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*May 11,12
*June 26

JOHN GEORGE MACDONALD and DONALD ARTHUR MACDONALD, infants suing by their next friend John Louis Macdonald, and JOHN LOUIS MACDONALD (Plaintiffs) ..... } RESPONDENTS.

AND

CITY OF VANCOUVER and JACK PINCH (Defendants) ..... } APPELLANTS;

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Automobiles—Negligence—Mother fatally injured while riding in police car following ambulance conveying injured child to hospital—Liability of city where no gross negligence—Whether deceased transported as a passenger in the ordinary course of the business of the city—Motor-vehicle Act R.S.B.C. 1948, c. 227, s. 82(b).

Section 82 of the *Motor-vehicle Act*, R.S.B.C. 1948, c. 227 exempts the owner or driver of a motor-vehicle from liability to a passenger by reason of the operation of the motor-vehicle, in the absence of gross negligence, but does not relieve "any person to whose business the transportation of passengers is normally incidental, transporting a passenger in the ordinary course of the transporter's business" from liability arising from the death of such passenger.

The plaintiff as next friend of his two infant sons, and on his own behalf, sued the City of Vancouver and the driver of a police car under the *Families Compensation Act*, R.S.B.C. 1948, c. 116, for damages arising out of the death of his wife, the boys' mother. The latter was fatally injured when a member of Vancouver's Police Force, acting on the orders of his superior officer, was transporting the parents in a police car owned by the City, to a hospital to which a third child, injured in a traffic accident, was being conveyed in an ambulance. The action was tried before a jury, which in answer to questions, found that the defendant city was a person to whose business the transportation of passengers was normally incidental and that it was transporting the parents in the ordinary course of its business. It also found negligence but not gross negligence on the part of the driver of the police car, and awarded damages. The Court of Appeal for British Columbia set aside the judgment and dismissed the action.

Held: That there was no evidence to support the jury's finding that the parents in the circumstances of the case were being transported in the ordinary course of the city's business.

Judgment of the Court of Appeal for British Columbia (1952-53) 7 W.W.R., affirmed.

*PRESENT: Kerwin, Taschereau, Rand, Kellock and Locke JJ.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), O'Halloran J.A. dissenting, allowing the appeal of the respondents and setting aside the judgment of Macfarlane J. following a verdict of a jury awarding damages.

C. K. Guild, Q.C. and *M. G. Caple* for the appellants.

J. W. de B. Farris, Q.C. for the respondents.

KERWIN J.:—The jury found that there was negligence on the part of the respondent Pinch which caused the accident and that such negligence consisted of excessive speed under the circumstances. That finding is not now in dispute. However, the jury also found that there was no gross negligence on his part and, therefore, under s. 82 of the British Columbia *Motor-vehicle* Act, R.S.B.C. 1948, c. 227, no action lies for the death of Mrs. MacDonald unless the respondents fall within these words at the end of the section:—

> but the provisions of this section shall not relieve:—
>
> * * *
>
> (*b*) Any person, to whose business the transportation of passengers is normally incidental, transporting a passenger in the ordinary course of the transporter's business,—
>
> from liability for injury, loss, or damage to such passenger, or arising from the death of such passenger.

It was argued on behalf of the respondent City that the pleadings and the course of the trial showed plainly that the only business of the City suggested by the appellants was that of policing the municipality. Assuming, however, that the appellants are entitled to claim that anything that might be described as a business mentioned in the Vancouver charter constitutes the Municipality's business within (*b*), and without expressing an opinion on any other question, I find it impossible to say that transporting Mr. and Mrs. MacDonald was in the ordinary course of any such business. Not only was there no evidence upon which the jury could answer "Yes" to Question 2:— "If your answer to Question 1 is 'Yes' was the City transporting Mr. and Mrs. MacDonald in the ordinary course of its business?" but the evidence was all in the opposite sense. The appeal must be dismissed with costs if demanded.

(1) (1952-53) 7 W.W.R. (N.S.) 454; [1953] 1 D.L.R. 516.

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TASCHEREAU J.:—This case arises out of an automobile accident which occurred in the City of Vancouver on July 18, 1950. On that date a four year old son of Mr. and Mrs. John G. MacDonald was run over by a truck in front of the MacDonald home, at 2295 Parker Street, in the City of Vancouver. An ambulance as well as two police cars were called to the scene of this accident, one of which was a "beat" car driven by Constable Jack Pinch who was accompanied by Constable Robert Gibson.

