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# Section 105: Highway Traffic Act

DONALD J. M. BROWN and C. R. BALL\*

Section 105 of the Highway Traffic Act<sup>1</sup> is divided into two sub-sections. S. 105(1) generally imposes a vicarious liability upon the owner of a motor vehicle for loss or damage occasioned by the driver of such motor vehicle. S. 105(2) restricts the liability of an owner or driver where such injury is sustained by a "guest passenger".

The purpose of this article is to provide a concise review of the operation of Section 105 as it has been interpreted and applied by the courts. To achieve this aim the subject matter will be dealt with as follows:

1. An examination of S. 105(1) by reviewing the judicial interpretation of its phraseology.
2. The extent of the limitation imposed by S. 105(2) with special reference to *Harrison v. Toronto Motor Car Ltd. & Krug*.<sup>2</sup>
3. Section 2(2) of the Negligence Act<sup>3</sup> as it affects s. 105(2) of the Highway Traffic Act.

The present subsection 105(1) was originally enacted in Ontario in 1930 and has remained substantially unchanged since that time. In 1935 the legislature added subsection 105(2) to the Highway Traffic Act and subsection 2(2) to the Negligence Act. In 1930, what is now section 105, was numbered section 10; in 1937 it was changed to section 47; and in 1950 it became section 50. To avoid unnecessary confusion section 105 has been substituted for all references prior to 1960.

## *Review of Section 105(1):*

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.

**OWNER:** The Ontario Court of Appeal has clearly laid down the principle to be applied in determining "ownership" of a motor vehicle

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<sup>1</sup> R.S.O. 1960, c. 172.

<sup>2</sup> [1945] O.R. 1.

<sup>3</sup> R.S.O. 1960, c. 261.

for the purposes of this enactment.<sup>4</sup> Chief Justice Meredith stated that the "owner" in this context was the person exercising dominion over and control of the motor vehicle. In this case, the vendor under a conditional sales contract, although retaining legal title, was held not to be the owner.

The operation of this principle is illustrated in two cases. In each a father purchased an automobile for his infant son. In *Comer v. Kowaluk*<sup>5</sup> the father purchased the insurance and made payments under the conditional sale contract, although it was intended that he would later be re-imbursed. The court, however, found the father to be "master of the situation" and to have dominion and control over the automobile. In a later decision,<sup>6</sup> the court came to the opposite conclusion. The distinguishing factors were these: the son made all payments under the conditional sale agreement; registration was transferred to the son upon the purchase price being paid; the son at all times had the keys in his possession, and, most important, retained the car for his own exclusive use without requiring any permission or consent from his father. The sole purpose of the father's signature was to facilitate the financing of the purchase by conditional sale.

Although the word "owner" is singular it has been interpreted to include joint-ownership.<sup>7</sup>

The lessor of an automobile is "owner" within the meaning of the statute, at least in the customary short term rental situations.<sup>8</sup>

Since "owner" has been interpreted as meaning the person exercising dominion over and control of the motor vehicle, it follows that registration is not conclusive proof of ownership for the purposes of this section.<sup>9</sup>

#### MOTOR VEHICLE:

S 1(1)(15) "motor vehicle" includes an automobile, motorcycle, and any other vehicle propelled or driven otherwise than by muscular power; but does not include the cars of electric or steam railways or other motor vehicles running only upon rails, as a traction engine, farm tractor, self propelled implement of husbandry or road building machine within the meaning of this Act.

**NEGLIGENCE IN THE OPERATION:** It is to be noted that the provisions of this section are only operative when there has been negligence in the operation of a motor vehicle. "Operation" has been defined in a recent Court of Appeal decision<sup>10</sup> where a passenger in

<sup>4</sup> *Wynne v. Dalby* (1913), 30 O.L.R. 67; followed and affirmed in *Comer v. Kowaluk et al.*, [1938] O.R. 655; *Haberl v. Richardson & Richardson*, [1951] O.R. 302.

<sup>5</sup> *Comer v. Kowaluk*, *supra*, footnote 4.

<sup>6</sup> *Haberl v. Richardson & Richardson*, *supra*, footnote 4.

<sup>7</sup> *Barham v. Marsden*, [1960] O.W.N. 153.

<sup>8</sup> *McGrogan et al. v. Hertz Driveurself Stations of Ontario*, [1941] O.R. 348. *Wellman et al. v. Car-u-drive Co. et al.*, [1953] O.R. 75.

<sup>9</sup> *Aubrey v. Harris et al.*, *Drabik v. Harris et al.* (1957), 7 D.L.R. (2d) 545.

