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Automobiles: "Guest Statutes": Gross Negligence as Contemplated by the "Statutes"

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494 (1914). In the case of *Scory* v. *La Fave,* Case No. 57, Jour. State Gov't. Service, Apr. 7, 1934, this difference is pointed out, following the language of *Fandek* v. *Barnett and Record Co.,* 161 Wis. 55, 130 N.W. 537 (1915), that if the injury is caused by acquiescence in a hazard no greater than that an ordinarily careful and prudent man would accept, it is assumption of risk; but if the hazard is not one such as a man of ordinary care and prudence would accept, it is contributory negligence. Under the comparative negligence statute neither is now a bar to an action against a third party.

The rule of contribution is founded on the principles of equity—where one of several common obligors has discharged more than his equitable share of the common liability. *Wait* v. *Pierce,* 191 Wis. 202, 225, 209 N.W. 475, 210 N.W. 822 (1926); *Grant* v. *Asmuth,* 195 Wis. 458, 218 N.W. 834 (1928); *Michel* v. *McKenna,* 199 Wis. 608, 227 N.W. 396 (1929); *Buggs* v. *Wolff,* 201 Wis. 533, 230 N.W. 621 (1930). Here there is no common liability as between the plaintiff Walker and the defendants, and therefore there can be no contribution. *Standard Accident Ins. Co.* v. *Runquist,* 209 Wis. 97, 244 N.W. 759 (1932); *Zutter* v. *O'Connell,* 200 Wis. 601, 229 N.W. 74 (1930).

Because the case does not fall within the rule of *Knipfer* v. *Shaw,* supra, the court refused to combine the negligence of Walker with that of either of the guests, Iselin or Bashaw. Sec. 331.045, Wis. Stats., provides that "any damages allowed shall be diminished by the jury in proportion to the amount of negligence attributable to the person recovering." The court holds that the recovery by the plaintiff guest may be diminished only by the amount of his own negligence. Therefore the other term must include the causal negligence of all the other parties. This follows the rule of liability among joint tort-feasors at common law. *Kingston* v. *C. & N. W. Ry. Co.,* 191 Wis. 610, 211 N.W. 613 (1927).

Between each of the guests, Iselin and Bashaw, and the defendants, the negligence of each toward himself must be compared with the negligence of all the others whose negligence concurred in causing his injury. The doctrine of assumption of risk has no place in a suit against a negligent third party. While assuming the risk toward their host herein, plaintiff guests were found to have neglected the duty which they owed to themselves, and such neglect was found by the jury to have contributed to their injury. To hold that in assuming the entire risk of the negligence of plaintiff Walker the guests assumed Walker's negligence would amount to imputing his negligence to them. This cannot be done since the relationship is no more than that of host and guest. *Knipfer* v. *Shaw,* supra; *Young* v. *Nunn, Bush & Weldon Shoe Co.,* supra.

The court in refusing to allow contribution against Walker was not forced to decide whether the comparative negligence statute abrogated the rule of contribution between joint tort-feasors. It may be that under this section the burden of sharing the liability for damage caused by joint tort-feasors may be equitably prorated among them according to the proportion of negligence each contributed.

RICHARD A. MCDERMOTT.

AUTOMOBILES—"GUEST STATUTES"—GROSS NEGLIGENCE AS CONTEMPLATED BY THE "STATUTES."—The plaintiff was a gratuitous guest in a car owned and operated by the defendant in North Dakota. The defendant who was feeling drowsy fell asleep while driving and the car plunged into the ditch injuring the plaintiff. The North Dakota statute provides that a gratuitous guest in an automobile cannot recover for injuries unless the same resulted proximately from the "intoxication, wilful misconduct, or gross negligence of the owner, operator,

or person responsible for the operation of such vehicle." (Laws N.D. 1931, c. 184). *Held,* There was sufficient evidence to warrant the court's submitting to the jury the question of whether or not there was gross negligence. (The jury found gross negligence.) *Hardgrove* v. *Bade,* (Minn. 1934) 252 N.W. 334.

