Osgoode Hall Law Journal

Volume 2, Number 4 (April 1963)

Article 13

Feldstein vs. Alloy Metal Sales Ltd.

C. R. Ball

FELDSTEIN VS. ALLOY METAL SALES LTD.—NEGLIGENCE—VICARIOUS LIABILITY—GRATUITOUS PASSENGERS—SECTION 105, ONTARIO HIGHWAY TRAFFIC ACT—An article, *Section 105: Ontario Highway Traffic Act* in Volume 2, Part 3 of the Osgoode Hall Law Journal[1] briefly reviewed the operation of the "gratuitous passenger" section of the Ontario Highway Traffic Act[2] placing special emphasis on the

---

59 *Supra*, footnote 50.
60 *Supra*, footnote 52.
61 *Supra*, footnote 51.
62 *Supra*, footnote 51.
63 *Fleming v. Fleming* [1934] O.R. 588.
64 *Supra*, footnote 54.
65 *Supra*, footnote 63.
66 *Supra*, footnote 57.
67 *Supra*, footnote 54.
68 *Ross-Smith v. Ross-Smith* [1962] 1 All E.R. 344, p. 354.

*Messrs. Rubinoff and Nathan are in the third year at Osgoode Hall Law School.

1 2 O.H.L.J. (1961-62) p. 322.
2 R.S.O. 1960, c. 172, s. 105.

decision of the Ontario Court of Appeal in *Harrison v. Toronto Motor Car and Krug*.[3]

In a recent decision, *Feldstein v. Alloy Metal Sales Ltd. and Mathews*,[4] Mr. Justice Ferguson was faced with an almost identical factual situation as was the Ontario Court of Appeal in the *Harrison* case but he came to an opposite conclusion.

The facts of the *Feldstein* case can be set out briefly. Mrs. Feldstein, an employee of Alloy Metal Sales was injured while a passenger in one of her employer's automobiles. Alloy's office was located some distance from downtown Toronto and it was the company's policy to provide free transportation service for employees who wished to shop downtown during their lunch hour. The co-defendant, Mathews, a servant of Alloy Metal, was employed as a chauffeur to drive the company station wagon on these noon-hour excursions. Mrs. Feldstein was found to have been injured as a result of the negligence of Mathews, and he in turn was found to have been acting within the scope of his duties at the relevant time.

Section 105 of the Highway Traffic Act provides 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.
> 105(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.

Section 105(1) generally imposes a statutory vicarious liability upon the owner of a motor vehicle for loss or damage occasioned by the negligence of the driver of such motor vehicle. Section 105(2) in general exempts the owner and driver from liability where the injury is sustained by a passenger being carried in a vehicle "not operated in the business of carrying passengers for compensation."
The courts have found exceptions to the bar in 105(2) in three sets of circumstances summarily stated as follows:[5]

(1) Where there is a term of safe carriage in a private contract 105(2) will not bar the claim of the injured passenger.[6]

(2) Where a servant-passenger is injured while in the course of his employment due to a master-owner's negligence in operating his motor vehicle, 105(2) does not bar the claim.[7]

---

[3] [1945] 1 D.L.R. 286, [1945] O.R. 1. See also C. A. Wright (1945), 23 Can. B. Rev. 344, and J. D. Morton (1958), 36 Can. B. Rev., p. 414.
[4] [1962] O.R. 476.
[5] *Supra*, footnote 1 at p. 332.
[6] *Dorosz & Dorosz v. Koch*, 28 D.L.R. (2d) 171. [1961] O.R. 422, affd. 31 D.L.R. (2d) 139.
[7] *Duchaine v. Armstrong & Legault* [1957] O.W.N. 251.

