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person may not be able to consent to negligence in the abstract. As stated, when the subsection was promulgated, fault liability constituted the foundation of the law of torts and insurance coverage was less widespread. But these factors are no longer operative. As a matter of policy, fault liability should be of no account.

First, it is the writer's thesis that the aim of the law in penalizing fault should be clearly and finally separated from the aim of compensating victims. Fault should be relegated entirely to the criminal law, where it properly belongs, and the community as a whole should ensure that victims of accidents are compensated whether or not a particular individual can be proved at fault. So long as the ideas of fault and of compensation are linked in our civil law of torts, we shall fail to achieve either aim of the law. Historically, fault first developed as a concept in the criminal law, and it was only later that it was taken over into the civil law as a tortious concept governing compensation to the victim of a wrong.

As a matter of practice, fault has become a meaningless concept when the smallest error in judgment can result in a lawsuit of astronomic proportions. Secondly, third party liability insurance is now of almost universal incidence. The last step remaining is to make such coverage compulsory. There can be no doubt that this is a social necessity. Thus, the occasion of loss-spreading has become virtually so complete than any legislative anomalies should be eradicated. The courts in general have shown their abhorrence of the "gratuitous passenger" clause and the public is definitely uneasy about its operation. Undoubtedly, the legislature would be well advised both on legal and political grounds to abolish subsection 105(2).


This case in which the Supreme Court of Canada reverses the Manitoba Court of Appeal and restores the judgment of the trial judge is an illustration of Jerome Frank's thesis that the essential jurisprudence is to be found in the trial courts and not in the higher courts. In general, the writer's thesis is that the aim of the law in penalizing fault should be clearly and finally separated from the aim of compensating victims. Fault should be relegated entirely to the criminal law, where it properly belongs, and the community as a whole should ensure that victims of accidents are compensated whether or not a particular individual can be proved at fault. So long as the ideas of fault and of compensation are linked in our civil law of torts, we shall fail to achieve either aim of the law. Historically, fault first developed as a concept in the criminal law, and it was only later that it was taken over into the civil law as a tortious concept governing compensation to the victim of a wrong.

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A.R.A.S.

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35 See Dann v. Hamilton [1939] 1 N.B. 509. The mere fact that a motorist is receiving a gratuitous benefit from the driver does not mean that he thereby consents to run the risk of suffering injury caused by the driver's negligence and to forego compensation.
38 Note here the so-called "thin skull" cases.
39 The figures here are conflicting, but it can be assumed that there is now 97-99% coverage.
40 In Saskatchewan, a scheme not based on fault has been in force since 1946; it is administered on a non-profit basis, by a Crown corporation, the Saskatchewan Government Insurance Office.
41 See Accident Facts, 1962: Statistics Relating to Motor Vehicle Traffic Accidents, Ontario Department of Transport. In 1962, 1,383 persons were killed in Ontario. If 2% of all motorists were uninsured this would mean that 27 persons were possibly left without any remedy whatsoever.
The court was asked to determine whether the conduct of the respondent Irene Perry in driving a motor vehicle amounted to "gross" as opposed to "ordinary" negligence. On this distinction depended the claim of the appellant here to take advantage of s. 99(1) of the Highway Traffic Act, R.S.M. 1954, c. 112, which provides gratuitous passengers may recover from the host driver where the driver's conduct is proved to be grossly negligent. The trial judge had found that the cumulative effect of several negligent acts on the part of the respondent did constitute gross negligence. In effect, the majority of the Court of Appeal tried to evaluate the proper weight to give to the evidence in applying to it the law. They (the majority) felt there should be a flagrant quality in some of the acts which cumulatively constituted gross negligence. Speaking for the Court, Ritchie J. agrees with Freedman J.A. in his dissenting opinion that "An appellate court should be slow to substitute its opinion for his [t.j.] as to whether the defendant's conduct amounts to gross negligence." Ritchie J. considers this is not a case "on which the opinion of an appellate court as to the quality of the negligence should be substituted for the opinion reached by the learned trial judge."

In effect the case is a reminder from the highest authority that appellate courts must deal with questions of law, and rely for better or for worse on the first hand impressions of the trial judge as to what the facts are. As the Court pointed out:

"... the difficult task of assessing the quality of the negligent action ... in order to determine whether or not they [the facts] are to be characterized as "gross negligence" involves a reconstruction of the circumstances of the accident itself including the reactions of persons involved, and this is a function for which the trial judge who has seen and heard the witnesses is far better equipped than are the judges of an appellate court.


In the case of Burkhardt v. Beder, the Court has settled a problem in procedure which had apparently puzzled the Ontario Bar for some time.

In this case the widow of the late Christian Burkhardt sued for damages under the Fatal Accidents Act. The statement of claim as originally delivered claimed general damages of $15,000 and $300 for funeral expenses. By an amendment made at the opening of the trial, the claim for general damages was increased to $20,000.