1932

*Apr. 28.
*Jan. 15.

CITY OF VANCOUVER (DEFENDANT).....APPELLANT;

AND

OLIVE MAY BURCHILL (PLAINTIFF)....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Highways—Obstruction on—Municipal corporation—Injury to unlicensed driver—Liability of municipality—Motor-vehicle Act, R.S.B.C., 1924, c. 177, s. 7, ss. 7, as amended by B.C. [1930], c. 47, s. 2, ss. 2.

The fact that a taxi driver has not obtained the chauffeur's permit from the Chief of Police provided for by s. 2 (2). of the *Motor-vehicle Act Amendment Act,* 1930, c. 47 and has not procured the driver's licence required by the appellant city's by-law, does not affect the liability of the city for injuries caused to him by its negligence.

At common law and as a member of the public, any individual has the right to the use of the highway under the protection of the law; and the liability of the municipality exists towards every member of the public so using the highway. This principle should not be taken to have been altered in the *Motor-vehicle Act,* except by express words or by necessary intendment. The whole scope of the Act is to prescribe certain requirements for those using the highway with motor vehicles, and to impose certain penalties upon the offenders; it does not provide that they will not be entitled to recover damages, if the damages are suffered while they are infringing the Act.

Goodison Thresher Co. v. *Township of McNab* (44 Can. S.C.R. 187) dist.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of Morrison C.J.S.C. on the verdict of a jury and maintaining the respondent's action for damages.

*PRESENT: Duff, Rinfret, Lamont, Smith and Cannon JJ.

(1) [1932] 1 W.W.R. 641.

The respondent recovered from a jury $20,000 damages against the city of Vancouver for the death of her husband, a taxi driver, who was killed consequent upon the motor car crashing through the cement railing upon the viaduct situate on Georgia street, in that city.

At the close of the argument, the Supreme Court of Canada announced that it would not interfere with the finding of negligence made by the jury, but reserved judgment on the question whether the deceased's failure to take out a driver's licence under the city by-law, and to obtain a permit from the Chief of Police, as prescribed by the *Motor-vehicle Act,* disentitled the respondent from recovering.

G. E. McCrossan K.C. for the appellant.

J. W. de B. Farris K.C. for the respondent.

DUFF J.—I concur with my brother Rinfret.

My view of the pertinent provision of the *Motor-vehicle Act,* (R.S.B.C., 1924, c. 177, s. 7, ss. 7, as amended by c. 47, s. 2, 1930), is that its object is to require persons operating motor vehicles for hire to obtain a municipal permit as prescribed, and to make this obligation enforceable through the penal provisions of the Act. We should, in my opinion, pass beyond the scope and intendment of the statute if we were to enlarge these sanctions, by introducing an additional one having the effect of depriving such a person (in case of non-observance of this obligation) of his *prima facie* right to sue the municipality for negligence in respect of the non-repair of a highway.

The appeal should be dismissed with costs.

The judgments of Rinfret, Lamont, Smith and Cannon JJ. were delivered by

RINFRET J.—At the close of the argument, the Court announced that it would not interfere with the finding of negligence made by the jury and that the appeal should be dismissed unless the deceased's failure to take out a driver's licence under the city by-law, and to obtain a permit from the Chief of Police, as prescribed by the *Motor-vehicle Act,* disentitled the respondent from recovering.

The *Motor-vehicle Act,* of the province of British Columbia (R.S.B.C., 1924, c. 177), is an act respecting the

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operation of motor-vehicles in that province. It provides for the registration and licensing of these vehicles and for the issuance of chauffeurs' licences. It contains traffic regulations, certain requirements with regard to the age of the driver and to such other things as the equipment of the vehicles or the sale and transfer thereof. Provisions are made for the collection of the registration and licence fees. The statute further specifies in what cases any person "shall be guilty of an offence against (the) Act," the penalties he shall thereby incur and to which he shall be liable, on summary conviction.

The particular section of the Act relied on by the appellant reads in part as follows (*Motor-vehicle Act Amendment Act, 1930*, c. 47 of S.B.C., 1930, s. 2, ss. 2):

> No chauffeur shall within any municipality drive, operate or be in charge of a motor-vehicle carrying passengers for hire unless he is the holder of a permit therefor issued to him by the Chief of Police of the municipality; and every chauffeur to whom a permit is so issued shall comply with all such regulations as may be made by the municipality and are not repugnant to the provisions of this Act or the regulations made thereunder.

