Michigan Law Review

Volume 38 | Issue 3

1940

AUTOMOBILES - GUEST PASSENGERS - GROSS NEGLIGENCE

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AUTOMOBILES — GUEST PASSENGERS — GROSS NEGLIGENCE — Defendant was the owner of a vehicle which was being driven by his servant and agent, a joint defendant. Plaintiff's status was that of a non-paying guest. Plaintiff brings an action in tort, alleging "gross negligence" in the operation of an automobile on a public highway in the state of Florida. Defendants pleaded and proved a "Guest Act" of the state of Florida. The action was brought in the state of New Jersey and the sole question on appeal is the propriety of the submission to the jury of the issue of gross negligence. *Held*, "gross negligence" is a relative term that does not lend itself to precise definition, and at most the

difference between "gross" and "ordinary" negligence is one of degree rather than of quality, irrespective of applicability of the statute of Florida. *Oliver v. Kantor*, (N. J. L. 1939) 6 A. (2d) 205.

The statute of the state of Florida provides that, "in case of accident," a guest shall not have a cause of action for damages against the owner or operator of the vehicle, "unless such accident shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or operator of such vehicle. . . ." [1] In the absence of any statute, the general majority rule has been that the operator of an automobile owes an invited guest a duty to exercise reasonable care and will be liable to the guest for ordinary negligence.[2] A few jurisdictions have adopted the so-called minority rule, that gross negligence must be shown in order to hold the operator liable to his guest.[3] The common-law rule has been affected, in many states, by the adoption of a so-called "Guest Act." [4] The Michigan Supreme Court has made it clear that despite the use of the words "gross negligence" in the statute, no degrees of negligence exist in Michigan and that the test of liability to a guest under the statute is whether the operator was guilty of wilfulness and wantonness.[5] The large majority of states which have adopted such statutes have followed this view, and it has been held that the elements necessary to constitute wanton and wilful misconduct are: (1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it

[1] Fla. Gen. Laws (1937), c. 18033.

[2] Perkins v. Galloway, 194 Ala. 265, 69 So. 875 (1915); Beard v. Klusmeier, 158 Ky. 153, 164 S. W. 319 (1914); Avery v. Thompson, 117 Me. 120, 103 A. 4 (1918); collections of cases in 20 A. L. R. 1014 (1922); HUDDY, AUTOMOBILES, 6th ed., § 678 (1922); 1 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW 955 (1927).

[3] Massachusetts is one of the leading states on the minority side holding that guests must show gross negligence at common law to recover. Massaletti v. Fitzroy, 228 Mass. 487, 118 N. E. 168 (1917); Mercienowski v. Sanders, 252 Mass. 65, 147 N. E. 275 (1929); Burke v. Cook, 246 Mass. 518, 141 N. E. 585 (1928); Bertelli v. Tronconi, 264 Mass. 235, 162 N. E. 307 (1932). Georgia, Pennsylvania, and Washington also follow the gross negligence rules. Epps v. Parish, 26 Ga. App. 399, 106 S. E. 297 (1921); Cody v. Venzie, 263 Pa. 541, 107 A. 383 (1919); Eastman v. Silva, 156 Wash. 613, 287 P. 656 (1930).

[4] Colo. Stat. Ann. (1935), c. 16, § 371; Conn. Gen. Stat. (1930), § 1628; Del. Rev. Code (1935), § 5713; Fla. Gen. Laws (1937), c. 18033; Idaho Code Ann. (1932), § 48-901; Ill. Ann. Stat. (Smith-Hurd, 1935), c. 95½, § 58; Ind. Stat. Ann (Burns, 1933), § 47-1021; Mich. Comp. Laws (1929), § 4648; Mont. Rev. Code Ann. (1935), § 1748.1; N. D. Laws (1931), c. 184, p. 310; S. C. Code (1932), § 5908; Tex. Civ. Stat. (Vernon Supp. 1939), art. 6701b; Vt. Pub. Laws (1933), § 5113. For general discussion of guests acts, see 18 IOWA L. REV. 78 (1932).

[5] Oxenger v. Ward, 256 Mich. 499, 240 N. W. 55 (1932); Bobich v. Rogers, 258 Mich. 343, 241 N. W. 854 (1932); Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581 (1931); 74 A. L. R. 1198 (1931).

must be apparent that the result is likely to prove disastrous to another.[6] Therefore, it seems that the New Jersey court was wrong when it applied the rule of ordinary negligence to this case and held the Florida statute did not change said rule. The Florida courts have not as yet passed upon the statute involved. The only court which has had an opportunity to inquire into this statute is Minnesota, which in 1929 held the plaintiff in *Teders v. Rothermel*,[7] to be a passenger for hire and not therefore a "guest" under the statute. The Minnesota court hinted that, had the passenger been found to be a "guest," he would have had to prove more than ordinary negligence on the part of the defendant. The Florida "Guest Statute" is worded just like the Michigan Guest Act and therefore it is reasonable to believe that it will be construed as it has been in other states having like statutes. In New Jersey the rule is that where one is invited to ride in an automobile, the driver thereof owes him the duty of reasonable care in his transportation so long as such status continues.[8] However, in a case where the action was brought in New Jersey on an accident which occurred in Virginia, the New Jersey Court in *Garris v. Kline*,[9] charged that under the Virginia law a guest could not recover unless the driver was guilty of gross negligence, and that gross negligence meant extreme or wanton carelessness.

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[6] Willett v. Smith, 260 Mich. 101, 244 N. W. 246 (1933).

[7] (Minn. 1939) 286 N. W. 353, where it was held that the plaintiff was not a "guest" under the Florida statute as he had contributed toward the cost of the trip. But we can see that if plaintiff had been held to be a guest, then he would have to prove more than ordinary negligence on the part of the driver of the car.

[8] Faggioni v. Weiss, 99 N. J. 157, 122 A. 840 (1923); Iannicelli v. Benvenga, 99 N. J. L. 506, 123 A. 882 (1924); Flammer v. Morelli, 100 N. J. L. 314, 126 A. 307 (1924); MacKenzie v. Oakley, 94 N. J. L. 66, 108 A. 771 (1920).

[9] Garris v. Kline, 119 N. J. L. 435, 197 A. 63 (1938).