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CONFLICT OF LAWS - GUEST MOTORISTS -HOW FAR IS THE LEX LOCI DELICTI CONTROLLING IN THE FORUM?

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CONFLICT OF LAWS — GUEST MOTORISTS — HOW FAR IS THE LEX LOCI DELICTI CONTROLLING IN THE FORUM? — Before the advent of the "guest statutes," the decisions of all but a very few states recognized no degrees of negligence and measured the duty of the automobile host towards his non-paying guest by due care under all the circumstances—the "ordinary negligence" rule.[1] In the few exceptional states, the decisions required the plaintiff to prove "gross," "wilful," or "wanton" negligence on the part of his host in order to maintain his action.[2] And within the last decade nineteen states have adopted "guest statutes" which, with varying language, adopt the "gross negligence" rule.[3] Since the rule of the lex loci delicti will often differ from the rule applicable under the law of the forum, some interesting conflict of law problems have arisen. (1) Have the state courts worked out a theory of "general jurisprudence" on this subject, or, conversely, how far will a state court feel itself bound by the lex loci delicti (a) if the action is at common law, or (b) if a statute is in question? (2) Have the federal courts worked out a theory of "general jurisprudence" in the guest cases? (3) What influence, if any, have the "guest statutes" had on the federal decisions? And (4) has the federal rule, following the doctrine of *Swift v. Tyson*,[4] had any influence on the state decisions in bringing about changes toward the federal view?

I.

In examining the problem of what law the state court will feel itself bound to apply, under either the statutes or decisions of another

[1] HUDDY, AUTOMOBILES, 6th ed., 881 (1922).

[2] Three states adopt the "gross negligence" rule by their decisions. *Massachusetts:* Massaletti v. Fitzroy, 228 Mass. 487, 118 N. E. 168 (1917). *Virginia:* Boggs v. Plybon, 157 Va. 30, 160 S. E. 77 (1931). *Georgia:* Epps v. Parrish, 26 Ga. App. 399, 106 S. E. 297 (1921). Pennsylvania varies liability on the basis of benefit to the guest. Cody v. Venzie, 263 Pa. 541, 107 A. 383 (1919). Alabama and New Jersey distinguish liability on the status of the guest as an invitee, licensee or trespasser. Thomas v. Carter, 218 Ala. 55, 117 So. 634 (1927); Faggioni v. Weiss, 99 N. J. L. 157, 122 A. 840 (1924).

[3] Cal. Gen. Laws (1931), Act 5128, § 141¾; Colo. Laws (1931), c. 118, § 1; Conn. Gen. Stat. (Rev. 1930), § 1628; Del. Rev. Code (1935), § 5713 [Del. Laws (1929), c. 26]; Idaho Code (1932), § 48-901-2; Ill. Rev. Stat. (Bar Ed. 1935), c. 95a, ¶ 47 (5); Ind. Ann. Stat. (1933), § 47-1021; Iowa Code (1931), § 5026-61; Kan. Gen. Stat. (1935), § 8-122b; Mich. Comp. Laws (1929), § 4648; Mont. Rev. Stat. (1935), § 1748.1; Neb. Comp. Stat. (Supp. 1933), § 39-1129; N. D. Laws (1931), c. 184; Ohio Laws (1933), § 6308 (6); Ore. Code (1930), § 55-1209; S. C. Code (1932), § 5908; S. D. Laws (1933), c. 147; Tex. Comp. Stat. (Vern. Supp. 1931), art. 6701b; Vt. Pub. Laws (1933), § 5113; Wash. Laws (1933), c. 18, § 1; Wyo. Rev. Stat. (1931), § 72-701.

