WARE'S TAXI LIMITED AND ELIZABETH DOETS (DEFENDANTS) } APPELLANTS

AND

CAROL ANN GILLIHAM ET AL (PLAINTIFFS) ..... } RESPONDENTS.

1949
*Apr. 26
*Jun. 24

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Motor vehicles—School Taxi—Negligence—Degree of care required—Child falling through opened door—Safety devices—Supervision—Allurement.

The five year old respondent fell out of appellant's taxi, when the door opened, as she was being transported from school in pursuance of a contract between the school and the appellant taxi company. The taxi was a 4 door sedan, the door had the standard push button lock and there was no evidence of any defect in it or in the door. The trial judge and the Court of Appeal found that the infant plaintiff or one of the other children in the car must have played with the plunger and opened the door. There was evidence that the plaintiff had on previous occasions fiddled with the push button. On the day of the accident, while the car was stopped, the driver had noticed the plaintiff playing with the button and had ordered her to cease and to stand back from the door. The child obeyed and the driver made sure that the button was down and the door securely locked and fastened. The trial judge dismissed the action and the Appellate Division reversed his decision and ordered a new trial limited to an assessment of damages.

*PRESENT: The Chief Justice and Kerwin, Rand, Estey and Locke JJ.

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Held, affirming the Appellate Division (Rand and Locke JJ. dissenting), that the appellant was negligent in conveying these children in this 4 door sedan without safety devices and no greater degree of supervision than could be exercised under the circumstances by the driver, as the push button and the handle constituted an allurement to the children and a reasonable man should have anticipated this attraction and the resulting danger.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the dismissal of the action by McLaurin J. and ordering a new trial limited to the assessment of damages.

L. R. Fenerty for the appellants.

A. W. Hobbs for the respondents.

THE CHIEF JUSTICE:—I agree with my brother Estey and would dismiss the appeal with costs.

The judgment of Kerwin and Estey JJ. was delivered by

ESTEY J.:—This is an action for damages arising out of an injury suffered by Carol Ann Gilliham, daughter of the respondent Ernest James Gilliham, when she fell out of a taxi owned by the appellant Ware's Taxi Limited while it was proceeding on Centre Street near 2nd Avenue in the City of Calgary at about 5.15 p.m. on the 17th of June, 1946.

Carol, about five years of age, was attending the Christopher Robin Kindergarten and Preparatory School in Calgary. Fees charged by this school covered the cost and thereby it assumed the responsibility of conveying the children to and from the school and their respective homes. In February 1946 in discharge of that responsibility the school entered into a contract with Ware's Taxi Limited to convey the children in the morning, at noon and after school. The school is not a party to this action and therefore any question as to its liability or the terms of the contract between it and the appellant Ware's Taxi Limited is not in issue. The appellants, therefore, accepted these children, from about three to six years of age (with possibly a few up to eight), as passengers and were thereby under a duty to exercise reasonable care in their conveyance. The appellant Ware's Taxi Limited employed in this work

(1) (1948) 2 W.W.R. 991.

some four or five taxis about four and a half hours per school day. At other times these taxis were used in their regular taxi service.

The taxi in question was a 1942 4-door Dodge Sedan. Each of the doors was equipped with the usual handle for opening as well as a push button which when down locked the door in a manner that prevented it being opened from either the inside or the outside. Miss Doets, an experienced driver who had been transporting the children since the contract was made in February, deposed that she was always careful to see that the push button was down before starting the automobile.

It was under the terms of the above contract that on the afternoon in question the appellant Elizabeth Doets, employed by appellant Ware's Taxi Limited, was driving the taxi. She left the school with some seven or eight children in the taxi. Two or three had already been left at their respective homes leaving about five in the taxi when proceeding along Centre Street Miss Doets noticed Carol playing with the push button on the right rear door. She "told her to stand away from the door and she did." Miss Doets at that time made certain the push button was down and continued. When she had gone about a block that door opened and Carol fell out suffering the injuries for which damages are here claimed.

In both the Trial and Appellate Court (1) it has been accepted as a fact that Carol or one of the other girls had raised the push button and operated the handle permitting the door to open. The push button, the handle and locking device on the door, so far as the evidence discloses, were in good condition. When, therefore, the doors were closed and the push button down the children were safe but if the push button was raised and the handle moved the door would open.

