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NEGLIGENCE - GUEST STATUTES - PROXIMATE CAUSE

Erwin S. Simon
University of Michigan Law School

NEGLIGENCE — GUEST STATUTES — PROXIMATE CAUSE — The deceased was fatally injured while riding as a guest in defendant's truck. In the course of the action for damages brought by the administratrix, the court instructed that "if you find from a preponderance of the evidence that the driver of the truck was guilty of willful and wanton misconduct . . . and that as a consequence thereof the accident occured, and further, that such conduct contributed to the death of plaintiff's intestate," then the jury should find for the

plaintiff. Verdict was for the plaintiff and defendant appealed. *Held*, that the instruction was erroneous because it allowed the jury to find for the plaintiff upon proof that the acts of the driver merely contributed to the death and did not require a finding of proximate cause. *Denton v. Midwest Dairy Products Corp.*, 284 Ill. App. 279, 1 N. E. (2d) 807 (1936).

In several jurisdictions, including Illinois, statutes have been recently adopted by which the liability of automobile owners and drivers to guests is limited to responsibility for willful and wanton misconduct.[1] The statute does not create a new cause of action,[2] but merely limits an existing common-law right.[3] Proof of proximate cause continues to be a necessary element of recovery.[4] The instruction in the principal case in regard to causation was couched substantially in the terms of the statute,[5] yet it was held to be insufficient, largely because of the use of the words "contributed to."[6] There are at least three

[1] Cal. Gen. Laws (1931), Act 5128, § 141¾; Colo. Laws (1931), c. 118, § 1; Conn. Gen. Stat. (Rev. 1930), § 1628; Del. Laws (1929), c. 270; Iowa Code (1931), § 502(b)(1); Idaho Code (1932), § 48-901; Ill. Rev. Stat. (1935), c. 95a, par. 47 (5); Ind. Ann. Stat. (Burns 1933), § 47-1021; Kan. Rev. Stat. (Supp. 1933), § 8-122b; Mich. Comp. Laws (1929), § 4648; Mont. Laws (1931), c. 195, § 1; Neb. Comp. Stat. (Supp. 1933), § 39-1129; N. D. Laws (1931), c. 184; Ore. Code (1930), § 55-1209; S. C. Code (1932), § 5908; Tex. Comp. Stat. (Vern. Supp. 1931), art. 6701b; Vt. Pub. Laws (1933), § 5113; Wash. Laws (1933), p. 145, § 1; Wyo. Rev. Stat. (1931), § 72-701. For a general discussion of these Guest Acts, see 18 IOWA L. REV. 78 (1932).

[2] Reed v. Zellers, 273 Ill. App. 18 (1933).

[3] At common law, a guest was generally allowed recovery for injuries caused by merely negligent acts, although in Massachusetts, New Jersey, Georgia, and Pennsylvania, the duty of a driver to his guest was limited without the aid of statutes. See 6 NOTRE DAME LAWY. 300 (1931) and 7 NOTRE DAME LAWY. 87 (1932); also 74 UNIV. PA. L. REV. 86 (1925) and 27 MICH. L. REV. 458 (1929).

[4] 45 C. J. 901, note 27 (1928). But it has been held in a few cases that if an injurious act is willful and wanton, the actor is liable for all consequences, however remote. 22 R. C. L. 123 (1918). The Guest Acts of only three jurisdictions—Cal. Gen. Laws (1931), Act 5128, § 141¾; Mont. Laws (1931), c. 195, § 1; and N. D. Laws (1931), c. 184—expressly require that the willful misconduct be the proximate cause of the injury.

[5] "No person riding in a motor vehicle as a guest . . . shall have a cause of action for damages against the . . . owner . . . for injury, death, or loss, in case of accident, unless such accident shall have been caused by the willful and wanton misconduct of the driver . . . and unless such willful and wanton misconduct *contributed* to the injury, death, or loss for which the action is brought." Ill. Rev. Stat. (1935), c. 95a, par. 47 (5).

The Michigan act, Mich. Comp. Laws (1929), § 4648, and the Wyoming act, Wyo. Rev. Stat. (1931), § 72-701, are phrased in almost identical language. See Morgan v. Tourangeau, 259 Mich. 598, 244 N. W. 173 (1932).