[4] 16 Pet. (41 U. S.) 1, 10 L. Ed. 865 (1842). The most exhaustive analysis of the influence of this case is found in Yntema and Jaffin, "A Preliminary Analysis of Concurrent Jurisdiction," 79 UNIV. PA. L. REV. 869 at 881-886, note 23a (1931).

state, it is important to observe that the principles in the field of conflict of laws have no mandatory operation upon one independent state to recognize and enforce the laws of another, and it is only by virtue of a constantly developing sense of comity between the several states of our federal system that the law of one state is given effect in another.[5] Thus far, the "full faith and credit" clause of the Federal Constitution has not been construed to require this application.[6] Therefore, our question whether a state is bound by the decisions and statutes of other states, means simply, should or will it recognize such decisions and statutes within the measure of established comity.

In dealing with this type of liability, the state courts apply without exception the lex loci delicti, whether statutory or not, although that law conflicts with the law of the forum.[7] These courts apply this general rule whenever the foreign law has been well pleaded and proved[8] and is shown to relate to substantive rights and not merely to the remedy.[9] In these cases there can be said to be no theory of "general jurisprudence" worked out by the state courts.

All the cases, however else they diverge, agree that where the lex loci is statutory, or involves the construction of statutory law, the courts of the forum will follow such law and the interpretation thereof by the courts of the lex loci delicti, however correct or incorrect the court of the forum feels that interpretation to be.[10] Most courts go further, as noted above, and say that whether the lex loci delicti involves statute or non-statute law it will be applied as understood and interpreted by the courts there. So, if the lex loci delicti requires either a showing of "gross" negligence, "wanton and wilful disregard," or "intoxication," under their guest statutes, the court of the forum will require a similar showing although the lex fori measures the host's duty by

[5] 1 BEALE, CONFLICT OF LAWS, §§ 5.4, 6.1, p. 53 (1935).

[6] See, however, Bradford v. Clapper, 286 U. S. 145, 52 S. Ct. 571 (1932); and Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 45 S. Ct. 129 (1924).

[7] See Eskovitz v. Berger, 276 Mich. 536, 268 N. W. 883 (1936), where defendant contended that the presence of the guest statute in the forum made recovery on "ordinary negligence" grounds as allowed by the lex loci delicti against the public policy of Michigan, held that the lex loci delicti controls whether it be considered on "comity" or "vested" rights" theories. See also 2 BEALE, CONFLICT OF LAWS, §§ 378.2-378.3, pp. 1289-90 (1935); DeShetler v. Kordt, 43 Ohio App. 236, 183 N. E. 85 (1931); Redfern v. Redfern, 212 Iowa 454, 236 N. W. 399 (1931); Wright v. Pettus, 209 N. C. 732, 184 S. E. 494 (1936); Baise v. Warren, 158 Va. 505, 164 S. E. 655 (1932). In each of the latter four cases the lex fori differed either by statute or decision from the lex locus delicti.

[8] 3 BEALE, CONFLICT OF LAWS, § 621.1 et seq., p. 1663 (1935).

[9] Redfern v. Redfern, 212 Iowa 454, 236 N. W. 399 (1931).

[10] DeShetler v. Kordt, 43 Ohio App. 236, 183 N. E. 85 (1931); Metcalf v. Reynolds, 267 N. Y. 52, 195 N. E. 681 (1935).

the "ordinary negligence" rule.[11] Conversely, it has been held that a guest statute in the state of the forum has no application to a suit growing out of a cause of action arising in a jurisdiction requiring the guest to prove only ordinary negligence.[12]

In an exceptional case, the Georgia court held that if the lex loci delicti invoked is not statutory, and if the law invoked conflicts with the law of the forum as interpreted and applied there, the forum law of negligence will determine the substantive rights of the parties.[13] But this case can be distinguished because the parties were both residents of the forum temporarily over the state line when the accident occurred.

The state courts, in adopting these general rules, deny a "general common law independent of judicial decisions establishing it," and refuse to accede to Justice Story's proposition that decisions of the locus delicti are merely evidence of what might be law of that state.[14] In effect, the decisions of the state courts, in enforcing foreign claims for injuries to an automobile guest, exemplify the policy of the conflict of laws, emphasizing uniformity in the choice of law.