The question is therefore whether the push button and handle constituted an allurement to these children and should a reasonable man anticipate both that they would attract children, who, if they meddled therewith, would be in a position of peril. As stated by Lord Macnaghten in *Cooke's Case* (2), is the push button and the handle "attractive to children and dangerous as a plaything?"

(1) (1948) 2 W.W.R. 991. (2) [1909] A.C. 229.

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> Every person must be taken to know that children are likely to meddle with what comes within their reach, and this knowledge may impose a relatively higher degree of duty to take care on any one who leaves that which may be dangerous, if meddled with, in a place where it is probable that children will reach it, than if there was no such probability.

Halsbury, Vol. 23, p. 584.

It must therefore be assumed that Ware's Taxi Limited and its employees were aware of the natural curiosity of children which would lead them to investigate whatever might attract and was within their reach in the automobile.

Hamilton, L.J., later Lord Sumner, in *Latham* v. *R. Johnson & Nephew Ltd.* (1), stated:

> What property must the chattel possess to make the consideration of its attractiveness to children relevant? It must be something which, from its nature or state, will draw children to it and induce them heedlessly to put it into operation.

This push button was within easy reach of every child in the rear seat of the automobile. Moreover, that it could be raised up and pushed down was made evident to each child every time the driver of the automobile opened or closed that door. The operation of the push button and the handle were being constantly brought to their attention. In these circumstances it would be expected that the children would be drawn toward them and "heedlessly to put them in operation."

Moreover, that there is a danger or a circumstance of peril when children are placed in the rear seat of a 4-door sedan is supported by the evidence. Some parents take the precaution to purchase the 2-door type. Other parents, however, equip their 4-door sedans with safety devices and prior to the war and again at least in 1947 some of these devices were upon the market. Three of them were before the Court at the trial. An automobile could be equipped with the most expensive of these for about $10. Moreover, these devices were not complicated and anyone with mechanical ability could place a workable device upon an automobile which would insure the door remaining closed even if the children should meddle or play with the push button and the handle.

A representative of another taxi company called as a witness said, "we have at times transported children" from two other kindergartens without either a safety device

(1) (1913) 1 K.B. 398 at 419.

upon the rear doors or any supervision. A taxi owner called as a witness stated that he had transported children for two organizations in Calgary, one for a period of two years and the other four months, using eight cars and making four trips per day. He had only the push buttons without any safety device upon the rear doors. The children, however, that he transported were of ages from four to ten years. He stated that the younger children were placed in the front seat with the driver, and then, "we do make a point to have the old children look after the doors," or as he again stated, "we put a couple of the older kiddies to watch it." The appellants took the precaution of placing the younger children in the front seat but this left children usually up to six years of age entirely by themselves in the back seat with only such supervision as the driver in the circumstances might find it possible to exercise.

The foregoing indicates that parents and at least one taxi owner appreciate the need for either safety devices or supervision when young children are being conveyed in a 4-door sedan. That these devices have been developed and placed upon the market would suggest that the apprehension of danger is generally recognized.

The possibility of an automobile rear door opening without being meddled with is very remote. The precautions suggested above are taken because of the propensity of small children to meddle with that which attracts them. It would, therefore, appear that a reasonable man, assuming an obligation to transport children from the ages of about three to six years in a 4-door sedan equipped with push button and door handle, as in this case, would foresee the possibility of these small children meddling or playing with the push button and the handle and foresee the danger or peril consequent upon their doing so and would take such precautions as would either prevent them playing with the push button and the handle, or if they did so, remove the possibility of dangerous consequences ensuing.

The conduct of Carol in meddling with the push button while the automobile was en route on the day in question, and upon previous occasions when she had reached her destination and was anxious to get out to play, was

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important only in so far as it may have drawn the attention of appellants to this possible danger and to indicate the natural propensity of children. She being a child of about five years of age her conduct would not be accepted as constituting in law contributory negligence. *Merritt* v. *Hepenstal* (1); Beven on Negligence, 4th ed., p. 196.

