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Burke v. Perry and Perry, [1963] S.C.R. 329

Anonymous

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This case in which the Supreme Court of Canada reverses the Manitoba Court of Appeal and restores the judgment of the trial judge is an illustration of Jerome Frank's thesis that the essential jurisprudence is to be found in the trial courts and not in the higher

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[35] See *Dann v. Hamilton* [1939] 1 N.B. 509. The mere fact that a motorist is receiving a gratuitous benefit from the driver does not mean that he thereby consents to run the risk of suffering injury caused by the driver's negligence *and* to forego compensation.

[36] See Friedmann, *Social Insurance and Principles of Tort Liability* (1949) Harv. L. Rev. 241.

[37] Harris, D. R., *Compensation for Accidents,* (1957, 1958, 1959 and 1960) *Solicitors' Journal,* p. 1.

[38] Note here the so called "thin skull" cases.

[39] The figures here are conflicting, but it can be assumed that there is now 97-99% coverage.

[40] In Saskatchewan, a scheme not based on fault has been in force since 1946; it is administered on a non-profit basis, by a Crown corporation, the Saskatchewan Government Insurance Office.

[41] See *Accident Facts,* 1962: Statistics Relating to Motor Vehicle Traffic Accidents, Ontario Department of Transport. In 1962, 1,383 persons were killed in Ontario. If 2% of all motorists were uninsured this would mean that 27 persons were possibly left without any remedy whatsoever.

courts. The court was asked to determine whether the conduct of the respondent Irene Perry in driving a motor vehicle amounted to "gross" as opposed to "ordinary" negligence. On this distinction depended the claim of the appellant here to take advantage of s. 99(1) of the Highway Traffic Act, R.S.M. 1954, c. 112, which provides gratuitous passengers may recover from the host driver where the driver's conduct is proved to be grossly negligent. The trial judge had found that the cumulative effect of several negligent acts on the part of the respondent did constitute gross negligence. In effect, the majority of the Court of Appeal tried to evaluate the proper weight to give to the evidence in applying to it the law. They (the majority) felt there should be a flagrant quality in some of the acts which cumulatively constituted gross negligence. Speaking for the Court, Ritchie J. agrees with Freedman J.A. in his dissenting opinion that "An appellate court should be slow to substitute its opinion for his [t.j.] as to whether the defendant's conduct amounts to gross negligence." Ritchie J. considers this is not a case "on which the opinion of an appellate court as to the quality of the negligence should be substituted for the opinion reached by the learned trial judge."

In effect the case is a reminder from the highest authority that appellate courts must deal with questions of law, and rely for better or for worse on the first hand impressions of the trial judge as to what the facts are. As the Court pointed out:

> . . . the difficult task of assessing the quality of the negligent action . . . in order to determine whether or not they [the facts] are to be characterized as "gross negligence" involves a reconstruction of the circumstances of the accident itself including the reactions of persons involved, and this is a function for which the trial judge who has seen and heard the witnesses is far better equipped than are the judges of an appellate court.