<sup>10</sup> *Schuster v. Whitehead*, [1960] O.R. 125.

opening a door caused injury to a passing cyclist and was found to be negligent. The Court strictly construed the phrase "operation of a motor vehicle" and concluded that this was beyond its application, thus exempting the owner and driver from liability. Mr. Justice Shroeder commented:

In my opinion the word operation in Section 105(1) must be construed in its strict and primary sense, and not as extending beyond the acts or omissions of a person having charge or control of the actual operation or driving of a motor car. . . .  
To hold that the terms of the statute apply to the act of one who was a mere passenger in a motor car and not in charge or control of its actual operation would be to place a broader construction on the word operation than is warranted by the principles of construction which must be applied.<sup>11</sup>

However, had the driver himself opened the door, the court was of the opinion that this *would* have been negligence in the operation of a motor vehicle.

#### ON A HIGHWAY:

S. 1(1)(10) "highway" includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct, or trestle, designed and intended for, or used by, the general public for the passage of vehicles.

It is clearly established that a sidewalk is within the meaning of the word "highway" as intended by this enactment. The case of *Hughes v. Watkins & Co.*<sup>12</sup> suggests that the definition is not to be restricted to the portions used only for the passage of motor vehicles. In order for The Highway Traffic Act to apply it is not necessary that the injured person be on the highway when injured. It is sufficient if the motor vehicle, while on the highway, exercised a force which uninterruptedly extended beyond the highway thereby occasioning injury. Similarly, a road allowance has been held to be part of a highway.<sup>13</sup>

The question of whether or not a private driveway or private road is a "highway" has received a certain amount of judicial consideration. It is implicit in the recent case of *Chenier v. Morin*<sup>14</sup> that a private driveway leading up to a private residence is not a "highway". It would appear that private roads such as those of the University of Toronto, or the Toronto General Hospital are "highways" for the purposes of this section.<sup>15</sup> Where negligence was occasioned upon a private Hydro access road, The Highway Traffic Act was held to apply.<sup>16</sup> The road was used by the public and because permission to use it had never been refused, the Court implied consent despite the lack of express permission in this instance. The road was held to

<sup>11</sup> *Supra*, footnote 10 at p. 130.

<sup>12</sup> *Hughes v. J. H. Watkins & Co.* (1928), 61 O.L.R. 587.

<sup>13</sup> *Bell Telephone Co. v. Kam Yan Jan Co.*, [1941] 1 D.L.R. 223.

<sup>14</sup> *Chenier v. Morin & Occidental Fire Insurance Co.* (1959), 15 D.L.R. (2d) 648.

<sup>15</sup> *Rex v. Red Line Ltd.* (1930), 66 O.L.R. 53.

<sup>16</sup> *Rosentreter v. Fuerst et al.* (1957), 10 D.L.R. (2d) 521, *contra R. v. Irwin*, [1957] O.W.N. 506.

fall within the definition, "used by the general public for the passage of vehicles".

**OWNER'S CONSENT:** The owner's consent is necessary to render him liable except in the case where his chauffeur has possession.<sup>17</sup> To be valid, consent must be for the use of the vehicle on a highway.<sup>18</sup> So, where the owner expressly forbade his employee to drive anywhere but on the farm property and the employee nevertheless took the vehicle on the highway, he was held to be in possession without the owner's consent. Thus, possession changed from possession with consent to possession without consent, without any change in the de facto possession of the chattel.<sup>19</sup> It is to be noted however, that where the owner consents to a limited use of the vehicle on the highway, for example, with the condition that the driver would not be drinking, breach of the condition will not negative consent.<sup>20</sup>

Consent can be either express or implied.<sup>21</sup> Whether or not consent will be implied depends upon the circumstances of each case. An employee-employer, or family relationship between owner and driver are weighty factors favoring the implication of consent.<sup>22</sup> In the case of *Bickell v. Blewitt*,<sup>23</sup> which involved a son driving his father's automobile, the Court implied consent. The basis for their decision was that if permission had been requested, it would have been granted. In *Madere v. Silk*,<sup>24</sup> an employee was found to be in possession of his employer's automobile and consent was implied. The relevant circumstances were these: the owner was a garage proprietor; the company policy was to allow their employees use of the second-hand cars; and although permission was necessary it was seldom refused. Without a specific request the employee took the automobile to the knowledge of other employees and upon noticing the automobile missing, the owner did not express alarm. The court held that the owner had failed to satisfy the onus of proving non-consent, and was therefore liable.