The appellants also submitted that they were using taxi cabs with standard or approved equipment which would negative the negligence here alleged on their part. That they were using the standard or approved equipment for the transportation of other than young children is not here in issue. Counsel on appellants' behalf cited *MacLeod* v. *Roe* (2), where the provision of standard equipment for customers was held under the circumstances to be sufficient. In that case the principle applied in *McDaniel* v. *Vancouver General Hospital* (3) was followed. In the latter the defendant acted in accord with the "general approved practice." The appellant Ware's Taxi Limited had been operating under this contract from February to June. A representative of another taxi company deposed that they transported children "at times," while a taxi owner who had the longest experience in transporting children did provide some supervision. This evidence does not establish either that there is any "general approved practice" or that there is what may be properly described as standard equipment for the transportation of young children in 4-door sedan automobiles, and therefore it cannot be contended that the appellant Ware's Taxi Limited was acting within the scope of either of the foregoing cases.

Neither can the appellants' submission that they were acting in accord with the custom among taxi companies in using this 4-door sedan in the transportation of these children be accepted. It is true that evidence of established practice or custom may be adduced for the purpose of rebutting an allegation of negligence but in order to establish such it must have been a practice over a long period of years. In the case cited by appellants of *Rothschild* v. *The Royal Mail Steam Packet Co.* (4), Pollock, C.B., referred to the particular mode of conveyance "for a great

(1) (1896) 25 S.C.R. 150.
(2) [1947] S.C.R. 420.
(3) (1934) 3 W.W.R. 619.
(4) (1852) 18 L.T.R. 334.

number of years," and in *Hart* v. *Lancashire and Yorkshire Ry Co.* (1), the period was twenty years. The evidence here does not establish any such custom or practice.

It would appear that *Shrimpton* v. *Hertfordshire County Council* (2) is more in point. There a child was injured while being transported in a school conveyance. The jury found that it was negligence not to provide supervision other than that of the driver. The Lord Chancellor (Loreburn) stated at p. 147:

> They (the jury) have found that it was not a reasonable and proper way for the county council to convey children to school in this vehicle without a conductor or some adult person to take care of them. It is said that there is no evidence in support of this finding. To my mind it is a question which any man of the world can answer by the exercise of his own common sense and his knowledge of life.

It would therefore appear that the appellants in conveying the children in the above described 4-door sedan, without safety devices and no greater degree of supervision than could be exercised under the circumstances by the driver, were negligent.

In reversing the judgment at trial dismissing respondents' action the Appellate Court ordered a new trial limited to an assessment of damages. In my opinion the judgment of the Appellate Division should be affirmed and the appeal dismissed with costs.

The dissenting judgment of Rand and Locke JJ. was delivered by

RAND J.:—The facts out of which this appeal (3) arises have been stated, and I will not repeat them. It is, I think, unquestioned that from the standpoint of the actual undertaking of the appellant there was no failure in performance. Both the school authorities and the parents of the respondent, as well, I have no doubt, as all the other parents, were fully aware that the children were being carried in a taxicab with ordinary safety devices, though under the care and oversight of a selected chauffeur. This had continued for over six months during which the automobile would be at each home and at the school four times on every school day.

The serious question then is whether the standard of care imposed by law on such a relation called for further

(1) (1869) 21 L.T.R. 261.
(2) (1911) 104 L.T.R. 145.
(3) (1942) 2 W.W.R. 991.

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mechanical or other devices or an attendant. If the terms of the actual undertaking were inadequate, the safety of a child could not be jeopardized even with the consent of his guardians. The test is what the reasonable and prudent person, if his mind was directed to the matter, would accept as being all that could fairly be required in the circumstances. That judgment, of course, would take into account the potential dangers from speed and movement in the traffic conditions in which the automobile moved and the means of safety by which the child was protected against them.

