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Torts - Guest Act - Negligent Conduct of the Driver

William K. Muir Jr.
University of Michigan Law School

TORTS—GUEST ACT—NEGLIGENT CONDUCT OF THE DRIVER—Plaintiff was a gratuitous passenger in an automobile driven by defendant. Defendant, intending to coast to his destination, turned off the ignition, removed the key, and placed it in his pocket. The removal of the key caused the steering gear to lock, and defendant was unable to avoid a collision with a tree. Plaintiff suffered injuries and brought suit. Evidence was adduced to show that in defendant's type of automobile the steering wheel was so constructed as to lock upon removal of the key. Testimony revealed that defendant understood the general operation of the lock, but that the particular mechanism on his car had never worked previously. Even though the Indiana guest act bars recovery for injuries to a guest unless caused by "willful or wanton misconduct" of the driver, the trial court found defendant liable. On appeal, *held,* reversed. The case was not a question for the jury. Wanton or reckless conduct, within the meaning of the Indiana guest act, means a conscious persistence in negligent conduct in the face of a known danger. *Sausaman v. Leininger,* (Ind. App. 1956) 137 N.E. (2d) 547.

Guest acts similar to that of Indiana are in effect in twenty-six states.[1] Their provisions immunize a negligent driver from liability for injury to gratuitous passengers riding in the defendant's automobile unless the injury has been caused by misconduct variously described as willful,[2] wanton,[3] grossly negligent,[4] reckless,[5] or heedless.[6] For the past thirty years judges have struggled to translate these epithets into a simple, useful statement of a standard of duty owing from the motorist to the passenger—a standard which would enable the courts to determine under what circumstances a case should be submitted to the jury and, on the other hand, when it should be taken from the jury and decided, in favor of the defendant, as a matter of law. A notable harmony among the state courts both as to approach and outcome has resulted, despite the variety of descrip-

[1] Alabama, Arkansas, California, Colorado, Delaware, Florida, Idaho, Indiana, Illinois, Iowa, Kansas, Michigan, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, and Wyoming. A twenty-seventh, Washington, has passed a statute which bars all recovery unless the injury is the result of the driver's "intentional" misconduct.

[2] Alabama, Arkansas, Colorado, Delaware, Florida, Indiana, Illinois, Michigan, Nevada, North Dakota, Ohio, South Dakota, Utah, Vermont, Virginia, and Wyoming.

[3] Alabama, Arkansas, California, Colorado, Delaware, Florida, Indiana, Illinois, Kansas, Michigan, Ohio, South Dakota, Virginia, and Wyoming.

[4] Florida, Kansas, Michigan, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Vermont, Virginia, and Wyoming.

[5] Idaho, Iowa, Montana, New Mexico, Oregon, South Carolina, and Texas.

[6] New Mexico, South Carolina, and Texas.

tions of culpable negligence.[7] The minimum duty is the following: after the host-motorist has actually discovered that there is danger in the manner in which his automobile is being driven, he must use reasonable care to get out of that position of danger. Put another way, a passenger must establish two facts before the judge will decide that the case should go to the jury: first, that defendant actually knew of a particular dangerous situation; and second, that defendant, in view of the emergency circumstances, did not exercise reasonable and prudent efforts to extricate his guest from the danger.[8] Evidence that the defendant had an actual knowledge of the peril may be shown by the fact that defendant actually observed the danger,[9] or that he was given warning of it by his guests,[10] or by road signs,[11] or by familiarity with the roadway[12] or vehicle.[13] The experience of a driver is a factor in establishing his knowledge of the danger. Inexperienced drivers, unused to the treachery of deep gravel or

[7] Vermont and Virginia, in the construction of their guest acts, have adopted a more liberal rule for the guest than have the other states. Their "humanitarian" interpretation grants recovery for conduct not much removed from ordinary negligence. See Chamberlain v. Delphia, 118 Vt. 193, 103 A. (2d) 94 (1954) and Masters v. Cardi, 186 Va. 261, 42 S.E. (2d) 203 (1947).

