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Emergency Vehicles - Standard of Care

Robert Watson

"You're seeing windmills that don't exist. Rather than add all of those amendments, I'd rather let the whole thing go. Then the courts will adopt a common law right of privacy."[13]

The legislative efforts in establishing a statutory right of privacy as recommended by the Wisconsin Supreme Court in the *Judevine* case and affirmed in the *Distenfeld* decision were summarily stalemated. Subsequent attempts to introduce such bills were also stymied by press opposition. Despite this apparent inability on the part of the Legislature to create a statutory right of privacy the court has refused to recognize a common law right of privacy. The transcending question is patent: With an awareness of the apparent inability of the Wisconsin Legislature to enact suitable legal safeguards for such situations as presented in the instant case, will the Supreme Court of Wisconsin continue to be bound by stare decisis or will they follow the lead of the majority in creating and recognizing the right of privacy by judicial decision? Recognition of this right appears to be the modern trend. In one form or another, the right of privacy is presently recognized in all states except Wisconsin, Rhode Island, and Texas.[14]

Two courses are open to establish a right of privacy, namely, legislative action or judicial decision. The 1957 Legislature should clearly define the right or the court will have to overrule its prior decisions. The latter course appears hopeless. A middle ground might be open to our court if the situation presented itself. Upon being confronted with an invasion of a citizen's privacy, through the medium of commercial advertising, our court could follow the Michigan decision and adopt a limited right of privacy. The Court could find that this type of invasion is at variance with the invasions ruled upon in the *Judevine, Distenfeld* and the instant case.

Considering our media of modern communication, especially with the advent of television, the dilemma is brought into sharp focus. As of this date, discounting legislative success in obtaining statutory recognition of the rgiht, Wisconsin remains remediless for violations of a right which inheres in every one of us.

RICHARD GLEN GREENWOOD

Emergency Vehicles—Standard of Care—The accident giving rise to this litigation occurred when two girls, ten and eight years old, were struck by an ambulance which was conveying a patient to the hospital. The ambulance was preceded by a motorcycle escort. Both vehicles had red lights and sirens in operation and were traveling west at a speed estimated at forty to fifty miles per hour. Traffic at the intersection had stopped and the driver of the ambulance had

[13] Senator Warren Knowles, Milwaukee Journal, May 17, 1951, p.11.
[14] PROSSER, HORNBROOK ON TORTS 636 (2d ed. 1955).

swung his vehicle into the south lane to go around the lines of traffic. The girls were struck as they stepped off of the safety island in the middle of the street and began to cross the south lane.

The trial court found the defendant-ambulance driver causally negligent as to speed and lookout and it found the girls negligent in failing to hear the siren. The negligence was apportioned 80% to the defendant and 20% to the plaintiff. The Supreme Court of Wisconsin affirmed the decision. *Montalto v. Fond du Lac County,* 272 Wis. 552, 76 N.W. 2d 279 (1955).

The case raises the problem of the standard of care required of an emergency vehicle. The decision turns on the construction given to Secs. 85.12 (5) and 85.40 (5) of the WISCONSIN STATUTES.[1]

In construing statutes similar to these, there appears to be two views prevalent in the majority of state courts.

The first of these views is characterized by the decision of *Lucas v. City of Los Angeles* in which the court held:

> "Emergency vehicles are exempted from observing speed limits and other rules of the road providing they use due regard for the safety of others and are not guilty of an arbitrary exercise of the privilege. This due care consists in giving adequate warning so that other drivers have a reasonable opportunity to yield the right of way."[2]

The court further stated that since emergency vehicles are exempted from the speed and movement regulations, negligence cannot be predicated on these elements if proper warning has been given.[3]

Thus the giving of proper warning is the measure of due care and once this warning has been given the driver of an emergency vehicle cannot be held liable for negligence unless it can be proven that he acted arbitrarily in the exercise of the privilege granted by the statute.

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[1] WIS. STATS. §85.12 (5) (1953).
"The provisions of said section regulating the movement, parking and standing of vehicles shall not apply to authorized emergency vehicles while the operator of such vehicle is operating the same in an emergency in the necessary performance of public duties. This exemption shall not, however, protect the operator of any such vehicle from the consequence of a reckless disregard of the safety of others."
Wis. Stats §85.40 (5) (1953).
"The speed limitations set forth in this section shall not apply to authorized emregency vehicles when responding to emergency calls and the operators thereof sound audible signal by siren or exhaust whistle, and when such emergency vehicle is equipped with at least one lighted lamp exhibiting red light visible under normal atmospheric conditions from a distance of 500 feet to the front of such vehicle. This provision shall not relieve the operator of an authorized emergency vehicle from the duty to operate with due regard for the safety of all persons using the highway, nor shall it protect the operator of any such vehicle from the consequence of a reckless disregard of the safety of others."

[2] Lucas v. iCty of Los Angeles. 10 Cal.2d 476, 75 P.2d 599, at 602 (1938).