Ordinarily a reasonably intelligent parent can be taken to foresee all risks likely or remotely possible to his young child in any situation more sensitively than another and if we find parents uniformly, freely and voluntarily accepting a course of conduct in others involving risks to their young children, could there be a better test of the reasonableness or sufficiency of the actual care in the particular case? That principle was applied by this Court in the case of *Ouellet* v. *Cloutier* (1). There, a young boy had gone to a neighbouring farm where threshing was in progress. He was standing on the floor of a shed in the presence of the owner, the defendant, a few feet from the machinery as it was slowing down at the end of the day. In a moment of wilfulness he darted to the moving belt and in endeavouring to slow it down caught his hand on the wheel and was injured. The defendant was acquitted of negligence because he had acted as the boy's father in the same situation would have done. Similarly here: the act of the child was not the expectable or likely act: it was a conceivable act, no doubt, but as done it was wilful and impulsive and in the circumstances beyond the range of reasonable anticipation that called for added safeguard.

Now, although the acquiescence by the parents in the carriage of their children in the manner adopted here may not be conclusive of that standard, yet when associated as it is with the acceptance of similar services both in Calgary and other places in Canada and in the absence of a syllable of evidence gainst it, I feel bound to find its security to be reasonable: it was adequate to the risks.

If it had been feasible by adding a convenient device that had become generally used as an additional precaution,

(1) [1947] S.C.R. 521.

a new element in the realized standard would have been added; but although two or three mechanisms have appeared on the market, which were claimed not to have been available during the time in question, the public have not taken them up. The door, of course, might be locked with a key, but there are flaws in all perfection of one dimension, and in that case there would be not only intolerable inconvenience but also new dangers in case of accident.

It is an everyday occurrence in Canada and the United States that parents set off in their automobiles with young children in the rear seat. It is frequent that little ones "pile in" for a short pleasure trip. The doors uniformly, as in this case, have double catches and safety lock and within that protection they enjoy the ride. It would confound a neighbour who with the consent of a parent had taken a young child along with his own for a short run to find himself the victim of a crippling lawsuit because in a moment of wantonness the young child had opened a car door and fallen out. And the duty of care toward such a child in that case would in this respect be the same as in this. Settled over this physical security of lock and catches is the presence of the adult who exercises the authority and oversight of the parent. That was the case here. But the most assiduous surveillance is not absolute insurance against impulse or perversity; there is always an irreducible margin. With insignificant exceptions, children are sufficiently within control by what was furnished here just as they are within their own home, and no other accident of this nature, so far as known, had ever before happened in Alberta; and the searches of counsel have not revealed a similar reported instance in the many services of this sort carried on in the United States.

The injury to the child may be a permanent scar upon a young life, but unfortunately in the multiplying risks and perils of this age these misfortunes occasionally happen as their inevitable result. But I can imagine no sounder or more realistic appraisal of reasonable safety than the long continued acceptance by parents of protective conditions against hazards into which they allow their children to be taken by strangers. Even hindsight supports that

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here because for some time after the accident the child continued to be carried under the same conditions in the taxi.

In the reasons of Ford, J.A. in the Court of Appeal (1), the principle of allurement as applied in *Cooke* v. *Midland Railway* (2) is invoked, but I am bound to say that I cannot see that it is appropriate to the facts. In *Latham* v. *Johnson* (3), Hamilton, L.J. enquires into the qualities or characteristics of the thing or article which give to it the incriminating attractiveness. On p. 419 he says that the chattel "must be something highly dangerous in itself, inherently or from the state in which its owner suffers it to be;" and later that "it must be something which, from its nature or state, will draw children to it and induce them heedlessly to put it into operation." There is nothing of that sort here. The safety catch is merely the small button which is pressed down to prevent the handle of the door from being used and pulled up to release it: in itself it is quite harmless. What opened the door was the pressing down of the handle. I think it quite out of the question to speak of these ordinary and familiar bits of mechanism, with which certainly the child here was thoroughly well acquainted, as "fascinating and fatal." The principle is aimed against setting a trap for children, treating them in this respect as governed by an irresistible curiosity or desire or impulse, quite analogous to the holding out of bait to an animal.

I agree, therefore, with McLaurin, J. who tried the case. The appeal must be allowed and the action dismissed with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellants: *Cairns & Howard.*

Solicitors for the respondents: *Patterson, Hobbs & Patterson.*

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(1) (1948) 2 W.W.R. 991.
(2) [1909] A.C. 229.
(3) (1913) 1 K.B. 398.