[8] See Russell v. Turner, (N.D. Iowa 1944) 56 F. Supp. 455 (applying Iowa law), affd. (8th Cir. 1945) 148 F. (2d) 562. See also Willett v. Smith, 260 Mich. 101, 244 N.W. 246 (1932); Hottel v. Read, 66 Ohio App. 323, 33 N.E. (2d) 1011 (1940).

[9] A jury question: Blinn v. Hatton, 112 Mont. 219, 114 P. (2d) 518 (1941) (defendant tried to pass a weaving truck on a narrow road and was side-swiped); Froh v. Hein, 76 N.D. 701, 39 N.W. (2d) 11 (1949) (defendant though enveloped in a dust cloud raised by preceding cars, did not slacken speed, struck an unlit car hidden by the dust); Jones v. Harris, 104 Cal. App. (2d) 347, 231 P. (2d) 561 (1951) (defendant struck car which he saw was in the oncoming car lane). A question not submissible to the jury: Schneider v. Parish, 242 Iowa 1147, 49 N.W. (2d) 535 (1951) (motorcyclist and his passenger could not see a road fork nor the truck driver's signal that he was turning into the fork, tried to pass the truck, and were side-swiped).

[10] A jury question: Crowell v. Demo, 231 Iowa 228, 1 N.W. (2d) 93 (1941) (guest warned driver of an obstacle in the road); Scott v. Shairrick, 225 Ark. 59, 279 S.W. (2d) 39 (1955) (protestation about defendant's inability to control car at speed he was driving). A question not submissible to the jury: Goetsch v. Matheson, 246 Iowa 800, 68 N.W. (2d) 77 (1955); Gunderson v. Sopiwnik, 75 S.D. 402, 66 N.W. (2d) 510 (1954) (guests uttered no protest at the driver's conduct prior to the accident).

[11] A jury question: Jenkins v. Sharp, 140 Ohio St. 80, 42 N.E. (2d) 755 (1942) (defendant attempted to shoot a stop sign); Clark v. Hicks, 127 Colo. 25, 252 P. (2d) 1067 (1953) (defendant attempted to pass even though he saw a sign which said "Do Not Pass"). A question not submissible to the jury: Born v. Matzner's Estate, 159 Neb. 169, 65 N.W. (2d) 593 (1954) (defendant did not see stop sign); Goodman v. Gonse, (Iowa 1956) 76 N.W. (2d) 873 (there was no curve sign on a deceptively sharp curve).

[12] A jury question: Nangle v. Northern Pac. R. Co., 96 Mont. 512, 32 P. (2d) 11 (1934) (defendant failed to negotiate familiar railway crossing). A question not submissible to the jury: Russell v. Turner, note 8 supra (defendant did not know road came to a dead end).

[13] A jury question: Bowman v. Puckett, 144 Tex. 125, 188 S.W. (2d) 571 (1945) (driver knew brakes were defective). A question not submissible to the jury: In re Smoke's Estate, 157 Neb. 152, 59 N.W. (2d) 184 (1953) (driver did not know of defect in the steering wheel).

ice, for example, will be relieved of liability,[14] while an experienced motorist, under similar conditions, will be culpable.[15] Any situation where injury is probable constitutes a danger.[16] Driving in excess of the speed limit is not a danger, unless it is at such an extreme speed,[17] or under such conditions,[18] that the driver has but partial control of the vehicle. The degree of care required to avoid the danger varies directly with the time interval between the moment of knowledge of the danger and the accident. If the driver never was aware of the danger until the accident, no effort at all is required.[19] Where the accident is inevitable when the defendant apprehends his peril, the presence or absence of effort, be it completely ineffectual and futile, may well be the difference between a driver's innocence or guilt.[20] Timely knowledge of danger and persistence in spite of it is the aggravated kind of conduct which falls below the standard of duty required of a motorist.[21] In the principal case, the Indiana court applied this standard. Its analysis turned on whether the defendant understood the danger of his particular steering mechanism locking, and it concluded that he was unaware that the previously defective lock would now work. Since he was without this actual knowledge, as a matter of law his conduct violated no duty to the plaintiff. In effect the courts have immunized what might be called unwitting negligence on the part of the driver. By inquiring into three particular facts—(1) defendant's subjective knowledge, (2) presence of danger, and (3) defendant's due care after apprehension of the danger—the courts have permitted liability to be affixed where the legislature would have it placed—upon the host with the "I-don't-care-what-happens" attitude.[22] It also provides the passenger with

[14] Chernotik v. Schrank, (S.D. 1956) 79 N.W. (2d) 4 (young defendant lost control of car when he braked on gravel); Pettingell v. Moede, 129 Colo. 484, 271 P. (2d) 1038 (1954) (defendant lost control when his car slid on ice).