[3] Lucas v. City of Los Angeles, *supra,* note 2.

Therefore, the only limitation on the exemption granted by the statute is that the driver's conduct shall not amount to an arbitrary exercise of this privilege. The court in the *Lucas* case further stated that excessive speed alone would not constitute an arbitrary exercise of the privilege. The *Lucas* case and subsequent cases enumerated the following as examples of an arbitrary exercise of the privilege: (a) emergency operation when an emergency does not exist; (b) emergency operation on routine runs; (c) where warning is given but the driver sees that others have not heard it or are not heeding it; and (d) when the conduct of the driver is so reckless that it amounts to wilful misconduct.[4]

Thus, under the California view there are three questions:

(1) Was the vehicle on an emergency run?[5]

(2) Was the siren sounding so as to give others a reasonable opportunity to yield the right of way?

(3) Was there an arbitrary exercise of the privilege?[6]

The second view[7] interpreting emergency-vehicle statutes is characterized by the decision of *Russel v. Nadeau*:

> "The right of way given to emergency vehicles and their exemption from traffic regulations does not relieve their operators from the duty of using due care. They are bound to exercise reasonable precautions against the extraordinary dangers their duty compels them to create. They must consider their speed and the measure of their responsibility is due care under the circumstances."[8]

Under this view, the driver of an emergency vehicle can be held liable for negligence as to speed and movement regardless of the exemption granted by the statute. It isn't necessary for the plaintiff to prove reckless conduct or an arbitrary exercise of the privilege but proof of ordinary negligence will be sufficient to attach liability.

This view is summed up by the Michigan Supreme Court in *City of Kalamazoo v. Priests*:

> "Statutes serve to relieve the drivers of emergency vehicles only from those duties imposed on other drivers which relate to the observance of speed limits, stop signs and right of way. The

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[4] Lucas v. City of Los Angeles, *supra* note 2.; Coltman v. City of Beverly Hills 40 CA. 2d 570, 105 P. 2d 153 (1940); Goldstein v. Rogers 208 P. 2d 719 (1949).

[5] Whether an emergency existed depends upon the nature of the call received and the situation presented to the driver at the time. See Lucas v. City of Los Angeles, *supra,* note 2.

[6] Coltman v. City of Beverly Hills, *supra,* note 4.

[7] For other cases following this view see: Reilly v. City of Philadelphia, 328 Pa. 563, 195 Atl. 897 (1938); Roadmann v. Bellone, 379 Pa. 483, 108 A2d 754 (1954); Archer v. Johnson, 90 Ga. App. 148, 82 SE. 2d 314 (1954); McDermott v. Irwin, 148 Ohio St. 67, 73 NE. 2d 86 (1948); and OHIO GENERAL CODE §3714-1 (1940).

[8] Russell v. Nadeau, 139 Me. 286, 29A.2d 916, at 917 (1943).

> language contains not the slightest intention of the legislature to excuse such drivers from other duties. The opposite purpose is evident from the fact that they signaled out speed limits, stop signs, and right of way as exceptions and by the selfsame statutes required that such vehicles be driven with due regard for the safety of others."[9]

Many duties are imposed upon drivers of motor vehicles. Some are the result of express statutory provisions to observe speed limits, stop signs and right of way; a violation of these statutory provisions may result in a presumption of negligence or in some jurisdictions negligence per se. Other duties are imposed by custom and are inherent in the exercise of due care which constitutes freedom from negligence. These duties are: to maintain a proper management and control; to maintain a proper lookout; to maintain the vehicle in proper condition; and to drive at a rate of speed that is reasonable under the circumstances.

The exemptions granted by the statutes under this view serve only to exempt the drivers of emergency vehicles from those arbitrary standards of speed and right of way as prescribed by the Legislature; they do not relieve the drivers of their common-law duty of exercising due care under the circumstances but expressly provide that due care shall be exercised regardless of the exemptions granted.

Therefore, from consideration of the cases following this view, it can be inferred that a driver of an emergency vehicle may be held liable when it can be proven that he failed to use reasonable care as to speed, lookout, management and control or any other common-law duty required of a driver of a motor vehicle. This lack of due care need not be gross negligence or wilful misconduct but proof of ordinary negligence will be sufficient to attach liaibility.[10]

The Wisconsin Supreme Court in reaching their decision in the present case considered both of these views and adopted, to some extent, the view of *Russel v. Nadeau.*

The court held that the WISCONSIN STATUTES exempted the drivers of an emergency vehicle from observing the rules of the road as to speed limits, stop signs, and regulations as to movement but did not relieve them from the duty of due care.

This duty of due care is to allow others on the road a reasonable opportunity to yield the right of way. Failure to allow others this opportunity may result in ordinary negligence or recklessness depending upon the circumstances.[11]

[9] City of Kalamazoo v. Priest, 331 Mich. 43, 49 NW. 2d 52, at 54 (1951).

