St. John's Law Review

Volume 24, November 1949, Number 1 Article 17

Torts--Duty of an Automobile Guest as to His Own Safety (Butler v. Darden et al., 53 S.E.2d 146 (Va. 1949))

St. John's Law Review

TORTS — DUTY OF AN AUTOMOBILE GUEST AS TO HIS OWN SAFETY.—Plaintiff's intestate, while a guest in the automobile of defendant driver, was killed when the car was hit by a train. While they were approaching a familiar crossing at approximately ten miles an hour, the oncoming train was in plain view of the guest for some three hundred feet. Decedent did nothing to warn the driver until the train was almost upon them. Plaintiff sues for the wrongful death, alleging defendant's negligence. *Held,* judgment for defendant. Even if the driver was guilty of gross negligence, the guest was contributorily negligent in failing to look for and see the train. *Butler v. Darden* et al., — Va. —, 53 S. E. 2d 146 (1949).

The majority of courts have treated an automobile guest as analogous to a licensee upon the land of another;[1] and as such he must give heed to his own safety[2] by exercising the degree of care that a reasonably prudent passenger would use in a similar situation.[3] But the precautions are less than those required of the driver.[4] Each case depends upon its own circumstances in ascertaining the guest's failure to employ ordinary care[5] which, if the proximate cause of his injury,[6] is fatal to his right of recovery.[7]

A guest in an automobile assumes some dangers but not others. He assumes the dangers incident to the known incompetency,[8] inexperience,[9] or recklessness[10] of the driver. Of course, this principle does not apply when he has no knowledge of his host's dangerous propensities.[11] On the other hand, a guest, merely because he believes or fears from past experience that a driver may drive negligently does not assume the risk of any such negligence.[12] A guest

---

[1] PROSSER, TORTS 633 (1941); Lutvin v. Dopkus, 94 N. J. L. 64, 108 Atl. 862 (1920).

[2] Note, 64 U. S. L. REV. 57 (1930).

[3] Sparks v. Chitwood Motor *et al.*, 192 Ark. 743, 94 S. W. 2d 359 (1936); Nelson v. Nyrgen, 259 N. Y. 71, 181 N. E. 52 (1932); Wagner v. Kloster, 188 Iowa 174, 175 N. W. 840 (1920).

[4] "While the standard of duty is the same the conduct required to fulfill that duty is ordinarily different." Clarke v. Connecticut Co., 83 Conn. 219, 76 Atl. 523, 526 (1910).

[5] Lavine v. Abramson, 142 Md. 222, 120 Atl. 523 (1923); Hubenette v. Ostby *et al.*, 213 Minn. 349, 6 N. W. 2d 637 (1942).

[6] ". . . the injured person's negligence must have been a juridical cause of the injury . . . ." McFadden v. Pennzoil Co., 341 Pa. 433, 19 A. 2d 370, 372 (1941); Lasene v. Syvanen, 123 Ore. 615, 263 Pac. 59 (1927).

[7] Howe v. Corey, 172 Wis. 537, 179 N. W. 791 (1920). *But cf.* Bordonaro v. Senk, 109 Conn. 428, 147 Atl. 136, 137, 138 (1929), "The defense of contributory negligence is not available where injury is inflicted under conditions open to the charge of willfulness or wantonness."

[8] Hall v. Hall, 63 S. D. 343, 258 N. W. 491 (1935).

[9] Cleary v. Eckart, 191 Wis. 114, 210 N. W. 267 (1926).

[10] Bogen v. Bogen, 220 N. C. 648, 18 S. E. 2d 162 (1942); Page v. Page, 199 Wis. 641, 227 N. W. 233 (1929). *But see* Amato v. Desenti, 117 Conn. 612, 169 Atl. 611 (1933).

[11] Stingley v. Crawford *et al.*, 219 Iowa 509, 258 N. W. 316 (1935).

