Michigan Law Review

Volume 37 | Issue 7

1939

AUTOMOBILES - HOST-GUEST STATUTES - "GROSS NEGLIGENCE OR WILFUL AND WANTON MISCONDUCT"

Michigan Law Review

AUTOMOBILES — HOST-GUEST STATUTES — "GROSS NEGLIGENCE OR WILFUL AND WANTON MISCONDUCT" — Plaintiff, a guest in defendant's automobile, sustained injuries when defendant attempted to pass a car while approaching the brow of a hill and failed to see an oncoming car until too late to avoid a collision. Although the highway was heavily crowded, defendant had been driving at a speed of sixty-five to seventy miles per hour, and had been passing cars on the straight and over hills, ignoring the protests of his passengers. Defendant appealed from verdict and judgment for plaintiff. *Held*, with two justices dissenting, that under the statute requiring proof of defendant's "gross negligence or wilful and wanton misconduct," [1] the evidence was insufficient to go to the jury. Judgment reversed with directions to enter judgment for defendant. *Granflaten v. Rohde*, (S. D. 1938) 283 N. W. 153.

At common law, in a majority of jurisdictions, the driver-host was bound to exercise due care toward his guest and was liable for ordinary negligence.[2] Numerous collusive suits, directed at insurance companies, were chief factors leading to the enactment of statutes limiting the host's responsibility.[3] "Heedlessness or reckless disregard," [4] "gross or wilful negligence," [5] "intoxication or wilful misconduct," [6] "gross negligence or wilful and wanton misconduct" [7] are typical phrases descriptive of the behavior for which statutory liability will attach. Most courts construe the various terms used as being substantially synonymous, so that similar problems of interpretation are presented in different juris-

[1] S. D. Rev. Code (1919), § 801, amended Sess. Laws (1933), c. 147.

[2] By the minority rule, the host was only liable for gross negligence. 35 MICH. L. REV. 804 (1937).

[3] MALCOLM, AUTOMOBILE GUEST LAW, § 4 (1937).

[4] Conn. Gen. Laws (1927), c. 308; Rev. Stat. (1930), § 1628.

[5] Vt. Acts (1929), no. 78; Pub. Laws (1933) tit. 22, § 5113.

[6] Cal. Gen. Laws (1935), c. 27, Cal. Vehicle Code (1937), § 403.

[7] Mich. Comp. Laws (1929), § 4648.

dictions.[8] According to the usually accepted formula, these statutes have reference to conduct differing in kind, rather than in degree, from ordinary negligence.[9] This leaves, then, the ultimate question: when is conduct so reprehensible that it differs "in kind" from negligence? The courts realize that as they are concerned with a particular defendant's state of mind, the reasonable man concept of negligence is not available; [10] and, as the defendant's mental attitude must be determined by its manifestations, the language and adjudications of previous cases are necessarily inconclusive. In general, the factual elements given most consideration, in the determination of statutory liability, are the defendant's awareness of danger, his knowledge of the probability of injury and his persistence in a negligent course of conduct.[11] All courts agree that momentary thoughtlessness, misjudgment, or inattention will not remove the defendant's statutory protection.[12] But where the defendant's wrongful conduct is not limited

[8] Holding, in accord with the principal case, that "gross negligence" and "wilful and wanton misconduct," as used in the statutes, are of like meaning: Thayer v. Thayer, 286 Mich. 273, 282 N. W. 145 (1938); Huffman v. Buckingham Transport Co., (C. C. A. 10th, 1938) 98 F. (2d) 916; Wedel v. Klein, (Wis. 1938) 282 N. W. 606. The statutory "wilful" conduct is not different from "wanton" conduct: Surgan v. Parker, (La. App. 1938) 181 So. 86; Cusack v. Longaker, (C. C. A. 2d, 1938) 95 F. (2d) 304; Wright v. Sellers, (Cal. App. 1938) 78 P. (2d) 209. "Gross negligence," "reckless disregard," and "heedlessness" are synonymous. Raub v. Rowe, (Tex. Civ. App. 1938) 119 S. W. (2d) 190. "Heedlessness" and "wilful misconduct" are interpreted similarly. Hamilton v. Perry, (Tex. Civ. App. 1937) 109 S. W. (2d) 1142.

[9] HARPER, TORTS, § 151 (1933); Wedel v. Klein, (Wis. 1938) 282 N. W. 606. This interpretation of the statutory "gross negligence" is apparently due to the general rejection of the degrees of negligence concept; for in jurisdictions where these degrees are recognized, gross negligence is not deemed equivalent to wilful and wanton misconduct. Gosnell v. Montgomery, 133 Neb. 871, 277 N. W. 429 (1938); Baatz v. Noble, 105 Mont. 59, 69 P. (2d) 579 (1937); Froman v. Kelley Stave & Heading Co., (Ark. 1938) 120 S. W. (2d) 164. In Vermont, where degrees of negligence were not accepted as a part of the common law, the statute is thought to require their recognition. Sorrell v. White, 103 Vt. 277, 153 A. 359 (1931).