To stem the ever increasing tide of litigation against automobile operators as hosts, many legislatures, within the last few years, have enacted the so-called "guest statutes" whose purpose it is to make the host's burden less onerous by limiting his responsibility to those cases where he is "grossly negligent," guilty of "wanton and reckless conduct," "reckless operation," "intoxication," "intentional disregard," etc. See 18 Marq. Law Rev. 3, at p. 16, (1933). Just what constitutes gross negligence under these statutes presents a perplexing problem to the courts. The Michigan court has attempted to define it as something of not a lesser degree than wilful misconduct. *Bobich* v. *Rogers,* 258 Mich. 243, 241 N.W. 854 (1932); *Mater* v. *Becraft,* 261 Mich. 477, 246 N.W. 191 (1933); *Findley* v. *Davis,* 263 Mich. 179, 248 N.W. 588 (1933). In Massachusetts it is not required that the conduct be "wilful and wanton," *Learned* v. *Hawthorne,* 269 Mass. 554, 169 N.E. 557 (1930); *Slobodnjak* v. *Coyne,* 116 Conn. 545, 165 A. 681 (1933). Any attempted definitions are unsatisfactory. The administrative factor in each case is important. *Coner* v. *Chittenden,* 116 Conn. 68, 163 A. 472 (1932); *Dye* v. *City of Seattle,* (Wash. 1933) 24 P. (2d) 67; *Younger* v. *Gallagher,* (Ore. 1933) 26 P. (2d) 783.

No court has decided that the defendant has been grossly negligent as a matter of law, but the courts have held in unusual instances that certain acts or situations in themselves are within the statute, and have refused to let the case go to the jury, as for example: where the host had not complied with the request of the guest, *Bobich* v. *Rogers,* supra; where the host was driving a car although he was not acquainted with the method of control, *Willett* v. *Smith,* 260 Mich. 101, 244 N.W. 246 (1932); where the host disregarded the guest's warning of the approach of a train, *Morgan* v. *Tourangeau,* 259 Mich. 598, 244 N.W. 173 (1932); where the host knew that the differential was defective but nevertheless directed the car down a steep grade and lost control of the automobile, *Turner* v. *Standard Oil Co. of California,* (Cal. 1933) 25 P. (2d) 988; where the host was driving at a speed of 35 m.p.h. on a wet pavement and attempted to pass another car, *Howard* v. *Howard,* (Cal. 1933) 22 P. (2d) 279; where the host failed to stop at an arterial highway, *Welch* v. *Minkel,* (Iowa 1933) 246 N.W. 775; where the host was intoxicated and intoxication was not defined by the statute as gross negligence in itself, *Findley* v. *Davis,* supra; where the host passed another car on the highway at a speed of 50 m.p.h. and the other car turned abruptly to the left, *Simpson* v. *Steinhoff,* (Cal. 1933) 23 P. (2d) 960; where the host was driving in the ruts on the left side of the road and was unable to get out as a truck approached and failed to stop in time although he could have easily done so, *Franzoni* v. *Ravenna,* (Vt. 1933) 163 A. 564; where the host did not have control of the car, *Stout* v. *Gallemore,* 138 Kan. 385, 26 P. (2d) 573 (1933); where the host was traveling on a wet pavement and approaching a sharp curve at a speed of 50 m.p.h., *Young* v. *Dyer,* (Va. 1933) 170 S.E. 731; where the host with knowledge of his defective brakes attempted to climb a steep grade in a Model T Ford, the accident having resulted proximately from this defect, *Fleming* v. *Thornton,* (Iowa 1933) 251 N.W. 158; where the owner permitted an incompetent and inexperienced minor to drive his car, *Naudizius* v. *Lahr,* 253 Mich. 216, 234 N.W. 581, 74 A.L.R. 1189 (1931).

