meaning which has been so put upon them. In *Barras v. Aberdeen Steam Trawling and Fishing Company* 42, in an appeal in a Scottish case, Viscount Buckmaster followed this statement of the law, and in *MacMillan v. Brownlee* 43, Sir Lyman Duff relied upon the principle as stated by Lord Buckmaster in construing a section in a statute of the Province of Alberta. Section 48 of the Interpretation Act (c. 1, R.S.S. 1940) provides that:

The Legislature shall not, by re-enacting an Act or part of an Act or by revising, consolidating or amending the same, be deemed to have adopted the construction which has by judicial decisions or otherwise been placed upon the language used in such Act or upon similar language.

A similar provision contained in subsection 4 of section 21 of The Interpretation Act, R.S.C. 1906, c. 1, is referred to in the judgment of Anglin J. in *Canadian Pacific Railway v. Albin* 44. In that case a section of the Consolidated Railway Act of 1903 was re-enacted after it had been interpreted in a number of decisions in Ontario and Anglin J. adopted the language of Lord Watson in *Casgrain v. Atlantic & North West Railway Co.* 45, reading:

Their Lordships cannot assume that the Dominion Legislature, when they adopted the clause verbatim in the year 1888, were in ignorance of the judicial interpretation which it had received. It must, on the contrary, be assumed that they understood that sect. 12 of the Canadian Act must have been acted upon in the light of that interpretation. In these circumstances their Lordships, even if they had entertained doubts as to the meaning of sect. 12 of the Act of 1888, would have declined to disturb the construction of its language which had been judicially affirmed.

In the present matter, however, after the decision of this Court in *McCulloch v. Murray* in 1942, the Legislature has by s. 11 of c. 59 of the Statutes of 1943 repealed s. 140 of The Vehicles Act, R.S.C. 1940, c. 275, and re-enacted it in rather different terms but again used the terms in question "gross negligence or wilful and wanton misconduct", and by c. 98 of the Statutes of 1945 repealed The Vehicles Act of 1939 and re-enacted as s. 141 the section as amended in 1943. In my opinion, if in spite of the language of s. 48 of The Interpretation Act there is any presumption that the Legislature intended to adopt the interpretation which had been placed upon the expression in judgments of the courts, when the amendment of 1943 was made and when subsequently the section was re-enacted, the presumption is that the interpretation assigned to the similar language of the Nova Scotia statute by this Court was adopted.

The appeal should, in my opinion, be dismissed with costs.

Appeal dismissed with costs.

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Solicitors for the respondents: Hall, Maguire & Wedge

1 [1950] 1 W.W.R. 780.

2 [1937] 2 W.W.R. 191.

3 [1937] 3 W.W.R. 504.

4 [1938] 2 W.W.R. 1.

5 (1919) 59 Can. S.C.R 151 at 166.

6 [1895] A.C. 282.

7 [1925] S.C.R. 364.

8 [1942] S.C.R. 141.

9 (1897) 27 Can. S.C.R. 46

10 [1927] S.C.R. 242.

11 (1943) 49 B.C.R. 249; 3 W.W.R. 162.

12 [1944] S.C.R. 143.

13 [1942] S.C.R. 140.

14 (1905) 37 Can. S.C.R. 1.

15 [1937] 2 W.W.R. 191 at 200.

16 [1937] 3 W.W.R. 504.

17 [1938] S.C.R. 315.

18 [1938] 2 W.W.R. 1.

19 (1941) 16 M.P.R. 45

20 (1942) S.C.R. 141.

21 [1926] S.C.R. 575.

22 [1940] A.C. 152 at 176.

23 [1946] 2 All E.R. 471 at 477.

24 [1868] L.R. 2 P.C. 317.

25 (1869) L.E. 3 PC. 115.

26 [1927] S.C.R. 242.

27 (1919) 59 Can. S.C.R. 263

28 [1933] A.C. 61 at 66.
29 (1905) 35 Can. S.C.R. 625.
30 (1920) 60 Can. S.C.R. 375
31 (1702) 2 Raym. 909 at 913.
32 (1896) 27 Can. S.C.R. 46.
33 (1917) 56 Can. S.C.R. 80.
34 [1927] S.C.R. 242.
35 (1925) 59 O.L.R. 628.
36 (1896) 27 Can. S.C.R. 46.
37 [1937] 2 W.W.R. 191.
38 [1937] 3 W.W.R. 504.
39 [1938] 2 W.W.R. 1.
40 [1942] S.C.R. 141.
41 [1907] A.C. 81 at 89.
42 [1933] A.C. 402 at 412.
43 [1937] S.C.R. 319.
44 (1919) 59 Can. S.C.R. 151.
45 [1895] A.C. 282 at 300.

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