The general rule is that the owner's consent is limited to the particular person to whom it is granted and permission to delegate possession to a third party will not usually be inferred.<sup>25</sup> However, if a third party has possession to the knowledge of the owner without his express consent, even contrary to express instructions, and the owner takes no positive action, consent may be implied.<sup>26</sup>

<sup>17</sup> *Clayton v. Raitar Transport Co.*, [1948] O.R. 897.

<sup>18</sup> *Newman & Newman v. Terdik*, [1953] O.R. 1.

<sup>19</sup> *Supra*, footnote 18.

<sup>20</sup> *Cooper et al. v. Temos et al.* (1956), 3 D.L.R. (2d) 172.

<sup>21</sup> *Bickell v. Blewitt* (1931), 40 O.W.N. 136.

<sup>22</sup> *Supra*, footnote 21; *Hamilton et al. v. Rodgers et al.*, [1949] O.W.N. 156.

<sup>23</sup> *Supra*, footnote 21.

<sup>24</sup> *Madere & Clanoux v. Silk, Guthrie & Guthrie* (1956), 2 D.L.R. (2d) 239.

<sup>25</sup> *McGrogan v. Hertz Drivurself Stations of Ontario*, *supra*, footnote 8; *Boyd v. Smith*, [1931] O.R. 361; *Bennetto & Bennetto v. Leslie et al.*, [1950] O.R. 303; *Sykes v. Leslie & Weiby*, [1950] O.R. 303; *Brent v. Morrison et al.*, [1946] O.W.N. 431.

<sup>26</sup> *Bender et al. v. Ronnenburg et al.*, [1955] O.W.N. 105.

Once the plaintiff has proven injury arising from the negligent operation of a motor vehicle on a highway and has established the ownership of the vehicle, if the defence of "possession without the owner's consent" is raised, the burden of proof rests upon the owner.<sup>27</sup> There has been some uncertainty as to the degree of proof required in these circumstances. Generally, when the owner raises the defence of "no consent" it will place the driver in breach of Section 281 of the Canadian Criminal Code,<sup>28</sup> commonly known as the "joy-riding" section. In *Madere v. Silk*<sup>29</sup> Mr. Justice Thompson traced the development of the principle that where a plea in a civil action amounts to an allegation of a crime, the standard or degree of proof required is not the usual "balance of probabilities" but rather the criminal standard of "beyond a reasonable doubt".<sup>30</sup> He felt this principle would also apply to s. 105(1). The Court of Appeal affirmed the decision<sup>31</sup> but disapproved of the applicability of the higher standard of proof. In a later case, *Barham v. Masden*<sup>32</sup> the Court of Appeal had this to say:

In this case it was not necessary to consider or discuss the nature or extent of the onus resting upon an owner under s. 105(1), where it was alleged by him that the motor vehicle was in the possession of some person without his consent. The Court however, thought it desirable to make it plain that it did not concur in the opinion expressed by Hughes, J., that the onus was on the owner-defendants to show beyond a reasonable doubt that the motor vehicle was in the possession of some other person without their consent. Hughes, J., relied to a large extent upon *Madere v. Silk*, [1956] O.W.N. 113, 729. That case did not support the proposition stated by Hughes, J. In that case the Court of Appeal, the unanimous opinion of the Court was that the question to be determined was whether the owners had satisfied the onus of showing that the car was in the possession of the driver without their consent. There was no approval given by that decision to the proposition that the proof must be beyond reasonable doubt.<sup>33</sup>

**POSSESSION:** The interpretation of the word "possession" in relation to s. 105(1) of the Highway Traffic Act has given rise to a distinction between operation and possession. In *Thompson v. Bourchier*<sup>34</sup> the owner had given possession to X. X allowed Y to drive while X remained as a passenger in the vehicle. The Court held that "de facto" or physical possession was too narrow a construction to give to the word "possession" and not in accord with the legislature's intention which was to protect the public by imposing upon the owner of a vehicle responsibility of management thereof. X as passenger was held to be in possession of the automobile. This decision was

<sup>27</sup> *Supra*, footnotes 24 and 26.

<sup>28</sup> Sec. 281: Everyone who, without the consent of the owner, takes a motor vehicle with intent to drive or use it or cause it to be driven or used is guilty of an offence punishable on summary conviction.

<sup>29</sup> *Supra*, footnote 25.

