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Ouelette v. Johnson; Ouelette v. Tourigny, [1963] S.C.R. 96

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Ouelette v. Johnson; Ouelette v. Tourigny, [1963] S.C.R. 96.

By its dismissal of the appeal in the recent case of *Ouelette v. Johnson,*[1] the Supreme Court of Canada has exhibited its sympathy with the Ontario courts and their attempt to narrow the operation of subsection 105(2) of *The Highway Traffic Act.*[2] The facts of the case were as follows: the appellant-defendant Ouelette and the two plaintiffs, Johnson and Kennefic all worked at the Consolidated Deni-

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16 [1963] S.C.R. 131.

1 [1963] S.C.R. 96. In point of fact, there were two cases before the bar namely *Lionel Ouelette v. John Johnson and Lionel Ouelette* and *Ferrier Turcotte v. Gladys Tourigny and Terry Tourigny* infants under the age of 21 years by their next friend Hazel Agnes Kennefic and the said Hazel Agnes Kennefic.

2 R.S.O., 1960, c. 172, s. 105: (i) The owner of a motor vehicle is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on the highway unless the motor vehicle was without the owner's consent in possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner is liable to the same extent as the owner. (ii) Notwithstanding subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in business of carrying passengers for compensation, is not liable for any 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 the motor vehicle.

son Mine near Elliot Lake, Ontario, and commuted to their homes in Sudbury each weekend. The defendant, a car owner, agreed to drive the other two for a fixed fee of $2.00 each per one-way trip between the mine and Sudbury. This rate was not based on the cost of gas or oil but corresponded exactly to the amount which the plaintiff Johnson had paid to a previous driver. Several such journeys were made pursuant to the agreement until a collision occurred in which Kennefic was killed and Johnson was seriously injured.

The trial judge, Aylen, J.[3] in two judgments held that the accident resulted solely from the defendant's negligence and that his automobile was being "operated in the business of carrying passengers for compensation" within the ambit of subsection 105(2).[4] He implicitly affirmed the case of *Wing v. Banks*[5] and accordingly gave judgment for the plaintiffs.[6] Almost a year later, the Ontario Court of Appeal dismissed without reported reasons, appeals from the two judgments.[7] In the Supreme Court, no question was raised as to the trial judge's finding of negligence or the assessment of damages. The judgment was delivered by Cartwright J. who held that decisions in *Wing v. Banks* and *Lemieux v. Bedard*[8] were correct and legally indistinguishable from the instant case. Although it appears from the report that counsel on both sides cited numerous cases relating to subsection 105(2), the Court unfortunately did not think it necessary to examine them in detail and rationalize the conflicts. The only case which they chose to disapprove explicitly was *Csehi v. Dixon*.[9] There the amount of the fixed fee agreed to be paid by the plaintiff was a proportion of a reasonable estimate of the cost of gas and oil, and the Court refused to believe that once it has been determined that an arrangement is of a "commercial nature" the manner of deciding upon the amount of the fee should be relevant.[10]

It is submitted that this case in no way represents a departure from the previous law. Indeed, on the basis of *Wing v. Banks*, the Court certainly arrived at the logical conclusion. In that case, at trial, Gale J. clearly stated that for the purposes of section 105, a vehicle need not be a common carrier or devoted exclusively to the business

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[3] The judgment was unreported, however a copy can be obtained from the Supreme Court Office, 1961 #130 under the style *Johnson v. Ouelette*.

[4] At p. 13 Aylen J. stated "consideration of the above decisions has convinced me that when, as in this case, a fixed fee is paid for transportation regardless of the number of passengers in the car and that fee is in no way based on sharing of expenses, the driver of the car is, at least for the time being 'in the business of carrying passengers for hire'."

[5] [1947] O.W.N. 897 (C.A.).

[6] The cases referred to in argument were *Csehi v. Dixon* [1953] O.W.N. 238, *Demianiw v. Zinkewich* [1953] O.W.N. 121, *Wing v. Banks* [1947] O.W.N. 897, *Lemieux v. Bedard* [1953] O.R. 836, *Regan v. Edgill* [1956] O.W.N. 801 and *Bohm v. Maurer* [1957] O.W.N. 381.

[7] Upon inquiry at the Court of Appeal Office, the writer was informed that the appeal was dismissed without recorded reasons.

[8] [1953] O.R. 837, (1953) 4 D.L.R. 252 affirming [1952] O.R. 500, (1952) 4 D.L.R. 421.

[9] [1953] O.W.N. 238, (1953) 2 D.L.R. 202 (C.A.).

[10] *Supra*, footnote 1 at p. 98.

of carrying passengers. The case of *Lemieux v. Bedard* which was also of direct authority carried this line of reasoning even further. There, the Ontario Court of Appeal held that a motor car can in certain circumstances be operated in the business of carrying passengers for compensation even if it is so operated only for one day or on only one occasion.[12] It is perhaps dangerous to say categorically that the court could not have decided the case otherwise, but at least on the authorities, a contrary decision would have been difficult. Basically, the case is wholly consistent with a considerable body of jurisprudence. Its prime importance would seem to lie in the fact that the Supreme Court of Canada has lent its weight to the Ontario judiciary and their fight against section 105.

