

Negligence - Sharing of Expenses as Affecting the Host-Guest Relation Under the Automobile Guest Statutes

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On appeal to the United States Supreme Court, the principal case was affirmed on April 28, 1952, by a six to three decision. Justice Douglas in the majority opinion points out that:

"No one is forced to go to the religious classroom, and no religious exercise of instruction is brought to the classrooms of the public schools. A student need not take religious instructions. He is left to his own desires as to the manner or time of his religious devotions, if any."⁴⁰

The Constitution according to the majority opinion does not say that in every and all respects there shall be a separation of Church and State. The opinion declares:

"Rather, it (Constitution) studiously defines the manner, the specific ways in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostil, suspicious and even unfriendly. We find no constitutional requirements which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral, when it comes to competition between sects . . . But it can close its doors to suspend its operations as to those who want to repair to their religious sanctuaries for worship or instructions. No more than that is undertaken here."⁴¹

Justice Jackson in his dissenting opinion feels that the New York released time program is unconstitutional because it is founded upon a use of the state's power of coercion. Another dissenter, Justice Black, maintains that the majority opinion abandons the state's historic neutrality in the religious sphere.⁴²

The principal case presented an excellent opportunity to the Supreme Court to clarify the rather confused question of religious education for public school pupils. It seems to the writer that in view of wide practical differences in the many released time programs, the holding of the United States Supreme Court in the principal case has adopted the correct approach. The *McCollum* case did not strike down all released time programs as such, but only the program before it.

J. JOSEPH CUMMINGS

Negligence—Sharing of Expenses as Affecting the Host-Guest Relation Under the Automobile Guest Statutes—Plaintiffs, husband and wife, while on an extended vacation trip with the defendants, in an automobile owned and driven by the defendant husband, were injured

⁴⁰ 72 S.Ct.—(1952).

⁴¹ *Ibid.*

⁴² *Ibid.*

in an accident due to the ordinary negligence of the defendant husband. Plaintiffs agreed to pay for one-half of all the gas, oil, food and lodging expenses incurred on the trip, although there were four persons in defendant's family, and only two in the plaintiff's. Defendants and plaintiffs were friends. Defendant husband did all the driving while plaintiff husband procured maps and suggested routes to be followed. Defendants contend that the plaintiffs were barred from recovery for their injuries by the California Guest Statute.¹ Held: Plaintiffs by agreeing to share expenses became as a matter of law passengers for hire, and were thus taken out of the Guest Statute. *Whitmore et ux. v. French et ux.*, 235 P. (2d) 3 (Cal., 1951).

The effect of the guest statutes in the states in which they have been adopted is to render the host liable to his guest only for injury resulting from the host driving while intoxicated or from willful misconduct of the host.² On the other hand the host is liable for ordinary negligence if the person riding with him is said to have given compensation for his ride. The legislative purposes behind the enactment of these statutes is an attempt to prevent collusive suits against insurers of the host, to prevent abuse of hospitality extended and to protect the host from fraudulent claims by a guest who is the only witness to the accident.³

The aforementioned reasons necessitate that a distinction be made between the terms "passenger" and "guest" since when used in connection with the guest statutes they have two entirely different connotations. The distinction is well stated by the Restatement of Torts:⁴

"The phrase 'passenger in a vehicle' is used to denote the fact that the plaintiff is one being carried by another for hire. The word 'guest' is used to denote one whom the owner or possessor of a motor car or other vehicle invites or permits to ride with him as a gratuity, that is, without any financial return except such slight benefits as it is customary to extend as part of ordinary courtesies of the road. . . ."

It has also been held that the term passenger in its legal sense imports some contractual relation between the parties.⁵

From an examination of the cases it appears that the weight of authority supports the rule that the mere sharing of expenses of gasoline and oil on a trip is not sufficient to constitute "payment" or "compen-

¹ CAL. VEHICLE CODE § 403: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver."

² 60 C.J.S. MOTOR VEHICLES, §399 (3) (a).

³ 60 C.J.S. MOTOR VEHICLES, §399 (3) (b).

⁴ RESTATEMENT, TORTS, §490, Comment (a).

⁵ *Gale v. Wilbur*, 163 Va. 211, 175 S.E. 739 (1934).

sation" within the meaning of the guest statutes.⁶ But the above mentioned rule has application only in the absence of a prior contractual agreement to share expenses. Thus where before the trip is begun the parties have agreed to share the expenses, the majority holds that one is a passenger and not a guest and the sharing thereby becomes "payment" or "compensation."⁷ The majority view is the one adopted by the Restatement of Torts:⁸

" . . . On the other hand, if there is a prior arrangement that there shall be a substantial sharing of the expenses, the host and guest relation does not exist. The person so sharing expenses may be either a passenger or a participant in a joint enterprise."