The by-law referred to by the appellant is known as the "Vehicle Licence By-Law" (no. 1510 as amended by no. 1537) of the city of Vancouver. It provides for the licensing of certain trades and businesses: auto liveries, expressmen, automobiles used for purposes of business, vehicles used for hire for the carriage of passengers, etc. It describes specifically the classes of motor-vehicles coming under it. It fixes the tariff of fares that may be charged by the owners or drivers of these vehicles and subjects them to a long list of what may be truly termed police regulations.

Under s. 3 of the by-law,

> No person shall carry on, maintain, own, operate, or use any of the several trades, professions, occupations, callings, businesses, vehicles or things set forth in * * * this by-law, and more particularly described therein unless and until he has procured a licence to do so (for each such place or business, vehicle or thing operated by him), and shall have paid therefor such sums as are specified in said schedule "A," which sum shall in all cases be paid in advance.
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> 4. Every person so licensed shall be subject to the provisions of this by-law, and non-compliance with any of the provisions of this by-law shall be deemed to be an infraction of the same, and shall render any person violating any of the said provisions liable to the penalties contained in section 18 hereof.

And the section of the by-law on which the appellant mostly relies reads as follows:

(3) No person shall, after the passing of this by-law, drive or operate, or permit to be driven or operated, on any of the streets of the city any motor vehicle coming within the classes "C," "D," "E," "F," or "G" as hereinbefore defined in subsection (1) hereof without being licensed so to do under the provisions of this by-law.

The several classes of motor vehicles covered by this subsection come under the general description of vehicles operated for hire.

It was not disputed that, at the time of the accident, the deceased's car was being operated for hire. The further undisputed facts are these: Burchill, the deceased, owner and driver of the car, had no licence to operate for hire under the by-law and no permit had been issued to him by the Chief of Police of Vancouver. It is not that he had been denied a licence and was operating his car despite the refusal. He held a licence the previous year, "but simply had not paid the renewal fee" and had neglected to take out the licence and to get the permit for "the current year."

The question is as to the effect upon this case of Burchill's failure, in the manner just mentioned, to comply with the requirements of the statute and by-law.

The point has already been raised and discussed in several cases in the provincial courts (amongst others: *Etter* v. *City of Saskatoon* (1); *Sercombe* v. *Township of Vaughan* (2); *Godfrey* v. *Cooper* (3); *Boyer* v. *Moillet* (4); *Halpin* v. *Smith* (5); *Walker* v. *British Columbia Electric Ry.* (6); *Waldron* v. *Rural Municipality of Elfros* (7); *James* v. *City of Toronto* (8)); but it comes for the first time before this court, at least in its present aspect.

It should be said at once that the matter depends primarily upon the language of the peculiar statute. No one would doubt the competency of provincial legislatures, in properly framed legislation, to deny entirely the right of recovery in the circumstances we have described and which happen to exist in this case. Generally speaking, however, legislation of that character does not operate to modify

(1) (1918) 39 D.L.R. 1.
(2) (1919) 45 O.L.R. 142.
(3) (1920) 46 O.L.R. 565.
(4) (1921) 30 B.C.R. 216.
(5) [1920] 2 W.W.R. 753.
(6) (1926) 36 B.C.R. 338.
(7) (1923) 16 Sask. L.R. 141.
(8) (1925) 57 O.L.R. 322.

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the civil rights of the parties or to relieve them from the consequences of their negligence. It is not intended for that purpose. It is framed *alio intuitu;* and that is undoubtedly true of the Act and the by-law now under discussion.

Of the by-law, it is sufficient to say that it is nothing more than the regulation of certain trades. The purpose is to compel to take licences and the sanction is there. It is essentially a municipal enactment containing revenue or police ordinances with their own provisions for enforcement.

As for the *Motor-vehicle Act,* it does not pretend to deal with the liability for actionable negligence. The obvious purpose of the statute is to regulate the user of the highway for the protection of the public. Its object is not to disturb the ordinary rights of individuals or persons as between themselves.