[12] Marks v. Dorkin, 105 Conn. 521, 136 Atl. 83 (1927).

who rides with one whom he knows, or in exercise of ordinary care, should know, is intoxicated, will generally be precluded from recovery for injuries proximately caused by the driver's condition;[13] and this rule applies even if intoxication commences while riding.[14] A guest entering an automobile accepts it in the existing condition except for latent defects known to the driver.[15] When he enters knowing that some portion vital to its safe operation is defective, and is injured therefrom, he is contributorily negligent.[16] One may be negligent in assuming a dangerous position in or on the vehicle, the question depending on the circumstances.[17]

The guest also has certain affirmative duties. While riding he need not be constantly on the lookout for dangers,[18] but may rely to some extent on the driver, if he appears to have ordinary skill[19] and need not anticipate his negligence.[20] The prevailing view as to what constitutes a proper lookout is that the guest is under no specific duty,[21] that each case depends upon its own facts[22] taking into ac-

---

[13] *E.g.,* Weber v. Eaton, 160 F. 2d 577 (C. A. D. C.) (1947); United Brotherhood of Carpenters and Joiners of America Local Union No. 55 v. Salter, 114 Colo. 513, 167 P. 2d 954 (1946); Kirmse v. Chicago T. H. and S. E. Ry., 73 Ind. App. 537, 127 N. E. 837 (1920); Louisville Taxicab and Transfer Co. v. Barr, 307 Ky. 28, 209 S. W. 2d 719 (1948); Clinton v. City of West Monroe, — La. —, 187 So. 561 (1939).

[14] Winston's Adm'r v. City of Henderson, 179 Ky. 220, 200 S. W. 330 (1918).

[15] Galbraith v. Busch, 267 N. Y. 230, 196 N. E. 36 (1935); Poneitowcke *et al.* v. Harres, 200 Wis. 504, 228 N. W. 127 (1929). See Note, 138 A. L. R. 838 (1942).

[16] *See* Zimmer *et al.* v. Little, 138 Pa. Super. 374, 10 A. 2d 911 (1940); RESTATEMENT, TORTS § 466, comment *c* (1934). Clise v. Prunty, 108 W. Va. 635, 152 S. E. 201 (1930) (defective brakes and absence of chains); Sloan v. Gulf Refining Co. of Louisiana, — La. App. —, 139 So. 26 (1924) (no lights); Helming v. People's Nat. Bank, 206 Iowa 1213, 220 N. W. 45 (1928) (defective steering gear).

[17] Fidelity Union Casualty Co. v. Carpenter, 12 La. App. 321, 125 So. 504 (1929); Wilkerson v. Sanderson, 233 Ky. 493, 26 S. W. 2d 1 (1930) (prohibitory regulation); De Gregorio *et al.* v. Malloy *et al.,* 356 Pa. 511, 52 A. 2d 195 (1947) (emergency).

[18] Terwilliger v. The Long Island R. R., 152 App. Div. 168, 170, 136 N. Y. Supp. 733 (2d Dep't 1912), *aff'd,* 209 N. Y. 522, 102 N. E. 1114 (1913) (". . . he was not called upon to exercise any active vigilance to guard against a danger which was not known to him . . .").

[19] State, to the use of Creasey *et al.* v. Pennsylvania R. R., — Md. —, 59 A. 2d 190 (1948).

[20] Kirr *et al.* v. Suwak, — Pa. —, 9 A. 2d 735 (1939); 45 C. J., Negligence § 567 (1928).

[21] This duty does not place the guest under a liability to anyone but only signifies that he cannot recover from another if he fails to perform it.