In summing up these rules it may be said that: (1) in nearly all the courts, where there is no agreement, the mere sharing of expenses will not make a guest a passenger; (2) in a majority of jurisdictions, an agreement to share expenses will act to convert the guest to a passenger.

By application of the rules laid down in the preceding paragraphs to the principal case it appears that the decision is in harmony with them. We have a prior agreement to share expenses and substantial contribution being made. However, the ruling case on the subject in California prior to this decision was that of *McCann v. Hoffman*.⁹ There two couples took week-end pleasure trips and there existed between them a tacit and mutual understanding that the expenses were to be equally shared. There the court in affirming a non-suit said:

"Therefore, where a special tangible benefit to the defendant was the motivating influence for furnishing the transportation, compensation may be said to have been given. But it is not given where the main purpose of the trip is the joint pleasure of the participants. The paying of a portion of the expense, as for gasoline and oil consumed on the trip is merely incidental and does not constitute the moving influence for the transportation remains the joint social one of reciprocal hospitality and pleasure."¹⁰

It is also stated in the dissent by Justice Schauer that the rule as stated in the Restatement of Torts¹¹ has not been the law in California.¹² Thus it appears that the principal case is in conflict with the prior decision. The court found that by paying more than their proportionate share of the expenses, the plaintiffs conferred upon the defendant a special

⁶ *Jones v. Jones*, 312 Ky. 240, 227 S.W. (2d) 182 (1950); *Duncan v. Hutchinson*, 139 Ohio St. 185, 39 N.E. (2d) 140 (1942); *Potter v. Juarez*, 189 Wash. 476, 66 P. (2d) 290 (1937); See also 155 A.L.R. 575.

⁷ *Smith v. Clute*, 227 N.Y. 407, 14 N.E. (2d) 455 (1938); *Campbell v. Campbell*, 104 Vt. 468, 162 A. 379 (1932).

⁸ *Supra*, note 4.

⁹ *McCann v. Hoffman*, 9 Cal. (2d) 279, 70 P. (2d) 909 (1937).

¹⁰ *Ibid.*

¹¹ *Supra*, note 4.

¹² See *Whitmore v. French*, 235 P. (2d) 3, 6 (Cal., 1951) (dissenting opinion).

benefit and that such benefit was the motivating reason for the transportation. The court placed much importance on the fact that the two sons of the defendants went along on the trip and that the share of expenses remained one-half each. It appears that had there been a sharing of the expenses in proportion to numbers, the plaintiff would be barred from recovery by the guest statute.

The advisability of adopting a similar statute in Wisconsin has been discussed in the *MARQUETTE LAW REVIEW*. It notes,¹³

“. . . These statutes generally limit the host's liability to cases of gross negligence. Consequently, they put at rest a great deal of legislation. They are real measures of economy in the cost of maintaining the judiciary. They are also a wholesome social influence in maintaining and encouraging a generous and altruistic relationship between those blessed with an automobile and those who cannot afford to own one. The subject recommends itself to legislative consideration.”

The failure of the legislature to adopt a guest statute in Wisconsin leads us to assume that it deems such action unnecessary. A search of the State Law Index reveals that at present a guest statute in some form is in force in twenty-five states¹⁴ and that a majority of these statutes were enacted between the years of 1933 and 1936 when the automobile began to fill the nation's highways. The Index also discloses that the last of these was enacted in 1939 and that none has been enacted since. Thus, the Wisconsin legislature may have acted wisely in not adopting a guest statute, as it appears that the present legal machinery governing the actions by a guest against his host is superior to that of the law proposed.

DONALD M. LOWRY

Sales — Time Condition in Contract for Removal of Growing Crop — A third party sold and conveyed certain lands to the defendants and sold to the plaintiffs nursery stock growing thereon. Plaintiffs and defendants then entered into a contract providing that plaintiffs should have the right to enter upon the land in question at any time until October 30, 1949, to remove the said nursery stock; that defendants would not damage, destroy or remove the stock prior to that date; and that plaintiffs could cultivate the stock up to, and would leave the land in good condition on, that date. Without excuse, except for illness immediately prior to October 30, 1949, plaintiffs failed to remove the stock before the day specified. However, they were ready, willing and able to do so three days later, and at all times thereafter, but

¹³ Meissner, Harry V., *Liability of Automobile Drivers to Gratuitous Passengers Under the Wisconsin Law*, 18 *MARQ. L. R.* 3, 19 (1933).

¹⁴ Ark., Cal., Colo., Del., Fla., Ill., Ind., Idaho, Kan., Ky., Mont., Neb., Nev., N.M., N.D., Ohio, Ore., S.C., S.D., Tex., Utah, Va., Vt., Wash., Wyo.