[10] Various tests and definitions are suggested: "conscious indifference . . . where probability of harm . . . was reasonably apparent." Biddle v. Boyd, (Del. 1938) 199 A. 479 at 480; consciousness that conduct will, in common probability, lead to injury —Thomas v. Foody, 54 Ohio App. 423, 7 N. E. (2d) 820 (1936); "willingness . . . that plaintiff might be injured"—Donelan v. Wright, 148 Kan. 287, 81 P. (2d) 50 at 52 (1938).

[11] Driving while sleepy, over guest's protest, Malicote v. DeBondt, 281 Mich. 650, 275 N. W. 664 (1937); extreme recklessness, with the professed purpose to give the passengers a thrill, Martins v. Kueter, 65 S. D. 384, 274 N. W. 497 (1937); taking a sharp curve at high speed, over protests of guests, Thomas v. Foody, 54 Ohio App. 423, 7 N. E. (2d) 820 (1936). See annotation, 86 A. L. R. 1145 (1933); 96 A. L. R. 1479 (1935). For an analysis of significant fact elements in the Michigan cases, see 35 MICH. L. REV. 804 at 812 et seq. (1937).

[12] Poor judgment in attempting to avoid another car which was out of control, Sheets v. Stalcup, (Ind. App. 1938) 13 N. E. (2d) 346; diversion of eyes from road, to adjust radio dial, Bashor v. Bashor, (Colo. 1938) 85 P. (2d) 732; sudden change of course at an intersection, Ferris v. Von Mannagetta, 124 Conn. 88, 198 A. 167

to these single acts of negligence, the courts differ in their application of the statutes to the fact situations. Two recent decisions, along with the decision in the principal case, indicate a requirement of proof that the defendant acted with full realization of the particular danger bringing about the plaintiff's injury.[13] It is even intimated in one opinion that the defendant, to be liable, must have had close to suicidal intentions.[14] Other courts, however, have taken what appears to be a more realistic approach. A showing that the defendant proceeded deliberately in the face of a generally perilous situation will entitle the plaintiff to go to the jury; [15] and in a close case the jury's finding will not be rejected.[16] This latter view would call for a different result in the principal case. The defendant knew of the crowded condition of the highway, was warned by his passengers, and must have realized the inherent danger of his conduct; in this situation, he knew the hazard of passing another car while nearing the crest of a hill. These facts, along with the showing of defendant's persistent negligence, would seem to justify the finding of "an affirmatively reckless state of mind." [17] That the defendant did not see the oncoming car before starting to pass, and that he tried to avoid a collision when he did see that car, are facts emphasized by the court; [18] but in view of the natural instinct of self-preservation, reasoning along this line is not persuasive. Legislative policy should not be nullified by the courts; but neither should it be unreasonably enforced. Other arguments—against leaving uncompensated a large and possibly deserving group of plaintiffs, and in favor of the trial of facts by jury—should be recognized. It is submitted that the South Dakota court has adopted an overly strict view of the statutory requirement.

(1938); driving on the wrong side of the road for a short period of time, Hamilton v. Perry, (Tex. Civ. App. 1937) 109 S. W. (2d) 1142. Also, see 86 A. L. R. 1145 (1933); 96 A. L. R. 1479 (1935).

[13] Defendant was suffering pains in his stomach, said he did not feel well, but continued driving until overcome by cramps. Thayer v. Thayer, 286 Mich. 273, 282 N. W. 145 (1938). Defendant was driving at night without lights; he averted one near-collision, but continued without lights, in spite of the protests of passengers. Donelan v. Wright, 148 Kan. 287, 81 P. (2d) 50 (1938). These cases held for defendants as matter of law.

[14] ". . . to hold defendant guilty of wanton conduct, we would be compelled to say that he was willing to injure himself and his sweetheart." Donelan v. Wright, 148 Kan. 287, 81 P. (2d) 50 at 52 (1938).

[15] While proceeding in a dense fog, defendant attempted to cut diagonally across the opposite lane of the highway. Defendant's motion for directed verdict denied. Powers v. Lackey, (Vt. 1938) 1 A. (2d) 693.

[16] After completing a curve at high speed, defendant came unexpectedly on another car which he was unable to avoid. Interpreting the Texas statute, court sustained verdict and judgment for plaintiff. Alesio v. Lococo, 134 Neb. 461, 279 N. W. 154 (1938).

[17] Principal case, 283 N. W. 153. This is the ground on which the court distinguishes Martins v. Kueter, 65 S. D. 384, 274 N. W. 497 (1937), supra, note 11.

[18] 283 N. W. 153.