<sup>30</sup> *London Life Insurance Co. v. Lang Shirt Company's Trustee*, [1929] 1 D.L.R. 328; *Earnshaw v. Dominion of Canada General Insurance Co.*, [1943] O.R. 385; *Saskatchewan Mutual Insurance Co. v. Lyle* (1959), 19 D.L.R. (2d) 134.

<sup>31</sup> *Supra*, 24, (1957), 6 D.L.R. (2d) 383.

<sup>32</sup> *Supra*, footnote 7.

<sup>33</sup> *Supra*, footnote 7, at p. 154.

<sup>34</sup> *Thompson v. Bourchier*, [1933] O.R. 525.

approved and followed in *Tompkinson v. Ross*,<sup>35</sup> where the facts were almost identical.<sup>36</sup>

**CHAUFFEUR:**

S. 1(1)(2). "Chauffeur" means any person who operates a motor vehicle and receives compensation therefor.

The Highway Traffic Act imposes upon the owner of a motor vehicle an absolute liability for its negligent operation by his chauffeur. The owner is liable although the chauffeur is in possession without the owner's consent and even if contrary to his express instructions. In *Clayton v. Raitar Transport*<sup>37</sup> the Ontario Court of Appeal held that so long as the driver of a motor vehicle can be said to be compensated for his driving of *that* vehicle he is a "chauffeur". It makes no difference whether he is driving after hours or not, and no difference whether he is driving not only without the consent of the owner, but contrary to the owner's specific instructions. Hogg J.A. stated that since the main object and purpose of the Highway Traffic Act is the protection of persons using the roads and highways in Ontario, such purpose would be more clearly and more reasonably carried out by placing such meaning on the word "chauffeur".<sup>38</sup>

If an employee is supplied a car by the employer but his compensation by way of salary was paid to him for his services as a clerk in the employer's store and as a collector, and the operating of the owner's automobile was merely incidental to his duties as collector, then he will not be considered a chauffeur under section 105(1).<sup>39</sup>

The indication from these cases seems to be that if the primary purpose of employment is to operate a motor vehicle, the employee will be a chauffeur. However, if driving is merely incidental he will not be a "chauffeur" within the meaning of this section.

*Limitation Imposed By 105(2)*

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.

This subsection, commonly known as the "guest or gratuitous" passenger provision, is a stringent limitation of the driver's and owner's liability for negligence in operation of a motor vehicle. Ontario has completely eliminated the drivers liability and the statu-

<sup>35</sup> *Tompkinson v. Ross*, [1953] O.W.N. 105, C. of A., [1953] O.W.N. 456.

<sup>36</sup> *Marsh v. Kulchar*, [1952] 1 D.L.R. 593; 1 S.C.R. 330. The Supreme Court of Canada interpreted the word "possession" with regard to sec. 141(1) Vehicles Act 1945 (Sask.) c. 98. They held it to mean "manual control" or "actual physical possession". However, the Saskatchewan act dealt with a "wrongful taking out of possession" whereas "possession" in s. 105(1) is in reference to the owner's consent. As Estsy, J. pointed out in the case these are quite distinct issues and the word "possession" in the latter context requires a different interpretation.

<sup>37</sup> *Supra*, footnote 17.

<sup>38</sup> *Supra*, footnote 17 at p. 902.

<sup>39</sup> *D'Allesandro et al. v. Minden*, [1943] O.R. 418.

tory liability of the owner *vis-a-vis* passengers except in the situation where the motor vehicle is being operated in the business of carrying passengers for compensation. This restriction is unique in Ontario. The other provinces, in similar legislation, have made the owner and driver liable for "gross negligence" or "wanton and wilful misconduct".<sup>40</sup>

Section 105 concerns the liability of both driver and owner of a motor vehicle. Subsection (1) has not altered the common law position of the driver. It has imposed a vicarious liability upon the owner of a motor vehicle for damage caused by the negligence of the driver which did not exist at common law. As toward gratuitous passengers, subsection (2) not only eliminates the statutory liability imposed upon the owner by sub-section (1) but also eliminates the common law liability of the driver which was unaffected by subsection (1).