(3) Where there is a previously existing common law right, such as a master's vicarious liability for the torts of his servant committed during the course of his employment, 105(2) does not bar the cause of action against the master.[8]

In the light of the foregoing summary and factual situation, the Feldstein decision can be reviewed. The basis of Mrs. Feldstein's claim is stated by Mr. Justice Ferguson as follows:[9]

> The plaintiff's counsel puts her case on four grounds. Firstly she was an employee of the defendant, Alloy Metal, at the time of the accident, and that she has, as an employee, a cause of action against her employer by virtue of s. 121 of the Workmen's Compensation Act, R.S.O. 1950, c. 430 [now s. 124, R.S.O. 1960, c. 437). Secondly, she was being carried pursuant to an express contract and not gratuitously. Thirdly, s. 50(2) is not a bar to the action because the plaintiff was a servant of the defendant Alloy at the time and as a servant she has a cause of action against her master for negligence. Fourthly, the defendants cannot avail themselves of the provisions of s. 50(2) because the vehicle does not come within the exception mentioned, as it was in the plaintiff's contention, a vehicle carrying passengers for compensation.[10]

The first claim under the Workmen's Compensation Act was dismissed. Mrs. Feldstein's second claim based on a contract of carriage was also denied, Mr. Justice Ferguson relying upon *Jurasits v. Nemes*[11] held that it was not sufficient for the contract of carriage to arise incidentally from the contract of employment. The "baby-sitter" case[12] in which liability was visited on the basis of contract was distinguished.[13] The third claim as stated by Mr. Justice Ferguson seems to rely on a master's direct liability for the safety of his servant. It is submitted that this claim was rightly dismissed if based on a previously existing common law liability of a master for the safety of his servant since no such duty exists. The fourth claim was dismissed on the basis of a statement made by Mr. Justice Laidlaw in *Jurasits v. Nemes*.[14] In that case it was held that the test of whether or not a vehicle was being operated in the business of carrying passengers for compensation was to consider the real and primary object of operating the motor vehicle. Mr. Justice Ferguson found that the real and primary object of operating the company station wagon was *not* to carry passengers for compensation and therefore it did not fall within the exception to s. 105(2).

What is difficult to understand is why Mrs. Feldstein was unable to recover on the same basis as did Miss Harrison in *Harrison v. Toronto Motor Car and Krug*[15] namely, on the basis of a master's liability for the negligence of his servant while in the course of his

---

[8] *Harrison v. Toronto Motor Car and Krug, supra,* footnote 3.
[9] [1962] O.R. 476 at p. 479.
[10] It is to be noted that section 50(2) referred to by Mr. Justice Ferguson is now section 105(2), Highway Traffic Act, R.S.O. 1960, c. 172.
[11] (1957) 8 D.L.R. (2d) 659, [1957] O.W.N. 166.
[12] *Dorosz & Dorosz v. Koch, supra,* footnote 6.
[13] See A. M. Linden (1962) 40 Can. B. Rev. 284, for a discussion of this claim dealt with in previous cases.
[14] (1957) 8 D.L.R. (2d) 659 at page 666.
[15] *Supra,* footnote 3.

employment. In that case, Miss Harrison was a nurse being carried in a motor vehicle driven by a servant of the defendant Krug, the master of the plaintiff nurse. She was injured due to the negligence of the driver while he was in the course of his employment. The *Harrison* decision turned on the vicarious liability of the master for the negligence of his servant, the driver. The court reasoned that sec. 105(2) was to be strictly construed and therefore did not abrogate any existing common-law rights. The distinguishing facts in the *Harrison* case, namely that the employer Krug was present in the automobile and that Miss Harrison was in the course of her employment were held to be immaterial to the decision. It was decided solely on the basis of vicarious liability, the existing common law right held not to be abrogated by s. 105(2). These facts being immaterial, Mrs. Feldstein was therefore in the same position as Miss Harrison. They both were passengers in a vehicle operated by a driver, employed by the owner of the vehicle, and both were injured by the negligence of the driver in the course of his employment. It is submitted that there is no distinction between the two cases and in fact none is made in the judgment. Mr. Justice Ferguson merely mentioned the Harrison case, albeit with approval, and then set it aside without further comment.

The doctrine of precedent and *stare decisis* is a fundamental principle in Anglo-Canadian jurisprudence. When faced with a prior decision of his own appellate court on the same point of law, a trial judge is obligated either to follow that decision or to make a careful distinction in coming to a contrary result. As anomalous as the *Harrison* decision might appear to be, that in itself is not sufficient to justify a contrary decision.[16]

C. R. BALL*