Permission was refused to Mr. and Mrs. MacDonald to ride in the ambulance with the injured boy, on account of his critical condition, but authorization was given by the Police Traffic Sergeant to Pinch and Gibson to take the MacDonald's in their car. It is while following the ambulance to the hospital that the "beat" car went out of control, skidded and struck a tree, whereupon Mrs. MacDonald received severe injuries which caused her death.

The jury awarded $6,000 to the husband John G. MacDonald and $5,000 each to the two infants John G. and Donald A. MacDonald, and Mr. Justice MacFarlane accepted this verdict, and directed judgment to be entered accordingly. The Court of Appeal, Mr. Justice O'Halloran dissenting, allowed the appeal and dismissed the action with costs.

The law that has to be considered for the determination of this case, is s. 82 of the *Motor-vehicle Act* R.S.B.C. 1948, c. 227. The section reads:—

> 82. No action shall lie against either the owner or the driver of a motor-vehicle or of a motor-vehicle with a trailer attached by a person who is carried as a passenger in that motor-vehicle or trailer, or by his executor or administrator or by any person who is entitled to sue under the "Families Compensation Act", for any injury, loss, or damage sustained by such person or for the death of such person by reason of the operation of that motor-vehicle or of that motor-vehicle with trailer attached by the driver thereof while such person is a passenger on or is entering or alighting from that motor-vehicle or trailer, unless there has been *gross negligence* on the part of the driver of the vehicle and unless such gross negligence contributed to the injury, loss, or damage in respect of which the action is brought; but the provisions of this section shall not relieve:—
>
> (*a*) Any person transporting a passenger for hire or gain; or
>
> (*b*) Any person, to whose business the transportation of passengers *is normally incidental,* transporting a passenger in the ordinary course of the transporters' business,—
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> from liability for injury, loss, or damage to such passenger, or arising from the death of such passenger.

By its answer to question 5, the jury negatived *gross negligence,* so that the plaintiffs in order to succeed, must necessarily rely on the argument that the City of Vancouver came within subsection (*b*), and that it was a person, to whose business the transportation of passengers was normally incidental, and it was transporting Mrs. MacDonald in the ordinary course of its business.

With this proposition, I respectfully disagree. The business of municipal constables is to police the city, and protect the lives and property of its citizens. It is not a part of the city's business, and it is not "normally incidental" thereto, that the "beat" cars of the police force be used to transport passengers, as Mr. and Mrs. MacDonald have been, in the circumstances of this case. I find nothing in the City Charter and in the evidence to support the proposition of the appellants.

I would dismiss the appeal with costs.

RAND J.:—Assuming that the City is a person "to whose business the transportation of passengers is normally incidental", and that as owner it would be responsible for the negligence of its police officers in operating the automobile in the circumstances here, on neither of which I express an opinion, that it was a carriage of a passenger "in the ordinary course of the transporter's business", is unsupported by anything in the case. It was an exceptional accommodation to the anxious parents of a child who had been injured and is not within the exception to s. 82 of the *Motor-vehicle Act,* R.S.B.C. 1948, c. 227.

The appeal must, therefore, be dismissed with costs if required.

KELLOCK J.:—The automobiles here concerned were both police cars and the evidence as to their use was limited to their use by the police. The first car, No. 4, a prowler or "beat" car, took the adult appellant and his wife from the scene of the first accident to the scene of the second, where Mrs. MacDonald was injured. No. 6, a traffic car, took them from there to the hospital. According to evidence which the jury could accept, the entry of the MacDonalds into each of the cars was on the orders of the police without any request on their part. It is argued by Mr. Farris that

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the mission of No. 6 was quite a different mission from that of No. 4 in that No. 6 was taking an injured person to the hospital accompanied by her husband, while No. 4 was taking two perfectly healthy people to the hospital in the wake of the ambulance carrying the child.

However that may be, there is no magic in the words "traffic" and "beat" and it would seem that the appearance of No. 6 and the use to which it was put sufficiently indicates that the police considered it their business to use their cars for such purposes, while paragraph 16 of the statement of defence indicates that car No. 4 was equally employed in the performance of a proper police duty. In my opinion, on the evidence car No. 4 was engaged upon police "business" at the time of the accident here in question.