The abrogation of liability by subsection (2) does not extend to the situation where the motor vehicle is operated in the business of carrying passengers for compensation. An early decision gave an indication that this restriction applied only to commercial vehicles.<sup>41</sup> However, the later cases are consistent in holding that the payment of a fixed fee brought the motor vehicle into the class of being operated in the business of carrying passengers for compensation.<sup>42</sup> This would appear to apply even where the business of carrying passengers was simply one isolated instance.<sup>43</sup> Generally, the sharing of expenses is not a payment of compensation, and, even where a fixed fee was paid but was intended to cover a portion of the cost of gasoline and oil, the Court of Appeal held the vehicle not to be in the business for compensation.<sup>44</sup>

The meaning of the words "compensation" and "business" in this context were recently canvassed by the Court of Appeal in *Jurasits v. Nemes*.<sup>45</sup> Laidlaw J.A., had this to say:

The words "for compensation" express the purpose or object of the business of carrying passengers, and they have the effect of limiting the meaning of the word "business" as used in the phrase. Moreover, the purpose or object of the owner or driver, namely "for compensation", must be the proximate or primary reason for operating his vehicle in order to fall within the scope and meaning of the phrase under consideration. If the real and primary object of the owner in operating his motor vehicle in the particular circumstances was not for compensation, then, in my opinion the case does not fall within the scope of the phrase.

<sup>40</sup> (Statutes) Some are:

R.S.A. 1955, c. 356 s. 132(1)

R.S.M. 1954, c. 112 s. 99(1)

R.S.P.E.I. 1951, c. 73 s. 70(1)

R.S.N.S. 1954, c. 184 s. 203(1).

<sup>41</sup> *Shaw et al. v. McNay et al.*, [1939] O.R. 368.

<sup>42</sup> *Chote v. Rowan et al.*, [1943] O.W.N. 6, *Wing v. Banks*, [1947] O.W.N. 897, *Dunnigan v. Gareau*, [1954] O.W.N. 504; *Regan v. Edgill*, [1956] O.W.N. 801.

<sup>43</sup> *Lemieux & Lemieux v. Bedard*, [1953] O.R. 837.

<sup>44</sup> *Csehi v. Dixon*, [1953] O.W.N. 238.

<sup>45</sup> *Jurasits v. Nemes* (1957), 8 D.L.R. (2d) 659.

It becomes necessary then, to consider the meaning of the word "compensation". Having due regard to the fact that the word is used to describe and limit "the business of carrying passengers" I think it is used in the sense of payment of money or money's worth made or given directly by a passenger to an owner or driver of a motor vehicle in a transaction of the same kind and character as one in which a person engages the services of an owner or driver of a motor vehicle in the business of a carrier of passengers. It is consideration given directly by a passenger to an owner or driver of a motor vehicle in pursuance of an express or implied contract of carriage in which the true relationship in law between the parties is that of passenger and carrier. It does not include every kind of consideration or benefit that may arise and be received indirectly or incidentally by an owner or driver of a motor vehicle by reason of a contract of some kind other than that which ordinarily exists between a passenger and a person who operates a motor vehicle in the business of a carrier.<sup>46</sup>

Mr. Justice Schroeder in the same case stated:

It is not every benefit or advantage however remote or indirect which flows to the owner or driver of a motor car from some contract or arrangement into which he may have entered with his passenger, or however incidental thereto which puts the motor car in which the passenger is carried, in the category of a "vehicle operated in the business of carrying passengers for compensation." In my opinion, the statute envisages compensation of such a character and so directly connected with the agreement to convey the passenger, as to constitute the act an operation in the business of carrying passengers for compensation in the sense of performing the act for gain or reward.<sup>47</sup>

A subsequent affirmation and application of these principles is to be found in the case of *Bohem v. Maurer*.<sup>48</sup>

The pertinent time to consider when determining whether or not a motor vehicle is being operated in the business of carrying passengers for compensation is the time of the accident. Thus, where an ambulance was being driven at the time of the accident for pleasure driving and a hitchhiker was given a ride, the court held the motor vehicle did not fall within the exception.<sup>49</sup>

Finally, liability for negligence, where a motor vehicle is being operated in the business of carrying passengers for compensation within the exception of s. 105(2), extends not only to a paying passenger, but also to a non-paying passenger who is being carried at the time.<sup>50</sup>

The question of whether or not an owner, riding as a passenger in his own car, should be barred from recovery by operation of s. 105(2) was considered by the Court of Appeal in *Koos v. McVey*.<sup>51</sup> Macdonell J. A. held:

The answer seems clear from an examination of the sections. First, certain liabilities are imposed upon an owner; then the driver is made liable to the same extent; on the other hand, in certain circumstances both driver and owner are declared not to be liable. So far as is possible,

<sup>46</sup> *Supra*, footnote 45 at p. 665.

<sup>47</sup> *Ibid* at p. 673.