[15] McLone v. Bean, 263 Mich. 113, 248 N.W. 566 (1933) (defendant lost control of his car on a gravel road).

[16] See Russell v. Turner, note 8 supra.

[17] See Fritz v. Wohler, (Iowa 1956) 78 N.W. (2d) 27 (1956) (court said, in dicta, that up to 90 m.p.h was insufficient in itself to be a violation of a driver's duty to his guest).

[18] Shams v. Saportas, 152 Fla. 48, 10 S. (2d) 715 (1942) (driving at extreme speed with smooth tires on a wet pavement was a violation of the driver's duty to his guest).

[19] Burrell v. Anderson, 133 Colo. 386, 295 P. (2d) 1039 (1956) (attention of driver distracted while he sought to adjust radio). *Contra,* Chamberlain v. Delphia, note 7 supra (defendant was lighting a cigarette and did not see oncoming car that was partially in defendant's lane. Jury verdict of grossly negligent conduct was affirmed).

[20] A jury question: Komma v. Kreifels, 144 Neb. 745, 14 N.W. (2d) 591 (1944) (driver did not apply his brakes after losing control). A question not submissible to the jury: Mason v. Mootz, 73 Idaho 461, 253 P. (2d) 240 (1953); Cunning v. Knott, 157 Neb. 170, 59 N.W. (2d) 180 (1953) (defendant applied brakes in vain for 120 feet before hitting embankment at dead end of country road).

[21] Even though a breach of duty is established, it must be proved that the breach caused the accident. Splawn v. Wright, 198 Ark. 197, 128 S.W. (2d) 248 (1939) (danger was the likelihood of skidding on the slick pavement; accident was caused by the inattention of the driver who did not see the bridge abutment in time to apply the brakes).

[22] See McHugh v. Brown, (Del. 1956) 125 A. (2d) 583 at 586.

a modicum of control, for, whether or not the passenger has given timely warning of a specific danger may well determine whether or not he will recover.[23] This standard is not without its difficulties. Ascertainment of what a man knows, difficult at best, is a hopeless job if both driver and passenger have been killed in the accident.[24] Also, since the test involves subjective knowledge, it may make liable the cautious, less negligent driver who is more perceptive to the dangers inherent in a situation, while the inattentive, even reckless, driver who never sees the trouble until the accident is inevitable may not be liable.[25] So long as some states choose to limit a driver's liability to his passengers, however, to draw the line between unwitting and knowing negligence is to arrive at a predictable and generally not unsatisfactory result.

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[23] See note 10 supra.

[24] Contrast the different presumptions raised in two cases where the question of culpable negligence was submitted to the jury: Ferguson v. Hurford, 132 Colo. 507, 290 P. (2d) 229 (1955) (court found circumstantially that the decedent defendant knew he lacked safe control of his car), and Orme v. Burr, 157 Fla. 378, 25 S. (2d) 870 (1946) (court held that since the plaintiff decedent was unable to prove actual knowledge of danger by defendant decedent, there should be no recovery).

[25] Compare English v. Jacobs, 263 Ala. 376, 82 S. (2d) 542 (1955) (a timid, inexperienced woman driver tried to negotiate a slippery country road after her guest had offered to drive if she was afraid; recovery granted when plaintiff was hurt when car slipped off the road), and Menkes v. Vance, 57 N.M. 456, 260 P. (2d) 368 (1953) (young college student drove extremely fast on unfamiliar country road, lost control of his car when he sought to avoid a mesquite bush; held, no recovery for injuries to his guest).