1962
*Dec. 13

LIONEL OUELETTE (*Defendant*) .....APPELLANT;

AND

JOHN JOHNSON (*Plaintiff*) .....RESPONDENT.

1963
Jan. 22

LIONEL OUELETTE AND FERRIER TURCOTTE (*Defendants*) .....APPELLANTS;

AND

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, personal representative of James Leo Kennefic deceased (*Plaintiffs*) .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor vehicles—Passengers carried pursuant to agreements for particular journeys—One passenger injured and another killed—Whether vehicle "operated in the business of carrying passengers for compensation"—Liability of owner—The Highway Traffic Act, R.S.O. 1960, c. 172, s. 105(2).

*PRESENT: Kerwin C.J. and Cartwright, Abbott, Martland and Ritchie JJ.

The defendant while carrying two passengers in his motor vehicle was involved in a collision with another motor vehicle, as a result of which one of the passengers, the plaintiff J, was seriously injured, and the other passenger, the husband of the plaintiff K, was killed. J and K had made separate arrangements with the defendant whereby the latter agreed to provide them with transportation, at a fixed rate, from their place of employment to their family homes and return on week-ends. It was while they were being driven by the defendant pursuant to these agreements that the accident occurred. The trial judge, who held that the collision was caused solely by the negligence of the defendant, was of the opinion that at the time of the accident the defendant's automobile was being "operated in the business of carrying passengers for compensation", within the meaning of s. 105(2) of *The Highway Traffic Act*, R.S.O. 1960, c. 172, and gave judgment for the plaintiffs. The Court of Appeal upheld the decision of the trial judge.

Held: The appeals should be dismissed.

The principle enunciated in *Lemieux v. Bedard*, [1953] O.R. 837, that one who enters into an agreement to transport other persons in his automobile on a particular journey, in return for payment of an agreed sum of money, and proceeds to carry out the agreement, makes it his business on that occasion to carry passengers for compensation, and will not be relieved by s. 105(2) of *The Highway Traffic Act* from liability for his negligence, even if there is no evidence that he has engaged in the business on any other occasion, was correct and applied *a fortiori* to the present case in which the arrangement was carried out week after week.

Wing v. Banks, [1947] O.W.N. 897, approved; *Csehi v. Dixon*, [1953] O.W.N. 238, disapproved.

APPEALS from two judgments of the Court of Appeal for Ontario, dismissing two judgments of Aylen J. Appeals dismissed.

Andrew Brewin, Q.C., and *Maurice Lacourciere*, for the defendants, appellants.

P. B. C. Pepper, Q.C., and *F. L. Gratton*, for the plaintiffs, respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—These appeals, which were argued together, are from two judgments of the Court of Appeal for Ontario pronounced on February 6, 1962, dismissing without recorded reasons appeals from two judgments of Aylen J. pronounced on May 30, 1961.

On November 21, 1959, John Johnson and the late James Leo Kennefic were riding as passengers in a motor vehicle owned and driven by the appellant, which came into collision with another motor vehicle on Highway Number 17 in the Town of Copper Cliff in the Province of Ontario. Johnson was seriously injured and Kennefic was killed.

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Aylen J. held that the collision was caused solely by the negligence of the appellant and gave judgment in favour of the respondent Johnson for $14,945.35 and in favour of the respondent Hazel Agnes Kennefic, the widow of the late James Leo Kennefic, for $22,300 apportioned between her and her two infant children.

In this Court no question is raised as to the findings of negligence or the assessment of damages. The sole question is whether the appellant is relieved from liability by the terms of subs. 2 of s. 105 of *The Highway Traffic Act*, R.S.O. 1960, c. 172.

Section 105 reads as follows:

105 (1) 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 a highway unless the motor vehicle was without the owner's consent in the 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.

(2) Notwithstanding subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the 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.

In July 1959, the appellant commenced working at Consolidated-Denison Mine near Elliot Lake, Ontario. Johnson and Kennefic commenced work at the same mine early in September 1959.

