

## Automobiles: Driver and Guest: Negligence: Ordinary Care

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## NOTES AND COMMENT

### Automobiles: Driver and Guest: Negligence: Ordinary Care.

In *Schmidt v. Leuthener*, — Wis. —, 227 N.W. 17, there were two separate actions brought by two plaintiffs, Schmidt and Waschak, to recover damages for personal injuries received while passengers in an automobile driven by one Leuthener. The two actions were consolidated, and one verdict rendered in both cases.

Leuthener was traveling by automobile from Pittsburgh to Milwaukee accompanied by Schmidt and Waschak as guests. Schmidt occupied the rear seat, Waschak sat beside the driver. At the time in question there were no other automobiles on the highway except a truck which was several blocks ahead, and which the defendant believed to be moving in the same direction. When the defendant came within fifteen or twenty feet of the truck, he realized that it was standing still; he then quickly turned to avoid hitting the truck, but it was too late, and a collision resulted. The defendant could have passed the truck without interference had he turned seasonably. Leuthener's car was traveling ten miles per hour when the accident occurred.

About ten or fifteen minutes before the collision Waschak had rested his head on the seat and tried to sleep. Schmidt was reading a newspaper which he had folded to a narrow strip. He testified that he had seen the truck when they were about one-half mile back, but had said nothing to Leuthener about it. Both passengers said nothing to the defendant about his manner of driving; in fact, they were satisfied with the way in which the automobile was being operated; and did nothing to distract the driver when approaching the truck.

Counsel for the defendant contended that the guests had failed to exercise reasonable care for their own safety and that they were guilty of contributory negligence as a matter of law. The jury decided that the plaintiffs were not guilty of contributory negligence. The court affirmed the judgment in both cases.

The case briefly discusses an instruction with reference to the duty which a driver owes to a guest. The law required the driver to exercise reasonable care for the protection of his guest; that is, the driver owes "the duty of exercising ordinary care, which is that degree of care which an ordinary, prudent person would exercise under like or similar circumstances." See *Vogel v. Otto*, 182 Wis. 1 at 6, 195 N.W. 859. But the fact that the guest does not have charge of the automobile does not absolve him from exercising reasonable care for his own

safety. See *Belongy v. Kewaunee, G.B.&W.R. Co.*, 184 Wis. 374, 199 N.W. 384; *Glick v. Baer*, 186 Wis. 268, 201 N.W. 752.

The trial court in its effort to make the average juror understand the difference between the "duty of the driver to exercise ordinary care" and the "want of ordinary care" has in some instances used words in the charge to the jury which give rise to error because it has been implied that ordinary care is divided into various degrees. See *Kausch v. Chicago and M.E.R. Co.*, 176 Wis. 21, 28; 186 N.W. 257, 260. Thus in *Gherke v. Cohran*, — Wis. —, 222 N.W. 304, it was declared that the use of the expression that if the driver failed to exercise ordinary care "in the slightest degree" in instructing the jury is objectionable. But in *Sommerfield v. Flury*, — Wis. —, 223 N.W. 408, 411, the court suggests that the duty which the driver of a car owes to his occupant is that of licensor and licensee; and then implies that "this calls for the slightest degree of care. . . ." In the light of the language used in *Sommerfield v. Flury*, *supra*, the court in *Grandhagen v. Grandhagen*, — Wis. —, 225 N.W. 935, criticizes the trial court's instruction to the jury "that the owner or driver of an automobile upon the public highways owes to a gratuitous guest the duty of exercising ordinary care to avoid personal injury to him." Obviously, the law does not impose so great a burden upon the driver, *Grandhagen v. Grandhagen*, — Wis. —, 225 N.W. 935, 937. It is almost equally as obvious that some confusion has arisen as to the relationship between host and guest due to the difficulty of defining the exact duty owed by host to guest and by guest to the driver.

In *Prideaux v. City of Mineral Point*, 43 Wis. 513, where the plaintiff, as the guest of the driver of a carriage was suing for injuries sustained due to a defect in the highway, it was held that plaintiff's action could not be maintained because the negligence of the driver of the carriage would be imputed to her as contributory negligence on her part. The doctrine that the driver is the agent of the occupant of a vehicle and his negligence is imputed to the occupant was the law in Wisconsin for nearly half a century (1878-1921) and was followed in many decisions (See cases cited in *Reiter v. Grober*, 173 Wis. 493 at 496, 181 N.W. 739 at 740.) In *Kuchler v. The Milwaukee E. R. and L. Co.*, 157 Wis. 107, 146 N.W. 1032, the parents of a boy of ten who was riding in a carriage with his grandfather, were unable to recover for the boy's death resulting from a collision with a street car, because the negligence of the grandfather made the boy also guilty of negligence.

That rule was changed by the important case of *Reiter v. Grober*, *supra*, which held that the negligence of the driver of a private vehicle should not be imputed to an occupant who was not engaged in a joint enterprise with and exercised no control over the driver. In *Brubaker v. Iowa County*, 174 Wis. 574, 183 N.W. 690, the court followed the

rule asserted in *Reiter v. Grober*, and extended the doctrine so as to hold—as it had been held in numerous cases outside its own jurisdiction—that a mere marital relationship did not make the wife chargeable with the contributory negligence of the husband. The principle had previously been followed that one who stands in a blood or marriage relationship to the driver has the negligence of the driver imputed to him. (See cases cited in *Reiter v. Grober*, 173 Wis. 493, at 496.)

In *Oppenheim v. Barkin*, 262 Mass. 281, 159 N.E. 628, cited in *Schmidt v. Leuthener*, *supra*, it was held that a guest who was asleep in the rear seat of an automobile cannot recover for injuries received notwithstanding that the driver was guilty of gross negligence, because the guest had failed to look after his own safety and was therefore guilty of contributory negligence. The decision, however, is not given much weight by the Wisconsin court. It concludes that the fact that each plaintiff was asleep had no casual connection with the collision.

Previous declarations of our Supreme Court, viewed apart from the set of facts upon which they rest, would tend to indicate that the acts of the two plaintiffs or their failure to act in the case of *Schmidt v. Leuthener* would make them guilty of contributory negligence. For example, it has been declared that the guest is bound to exercise due care for his own safety in the matter of maintaining a lookout and must give some heed to his own safety. See *Howe v. Corey*, 172 Wis. 537, 179 N.W. 791; *Glick v. Baer*, 186 Wis. 268, 201 N.W. 752; *Krause v. Hall*, 195 Wis. 565, 217 N.W. 290.

The relationship between guest and host as to the exercise of ordinary care could reasonably be treated as a question of cause and effect. The determination of the question depends upon the circumstances involved in each separate case. When the court in *Schmidt v. Leuthener* makes causal connection between the alleged negligent acts and the collision the test as to negligence, it expresses a proposition of law that does not appear in the early host and guest cases and which doubtless will serve as a safe guide in the judicious disposition of future host and guest cases.

BERNARD SOREF

### **Contracts: Master and Servant: Advancement of Funds.**

In rendering its decision in the recent case of *Shaler Umbrella Co. v. Blow*, 227 N.W. 1, the Wisconsin Supreme Court interpreted a question it had never before directly considered. Consequently the doctrine laid down is based largely on modern reasoning and the rulings of foreign courts.

The question before the court was, whether an agent employed on