2.

In *Hewlett v. Schadel*,[15] the leading "guest motorist" case in the federal courts, it was held that if the lex loci delicti is not statutory, and if that law and the interpretation thereof conflict with the principles of the common law in relation to the doctrines of negligence as interpreted and applied by the federal courts, the interpretation prevailing in the latter will determine the substantive rights of the parties. In the *Hewlett* case, a non-paying guest sued her host in the federal district court in Virginia. The Virginia supreme court decisions required proof of gross negligence in order to sustain the plaintiff's case. The circuit court of appeals, in reversing the judgment of the district court, was of the opinion that since no state statute, local rule of property, or question affecting the internal organization of the state was involved,

[11] Wright v. Palmison, 237 App. Div. 22, 260 N. Y. S. 812 (1932); Wright v. Pettus, 209 N. C. 732, 184 S. E. 494 (1936). And see Freas v. Sullivan, 130 Ohio St. 486, 200 N. E. 639 (1936), where the Ohio court applied the Pennsylvania rule.

[12] See Eskovitz v. Berger, 276 Mich. 536, 268 N. W. 883 (1936); Freas v. Sullivan, 130 Ohio St. 486, 200 N. E. 639 (1936); Loranger v. Nadeau, 215 Cal. 362, 10 P. (2d) 263 (1932).

[13] Slaton v. Hall, 168 Ga. 710, 148 S. E. 741 (1929), affd. 40 Ga. App. 288, 149 S. E. 306. (1929).

[14] Swift v. Tyson, 16 Pet. (41 U. S.) 1 at 18, 10 L. Ed. 865 (1842). See Forepaugh v. Delaware L. & W. R. R., 128 Pa. 217, 18 A. 503 (1899), for a criticism of this view.

[15] (C. C. A. 4th, 1934) 68 F. (2d) 502.

the question what constituted negligence was one of "general jurisprudence," to be answered by applying the rules of the common law. The court stated that in determining such rule it would exercise an independent judgment, particularly when the question related to the use of the highways by citizens of different states, in order to establish a uniform rule of liability on this subject matter in the federal courts. The court followed the standard interpretation of the thirty-fourth section of the Judiciary Act of 1789,[16] adhered to by the federal courts since Justice Story's decision in *Swift v. Tyson*, in determining that the guest cases were to be decided without reference to the course of decisions in the locus delicti, in the absence of controlling statutes there.

Although there are a few earlier cases to the contrary,[17] the federal cases involving negligence on the part of other than automobile hosts have followed the "ordinary negligence" rule.[18] That there were no degrees of negligence recognized in the federal courts was decided before the era of the motor car and the rule is generally applied in the absence of statute to the contrary.[19] It has also been decided that in automobile accident cases the negligence of the driver would not be imputed to his guest despite the fact that the lex loci delicti was to the contrary.[20] Next, contributory negligence and the doctrine of "last clear chance" were assimilated into the "general law" theory.[21] The final step in this process was to include the guest cases within this field.[22] Since there are but few federal cases in which the

[16] 28 U. S. C., § 725 (1926).

[17] Milford & U. St. Ry. v. Cline, (C. C. A. 1st, 1907) 150 F. 325; and see note to Hill v. Hite, 29 C. C. A. (8th, 1898) 549 at 553, 85 F. 268.

[18] See references in notes 19, 20, 21 and 22. The Court of Appeals of the First District is apparently in favor of applying the lex loci in this and other situations. Pepper v. Morrill, (C. C. A. 1st, 1928) 24 F. (2d) 320; Boston & M. R. R. v. Breslin, (C. C. A. 1st, 1935) 80 F. (2d) 749, cert. den. 297 U. S. 715, 56 S. Ct. 590 (1935).