[6] It may be argued that the part of the instruction charging that the injury must have been a "consequence of" the act sufficiently required a finding of proximate cause which was not vitiated by the additional requirement of "contributory" cause. In Dougherty v. Ellington, 97 Cal. App. 87, 275 P. 456 (1929), and in Westerman v. Brown Cab Co., (Mo. App. 1925) 270 S. W. 142, the words "by reason thereof" were held synonymous with proximate cause. Certainly, the use of the words "proximate cause" is not obligatory. Applebee v. Ross, (Mo. 1932) 48 S. W. (2d) 900 ("direct

situations in which contributory cause may arise: (1) the conduct of the plaintiff may contribute to his own injury; (2) the concurring conduct of two tortfeasors may contribute jointly to the plaintiff's injury; and (3) the "sole" conduct of an individual may contribute with natural conditions to cause the plaintiff's injury. Contributory negligence of the plaintiff was not involved in the principal case. According to a previous decision in this same court, if there had been concurring misconduct, the instruction as it was given would have been both proper and necessary.[7] But when the accident involves only the "sole" misconduct of the driver, the cases are in confusion. Generally, if the finding of proximate causation is expressly required by the instruction, a reference to contributory causation is not improper.[8] Whether or not an instruction requiring only a finding of contributory causation is error would seem to depend upon the nature of proximate cause. If proximate cause is held to mean direct physical connection, then "contributed to" should be sufficient alone.[9] But if, as in Illinois,[10] foreseeability is an additional element of proximate cause a technical instruction should be necessary which the words "contributed to" would not satisfy.[11] The cases, however, do not appear to follow any one rule, the same

result of"); Cernovski v. St. Louis Transit Co., 207 Mo. 263, 106 S. W. 51 (1907) ("caused"); Lichter v. Aurora, Elgin & Chicago Ry., 179 Ill. App. 216 (1913) ("direct cause").

[7] In Luke v. Marion, 271 Ill. App. 48 (1933), which was an action under the Illinois Guest Act, Ill. Rev. Stat. (1935), c. 95a, par. 47 (5), the trial court instructed that defendant was liable if the injuries of plaintiff were "caused" by the willful and wanton misconduct of defendant. On review it was held that the instruction was too narrow and not in accordance with the law as announced by the statute, that "the willful and wanton misconduct of defendant might not have been the sole cause of the injury, but if it contributed to the causation, he would be liable therefor." See also Mattingly v. Broderick, 225 Mo. App. 377, 36 S. W. (2d) 415 (1931); Goehring v. Rogers, 67 Cal. App. 253, 227 P. 687 (1924); Fisse v. Toye Bros. Auto & Taxicab Co., 14 La. App. 70, 127 So. 756 (1930); Webb v. Linnemann, 201 Ky. 131, 255 S. W. 1036 (1923); Siff v. O'Neil, 17 Ohio App. 216 (1922).

[8] Thomas v. Maine Cent. Ry., 127 Me. 466, 144 A. 212 (1929); Chadwick v. Bush, 174 Miss. 75, 163 So. 823 (1935) ("contributed directly and proximately"); Fink v. Dasier, 273 Mich. 416, 263 N. W. 412 (1935) ("contribute as a proximate cause"); Stone v. Wood, 104 Vt. 105, 157 A. 829 (1932) ("proximately contribute"); Mooney v. Canier, 198 Iowa 251, 197 N. W. 625 (1924) ("contributed as a proximate cause"). But see Wiseman v. Skagit County Dairymen's Ass'n., 166 Wash. 57, 6 P. (2d) 369 (1931), in which an instruction that the jury should find for plaintiff if the alleged negligence of defendant was "the proximate cause or proximately contributed to" plaintiff's injuries, was held erroneous on the ground that the words "contributing cause" should be used only in cases of concurring negligence.

[9] In Evans v. Klusmeyer, 301 Mo. 352, 256 S. W. 1036 (1923), the words "directly contributed to cause plaintiff's injuries" were held to satisfy an instruction in regard to proximate cause. The court said (301 Mo. 352 at 360): " 'Directly contributed to' . . . cannot be reasonably construed as other than synonymous with proximate cause, by which we mean a cause as operates to produce a particular consequence without the intervention of an independent cause in the absence of which the injuries would not have been inflicted." But see contra, Hof v. St. Louis Transit Co., 213 Mo. 445, 111 S. W. 1166 (1908).

[10] Shayne v. Colliseum Bldg. Corp., 270 Ill. App. 547 (1933).

[11] E. L. Chester Co. v. Wisconsin Power and Light, 211 Wis. 158, 247 N. W. 861 (1933), commented on in 9 WIS. L. REV. 109 (1933).

jurisdictions having conflicting decisions.[12] Perhaps the final test, on review, should be the probability of the jury having been misled by the instruction.[13] If that test is applied to the principal case, it seems doubtful if a reversal was merited.

Erwin S. Simon

[12] Compare the two Missouri cases cited in note 9 above, and also the principal case, with Shurlow v. Hoadley,186 Ill. App. 328 (1914), in which an instruction similar to that in the principal case was held valid.

[13] Dougherty v. Ellingson, 97 Cal. App. 87, 275 P. 456 (1929).