Ouelette, Kennefic, and Johnson all lived in or near Sudbury which is some 128 miles east of Elliot Lake. It was their usual practice, however, to stay at lodgings provided by the company at the mine head during the work week and to go to and from their family homes in the Sudbury area on week-ends. There was no train connection between Elliot Lake and Sudbury and the only method of transport between the mine and the parties' homes in Sudbury was by private automobile or by bus. The bus fare was $4.20 for a one-way trip. Before getting work at the Consolidated-Denison Mine, Johnson had travelled by bus to Sudbury for the week-end a few times, and both he and Kennefic had driven to Sudbury on a number of occasions with a fellow employee, Dionne, to whom they each paid $2 each way.

In September 1959, Ouelette purchased an automobile. The evidence is that thereafter he drove to Sudbury on the week-ends alone on at least three occasions. He said that the cost of gasoline and oil for a one-way trip from Elliot Lake to Sudbury was approximately $4.

In late September or early October Johnson asked Ouelette if he would drive him to Sudbury on the week-ends. Ouelette agreed to do so. The learned trial judge has found, and his finding is supported by the evidence, that it was agreed that Johnson would pay $2 each way for the week-end trips and that later the same agreement was made between Ouelette and Kennefic. It was while Johnson and Kennefic were being driven by Ouelette pursuant to these agreements that the accident occurred. They had been driven by him under the same agreements on several prior week-ends. The learned trial judge has found that Johnson and Kennefic either paid or obligated themselves to pay for all of these trips at the rate mentioned. He also found that the amount agreed to be paid was not based on the cost of gas or oil but on the amount Johnson had previously paid to Dionne.

On these facts the learned trial judge was of opinion that at the time of the accident Ouelette's automobile was being "operated in the business of carrying passengers for compensation", within the meaning of s. 105(2), and gave judgment for the plaintiffs. In so doing he followed, *inter alia,* the case of *Wing v. Banks*[1], a judgment of Gale J. which was affirmed, without recorded reasons, by the unanimous judgment of the Court of Appeal composed of Fisher, Laidlaw and Roach JJ.A. In my view that case was rightly decided and is indistinguishable from the case at bar. I agree with the conclusion of the learned trial judge.

In the course of the full and helpful arguments addressed to us by both counsel almost all, if not all, of the reported cases dealing with s. 105(2) or its predecessors were examined and discussed. Some of them are not easy to reconcile with others. It is not necessary for the decision of this appeal to examine them as I am satisfied that the facts of the case at bar bring it clearly within the *ratio decidendi* of those cases of which *Wing v. Banks, supra,* is a leading example, I wish to add only the following observations.

[1] [1947] O.W.N. 897.

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In my opinion the principle enunciated in the judgment of the Court of Appeal in *Lemieux v. Bedard*[1] is correct. It is accurately summarized in the headnote as follows:

> One who enters into an agreement to transport other persons in his automobile on a particular journey, in return for payment of an agreed sum of money, and proceeds to carry out the agreement, makes it his business on that occasion to carry passengers for compensation, and will not be relieved by s. 50(2) (now s. 105(2)) of The Highway Traffic Act from liability for his negligence, even if there is no evidence that he has engaged in the business on any other occasion.

This principle applies *a fortiori* to the case at bar in which the arrangement was carried out week after week.

I do not wish to be understood as approving the judgment of the Court of Appeal in *Csehi v. Dixon*[2]. In that case the Court accepted the decision in *Wing v. Banks* but found themselves able to distinguish it on the ground that the amount of the fixed fee agreed to be paid by the plaintiff to the defendant for transporting him was arrived at by estimating a portion of the cost of the gasoline and oil used by the defendant. In my respectful view, once it has been determined that the arrangement between the parties was of a commercial nature the manner in which the amount of the fee to be paid was decided upon becomes irrelevant.

I would dismiss both appeals with costs.

Appeals dismissed with costs.

Solicitors for the defendants, appellants: Lacourciere & Lacourciere, Sudbury.

Solicitors for the plaintiff, respondent, John Johnson: Hawkins & Gratton, Sudbury.

Solicitors for the plaintiffs, respondents, Gladys Tourigny et al.: Valin & Valin, Sudbury.

[1] [1953] O.R. 837.

[2] [1953] O.W.N. 238, 2 D.L.R. 202.