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Torts--Automobiles--Liability for Injuries Under a Guest Statute (Eshelman v. Wilson, 80 N.E.2d 803 (Ohio App. 1948))

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a remedy which otherwise might have been denied him, for there is a dearth of respectable authority to support the position taken.²¹ It is submitted that the New York courts will not follow the view set forth in the principal case. When an intent to engage in an unreasonable and unprivileged physical contact is clearly shown, and the resulting injury, though not intended, is the natural and probable consequence of the act, assault and battery is the proper remedy to be pursued,²² and, in New York, the two-year assault and battery statute of limitation,²³ rather than the three-year negligence statute of limitation,²⁴ is applicable.

H. I. L.

TORTS — AUTOMOBILES — LIABILITY FOR INJURIES UNDER A GUEST STATUTE.—The defendant had transported plaintiff to a social gathering. Before beginning the return trip, plaintiff entered defendant's automobile but alighted when defendant couldn't find the car keys. The defendant inadvertently caused the vehicle to lurch backwards, thus striking the plaintiff. Defendant offers as a bar to this action to recover for the injuries so sustained, Ohio Gen. Code Ann. § 6308-6 which states, in substance, that the owner, responsible for the operation of a motor vehicle, shall not be liable for loss or damage arising from injuries to a guest, while being transported without payment therefor *in or upon said motor vehicle*, resulting from the operation thereof, unless such injuries are caused by the willful or wanton misconduct of such operator. Defendant contends that the phrase, *in or upon said motor vehicle*, should be construed as to include a mere temporary interruption in the transportation as the alighting of plaintiff in this case, and, as a matter of law, that plaintiff was being transported as a guest at the time she was struck. *Held*, judgment for the plaintiff. To hold as defendant contends would require the elimination from the statute of the words, "in or upon said motor vehicle." *Eshelman v. Wilson*, — Ohio App. —, 80 N. E. 2d 803 (1948).

The common law of most states has placed the gratuitous automobile guest in much the same position as a mere invitee concerning *defects in the vehicle*; the owner is responsible only for injuries

²¹ *Johnston v. Pittard*, 62 Ga. App. 550, 8 S. E. 2d 717 (1940); *Baltimore City Pass. Ry. v. Tanner*, 90 Md. 315, 45 Atl. 188 (1900); *Koons v. Rook*, 295 S. W. 592 (Tex. Com. App. 1927), *affirming* *Rook v. Koons*, 289 S. W. 1077 (Tex. Civ. App. 1926).

²² *McGovern v. Weis*, 265 App. Div. 367, 370, 39 N. Y. S. 2d 115, 118 (4th Dep't 1943); *Gage v. Bewley*, 160 N. Y. Supp. 1111 (Co. Ct. 1916), *aff'd mem.*, 175 App. Div. 914, 160 N. Y. Supp. 1131 (4th Dep't 1916); *Noonan v. Luther*, 206 N. Y. 105, 99 N. E. 178 (1912).

²³ N. Y. CIV. PRAC. ACT § 50.

²⁴ N. Y. CIV. PRAC. ACT § 49.

caused by defects, known to him.¹ There is a greater variation of opinion, however, on the question of an owner's liability for injuries caused by his *operation of the vehicle*. Massachusetts courts hold the owner liable only for injuries caused by his gross negligence;² whereas, New York makes no distinction as to the degrees of negligence in such cases.³ A few states with a common law doctrine similar to that of New York have enacted guest statutes to lift from car owners the burden of liability for ordinary negligence to gratuitous guests. Such attempts have oftentimes proved to be ineffective because of ambiguity in the wording of the Act.

In the principal case defendant's contention as to when the guest relationship terminates is strongly supported in a Massachusetts case, *Donahue v. Kelley*,⁴ wherein plaintiff and defendant while on an automobile journey and preparatory to making the return trip, plaintiff was injured by defendant who was maneuvering his car into position to enable plaintiff to get in. The court held that the relationship between the parties had not terminated and that the plaintiff was still a guest, thus absolving defendant from liability in the absence of any gross negligence on his part. In passing upon the same question a later Massachusetts case, arriving at a similar result, held, "The stop, which was for a common purpose, was an incidental part of the transportation and a part of the undertaking would not have been completed . . . until the common purpose . . . had been abandoned."⁵

These decisions, though sound in reason, are of no avail in overcoming obstacles created by certain words in a statutory enactment. Words in a statute should be construed as they are generally understood, and effect must, if possible, be given to each and every word of an act.⁶ Conclusions reached in other jurisdictions involving guest statutes afford little help because of the dissimilarity in the wording of each particular act. At best they serve to exemplify the strict construction which courts give to statutes enacted to change the common law.⁷ In cases where the plaintiff was injured while cranking defendant's car;⁸ or while moving from the rear to the front seat, the automobile being parked,⁹ the courts held that the

¹ PROSSER, TORTS 633 (1941).