<sup>48</sup> *Bohm v. Maurer & Maurer*, [1958] O.R. 249, 9 D.L.R. (2d) 349, affirmed C. of A. (1958), 11 D.L.R. (2d) 619.

<sup>49</sup> *Coutts v. Smith*, [1949] O.W.N. 155.

<sup>50</sup> *Supra*, footnote 48.

<sup>51</sup> *Koos v. McVey*, [1937] 2 D.L.R. 496.

owner and driver are fixed with identical responsibility. This would not be so if the intention were to deal with their rights and liabilities as between each other. The conclusion is irresistible that what is dealt with is the rights and liabilities of owner and driver, regarded as one, towards other persons. In short the words "any person being carried in, or upon" etc. mean any person other than the owner or driver.<sup>52</sup>

However, it is submitted that in the light of the recent Supreme Court of Canada decision, *Handley v. Allardyce*,<sup>53</sup> on appeal from the Saskatchewan Court of Appeal, *Koos v. McVey* can no longer stand. Mr. Justice Martland expressly disapproved of the reasoning in *Koos v. McVey* and firmly established that an owner riding as a passenger in his own vehicle is on the same footing as any other passenger under s. 105(2) of the Ontario Highway Traffic Act as well as under the relevant legislation in Saskatchewan.

The wide language of the phrase "any person being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle" has not given rise to many problems in its interpretation. However, in the situation where a passenger was requested to ride on the fender of a motor vehicle and pour gasoline into the carburetor to keep the vehicle running, it was held that he would not fall within the aforementioned phrase but would in fact amount to a joint operator of the vehicle.<sup>54</sup>

It is submitted that the term "gratuitous passengers" is a misnomer when used to describe the application of s. 105(2). In the case of *Bertol v. Wyatt*<sup>55</sup> a person was forced to ride as a passenger and was injured. She tried to collect damages by claiming that she was not a "gratuitous passenger" and therefore covered by the exception in s. 105(2). The court held that the proper question was not whether a passenger was a "gratuitous passenger" but whether the vehicle was being operated in the business of carrying passengers for compensation.

The severity of the limitation imposed by s. 105(2) upon passengers injured in motor vehicles not used in the business of carrying passengers for compensation, has been recognized and the courts have responded by giving the subsection a narrow interpretation. This attitude is clearly indicated by the Ontario Court of Appeal in *Harrison v. Toronto Motor Car Ltd. and Krug*.<sup>56</sup> Mr. Justice Gillanders commented that the legislature is presumed not to intend any alteration in the law beyond the immediate scope and object under consideration. Thus, s. 105(1) conferred liability on the owner of a motor vehicle which did not exist at common law, and so they must have intended s. 105(2) as only excluding the liability imposed by s. 105(1). Thus, the subsection cannot be held to take away any other

<sup>52</sup> *Supra*, footnote 51 at p. 499.

<sup>53</sup> *Allardyce v. Handley* (1961), 31 D.L.R. (2d) 358.

<sup>54</sup> *Dokuchia v. Domansch*, [1945] O.R. 141.

<sup>55</sup> *Bertol v. Wyatt and Smith*, [1940] O.W.N. 1.

<sup>56</sup> *Supra*, footnote 2. For a more comprehensive review see C. A. Wright (1945), 23 Can. Bar Rev. 344, and J. D. Morton (1958), 36 Can. Bar Rev. p. 414.

common law rights, an injured person may have. Gillanders, J.A. then went on to say:

The provisions now being considered, being directed to the liability of the owner and driver should be restricted to their liability *qua* owner and *qua* driver and I think may not bar a right of action due to some other relationship. If the appellant has a cause of action against her master by reason of the negligence of his servant, subsection (2) does not take it away, even though at the time it arose she was being carried in her employer's motor vehicle.<sup>57</sup>

This is a clear statement that a right of action by a person against a master for torts committed by his servant in the course of his employment is not abrogated by s. 105(2). The plaintiff, Miss Harrison recovered damages from Krug's estate for injuries incurred by the negligence of Krug's chauffeur-servant acting in the course of his employment. The court found it immaterial that the negligence of Krug's chauffeur-servant occurred while he was operating a motor vehicle on a highway. And, they found as a fact that the motor vehicle was not used in the business of carrying passengers for compensation.