At common law and as a member of the public, any individual has the right to the user of the highway under the protection of the law; and the liability of the municipality exists towards every member of the public so using the highway. This well established principle should not be taken to have been altered in the *Motor-vehicle Act,* except by express words or by necessary intendment. The whole scope of the Act is to prescribe certain requirements for those using the highway with motor vehicles, and to impose certain penalties upon the offenders, but nothing more.

It does not provide that they will not be entitled to recover damages, if the damages are suffered while they are infringing the Act.

After all, we are concerned here with an action founded on negligence and, in actions of that kind, the guiding principle—we should say the inevitable principle—is the principle of cause and effect. The liability in such a case is based—and can only be based—upon the causal connection between the tort and the resulting damage. Failure by the plaintiff to comply with a statute, in no way contributing to the accident, will not, in the absence of a specific provision to that effect, defeat the right of recovery of the plaintiff; no more than, under almost similar circumstances, the violation of a statutory prohibition by the

defendant will exclude the defence of contributory negligence. (*Grand Trunk Pacific Ry.* v. *Earl*) (1).

We will not pause to emphasize the distinction to be made between the present case and that of *Goodison Thresher Co.* v. *Township of McNab* (2). But we may refer to that case as an instance of the application of the principle. There, in the words of Duff J., at p. 194:

> The mishap was caused by the failure of the plaintiff's servants to perform the conditions under which alone they were entitled to take the engine upon the bridge.

There, as observed by Mr. Justice M. A. McDonald, "the damage was consequent upon the failure to comply with the Act." The damage, in the case at bar, was not caused by the absence of a permit or of a licence. Their absence, under the particular circumstances, did not even show that the deceased was incompetent as a chauffeur; and the jury did not find him incompetent.

The appellant draws a distinction, in the premises, between the position of an ordinary defendant and that of a municipality. It points out that the municipality is the owner of the driveway and contends that the respondent's husband, holding no permit and no licence, was unlawfully upon the street, that he was at all times material a trespasser and the appellant owed him no duty other than not to do or cause him malicious or wilful injury; in other words: that Burchill had to take the road as he found it.

We are unable to accede to the proposition which would, in that respect, assimilate the municipality to an ordinary land-owner or make a trespasser of the unlicensed chauffeur. Under statutes where the fee simple is vested in them, the municipalities are in a sense owners of the streets. They are not, however, owners in the full sense of the word, and certainly not to the extent that a proprietor owns his land. The land-owner enjoys the absolute right to exclude anyone and to do as he pleases upon his own property. It is idle to say that the municipality has no such rights upon its streets. It holds them as trustee for the public. The streets remain subject to the right of the public to "pass and repass"; and that character, of course, is of the very essence of a street. So that the municipality, in respect of its streets, does not stand in the same position as a land-owner with regard to his property. Under the *Motor-*

(1) [1923] S.C.R. 397, at 403. (2) (1910) 44 Can. S.C.R. 187.

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vehicle Act and similar statutes, the situation is really this: that the unlicensed chauffeur, being on the highway as he has a right to be as a member of the public, fails to observe the rules laid down for the direction of those who make use of the highway and passed for the protection of the public, and thereby becomes subject to certain penalties. But the Act has not the effect of making him a trespasser, more particularly in the sense of an outlaw. The fair way of reading this kind of legislation is to ask the question: Does it impose such a legal incapacity as to make the offender a wrongdoer? And the answer is in the negative. The failure to take the licence or the permit is a failure to comply with the Act and the sanction is the penalty.

We need only point out that in the particular section of the Act relied on by the appellant and quoted at the beginning of this judgment, the mischief aimed at is not the user of a highway without a license, but the operation for hire without a permit from the Chief of Police. The enactment is directed only against the chauffeur's right to "drive a motor-vehicle carrying passengers for hire." There was no intention to prevent him from using the highway. To borrow the expression of Lord Halsbury in *Lowery* v. *Walker* (1), Burchill was certainly not a trespasser in the sense in which that word is strictly and technically used in law.

The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. B. Williams.*

Solicitors for the respondent: *Beck & Grimmett.*