[19] Steamboat New World v. King, 16 How. (57 U. S.) 469 at 474, 14 L. Ed. 1019 (1853); New York Cent. Ry. v. Lockwood, 17 Wall. (84 U. S.) 357 at 383, 21 L. Ed. 627 (1873); REDFIELD, CARRIERS, § 376 (1869); Hewlett v. Schadel, (C. C. A. 4th, 1934) 68 F. (2d) 502.

[20] Commonwealth Electric Supply Co. v. Greschner, (C. C. A. 6th, 1932) 59 F. (2d) 512; Wabash Ry. v. Walczak, (C. C. A. 6th, 1931) 49 F. (2d) 763; Grand Trunk Western Ry. v. Collins, (C. C. A. 6th, 1933) 65 F. (2d) 875.

[21] Virginia Motor Express v. Jimenez, (C. C. A. 4th, 1935) 76 F. (2d) 694; Butler v. Missouri Pac. Ry., (D. C. La. 1932) 2 F. Supp. 226. *Contra*, on the question of contributory negligence, Roberts v. Tennessee, Coal & Iron Co., (C. C. A. 5th, 1918) 255 F. 469.

[22] Hewlett v. Schadel, (C. C. A. 4th, 1934) 68 F. (2d) 502; Jarvis v. Bostic, (App. D. C. 1935) 79 F. (2d) 831; Pryor v. Strawn, (C. C. A. 8th, 1934) 73 F. (2d) 595; Weekley v. Thomas. (C. C. A. 4th, 1933) 63 F. (2d) 988; De Soto Motor

lex loci delicti differed from the rule applied by the federal courts, there is little discussion to be found on the choice of law. In all the cases where the court purported to apply the state law, or at least to examine the decisions at the locus delicti, the latter were in line with the federal rule. Consequently, the decision on the choice of law in these cases is not highly significant.

There are instances both in the guest cases and in the related automobile accident cases where a federal court followed the lex loci delicti although there was no applicable statute controlling. Thus the Court of Appeals of the First Circuit has held that the lex loci delicti controls on the question of imputed negligence.[23] The strength of the decision is weakened by the fact that the lex loci followed the same rule previously applied by the federal court in that district. The court that decided the appeal in the *Hewlett* case had previously ruled that in a case involving the "family purpose" doctrine, the lex loci delicti was "as binding as a legislative enactment."[24] However, in the latter case both parties and the court agreed that such was the law to be applied. And in a recent "turn-table" case it was held that the question involved was not one of "general law" and that the lex loci delicti controlled.[25] This decision is certainly contrary to earlier views in the federal courts.[26] There are suggestions in the last two cases that "local customs and uses of property" were involved and therefore conformity was necessary.

The "ordinary negligence" rule applied in the federal courts and in a majority of the states which have not adopted guest statutes would seem to be a more desirable rule than that incorporated into the statutes and applied in the common-law "gross negligence" jurisdictions. The majority rules rests on the fact that a potentially dangerous instrumentality is involved; that in its operation the same measure of duty is required toward those within the zone of danger to be apprehended as in other situations where human action is concerned.[27] As the Indiana appellate court said recently, "It will not do

Corp. v. Vann, (C. C. A. 10th, 1933) 66 F. (2d) 753; Ingerick v. Mess, (C. C. A. 2d, 1933) 63 F. (2d) 233.

[23] Marcus v. Forcier, (C. C. A. 1st, 1930) 38 F. (2d) 8; Higgins v. Ledo, (C. C. A. 1st, 1933) 66 F. (2d) 265. And see Pepper v. Morrill, (C. C. A. 1st, 1928) 24 F. (2d) 320, which allowed a recovery based on a finding of *gross* negligence as required by the *Massachusetts* decisions.

[24] Rubinstein v. Williams, (App. D. C. 1932) 61 F. (2d) 575.

[25] Boston & M. R. R. v. Breslin, (C. C. A. 1st, 1935) 80 F. (2d) 749, cert. den. 297 U. S. 715, 56 S. Ct. 590 (1935).

[26] Hudson, "The Turntable Cases in the Federal Courts," 36 HARV. L. REV. 826 (1923).

