STANLEY ROSS TEASDALE (*Plaintiff*) ..APPELLANT;

1968

*Mar. 20, 21
June 3

AND

MALCOLM NEIL MacINTYRE (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Motor vehicles—Negligence—Plaintiff and defendant agreeing to share expenses of holiday trip to be taken in defendant's car—Plaintiff injured due to defendant's negligent driving—Whether an arrangement of a commercial nature—Whether driver liable—The Highway Traffic Act, R.S.O. 1960, c. 172, s. 105(2).*

The plaintiff and the defendant were fellow students and planned to take a motor holiday together in the defendant's automobile. Their intention was to camp along the route and the plaintiff supplied the larger portion of the necessary camping equipment. They agreed to share all food and other costs, and in so far as the costs of gas and oil were concerned it was decided that the defendant would obtain a credit card and at the end of the trip the plaintiff would pay to the defendant one-half of the amount payable to the oil company. They also arranged to take turns in driving the car.

Some hours after they had left on their journey the car turned over on a curve due to the defendant's negligent driving and the plaintiff was seriously injured. The plaintiff sued claiming damages for the said negligence and at trial judgment was given in his favour. On appeal, the Court of Appeal by a majority reversed the trial judgment. An appeal by the plaintiff from the judgment of the Court of Appeal was then brought to this Court.

*Held* (Cartwright C.J. and Judson J. dissenting): The appeal should be dismissed.

*Per* Martland, Ritchie and Spence JJ. The arrangement between the plaintiff and the defendant was not an arrangement of a commercial nature and therefore the defendant was not within the exception in s. 105(2) of *The Highway Traffic Act,* R.S.O. 1960, c. 172. The said s. 105(2) prevented the plaintiff's recovery from the defendant.

*Per* Cartwright C.J. and Judson J., *dissenting*: The many cases in which s. 105 of *The Highway Traffic Act, supra,* has been considered established the rule that a driver, who by negligent driving causes injuries to a passenger in his car, is not relieved from liability if there is a contract in existence between the driver and the passenger by the terms of which the passenger is under a legal obligation to pay the driver for carrying him. In the present case there was an arrangement under which an enforceable obligation to pay was assumed by the passenger.

[*Ouelette v. Johnson,* [1963] S.C.R. 96, referred to.]

*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Spence JJ.

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APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of King J. Appeal dismissed, Cartwright C.J. and Judson J. dissenting.

*Bernard L. Eastman,* for the plaintiff, appellant.

*C. F. McKeon, Q.C.,* for the defendant, respondent.

The judgment of the Chief Justice and Judson J. was delivered by

THE CHIEF JUSTICE (*dissenting*):—The facts out of which this appeal arises are undisputed. They are set out in the reasons of my brother Spence.

The only question to be decided is whether the respondent is relieved, by the terms of s. 105 of *The Highway Traffic Act,* R.S.O. 1960, c. 172, from liability for the damages caused to the appellant by the negligent driving of the respondent.

Since the predecessor of that section was first enacted, by 1935 (Ont.), c. 26, s. 11, it has been considered in many cases, one of the most recent being *Ouelette v. Johnson*[2].

In my opinion, these cases establish the rule that a driver, who by negligent driving causes injuries to a passenger in his car, is not relieved from liability if there is a contract in existence between the driver and the passenger by the terms of which the passenger is under a legal obligation to pay the driver for carrying him. This rule is applicable although the agreement to pay relates to a single and isolated journey and the driver is not otherwise engaged in the business of carrying passengers for compensation and regardless of the manner in which the amount to be paid is to be calculated.

In the case at bar I think it clear that the appellant had undertaken to pay to the respondent one-half of the amount which the respondent would become liable to pay for the gas and oil used on the journey which the appellant and respondent were taking in the automobile belonging to the respondent. The circumstance that the object of that journey was pleasure and not business appears to me to be irrelevant. I find myself unable to distinguish the

[1] [1967] 2 O.R. 169, 62 D.L.R. (2d) 689.
[2] [1963] S.C.R. 96.

case at bar from that of *Ouelette v. Johnson, supra.* It may be that the choice of the phrase "an arrangement of a commercial nature" in that case was not a particularly happy one but read in context it is equivalent to "an arrangement under which an enforceable obligation to pay is assumed by the passenger".

For these reasons and those given by Laskin J.A. in the Court of Appeal, with which I am in complete agreement, I would allow the appeal with costs in this Court and in the Court of Appeal, set aside the judgment of the Court of Appeal and restore the judgment at trial.