Judicial legislation with regard to the section began in 1945 with *Harrison v. Toronto Motor Car and Krug*[13] and has followed two main streams. The first as evidenced by the Krug case has been to discover alternate relationships between the owner or driver and the passenger. The second as evidenced by the instant case has been to give a broad construction to the "exception within an exception" of subsection 105(2). However, the Supreme Court of Canada has not always proved itself to be sympathetic with these attempts to delimit the scope of the subsection. Thus in *Handley v. Allardyce,*[14] the Court clearly overruled a previous line of cases whereby an "owner-passenger" of a motor vehicle who was being driven by another person was allowed recovery.[15] Although this was a nakedly overt distortion which no doubt had to be remedied, nonetheless, it is both salutary and gratifying to note that the Supreme Court has not embarked on a totally literal interpretation of the statute.

Less clear is the resultant law following the Court's disapproval of *Csehi v. Dixon.* Certainly, there can be no disagreement with their conclusion, that once it is ascertained that the arrangement is of a "commercial nature", the manner of computing the tariff is irrelevant. Nonetheless, considerable doubt is thus cast upon the decision in *Shaw v. McNay.*[16] That case is not authority for the commonly held proposition that there is no liability where there is merely an expense-sharing arrangement motivated primarily by friendship.[17] Indeed, the parties were complete strangers. More apposite is the statement in the headnote that a vehicle operated in the business of carrying passengers for compensation does not include a vehicle in which the owner, on an isolated occasion, carries a passenger who

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[11] *Supra,* footnote 5 at p. 898.
[12] *Supra,* footnote 8, at p. 842 per Pickup C.J.O.
[13] [1945] O.R. 1, [1945] 1 D.L.R. 286.
[14] (1962) 37 W.W.R. 29, (1962) 31 D.L.R. (2d) 358 (S.C.C.).
[15] Recovery was allowed in *Cote v. Gauvreau* (1960) 31 W.W.R. 425 (Alta.) and in *Koos v. McVey* [1937] O.R. 369, [1937] 2 D.L.R. 496.
[16] [1939] O.R. 368.
[17] See Linden, A. M., Comment on *Dorosz and Dorosz v. Koch* [1961] O.R. 442 (Schatz J.), affd., [1962] O.R. 105, (1962) 31 D.L.R. (2d) 139 (Ont. C.A.) in 40 Can. Bar Rev. 284 at p. 290.

pays a portion of the expense of the operation of the vehicle.[18] If such be the true ratio decidendi,[19] then it certainly cannot stand with the 'frequency test' enunciated in *Lemieux v. Bedard.* Nor is the writer capable of grasping the impossibly subtle distinction between an expense-sharing arrangement and an arrangement intended to cover a portion of a reasonable estimate of the cost of gasoline and oil used, as existed in *Csehi v. Dixon.* With all due respect, it is unfortunate that the Supreme Court did not deign to consider the cases cited to them. This failure has certainly produced once obvious inconsistency in the law, namely the conflict between *Shaw v. McNay* and *Lemieux v. Bedard,* and a golden opportunity to clear some muddy water has been lost. Apart from the decided cases, the distinction between an expense-sharing agreement and a commercial venture is logically untenable. Clearly the word compensation in subsection 105(2) implies consideration. It is simple contract law that adequacy of consideration is of no moment. A practical dilemma of this conflict and one of great concern to numerous people is the legal status of the "car pool".[20] As the law stands, if a venture is of a commercial nature, one trip can give rise to liability.[21] If the stated fee is a fixed amount, the driver will be liable,[22] and as a result of the present case, once in the commercial category, the manner of computation is irrelevant. In conclusion, this writer submits that the driver in a car pool is no longer free from legal liability to his passenger if any money is received at any time.[23] The pertinent question in this regard is—what meaning have the courts given to "commercial".[24] Unfortunately all the decisions seem to have been strictly 'ad hoc' with little or no consideration given to policy or legal formulation.[25] This is doubly regrettable as the word has become a guise for many varied ventures and should be defined in at least a rudimentary fashion.

As stated previously, the line of reasoning adopted by the Court was that of giving the so called "exception within an exception" of subsection 105(2) a broad interpretation. The inherent difficulty

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[18] This conclusion is supported by the statement of Godfrey J. at pp. 371-372.

[19] Note also Horsley, *Manual of Motor Vehicle Law* at p. 292 for a similar view.

[20] For a good discussion of the cases on this subject see Linden, A. M., comment on *Feldstein v. Alloy Metal Sales Ltd. and Matthews* [1962] O.R. 476 (Ont. H.C.), in (1963) 41 Can. Bar Rev. 593 at pages 594-595.

[21] *Lemieux v. Bedard, supra,* footnote 8.

[22] See *Regan v. Edgill* [1956] O.W.N. 801, *Chote v. Rowan* [1943] 1 D.L.R. 339, and *Dunnigan v. Gareau* [1954] O.W.N. 897.