Also, this decision presents the somewhat anomalous situation of a passenger, injured by negligence of the driver of a motor vehicle, being unable to effect a recovery from the driver; whereas recovery is available against the owner by virtue of his common law vicarious liability. Perhaps this can be explained as a mere "procedural" bar similar to the explanation found in *Broom v. Morgan*.<sup>58</sup>

It is submitted that by misinterpreting the reasons for judgment in the Harrison Case, it appears that the Courts, in subsequent decisions, have created a novel cause of action. In the case of *Jurasits v. Nemes*<sup>59</sup> the Court of Appeal commented that the essence of the Harrison decision was the master-servant relationship between Krug and Miss Harrison and that the injury was suffered in the course of her employment. Later in the year the same tribunal was faced with similar facts in *Duchaine v. Armstrong*.<sup>60</sup> There, an injury was sustained by an employee during the course of his employment while riding as a passenger in his employer's automobile. The essential difference is that in the *Duchaine* case the employer himself was driving. The court bluntly held the owner liable on the basis of the decision in the *Harrison v. Toronto Motor Car & Krug*. In the *Harrison Case*, Krug's chauffeur-servant was the driver and Krug was liable by virtue of the master-servant relationship existing between him and his chauffeur. That is, Krug was liable for his chauffeur's negligence on the basis of vicarious liability. A direct claim against the chauffeur as driver, and the owner as owner, was barred by s. 105(2). The difficulty that arises from the *Duchaine case* is that the the owner rather than his servant was driving, and thus his liability

<sup>57</sup> *Supra*, footnote 2, at p. 13.

<sup>58</sup> *Broom v. Morgan*, [1952] 2 A.E.R. 1007.

<sup>59</sup> *Supra*, footnote 45.

<sup>60</sup> *Duchaine v. Armstrong & Legault*, [1957] O.W.N. 251.

being direct and not vicarious, it would seem recovery by the passenger should also have been barred. However, the Court stated in reference to the *Harrison case*:

That authority redounds even more strongly to the advantages of the plaintiff, in the present case, because here the plaintiff was being driven by one of her employers, and not by a fellow servant, at a time when she was unquestionably discharging the duties of her employment. Section 105(2) does not afford a defence to the defendants in the circumstances of this case and that ground of appeal must also fail.<sup>61</sup>

In the *Harrison case*, the relationship of employer-employee between the owner, Krug, and Miss Harrison was immaterial to the decision. Krug was vicariously liable for the negligence of his servant-driver. The *Duchaine case* wrongly emphasized the relationship of Harrison to Krug and concluded that if Krug was vicariously liable for his servants negligence, *a fortiori*, he should be liable for his own direct act of negligence. The *Harrison case* held that s. 105(2) was not to abrogate common law rights unaffected by s. 105(1). To justify the decision in the *Duchaine case* it is necessary to find a common law right arising from the employee-employer relationship. As Professor J. D. Morton states, "such authority is, to say the least hard to find."<sup>62</sup> Despite this criticism the *Duchaine case* was cited with approval in the recent case of *Dorosz & Dorosz v. Koch*.<sup>63</sup>

One other situation should perhaps be mentioned as being one in which the operation of s. 105(2) will be limited. This was impliedly referred to in *Leachin v. McGillivray*<sup>64</sup> and formed the basis of the decision in *Dorosz & Dorosz v. Koch*.<sup>65</sup> That is, where a contract of employment contains a term of safe carriage, s. 105(2) will be of no effect. In the *Dorosz case*, a baby sitter was injured while being driven home. The court held there to be a term of safe carriage in a private contract and thus s. 105(2) was not a bar to the plaintiff's claim.

In summation, it would appear that s. 105(2) is of no effect:

- (1) where there is a term of safe carriage in a private contract.
- (2) 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:
- (3) where, as in the *Duchaine Case*, a servant-passenger is injured while in the course of employment due to a master-owner's negligence in operating his motor vehicle.

### *The Negligence Act 2(2)*

2(2) In any action brought 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 a motor vehicle other than a vehicle

<sup>61</sup> *Supra*, footnote 60 at p. 253.

<sup>62</sup> (1958), 36 Can. Bar Rev., p. 414.

<sup>63</sup> *Dorosz and Dorosz v. Koch*, [1961] O.W.N. 442.

<sup>64</sup> *Leachin v. McGillivray et al.* (1959), 17 D.L.R. (2d) 408.

<sup>65</sup> *Supra*, footnote 63.

operated in the business of carrying passengers for compensation, and the owner or driver of the motor vehicle that the injured or deceased person was being carried in, or upon or entering, or getting on to or alighting from is one of the persons found to be at fault or negligent, no damages are, and no contribution or indemnity is, recoverable for the portion of the loss or damage caused by the fault or negligence of such owner or driver, and the portion of the loss or damage so caused by the fault or negligence of such owner or driver shall be determined although such owner or driver is not a party to the action.

