

1940

Insurance - Use of Automobile as "Public Conveyance for Compensation"

Robert P. Hamm

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Robert P. Hamm, *Insurance - Use of Automobile as "Public Conveyance for Compensation"*, 25 Marq. L. Rev. 51 (1940).

Available at: <https://scholarship.law.marquette.edu/mulr/vol25/iss1/11>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact elana.olson@marquette.edu.

Non-experts may, after describing the wound, give an opinion that the wound caused death, not in answer to a hypothetical question but as a conclusion of fact based on their observations. *Tanner v. State*, 163 Ga. 121, 135 S.E. 917 (1926); *Fudge v. State*, 9 S.E. (2d) 259 (Ga. 1940); *Johnson v. State*, 80 Fla. 61, 85 So. 155 (1920). Where the evidence of medical experts is not accessible, a non-medical's testimony is sufficient to sustain a conviction where the witness describes the wounds he examined and gives his opinion, with reasons, that the wounds caused death. *Edwards v. State*, 39 Fla. 753, 23 So. 537 (1897); *Revels v. State*, 64 Fla. 432, 59 So. 951 (1912); *Cecil v. State*, 100 S.W. 390 (Tex. Cr. App. 1907). A physician licensed to practice medicine, but not being a graduate of a medical school and it appearing that he was not familiar with surgery from reading nor with gunshot wounds from experience, was not permitted to testify in answer to hypothetical questions as to the cause of death to the deceased whose body he had not examined. *Smith v. State*, 99 S.W. 100 (Tex. Cr. App. 1907).

While a non-medical witness was erroneously permitted to testify that there had been no cases of a particular disease in the neighborhood, since he was not shown to have had any knowledge of the sickness in question, he could testify whether or not there had been any disease at all. The court stated that since there are as many grades of knowledge in the professions as out of them, the only safe method is to permit the witness to speak within the range of his ascertained qualifications. *Evans v. People*, 12 Mich. 27 (1863). A medical student who was present while a doctor made a physical examination may testify that the person was afflicted with a venereal disease, where the student had studied and practiced under the doctor and had treated not less than fifty cases of the disease. *State v. Dixon*, 47 La. 1, 16 So. 589 (1895). In a prosecution for abortion, a witness who was a student interne in an obstetrical ward when she made an examination of the deceased prior to receiving her license to practice, was permitted to testify as an expert having received her license by the time of trial. *People v. Heissler*, 338 Ill. 596, 170 N.E. 685 (1930).

In Wisconsin it does not appear that there has been a decision to the effect that non-medics are not permitted to testify as experts on physical or mental conditions, but the cases indicate that all expert testimony in such matters has been presented, in criminal actions, by licensed physicians and surgeons only. *Tendrup v. State*, 193 Wis. 482, 214 N.W. 356 (1927); *Lowe v. State*, 118 Wis. 641, 96 N.W. 417 (1903).

PHILIP W. GROSMAN, JR.

Insurance—Use of Automobile as "Public Conveyance for Compensation."—The defendant insurance company insured the plaintiff against damage to his automobile, but the policy was to be void if the automobile was "used as a public or livery conveyance for carrying passengers for compensation." The plaintiff used the car in going to and from school, and carried other students who voluntarily paid him 75 cents per week. Held, that the contributions of 75 cents per week, being voluntary, did not make the car a "public or livery conveyance for compensation" such as was described in the policy. *Wood v. Merchants' Insurance Co. of Providence*, 289 N.W. 259 (Mich. 1939).

To be a public conveyance the vehicle must be operated as either a private contract-carrier or as a common carrier. *Primrose v. Casualty Co. of America*, 232 Pa. 230, 81 Atl. 212 (1911); *Anderson v. Fidelity and Casualty Co.*, 170 N.Y. Supp. 431, 183 App. Div. 170 (1918). Since the plaintiff in the principal case did

not hold himself out as ready to carry all who requested transportation he was not operating a common carrier. *Brown v. Pacific Mutual Life Insurance Co. of Calif.*, 8 F. (2d) 996 (C.C.A. 5th, 1925). And since the contributions were voluntary he was not under a contractual duty to the passengers and therefore was not a private carrier. *Marks et al. v. Home Fire and Marine Insurance Co. of Calif.*, 285 Fed. 959 (App. D.C. 1923).

The question whether he was carrying for hire or compensation offers more difficulty. In deciding whether the Board of Railroad Commissioners had jurisdiction over a motor vehicle as being operated for hire, the words "for hire" were held to mean "for remuneration of any kind, paid or promised, either directly or indirectly." *Murphy et al. v. Standard Oil Co. of Indiana*, 49 S.D. 197, 207 N.W. 92 (1926). When the owner of the car himself contributed his proportionate share of the gas, oil, and garage expenses for a trip, it has been held that there was not a carrying for hire or compensation so as to make the driver exercise a higher degree of care. *Askowith v. Massel*, 250 Mass. 202, 156 N.E. 875 (1927). Requiring the passenger to pay the cost of the gas and oil used on a trip has been held not a carrying for hire. *Armistead v. Lenkeit*, 230 Ala. 155, 160 So. 257 (1935). But where students agreed to pay the amount of gas and oil used on a trip plus a small sum to the driver for the use of the car, it was held a carrying for hire within the provisions of defendant's insurance policy because of the slight sum given in addition to the cost of the gas and oil. *Gross et al. v. Kubel*, 315 Pa. 396, 172 Atl. 649 (1934).

Where plaintiff's car was used for hire on two or three occasions to carry passengers to fair grounds during a county fair, it was not such a carrying for hire as would enable an insurance company to avoid liability on its policy, the court holding that in order to make a carrying for hire or compensation result in a forfeiture of the policy it must be shown that the automobile was used continuously for that purpose, or that the owner made a business of it. *Commercial Union Assurance Co. of London v. Hill*, 167 S.W. 1095 (Texas, 1914). If there is a carrying for hire it makes no difference that the compensation was never in fact paid. Thus, where the plaintiff made an agreement to carry for a certain sum and the passenger stole the car, recovery for the value of the car was refused by the court since the car was being used in violation of the provisions of the policy. *Mittet et al. v. Home Insurance Co.*, 49 S.D. 319, 207 N.W. 49 (1926).

ROBERT P. HAMM.

Workmen's Compensation—Accident Distinguished from Occupational Disease.—The plaintiff operated for one day a motor truck which emitted excessive quantities of fumes. These were inhaled by the plaintiff, who contracted pneumonia as a result. Held, that pneumonia thus acquired was not an injury by "accident" within the New Mexico Workmen's Compensation Act, since the victim was "conscious of no mishap, hazard, or—misadventure." *Stevenson v. Lee Moor Contracting Co.*, 9 U.S.L. WEEK 2242 (N.Mex. Sup. Ct., Sept. 21, 1940).

The subjection of an employee to extraordinary strain, or unusual conditions and definite as to time and place, causing injury, is an "accidental" injury, under the compensation acts. *Esmonde v. Lima Locomotive Works*, 51 Ohio App. 454, 1 N.E. (2d) 633 (1937). Where the disability results from continual breathing of iron dust, and the employee can point to no particular occurrence or time