The judgment of Martland, Ritchie and Spence JJ. was delivered by

SPENCE J.:—This is an appeal by the plaintiff from the judgment of the Court of Appeal for Ontario[3] pronounced on April 10, 1967. By that judgment, the Court of Appeal reversed the judgment at trial which had been in favour of the plaintiff in the sum of $9,754.55; the interest on that amount prior to the decision of the Court of Appeal brought the total within the appealable limit to this Court.

The facts may be simply stated. The plaintiff and the defendant were fellow students in accounting working in the same office in the City of Toronto. Neither one of them was affluent and neither one owned a car, but both planned to purchase automobiles. From some time in the spring of the year 1963, the two young men had discussed the possibility of taking a motor holiday together. Neither one of them could afford to go away on such a holiday alone. The respondent MacIntyre purchased a Triumph TR.3 sports car and it was agreed that that would be the vehicle which they would use on their intended trip. As the appellant put it in the evidence, "at that time when we discussed it, we were going to take Neil's car. I did not have a car at the time". The two agreed that they would travel by automobile from Toronto easterly through Kingston to Montreal, on to Quebec City, and then down through the eastern United States to the Atlantic Seaboard, and return through the United States to Toronto, their point of commencement. Each of them supplied certain equipment. Since it was their intention to camp along the route,

[3] [1967] 2 O.R. 169, 62 D.L.R. (2d) 689.

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equipment for that purpose was necessary, and the appellant seems to have supplied the larger portion of that equipment. They agreed that they would share equally the costs of food on the way; as each put it in his evidence, one at trial and the other on examination for discovery, it was just about who would get his wallet out first. As they agreed to share equally all other costs, they agreed to share equally the costs of the gas and oil. Again, quoting the appellant, "for the transportation, well, it was arranged that Neil was to get a credit card and at the end of the trip we were going to split gas and oil costs on a 50-50 basis of the actual cost of the trip. If there had been any major repairs, well, we would have—would have—probably kicked in. If there was, we would each have paid part of it". It was further arranged that both of them would drive the car just as their particular desire of the moment dictated.

The trip was to be solely for vacation purposes, there being no commercial purpose to be served. Again, quoting the appellant, "and, well, I guess being friends, and there was a fair cost involved, we had to make an arrangement or deal so that we could have gone on the trip".

The respondent obtained his credit card from the oil company; the two men packed their goods and in mid-morning on July 15, 1963, left Toronto on their holiday. For the first 100 or so miles, the respondent drove, then they stopped, purchased gasoline using the credit card on that occasion, and changed drivers so that the appellant drove from that point, which was evidently somewhat west of Kingston, to Cornwall. During the trip, they had stopped on several occasions to purchase refreshments at small cost and sometimes one and sometimes the other paid for those refreshments. In Cornwall, having had a cup of coffee, they again changed drivers so that the respondent resumed the driving of the automobile. About fifteen miles east of Cornwall, the car turned over on a curve and the appellant was seriously injured.

The learned trial judge held, and there has been no appeal from this finding, that the accident occurred solely due to the negligence of the respondent. The appellant sued claiming damages for such negligence. It is, therefore, apparent that the sole question to be determined upon this appeal is whether or not the appellant is entitled to

such damages in view of the provisions of s. 105(2) of *The Highway Traffic Act,* R.S.O. 1960, c. 172. That section provides:

> 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.

That section and its predecessors have been the subject of many judgments in the Courts of the Province of Ontario and other sections with like intent have been the subject of decisions in the Courts of many of the other provinces. I see, however, no need to quote and analyze those many judgments, in view of the fact that this Court only in 1963 has authoritatively pronounced its interpretation. The judgment in *Ouelette v. Johnson*[4] was recognized by both the learned trial judge and the Court of Appeal in this case as being such an authoritative pronouncement upon the subject, and both the learned trial judge and the Court of Appeal sought to apply it to the circumstances which I have outlined above. In that case Ouelette, Johnson and one Kennefic, were all employees of the Consolidated Denison Mine in Elliott Lake, in the Province of Ontario, and they all lived in Sudbury. During the week they resided near the mine head in accommodation provided by the company but they desired to return home each week-end. Johnson and Kennefic had from time to time travelled with one Dionne in the latter's automobile who charged them $2 each one way for the trip. When Ouelette purchased an automobile, Johnson approached him and proposed that the two should make the same arrangement. Ouelette, on several occasions after he had purchased his automobile, had travelled to Sudbury alone. The trial judge found as a fact that the arrangement for the $2 charge one way for the trip was made not in relation to the cost of the gas and oil but rather because Johnson had paid the same amount to Dionne previously.