[10] For other cases following this view see: Grammier-Dismukes Co. v. Payton, Tex. Civ. App., 22 S.W. 2d 544 (1929); Johanson v. Baugher, 92 Colo. 588, 22 P. 2d 855 (1933); Hogle v. City of Minneapolis, 193 Minn. 326, 258 N.W. 721 (1935); City of Miami v. Thigpin, 11 So. 2d 300 (1943).

[11] Montalto v. Fond du Lac County, 272 Wis. 552, 76 N.W.2d 279, at 283 (1955).

Sec. 85.12 (5) of the WISCONSIN STATUTES exempts drivers of emergency vehicles from such rules of the road regarding the movement of vehicles. However, the exemption granted by this statute is qualified by a phrase prohibiting them from acting in reckless disregard for the safety of others. Under this statute the driver can only be held for reckless conduct when the case involves a question of right of way, going through a stop sign or driving on the wrong side of the street. In these cases, it is not sufficient to prove ordinary negligence because the statute prohibits them only from acting in reckless disregard for the safety of others and says nothing about exercising due care.

Sec. 85.40 (5) of the WISCONSIN STATUTES exempts drivers of emergency vehicles from speed regulations. This exemption is qualified by the same phrase prohibiting them from acting in reckless disregard of the safety of others and it is further qualified by a phrase stating that this exemption shall not relieve the driver from the duty of exercising due care for the safety of others. Under this statute, the Legislature intended a different measure of care and therefore in cases involving speed it is necessary only to prove ordinary negligence.

The statutes are silent as to lookout. However, in the present case, the court said:

> "In our opinion, a driver must maintain an efficient lookout regardless of his speed. Indeed, if his speed is greater than the statutory limit, it is incumbent on him to maintain a sharper lookout simply because he will have less time in which to react to any hazard which may arise in his path."[12]

The duty as to lookout is due care under the circumstances and proof of ordinary negligence as to lookout will render the driver of an emergency vehicle liable.

The Court did not consider management and control, condition of the vehicle and other common law duties in this case. However, in the light of this opinion, it seems safe to assume that they would apply the same standard of due care to such duties as they have done with reference to speed and lookout .

In summary, it would appear that in Wisconsin there are three questions to be considered in any case involving an emergency vehicle:

(1) Does the vehicle qualify as an emergency vehicle under Sec. 85.10 (14) of the WISCONSIN STATUTES which defines emergency vehicles and under Sec. 85.20 of the WISCONSIN STATUTES which requires them to give audible warning to secure the right of way?

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[12] *Ibid,* at 285.

(2) Was it on an emergency call at the time?[13]
(3) a) Was the driver operating his vehicle negligently as to speed, lookout and management and control?
b) Was the driver operating his vehicle in a reckless manner as to going through stop signs, driving on the wrong side of the road, and right of way?[14]

ROBERT WATSON

The Alcohol-blood test in Wisconsin—Wisconsin's legal position in regard to the alcohol-blood test has recently been clarified in large part by *State v. Kroening* (1956).[1] Defendant was the driver of a car which was involved in a head-on collision in the opposite lane of travel. Four persons in the other vehicle were killed and defendant was rendered unconscious. He was taken to a hospital where a nurse, acting upon the order of the District Attorney, removed a small quantity of blood from his arm for the purpose of obtaining a specimen for an alcohol-blood test. At the time the blood was removed, defendant was not under arrest and was still unconscious. Nine days later he was charged with, and subsequently convicted of, negligent homicide, analysis having shown an alcohol content of .13 of 1% of alcohol by weight.[2] Defendant made timely objection to the introduction of the results of the test into evidence upon three grounds which the Circuit Court certified to the Supreme Court: First, that admission of such evidence would constitute a violation of the Wisconsin Constitution, Art. I Sec. 8, which provides that:

> "No person . . . shall be compelled in any criminal case to be a witness against himself."

Second, that admission would violate the Wisconsin Constitution, Art. I, Sec. 11, which provides that:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated."

Third, that admission would violate the Federal Constitution, Fourteenth Amendment, which provides that:

> "[No] state [shall] deprive any person of life, liberty, or property without due process of law . . ."

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[13] It is for the jury to decide whether the situation presented to the mind of the driver was such as would, under all the circumstances present, require him to operate his vehicle as he did. *Ibid.*, at 286.

[14] The *Montalto* Case is the only recent Wisconsin case dealing with this problem. See also Suren v. Zuege, 186 Wis. 264, 201 N.W. 722 (1925) which is in accord with the present decision and Swartz v. Sommerfeldt, 272 Wis. 17, 74 N.W. 2d 632 (1956) in which the standard of care required of emergency vehicles was not before the Court on appeal.

[1] 274 Wis. 266, 79 N.W.2d 810 (1956).

[2] WIS. STATS. §325.235 (1955).