[22] "The court cannot lay down a mathematical precept as a rule of law enjoining in detail what should be said or done or omitted in every juncture of danger. It is plain, however, that an invited guest is not . . . mere freight." White v. Portland Gas and Coke Co., 84 Ore. 643, 165 Pac. 1005, 1008 (1917); Weidlich v. New York, N. H. and H. R. R., 93 Conn. 438, 106 Atl. 323 (1919). *Contra:* Read v. The New York Central and H. R. R. R., 123 App. Div. 228, 107 N. Y. Supp. 1068 (1st Dep't 1908).

count his position in the car,[23] his familiarity with the road,[24] the type of vehicle,[25] age,[26] and distractions.[27] In many states, however, as in the principal case reported, it is held that a passenger knowing he is approaching a railroad crossing, a place of special danger, is negligent as a matter of law, if he fails to look or listen.[28] Two other duties imposed on the guest are, first to warn if he sees or knows of an imminent peril of which the driver is not aware,[29] and to take such measures as may be open to avoid danger,[30] and second, to protest when the driver is operating the car negligently [31] or dangerously.[32] However, these duties are not absolute [33] and usually present a jury question.[34] The guest may be charged with negligence by remaining in the car even after warning or protesting when a safe opportunity to alight is offered.[35]

It can be seen that the *Butler* case follows the pattern of the above decisions, the courts on the one hand, sensing the economic and social problems facing the gratuitous host if the guest was duty free, and on the other hand, not wishing to raise the standard of care required of the guest too high fearing it may reach the stage of actual interference with reasonable driving and be itself a source of confusion and danger.

H. L. B.

---

[23] Boscarello v. New York, N. H. and H. R. R., 112 Conn. 279, 152 Atl. 61 (1930); Glanville v. Chicago, R. I. and P. Ry., 190 Iowa 174, 180 N. W. 152 (1920).

[24] Baltimore, C. and A. Ry. v. Turner, 152 Md. 216, 136 Atl. 609 (1927).

[25] Pittsburgh, Cincinnati, Chicago and St. Louis Ry. v. Bacon, 30 Ohio App. 295, 165 N. E. 48 (1928).

[26] Noakes v. New York Cent. and H. R. R., 121 App. Div. 716, 106 N. Y. Supp. 522 (1st Dep't 1907), *aff'd*, 195 N. Y. 543, 88 N E. 1126 (1909).

[27] Chicago and E. I. Ry. v. Divine, 39 F. 2d 537 (C. C. A. 7th 1930), *cert. denied*, 281 U. S. 765 (1930) (holding an infant on her lap and caring for three children); Krause v. Hall, 195 Wis. 565, 217 N. W. 290 (1928) (attack of asthma).

[28] See Notes, 18 A. L. R. 309 (1922); 22 A. L. R. 1294 (1923); 41 A. L. R. 767 (1926); 47 A. L. R. 293 (1927); 63 A. L. R. 1432 (1929); 90 A. L. R. 984 (1934); RESTATEMENT, TORTS § 495, comment *c* (1934).

[29] Monaghan v. Keith Oil Corporation, 281 Mass. 129, 183 N. E. 252 (1932).

[30] Baltimore C. and A. R. R. v. Turner, 152 Md. 216, 136 Atl. 609 (1927).

[31] Ellenberger v. Kramer, 322 Pa. 589, 186 Atl. 809 (1936).

[32] Eddy v. Wells, 59 N. D. 663, 231 N. W. 785 (1930); Sheehan v. Coffey, 205 App. Div. 388, 200 N. Y. Supp. 55 (3d Dep't 1923).

[33] Shields v. King, 207 Cal. 275, 277 Pac. 1043 (1929).

[34] Clark v. Traver, 205 App. Div. 206, 200 N. Y. Supp. 52 (3d Dep't 1923), *aff'd*, 237 N. Y. 544, 143 N. E. 736; Hermann v. Rhode Island Co., 36 R. I. 447, 90 Atl. 813, 814 (1914) (". . . the highest degree of caution may consist of inaction").

[35] Krouse v. Southern Michigan Ry., 215 Mich. 139, 183 N. W. 768 (1921). See Note, 154 A. L. R. 924 (1945).