On the other hand where an inference of gross negligence can possibly be

drawn the courts say that they will submit the question to the jury. The jury was permitted to pass on the quesion of gross negligence in the instant case and in the following ones: where the host drove to the left of automobiles which were waiting for a traffic signal at a speed of 40 m.p.h., *Nelson* v. *Westerguaard,* (Cal. 1933) 19 P. (2d) 867; where the host was driving down a hill at 55 m.p.h. and stepped on the accelerator instead of the brake, *Seisseger* v. *Puth,* (Iowa 1933) 248 N.W. 352; where the host was racing a motorcycle at a speed of 65 m.p.h., *Morris* v. *Erskine,* (Neb. 1933) 248 N.W. 96; where the host, after drinking intoxicating liquor, was driving at a speed of 55 m.p.h. when he turned to wave at the occupants of a passing car, *Tomlinson* v. *Kirsmidjian,* (Cal. 1933) 24 P. (2d) 559; where the host raced with another car at night at a speed of 70 m.p.h. on a gravel road in a dense cloud of dust, *McLone* v. *Bean,* 263 Mich. 113, 248 N.W. 566 (1933); where the host raced with another truck at a speed of 40 m.p.h. on a road where the greatest extent of vision was four hundred feet, *Younger* v. *Gallagher,* supra; where the host drove over a rough macadam road with a steering apparatus he knew to be defective, *Walker* v. *Bacon,* (Cal. 1933) 23 P. (2d) 520; where the host in driving down a steep hill at 35 m.p.h. turned out to pass a truck and collided head on with an oncoming car, *Schusterman* v. *Rosen,* (Mass. 1933) 183 N.E. 414; where the host was traveling about 25 m.p.h. on an icy street and on turning out to pass the automobile ahead skidded into a street car, *Learned* v. *Hawthorne,* supra; where the host driving 60 m.p.h. applied the brakes on a curve, the car skidded and a defective door swung open flinging the guest to the ground, *Slobodnjak* v. *Coyne,* supra; where the host in ascending a hill looked back and plunged into a ditch, *Richards* v. *Richards,* (N.H. 1933) 166 A. 823; driving at an excessive speed while intoxicated, *McCarron* v. *Bolduc,* 270 Mass. 39, 169 N.E. 559 (1930).

The legislatures have definitely intended to cut down the responsibility of car owners in a particular class of cases. Although the general trend of judicial decision in the field of tort is to impose wider responsibilities upon defendants for acts done which are injurious to others, nevertheless the indications are that more legislatures may very likely enact guest statutes. Perhaps it is impossible to expect the legislatures to confine the administrative discretion of the courts in defining gross negligence or "wilful misconduct" by any specific provision in the statutes. The courts themselves can devise no positive formulae to aid them in solving their administrative duties. Gross negligence cannot be defined.

JOHN C. QUINN.

BULK MORTGAGE STATUTES—BULK SALES STATUTES—RIGHTS OF CREDITORS AND TRUSTEES IN BANKRUPTCY.—A trustee in bankruptcy sued a mortgagee of the bankrupt to recover the proceeds derived by the mortgagee from a foreclosure sale. To secure a loan of $3,000 the bankrupt had given to the mortgagee a chattel mortgage covering the stock and fixtures of two drug stores. The mortgagee and the mortgagor had not complied with the sections of the local statutes requiring the borrower to furnish to the lender a complete list of his creditors so that notice could be given to the creditors of the prospective deal. *Held,* that the mortgage was void and that the plaintiff was entitled to the proceeds in the hands of the mortgagee *Union Guardian Trust Co.* v. *Detroit Creamery Co.,* (Mich. 1933) 251 N.W. 797.

A trustee in bankruptcy is in the position of a creditor armed with judicial process. 11 U.S.C.A. 75 (c. 541, s. 47, 30 Stat. 557; as amended by c. 412, s. 8, 36 Stat. 840). A judgment creditor of the seller can reach the goods or the pro-