[27] Hewlett v. Schadel, (C. C. A. 4th, 1934) 68 F. (2d) 502 at 507; 18 VA. L.

to say that the operator of an automobile owes no more duty to a person riding with him as guest . . . than a gratuitous bailee owes to a block of wood."[28] The policy of the cases to the contrary, under statute or otherwise, rests on attention to the interests of the host.[29] That view is probably best expressed in an old adage, "Never bite the hand that feeds you." As a secondary consideration to the desire for uniformity, the majority rules avoids hardships, which is one of the aims of conflict of laws princples.

3.

It is quite clear from the cases decided under the guest statutes (whose validity has been upheld by the United States Supreme Court[30]) that judgments for the guest have been and will be greatly reduced in number.[31] The same result must follow in the federal courts, since the statutes change the common-law measure of duty and require a departure from "general law" theories. The fact that practically all of these statutes have been enacted within the last few years accounts for the few interpretations of them in the federal courts.[32]

In *Miller v. Erickson*,[33] the only case found in the federal courts in which a guest statute was in force in the locus delicti at the time of the accident, the court, in a per curiam decision, followed the construction of "gross negligence" found in the Vermont court's interpretation of its statute.[34] This is in accord with the accepted doctrine that the federal courts are bound by the interpretation and construction of state laws as enacted in positive statutes. *Swift v. Tyson* left that

REV. 342 (1932); White, "Liability of an Automobile Driver to a Non-Paying Passenger," 20 VA. L. REV. 326 (1933).

[28] Munson v. Rupker, 96 Ind. App. 15 at 30, 151 N. E. 101 (1933).

[29] For example, see 12 NEB. L. BULL. 203 (1933) and the majority opinion in Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581 (1931), the case upholding the Michigan statute.

[30] Another view is that the statutes are intended to protect insurance companies from collusive suits. 35 MICH. L. REV. 804 (1937); Silver v. Silver, 280 U. S. 117, 50 S. Ct. 57 (1929).

[31] For instance, in Michigan where recovery would have been allowed for ordinary negligence before adoption of the statute, Hemington v. Hemington, 221 Mich. 206, 190 N. W. 683 (1922), under the cases in which the guest statute was pleaded in the period from May 1935 to Dec. 28, 1936, there was recovery in but four out of sixteen cases. All of the cases involved ordinary negligence under the former law.

[32] The scarcity of cases in point is due probably to the fact that guests are usually neighbors, thus presenting no diversity of citizenship grounds for getting into a federal court; and for the added reason that a defendant sued in the state court will not remove to the federal court since the statute will give him as much protection as possible under present interpretations by the state courts.

[33] (C. C. A. 2d, 1935) 76 F. (2d) 598.

[34] Shaw v. Moore, 104 Vt. 529, 162 A. 373 (1932).

clear, and it was reiterated in another leading case on "general law," to wit, *Baltimore & Ohio R. R. v. Baugh.*[35] There the court said, "There is no question as to the power of the states to legislate and change the rules of the common law in this respect as in others; but in the *absence* of such legislation the question is one determinable only by the general principles of that law." And the federal courts have not failed to follow the interpretations of the state courts dealing with *statutory* regulations of automobiles and their owners.[36] In *Paxon v. Davis*,[37] arising in the District of Columbia court, the Maryland statute dealing with reckless driving was applied in answering the question of what constituted negligence amounting to recklessness.

There have been cases involving the law merchant and the Negotiable Instruments Law in which federal courts have felt free to disregard the statute on the ground that it was merely declaratory or a codification of the common law.[38] Even if this were true today, which it is not,[39] the argument would be untenable since the guest statutes make a decided change in the common law.

4.