The question which arises in the first place, therefore, is whether this business can be said to be the business of the city within the meaning of s. 82(*b*) of the *Motor-vehicle Act*. By virtue of the provisions of s. 253 of the city charter, however, jurisdictional limits are expressly marked off between the business of the city and the business of the police commission. In my opinion it cannot be said that what was done by either police car on the day in question fell within the scope of the business of the respondent, which, in relation to the police, is confined "exclusively to the business and financial matters incident to the establishment, maintenance and upkeep of the police force". On the other hand, the "appointment, control, direction, supervision, discipline, and government" of the force are exclusively matters within the jurisdiction of the commission. In that view the appeal should be dismissed, with costs, if demanded.

LOCKE J.:—In the appellant's statement of claim it is alleged that the late Ethel Elizabeth MacDonald, having been directed or ordered by the respondent Constable Pinch, or by Constable Gibson or Sergeant Abercrombie, to ride in a motor car owned by the respondent city to be conveyed to the Vancouver General Hospital, suffered injuries which resulted in her death by reason of the gross negligence in the driving and operation of the car by respondent Pinch.

It was further alleged that the conveyance of Mrs. MacDonald was performed by one or other of the three constables above named:—

> In their business of the transportation of passengers normally incidental thereto, viz.: transportation of passengers in the ordinary course of their duty as police officers in the said motor vehicle as referred to under s. 82 of the Motor Vehicle Act and the said Act and regulations aforesaid.

and that the automobile was at the time in question driven by Pinch, while in the employment of and in answering a police call of the City of Vancouver Police Department.

The allegation that the respondent city was the owner of the motor vehicle was not denied in the statement of defence and, as it appears to have been common ground between the parties throughout the course of this litigation that the city was to be regarded as the owner of the motor vehicle within the meaning of that word, as used in s. 81 of the *Motor-vehicle Act* (c. 227, R.S.B.C. 1948), we should not, in my opinion, consider the question as to the accuracy of this conclusion raised by the judgment of Mathers, C.J. in *Bowles v. City of Winnipeg* (1) at p. 496 *et seq.*

As the jury found, in answer to one of the questions submitted to them, that the manner in which Pinch drove the motor car was negligent but that it had not been grossly negligent, the appellants were forced to rely upon their contention that the city was a person to whose business the transportation of passengers is normally incidental and that the accident occurred while it was engaged in transporting the passenger in the ordinary course of the transport business, within the meaning of s. 82 of the *Motor-vehicle Act.*

The statement of claim and the evidence given at the trial make it clear that the business of the city, to which it was contended that the transportation of passengers was normally incidental, was that of policing the streets. It was the "transportation of passengers in the ordinary course of their duty as police officers" as to which the negligence was alleged. The answer to the appellant's claim is that the Chief Constable and all the constables and members of the Police Force of the City are appointed by the Board of Police Commissioners, constituted under the provisions of s. 253 of the *Vancouver Incorporation Act, 1921,* as

(1) (1919) 29 Man. R. 480.

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amended, to which Board of control, direction, supervision, discipline and government are given by the statute. Members of the Police Force are directed by s-s. 10 of s. 253 to obey the lawful directions and be subject to the discipline and government of the Board and are charged with special duties of preventing infractions of by-laws of the city, preserving the peace, preventing crime and apprehending offenders, and are stated to have generally all the powers and privileges and be liable to all the duties and responsibilities which belong by law to the constables. Constable Pinch was directed by his superior, Sergeant Abercrombie, to drive the appellant John L. MacDonald and his wife to the hospital and it was in the course of what he undoubtedly considered to be his duty as a police officer that he was driving the car at the time of the accident. He was neither acting nor assuming to act on behalf of the City of Vancouver, or engaged in any of its business. If the City of Vancouver engages in any business to which the transportation of passengers is normally incidental, it is not in connection with the performance of the duties imposed upon the Board of Police Commissioners and the members of the Police Force by the statute.

While the question is not raised by the pleadings in the present action, the liability asserted being *qua* owner, it may be noted that in *Bowles v. Winnipeg,* above referred to, was held that neither the City of Winnipeg nor the Board of Police Commissioners was liable for the negligence of a police constable appointed by the Board and acting under its orders. Further authority on this aspect of the matter may be found in *Wishart v. City of Brandon* (1); *Winterbottom v. Board of Commisisoners of Police of the City of London* (2); and *McCleave v. City of Moncton* (3).

The appeal should be dismissed with costs if demanded.

Appeal dismissed with costs, if demanded.

Solicitor for the appellants: *M. G. Caple.*

Solicitors for the respondents: *W. H. K. Edmonds.*

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(1) (1887) 4 M.R. 453. (2) (1901) 1 O.L.R. 549.
(3) (1902) 32 Can. S.C.R. 106.