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[4] [1963] S.C.R. 96.

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During a trip by Ouelette, with Johnson and Kennefic as his passengers under this arrangement, an accident occurred due solely to the negligence of Ouelette. As in the present case, the only issue in this Court was whether or not Ouelette's liability was prevented by the provisions of the same s. 105(2) of *The Highway Traffic Act*. Cartwright J. (as he then was) said at p. 100:

> In my opinion the principle enunciated in the judgment of the Court of Appeal in *Lemieux v. Bedard,* [1953] O.R. 837, is correct. It is accurately summarized in the headnote as follows:
>
> > One who enters into an agreement to transport other persons in the 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,* [1953] O.W.N. 238, 2 D.L.R. 202. 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.

I point out that the tests as put in that judgment occurring in the last few lines is this, that 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 becomes irrelevant. The question to be resolved, therefore, is whether under the circumstances outlined above "the arrangement between the parties was of a commercial nature". It must be remembered that if it is found that such an arrangement was of a commercial nature then it is a finding that the respondent was "in the business of carrying passengers for compensation". I use the words of subs. (2) of s. 105 of *The Highway Traffic Act*. I am unable to regard the evidence in this case, and which I have outlined in some detail above, as showing that there had occurred "an arrangement of a commercial nature". With respect, I share the views enunciated in the Court of Appeal for Ontario by Evans J.A.

There was, in my opinion, no element of a contract of carriage. The arrangement, rather, in my view, was that of a joint adventure, not, in this particular case, an adventure in trade but an adventure in recreation. It would seem to me that every word of the plaintiff's evidence is corroborative of that view. As I have pointed out above, the plaintiff (here appellant) did not testify that the respondent took his car, he testified, "We were going to take Neil's car". I emphasize the word "we". Then the plaintiff's testimony in reference to the obtaining of the credit card was not that the respondent obtained a credit card and that he then charged to the appellant one-half of the amount which would be payable on the account but rather, and again I quote, "...it was arranged that Neil was to get a credit card and at the end of the trip we were going to split the gas and oil costs on a 50-50 basis of actual cost of the trip". It was the arrangement of the two of them that the respondent should obtain the credit card; since the car was his the credit card would naturally be carried in his name, but it was surely only for the purpose of keeping the account in a convenient form, not so one could charge the other but so they could both pay the same amount toward the discharge of the amount payable to the oil company. As the appellant said time after time, "We were to split". The arrangement as to the driving of the vehicle, although in no way conclusive, is another indication of the intent of the arrangement, for, again, the plaintiff said, "We were going to share driving depending on whoever got tired". All other costs of the trip were to be shared, or to use the words of the litigant, "split" in the same fashion; those costs being of smaller individual amounts, it was easy enough to divide them informally and the more formal method of the credit card was necessary to keep proper account of the largest cost which the two of them in their joint adventure would incur, that is, the cost of the gasoline and oil for use in the respondent's automobile.

For these reasons, I have come to the conclusion that the arrangement between the appellant and the respondent was not "an arrangement of a commercial nature" and s. 105 of *The Highway Traffic Act* by subs. (2) prevents the appellant's recovery from the respondent. Counsel for the appellant stressed that the finding of the learned trial judge that the "arrangement was of a commercial character" was

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a finding of fact which should not be disturbed on appeal. It must be remembered that in the present case there is not the slightest conflict of testimony. The evidence was given on behalf of the plaintiff alone and the evidence, so far as the present topic is concerned, consisted of the examination and cross-examination of the plaintiff and a reading by his counsel of excerpts from the cross-examination of the defendant (the present respondent). Not only is there no question of credibility, but there is no question of what the evidence, and all the evidence, was, and, in my view, the Court of Appeal was quite entitled, considering that uncontradicted evidence, to come to a conclusion which differed from that of the trial judge as to the nature of the arrangement.

For these reasons, I would dismiss the appeal with costs.

*Appeal dismissed with costs,* CARTWRIGHT C.J. *and* JUDSON J. *dissenting.*

*Solicitors for the plaintiff, appellant: Du Vernet, Carruthers, Beard and Eastman, Toronto.*

*Solicitors for the defendant, respondent: McGarry & McKeon, Toronto.*