² *Massaletti v. Fitzroy*, 228 Mass. 487, 118 N. E. 168 (1917).

³ *Higgins v. Mason*, 255 N. Y. 104, 174 N. E. 77 (1930); *Clark v. Traver*, 205 App. Div. 206, 200 N. Y. Supp. 82 (3d Dep't 1923), *aff'd*, 237 N. Y. 544 (1923); *Bolton v. Madsen*, 205 App. Div. 180, 181, 199 N. Y. Supp. 353 (3d Dep't 1923), the court states: "The law seems to be well settled that even though the plaintiff's intestate was an invited guest, the defendant owed him the duty of exercising reasonable care."

⁴ 306 Mass. 511, 29 N. E. 2d 10 (1940).

⁵ *Ethier v. Audette*, 307 Mass. 111, 29 N. E. 2d 707 (1940).

⁶ *Schraeder v. State*, 28 Ohio App. 248, 162 N. E. 647 (1928).

⁷ *Smith v. Pope*, 53 Cal. App. 2d 95, 127 P. 2d 292, 296 (1942).

⁸ *Moreas v. Ferry*, 135 Cal. App. 202, 26 P. 2d 886 (1933).

⁹ *Prager v. Isreal*, 15 Cal. 2d 89, 98 P. 2d 729 (1940).

guest statute¹⁰ in that state didn't protect the owner from liability because the statute required that the automobile be *moving* and the person be injured *while riding*, though in each case the common purpose had not been abandoned.

The present case has been well decided in view of the narrow wording of the statute. There exists, however, the dilemma of the legislature endeavoring to protect the car owner from liability for ordinary negligence to a gratuitous guest, and the judiciary forced into declaring the injured party not a guest, thus saving for him a right of action which existed prior to the statutes when he might well have been deemed a guest. The courts are blameless. It is the duty of the legislature to choose more accurate language and until they do so, the courts must interpret the statutes as they are written.

J. I. L.

TORTS—LANDLORD AND TENANT—LIABILITY FOR LATENT DEFECTS—IMPLIED WARRANTY.—Plaintiff tenant was injured when a wall-bed in her furnished apartment became disengaged from the fastenings on the door as she lowered the bed. For fourteen months the bed had been used by plaintiff and was apparently in good condition. *Held*, judgment for defendant. Even if there is an implied warranty that a completely furnished apartment is suitable for occupancy, the liability of a landlord for injuries to tenant due to a defective condition or faulty construction of demised premises is confined to the condition of the premises at the beginning of the term. With respect to conditions arising subsequently there is no liability in the absence of proof that landlord had knowledge of the defect. *Forrester v. Hoover Hotel & Investment Co.*, — Cal. App. 2d —, 196 P. 2d 825 (1948).

The theory of warranty of habitability of premises leased furnished emanated from England¹ and was met with disfavor in all jurisdictions in the United States with the exception of Massachusetts.² New York repudiated the doctrine in an early case.³ The holding has never been overruled and is the settled law of the state. In the *Pennington* decision⁴ California conformed with the precedent established in England and Massachusetts. The ruling was based on a California statute providing that a depositor must indemnify the

¹⁰ CALIFORNIA VEHICLE ACT St. 1929 as phrased in *Smith v. Pope*, *supra* note 7. Any person who as a guest accepts a ride in any vehicle, *moving* upon any of the public highways . . . and *while so riding* receives . . . an injury shall have no right of recovery against the owner.

¹ *Smith v. Marrable*, 11 M. & W. 5.

² WALSH, *THE LAW OF PROPERTY* 287 (2d ed. 1937).

³ *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. 126 (1889).

⁴ *Fisher v. Pennington*, 116 Cal. App. 248, 2 P. 2d 518 (1931).