Unlike the effect produced by *Swift v. Tyson*, which influenced some state courts in adopting the majority view of what constituted "value" in order to be a holder in due course under the law merchant (the view later adopted in the various negotiable instruments laws[40]), the federal "general law" in the guest cases is being repudiated every time a guest statute is adopted. About 1929 to 1933 when most of these statutes were enacted, the legislatures, undoubtedly urged on by insurance companies, felt that it was not only unsportsmanlike to allow recovery for mere negligence, but that collusion and perjury were being worked upon the courts.[41] Early cases likened the duty owed to a guest to that owed by a gratuitous bailee to the bailor or that owed by an occupier of land to a mere licensee.[42] The justifications set forth by various courts in upholding these statutes seem to have

[35] 149 U. S. 368 at 378, 13 S. Ct. 914 (1893) (italics the writer's).

[36] Linde Air Products Co. v. Cameron, (C. C. A. 4th, 1936) 82 F. (2d) 22; Harrison v. Love, (C. C. A. 6th, 1936) 81 F. (2d) 115; Harmon v. Barber, (C. C. A. 6th, 1918) 247 F. 1; Weiss v. Magnussen, (D. C. Va. 1936) 13 F. Supp. 948; Booth v. Gilbert, (C. C. A. 8th, 1935) 79 F. (2d) 790.

[37] (App. D. C. 1933) 65 F. (2d) 492.

[38] Presidio County v. Noel-Young Bond & Stock Co., 212 U. S. 58, 29 S. Ct. 237 (1908); Jockmus v. Claussen, (D. C. Fla. 1930) 47 F. (2d) 766.

[39] Burns Mortgage Co. v. Fried, 292 U. S. 487, 54 S. Ct. 813 (1934).

[40] N. I. L., § 25.

[41] Silver v. Silver, 280 U. S. 117, 50 S. Ct. 57 (1929); Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581 (1931).

[42] Massaletti v. Fitzroy, 228 Mass. 487, 118 N. E. 168 (1917).

been refuted,[43] and in view of the criticisms of these statutes, it may be doubted whether any federal court will change its requirement of "ordinary negligence" unless commanded to do so by the words of a statute. The *Hewlett* case is decisive of that point.

The federal decisions evidence the fact that the guest who sues his host in the federal court will be allowed to recover on a showing of ordinary negligence in the absence of a pertinent statute in the locus delicti. That this "general law" theory is of doubtful validity is suggested by text writers. It has also been criticized in the opinions of learned judges. As Judge Caldwell of the Court of Appeals of the Eighth Circuit has said, it is "The most serious blot on the American system of jurisprudence. . . ."[44] Judge August N. Hand has frowned upon the variant character of the rights it produces.[45] The rules established in the *Hewlett* case is, theoretically at least, conducive to uniformity in the sense that it tends to render uniform the law throughout the forty-eight states in cases falling with the jurisdiction of the federal courts. But in cases not getting into federal courts, uniformity in the functioning of the law towards all similarly situated will be prevented, since, if the state courts still adhere to their own rule, litigants there will receive a different measure of justice from that received by litigants in federal courts, under exactly the same circumstances. It would seem that uniformity of the law in the latter sense is more essential and should be preserved, even at the cost of divergent rules in various jurisdictions of the federal courts.

The law as applied in the state courts, on the other hand, is positive and clarifies the situation for all the parties, rendering certain the question what law is to be applied when the accident took place outside of the forum and their practice of applying the lex locus delicti is in harmony with the established doctrine in the conflict of laws.

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[43] See dissent in Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581 (1931); 18 VA. L. REV. 342 (1932); White, "The Liability of an Automobile Driver to a Non-Paying Passenger," 20 VA. L. REV. 326 (1933); Munson v. Rupker, 96 Ind. App. 15, 148 N. E. 169 (1933).

[44] Hartford Fire Ins. Co. v. Chicago M. & St. P. R. R., (C. C. A. 8th, 1895) 70 F. 201 at 209, affg. (D. C. Iowa, 1894) 62 F. 904.

[45] Cole v. Pennsylvania R. R., (C. C. A. 2d, 1930) 43 F. (2d) 953 at 956.