[23] This conclusion is somewhat supported by Horsley, *supra,* footnote 19 at p. 294: "The exception was not limited to cases where the car was being exclusively used in the business of carrying passengers for compensation, and when an owner carries passengers to and from work daily for a fixed weekly fee, such passengers have a right of action".

[24] Note that Phelan, *Highway Traffic Law,* does not even consider the matter.

[25] Note *Dunnigan v. Gareau* [1954] O.W.N. 504; *Demianiw v. Zinkewich* [1953] O.W.N. 121 (Co. Ct. J., Alta.); *Smith v. Steeves,* (1958) 41 M.P.R. 91 (N.B.C.A.).

of such a construction lies in the fact that there is a statutory condition in all insurance policies prohibiting recovery if the insured operates his vehicle in the business of carrying passengers for compensation.[26] A far more reliable and preferable approach, at least from the insured's point of view, is to discover an alternate relationship between passenger and driver. Thus in *Harrison v. Toronto Motor Car and Krug*[27] the decision rested on the law of vicarious liability as between the master and the driver,[28] despite the fact that some cases point to the view that the relationship of master and servant must exist between the plaintiff and the driver.[29] In *Dorosz and Dorosz v. Koch,*[30] both the trial judge and the Court of Appeal imposed liability on the basis of a "private contract" of employment which included a term requiring safe carriage.[31] Neither of these two relationships existed in *Ouelette v. Johnson.* With regard to vicarious liability, the defendant was himself the driver-owner and not the master-owner as exemplified by the *Krug* case. As to the *Dorosz* case, it is patently impossible to discover any private contract of employment between the parties. Nor could the court have relied on *Duchaine v. Armstrong*[32] as expanded in the *Dorosz* case whereby a master may be responsible for the safe carriage of his employment.[33] It should be noted that the present decision in no way impugns the 'contract of carriage' view as enunciated in the *Duchaine* case. In conclusion, the Court adopted the only possible line of reasoning enabling it to circumvent the subsection short of an absolute denial of its existence and validity.

It would be an exaggeration to say that the law in this area is uncertain. Nevertheless, there are numerous pitfalls waiting to catch the unwary plaintiff. The enactment of the "gratuitous passenger" subsection seems to have been largely motivated by a very strong insurance lobby.[34] Quite definitely it has no historical rationale. The essence of the enactment is to relieve the person at fault from liability, whereas historically, fault was the *implicit premise* of negligence. Possibly the subsection is a legislative example of "volenti non fit injuria", but this contention is weakened by the fact that a

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[26] R.S.O. 1960 c. 190, s. 203, condition 3(b) "unless permission is expressly given by an endorsement of the policy and in consideration of an additional stated premium, the automobile shall not be rented or leased, nor shall it be used as a taxicab, public omnibus, livery, jitney, or sight-seeing conveyance or for carrying passengers for compensation".

[27] *Supra,* footnote 13.

[28] See Morton, Comment on *Duchaine v. Armstrong* [1957] O.W.N. 251 in (1958) 36 Can. Bar Rev. 414 at pp. 416-417.

[29] *Jurasits v. Names* [1957] O.W.N. 166, (1957) 8 D.L.R. (2d) 659 (Ont. C.A.).

[30] [1961] O.R. 442 (Schatz J.) affd., [1962] O.R. 105, (1962) 31 D.L.R. (2d) 139 (Ont. C.A.).

[31] *Supra,* footnote 30 at p. 443.

[32] [1957] O.W.N. 251.

[33] *Supra,* footnote 30 at p. 444.

[34] See Wright, Comment on *Harrison v. Toronto Motor Car and Krug* in (1948) 23 Can. Bar Rev. 344 at p. 347.

person may not be able to consent to negligence in the abstract.[35] As stated, when the subsection was promulgated, fault liability constituted the foundation of the law of torts and insurance coverage was less wide spread. But these factors are no longer operative. As a matter of policy, fault liability should be of no account.[36]

> First, it is the writer's thesis that the aim of the law in penalizing fault should be clearly and finally separated from the aim of compensating victims. Fault should be relegated entirely to the criminal law, where it properly belongs, and the community as a whole should ensure that victims of accidents are compensated whether or not a particular individual can be proved at fault. So long as the ideas of fault and of compensation are linked in our civil law of torts, we shall fail to achieve either aim of the law. Historically, fault first developed as a concept in the criminal law, and it was only later that it was taken over into the civil law as a tortious concept governing compensation to the victim of a wrong.[37]

As a matter of practice, fault has become a meaningless concept when the smallest error in judgment can result in a law suit of astronomic proportions.[38] Secondly, third party liability insurance is now of almost universal incidence.[39] The last step remaining is to make such coverage compulsory.[40] There can be no doubt that this is a social necessity.[41] Thus, the occasion of loss-spreading has become virtually so complete than any legislative anomalies should be eradicated. The courts in general have shown their abhorrence of the "gratuitous passenger" clause and the public is definitely uneasy about its operation. Undoubtedly, the legislature would be well advised both on legal and political grounds to abolish subsection 105(2). A.R.A.S.