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Negligence - Duty of Care - Duration of Status of "Driver" for Puropses of Guest Statute

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NEGLIGENCE—DUTY OF CARE—DURATION OF STATUS OF "DRIVER" FOR PURPOSES OF GUEST STATUTE—Plaintiffs were guests riding in defendant's automobile. Defendant stepped out of the vehicle leaving the motor running, the hand brake unset, and the automatic shift in neutral position. A departing passenger brushed against the gear lever and started the vehicle which struck a wall causing injuries to the plaintiffs. On appeal from judgment adverse to the plaintiffs, *held,* reversed. Defendant may be held liable for ordinary negligence. California's "guest" statute[1] limiting guests

[1] Cal. Vehicle Code (Deering, 1948) §403.

to recovery for injuries sustained by the driver's willful misconduct does not apply in this case, since the defendant ceased to be a driver the moment he stepped out of the vehicle. *Panopulos v. Maderis,* (Cal. App. 1956) 293 P. (2d) 121.

Absent a controlling statute, the driver of a vehicle has a duty to exercise ordinary or reasonable care to avoid injuries to his guests.[2] The perils of modern highway driving, and claims that frequent collusion of driver and guest in actions against the driver's insurer had caused insurance rates to rise,[3] led to the adoption of statutes in twenty-six states limiting the driver's liability.[4] These statutes, generally considered constitutional,[5] limit recovery by a guest to certain types of conduct, such as willful misconduct or gross negligence on the part of specified individuals.[6] Whether the defendant is a "driver" within the scope of a guest statute is dealt with for the first time in the principal case. Prior cases considered extensively the scope to be given the term "guest,"[7] but had not passed on the definition of "driver" or "operator" under these statutes. The statutes commonly make the operator or owner liable to guests for gross negligence. Only the California statute is limited in scope to the driver of the vehicle.[8] Superficially, it could be argued that the California legislature must have intended to afford limited liability only to those in actual physical control of the vehicle, as the principal case holds. Otherwise it certainly could have adopted the language of any one of twenty-five other statutes. This

2 Avery v. Thompson, 117 Me. 120, 103 A. 4 (1918); Dashiell v. Moore, 177 Md. 657, 11 A. (2d) 640 (1940); Saxby v. Cadigen, 266 Wis. 391, 63 N.W. (2d) 820 (1954). This rule compares a guest in a vehicle with a licensee upon realty. A minority view, which allows recovery only when the driver has been grossly negligent, analogizes guest to bailor and operator to bailee. Passler v. Mowbray, 318 Mass. 231, 61 N.E. (2d) 120 (1945); Slaton v. Hall, 172 Ga. 675, 158 S.E. 747 (1931); 65 A.L.R. 952 (1930).

3 Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 581 (1931). These claims as reasons for guest statutes are challenged in White, "The Liability of an Automobile Driver to a Non-Paying Passenger," 20 VA. L. REV. 326 (1934).

4 Ala. Code (1940) tit. 36, §95; Ark. Stat. (1947) §75-913; Cal. Vehicle Code (Deering, 1948) §403; Colo. Rev. Stat. Ann. (1953) §13-9-1; Del. Code Ann. (1953) tit. 21, §6101; Fla. Stat. (1955) §320.59; Idaho Code (1948) §49-1001; Ill. Rev. Stat. (1955) c. 95½, §58(a); Ind. Stat. Ann. (Burns, 1952) §47-1021; Kan. Gen. Stat. Ann. (Corrick, 1949) §8-122b; Mich. Comp. Laws (1948) §256.29; Mont. Rev. Stat. Ann. (1954) §32-1113; Neb. Rev. Stat. (1952) §39-740; Nev. Comp. Laws (Hillyer, 1929; Supp. 1938) §4439; N.M. Stat. Ann. (1953) §64-24-1; N.D. Rev. Code (1943) §39-15; Ohio Rev. Code (Baldwin, 1953) §4515.02; Ore. Rev. Stat. (1953) §30.110; S.C. Code (1952) §46-801; S.D. Code (1939) §44.0362; Tex. Civ. Stat. Ann. (Vernon, 1948) art. 6701b; Utah Code Ann. (1953) §41-9-1; Vt. Stat. (1947) §10.223; Va. Code (1950) §8-646.1; Wash. Rev. Code §46.08.080; Wyo. Comp. Stat. Ann. (1945) §60-1201.

5 Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57 (1929); Naudzius v. Lahr, note 3 supra. But see Stewart v. Houk, 127 Ore. 589, 271 P. 998 (1928), which held that a statute denying any recovery was unconstitutional as a denial of due process of law.

6 See 96 A.L.R. 1479 (1935).

7 See 82 A.L.R. 1365 (1933).

8 There are other "guest" statutes that mention "driver." The Illinois statute includes "driver," but also includes owner, operator, employer, and agent. Montana includes the driver's intoxication but also includes the gross negligence of an owner or operator within its scope. North Dakota and Utah use "driver" along with "owner" and "person responsible for the operation of the car" in limiting liability to gross negligence.

argument, however, rests on questionable grounds. The policy reasons behind guest statutes in general should apply here, for there is as great a possibility of collusion between insured and guest as in any other highway negligence situation. According to the strict definition which this court adopts, "operator" as well as "driver" would include only those in actual physical control of a vehicle.[9] But a long line of cases indicates that "operator" as used in other statutes may include an owner who is not the person in actual physical control.[10] In another context the California court has concluded that "the driver of the vehicle," as used in a statute requiring a driver to render assistance to a victim of an accident, included an owner present in the automobile, but without physical control of the vehicle.[11] Thus the rule of the principal case, that driver includes only those in actual control, would seem to be inconsistent with past decisions, and would logically call for further limitations on the concept of "driver." The rule might be extended to exclude from the operation of the statute drivers who had fallen asleep, or who had been thrown from a vehicle before an accident.[12] One possible way to avoid this undesirable result would be to say that as long as the "ride" continues, all parties, including the driver, remain in the same relationship to each other.[13] Since a ride may be considered to continue as long as there is a "guest" in the vehicle, the duration of the ride might in turn be contingent upon duration of the guest status. As long as the plaintiff remains in the guest status, the guest statute would apply, and who is ultimately responsible would be a secondary question.

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[9] Cf. Cal. Vehicle Code (Deering, 1948) §§69, 70. Both driver and operator are defined as a person "who drives or is in actual physical control of a . . . vehicle."

[10] See 13 A.L.R. (2d) 378 (1950). Especially interesting in this connection is Sutton v. Tanger, 115 Cal. App. 267, 1 P. (2d) 521 (1931).

[11] People v. Odom, 19 Cal. App. (2d) 641, 66 P. (2d) 206 (1937).

[12] Cf. 138 A.L.R. 1388 (1942).

[13] In Puckett v. Pailthorpe, 207 Iowa 613, 223 N.W. 254 (1929), the court said at p. 618 that the plaintiff was not a guest within the statute "because no driver was operating the machine." However, the court stated that if the injury had taken place after the trip had started, but the group had stopped for snacks during which time the accident occurred, the results might have been different. In Frankenstein v. House, 41 Cal. App. (2d) 813, 107 P. (2d) 624 (1940), a driver left an unattended car upon a hill. The car rolled down the hill and injured a passenger who had been riding in the car. The court did not discuss the status of the driver at all but said at page 816: "As long as a person, without compensation to the driver, has entered a car upon the invitation of such driver and remains 'in the vehicle upon the highway', 'during such ride' (sec. 403) he is a guest and cannot recover damages for the simple negligence of the host."