This subsection was enacted in 1935 at the same time as section 105(2) was added to the Highway Traffic Act. The actual effect of s. 2(2) of The Negligence Act is yet uncertain and it is still in doubt as to whether it extends the immunity regarding "guest passengers" in s. 105(2) to situations where the negligence occurs off the highway. There is also a possibility that, if applied literally to a situation such as existed in the *Harrison* case, Krug, the owner, would not be liable.

In two recent Ontario cases the question was discussed as to whether or not s. 2(2) of the Negligence Act widened the provision of s. 105(2) to include all accidents and not just those occurring on a highway. In *Rosentreter v. Fuerst*,<sup>66</sup> Mr. Justice Danis approved and followed the Court of Appeal decision in *Verroche v. Russell*,<sup>67</sup> and held that s. 2(2) of the Negligence Act clearly was not limited to negligence on a highway. In the case of *Chenier v. Morin*, Mr. Justice McLennan came to the opposite conclusion.<sup>68</sup>

In the *Harrison* case s. 2(2) of the Negligence Act is referred to in the report of argument of counsel and merely mentioned in the reasons for judgment at pp. 290-1. While that section does not mention highway it does incorporate the words fault or negligence which is not referred to in ss. (2) s. 105 of the Highway Traffic Act. In any case I think the reasoning in the *Harrison* case is too forceful to be overcome by the argument as to construction from a statute *in pari materia* and for that reason I am of the opinion that the judgment in *Verroche v. Russell & Niagara, St. Catharines and Toronto Railroad Co.* [1916] 2 D.L.R. 348, O.W.N. 198; 59 C.R.T.C. 88 affd. [1946] 4 D.L.R. 847, O.W.N. 860, 60 C.R.T.C. 350 is not binding or applicable.

Although, in this case, the Court may be showing a desire to restrict the application of this onerous provision upon passengers, it is submitted that the *Harrison* case does not specifically state that s. 2(2) of the Negligence Act only applies to accidents on a highway. In the *Harrison* case s. 2(2) the Negligence Act is only referred to once, and then only as a submission by counsel. Perhaps it is feasible to argue that s. 2(2) of the Negligence Act does extend the operation of s. 105(2) of the Highway Traffic Act to accidents resulting from negligence off the highway.

Another situation which has been the subject of other comments is as follows.<sup>69</sup> Given a fact situation similar to that in the *Harrison* case, can s. 2(2) of the Negligence Act be applied to bar recovery by the passenger or not? The relevant words in the sub-section are:

<sup>66</sup> *Supra*, footnote 16.

<sup>67</sup> *Verroche v. Russell et al.*, [1946] 2 D.L.R. 348.

<sup>68</sup> *Supra*, footnote 14 at p. 654.

<sup>69</sup> Osgoode Hall Law Journal, Vol. 2, p. 167, *supra*, footnote 56.

. . . no damages contribution or indemnity shall be recoverable for the portion of the loss or damage caused by the fault or negligence of such owner or driver.

It is submitted that a strong argument, based on a literal application of this subsection, could be advanced in favour of barring such recovery.

This raises the further question of the right of the owner, in a case similar to the *Harrison* case, to recover indemnity from his negligent driver. In order that s. 2(1) of the Negligence Act may operate to provide indemnity two parties must have been at fault. The Court in *Picken v. Hesk*<sup>70</sup> held that subsection 2(1) only applied as between two defendants where the negligence of both is of a personal nature and not to a case where the negligence of one is imputed as a matter of law to the other on the basis of a master-servant relationship. Thus, where only the driver is at fault s. 2(1) of the Negligence Act would not apply and it would appear that an implied contract of indemnity would arise between the owner and driver in ordinary circumstances.<sup>71</sup>

However, it is submitted that s. 2(2) of the Negligence Act, as an exception to s. 2(1), would appear to apply. It follows that recovery by the owner of any indemnity over against the driver as regards injury incurred by "gratuitous" passengers would be barred.

In conclusion, it should be mentioned that the situation contemplated by the legislature in enacting s. 2(2) of the Negligence Act, was one in which a guest passenger was injured due to the combined negligence of his driver and another person. The effect of the section is to reduce the passenger's recovery by the degree of fault of his driver.

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<sup>70</sup> *Picken et al. v. Hesk & Lawrence* (1954), 4 D.L.R. 90.

<sup>71</sup> *McFee v. Joss* (1925), 56 O.L.R. 578.