1967
*Nov. 14
Dec. 18

DONNA MARIE HOLLAND, an infant under the age of twenty-one years by her next friend Frank Holland and the said FRANK HOLLAND *(Plaintiffs)* APPELLANTS;

AND

RICHARD HALLONQUIST *(Defendant)*..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Motor vehicles—Negligence—Injuries sustained by gratuitous passenger—Whether cause of action against owner for negligently operating motor vehicle which he knew, or should have known, was in unsafe condition—Necessity of establishing gross negligence—Motor-vehicle Act, R.S.B.C. 1960, c. 253, s. 71.*

The appellant commenced an action against the respondent for damages in respect of injuries which she sustained while being driven as a passenger in an automobile owned and driven by the respondent. The statement of claim alleged that the appellant sustained her injuries as a result of:—(a) the grossly negligent driving of the respondent; (b) the negligence of the respondent in the maintenance and upkeep of his automobile. Before a statement of defence had been filed the parties jointly referred a point of law to the Court, as to whether "the plaintiff is entitled to maintain a claim against the defendant as owner for negligent maintenance of his motor vehicle notwithstanding the provisions of s. 71 of the *Motor-vehicle Act*, R.S.B.C. 1960, c. 253 and amendments thereto". The question was answered in the negative by the judge who heard the application and his judgment was sustained on appeal. From that decision the appellant, with leave, appealed to this Court.

*Held:* The appeal should be dismissed.

The statement of claim alleged that, at the time the appellant was injured, the respondent was the owner and driver of a motor vehicle. The appellant stated that she was carried as a passenger in that motor vehicle. Her claim was for injury sustained by reason of the operation of that vehicle by the respondent, the driver, while she was a passenger in it. These facts alleged in the statement of claim brought the action squarely within s. 71, and, that being so, gross negligence on the part of the respondent contributing to her injury had to be established if she was to succeed. It was unnecessary to consider what might be the position, under s. 71, of an owner of a motor vehicle against whom a claim is made by an injured passenger, where the owner is not the driver, and where some specific negligence of the owner is alleged to have caused the plaintiff's injuries.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Wootton J. Appeal dismissed.

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

[1] (1961), 59 W.W.R. 41, 61 D.L.R. (2d) 275.

*B. A. Crane,* for the plaintiffs, appellants.

*R. Weddigen,* for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—The appellant commenced an action against the respondent for damages in respect of injuries which she sustained on August 30, 1964, while being driven, as a passenger, in an automobile owned and driven by the respondent. Her statement of claim alleged, in para. 3, that she sustained her injuries as a result of the grossly negligent driving of the respondent. Particulars of the alleged gross negligence were given, including an allegation that the respondent drove his motor vehicle at an excessive rate of speed when he knew or ought to have known that his motor vehicle was in a bad state of repair and when he knew or ought to have known the front end was in a dangerous condition.

The statement of claim also contained, in para. 4, an allegation that the respondent, on or about the month of February 1964 had purchased a 1954 Oldsmobile motor vehicle, that he had negligently maintained it and was careless in its upkeep, so that, just prior to the accident, it had travelled across the highway, then parallel to the highway and collided with a railway embankment, causing the injuries to the appellant. Six particulars of negligence were given, three of which related to failure to keep the vehicle in good repair and three of which referred to the respondent's having permitted the vehicle to be driven while in an unsafe condition.

Before a statement of defence had been filed the parties jointly referred a point of law to the Court, as to whether

> the Plaintiff is entitled to maintain a claim against the Defendant as owner for negligent maintenance of his motor vehicle notwithstanding the provisions of Section 71 of the Motor-vehicle Act, R.S.B.C. 1960, Chapter 253 and amendments thereto.

Section 71, as it read at the relevant time, provided as follows:

> 71. 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

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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 transporter's business

from liability for injury, loss, or damage to such passenger, or arising from the death of such passenger. No final judgment shall be entered in any such action until the Court is satisfied upon evidence adduced before it that the driver of the vehicle has been guilty of gross negligence.

The question was answered in the negative by the learned judge who heard the application and his judgment was sustained on appeal[2]. From that decision the appellant, with leave, has appealed.

In the Courts below the issue was dealt with in two stages. First, the question was considered as to whether an owner, *qua* owner, could be held liable for ordinary negligence in the maintenance and condition of his motor vehicle. As to this, both Courts held that he could, notwithstanding s. 71. Second, they went on to hold that where the owner was the driver of the car in which the passenger was riding, when injured, s. 71 did apply because the cause of action against the owner, *qua* owner, for negligent maintenance became fused into the character and nature of his operation of the motor vehicle. The learned judge of first instance puts the matter this way:

Here, however, the owner and the driver of the vehicle are one and the same person and consequently, as the facts pleaded in paragraph 3 of the statement of claim indicate that the defendant "was driving his 1954 Oldsmobile motor vehicle" and the infant plaintiff was his passenger, the defendant is entitled to the protection of the statute in its requirement that gross negligence must be established. The operation of the vehicle by the defendant in such circumstances includes in the field of negligence surrounding that operation the knowledge of the defendant as to the condition of his vehicle and the condition of the vehicle itself. The particulars indicated in paragraph 4 of the statement of claim are particulars which are relevant to the negligence in the operation of the vehicle itself. The pleadings clearly indicate that the defendant owned and operated the vehicle at the time of the accident.

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[2] (1961), 59 W.W.R. 41, 61 D.L.R. (2d) 275.

With respect, while reaching the same conclusion as to the answer to be given to the question of law raised, I have adopted a somewhat different approach to the issue.

To the question of law, as framed, the answer had to be in the negative. Apart altogether from the application of s. 71, negligent maintenance of a motor vehicle, *per se*, could not give rise to a cause of action. Facts would have to be established to link the negligence alleged to the injuries sustained by the appellant. In the particulars given in para. 4 of the statement of claim, it is alleged that the respondent "permitted" his motor vehicle to be driven while it was in an unsafe condition, but it is clear, from para. 3, that the appellant alleges that the respondent was the driver. The cause of action alleged in the statement of claim is, in substance, that he negligently operated his motor vehicle which he knew, or should have known, was in an unsafe condition. The question which the parties sought to put in issue is whether, in such circumstances, s. 71 is applicable.

Eliminating from that section those words which are not relevant in this case, it provides:

> No action shall lie against either the owner or the driver of a motor-vehicle ... by a person who is carried as a passenger in that motor-vehicle ... for any injury ... sustained by such person ... by reason of the operation of that motor-vehicle ... by the driver thereof while such person is a passenger . . . unless there has been gross negligence on the part of the driver of the vehicle ...

The statement of claim alleges that, at the time the appellant was injured, the respondent was the owner and driver of a motor vehicle. The appellant states that she was carried as a passenger in that motor vehicle. Her claim is for injury sustained by reason of the operation of that vehicle by the respondent, the driver, while she was a passenger in it.

These facts alleged in the statement of claim bring the action squarely within the section, and, that being so, gross negligence on the part of the respondent contributing to her injury must be established if she is to succeed.

It is unnecessary to consider, and for that reason I express no opinion upon, what might be the position, under s. 71, of an owner of a motor vehicle against whom a claim is made by an injured passenger, where the owner is not

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the driver, and where some specific negligence of the owner is alleged to have caused the plaintiff's injuries. That question would have to be determined in relation to the circumstances proved in the particular case.

I would dismiss the appeal, with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiffs, appellants: Heath & Hutchison, Nanaimo.*

*Solicitors for the defendant, respondent: Harper, Gilmour, Grey & Company, Vancouver.*