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Tort Liability of Motorist to Guest Dashiell v. Moore

Comments and Casenotes

TORT LIABILITY OF MOTORIST TO GUEST

Dashiell v. Moore[1]

Plaintiff-appellee was injured while riding either as an invited guest or as a hitch-hiker in an automobile owned and operated by defendant-appellant. The accident from which plaintiff's injuries arose resulted when defendant's car, while proceeding, at about dusk, with headlights burning and at a lawful speed on the right side of the road, struck a mule astray on the highway. As a result of that collision the car was made to swerve into another motor vehicle approaching from the opposite direction. When the mishap occurred the defendant was in the act of tuning a radio installed on the dash of his car; he testified, however, that in doing so his eyes never left the road, but in spite of this uninterrupted vigilance he failed to see the mule. Plaintiff, an infant of nineteen years, by his mother and next friend, recovered a judgment against his host for injuries received. On appeal, *held:* Affirmed. The custom of hitch-hiking and its incidents are, in Maryland, "affected by no statutory rule, but are governed by the common-law rule that one whose fault causes injury to another who is himself free from fault is subject to liability to the person injured." The evidence, however, permitted a finding that the plaintiff's status at the time of the accident was that of an invitee to whom the defendant owed a duty to use reasonable care to avoid injuring him, and defendant's failure to discover the presence of the mule on the road in time to avoid the accident was sufficient to support a finding that defendant failed to fulfill that duty. On the other hand, the facts were not such as would support a charge that the plaintiff was guilty of contributory negligence as a matter of law in either failing to see the mule himself or to protest against the defendant's tuning the radio while driving.[2]

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[1] 177 Md. 657, 11 A. (2d) 640 (1940).

[2] The Court seemed to recognize that the evidence of negligence was slight, and consisted of the momentary (approximately ten seconds) failure to keep an adequate lookout. The plaintiff's own testimony showed a similar lapse, either from watching the defendant adjust the radio, or perhaps because his view was obscured by the bended head of the defendant.

The degree of care owed by a motorist to an invited guest in Maryland was established in *Fitzjarrel v. Boyd.*[3]

The rule there adopted was that the owner or operator of an automobile owes to a guest the duty "to use ordinary care not to increase the danger of riding with him or to create any new danger."[4] In the *Fitzjarrel* case the plaintiff had been invited by the defendant to accompany him on a ride in the latter's automobile. In the course of the ride, the machine skidded, struck a telegraph pole and overturned and the plaintiff was injured. In the ensuing action, the plaintiff charged that the accident was due to the defendant's negligence in attempting to pass another car at a high rate of speed and against the timely remonstrances of the plaintiff. One of the prayers offered by the defendant was to the effect that the plaintiff was an invited guest in the defendant's private automobile and that the defendant should not be held liable unless the Court should find from the evidence that the plaintiff was injured by the defendant's *gross or wilful* negligence. The trial court refused the prayer embodying this argument and on appeal it was held that the rule of gross or wilful negligence sought to be applied was not the correct rule applicable to the case and the prayer was, in consequence, properly refused. The Court of Appeals cited with approval the important decisions of *Beard v. Klusmeier*[5] and *Patnode v. Foote*[6] and several other decisions[7] asserting the rule adopted in the *Fitzjarrel* case and quoted approvingly from Huddy on Automobiles, as follows:

> "Although he pays nothing for riding, he is, nevertheless, in the care and custody of the owner or driver of the machine and is entitled to a reasonable degree of care for his safety. If the driver has negligently run into some obstacle on the highway and thereby injured the guest, undoubtedly the owner[8] and the driver would be liable to civil suit for damages. One who

[3] 123 Md. 497, 91 A. 547 (1914).
[4] 123 Md. 497, 505, 91 A. 547, 549 (1914).
[5] 158 Ky. 153, 164 S. W. 319, 50 L. R. A. (N. S.) 1100, Ann. Cas. 1915 D 342 (1914).
[6] 153 App. Div. 494, 138 N. Y. Supp. 221 (1912).
[7] Pigeon v. Lane, 80 Conn. 237, 67 A. 886, 11 Am. & Eng. Ann. Cas. 371 (1907); Birch v. City of New York, 190 N. Y. 397, 83 N. E. 51, 18 L. R. A. (N. S.) 595 (1907); Mayberry v. Sivey, 18 Kan. 291 (1877); Lochhead v. Jensen, 42 Utah 99, 129 P. 347 (1912).
[8] In Maryland the owner as such would not be liable except on a master-servant or principal-agent theory. See Price v. Miller, 165 Md. 578, 582, 169 A. 800, 801 (1934), and Schneider v. Schneider, 160 Md. 18, 20, 152 A. 498, 499, 72 A. L. R. 449, 451 (1930).

> voluntarily accepts an invitation to ride as a guest in an automobile does not relinquish his right of protection from personal injury caused by carelessness, and it should be understood by owners of motor vehicles that they assume quite a serious responsibility when they invite others to ride with them, especially persons who by reason of weaknesses are subject to injury from slight causes."[9]

The view thus expressed in the *Fitzjarrel* case and followed in the instant case conforms to the weight of common law authority in this country. One of the leading cases supporting the majority view, and as noted above one of the cases expressly followed in *Fitzjarrel v. Boyd,* is *Beard v. Klusmeier.* There the plaintiff was riding in a car owned and operated by the defendant as the latter's invited guest. When another machine, proceeding in the same direction, attempted to pass, the defendant increased his speed and began to race the other car. Plaintiff thereupon protested and begged to be allowed to get out of the automobile, but defendant refused to accede to her request. Suddenly the car crashed into a pile of building materials stacked in the street and the plaintiff was injured. In reply to an appeal from a judgment for the plaintiff, the Kentucky Court of Appeals recognized that the case presented the question of whether it was the duty of the defendant, under the circumstances, to exercise (a) ordinary care, or (b) slight care. After a careful review of the authorities, and relying heavily on *Patnode v. Foote,* a New York case, the Court held that the correct rule applicable to the facts before it was that the defendant's duty to the plaintiff was "to use ordinary care not to increase the danger of her riding with him, or to create any new danger."[10] The Court then went on to observe that "one who invites another to ride is not bound to furnish a safe vehicle or a safe horse or a safe automobile;[11] but if the driver fails to use ordinary care in driving the automobile, he thereby creates a new danger for which he is liable."[12]

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[9] HUDDY, AUTOMOBILES, Sec. 113, as quoted in Fitzjarrel v. Boyd, *supra,* n. 3.

[10] 158 Ky. 153, 164 S. W. 319, 50 L. R. A. (N. S.) 1100, Ann. Cas. 1915 D 342 (1914).

[11] It has been held, however, that where the motorist knows or should know that the car is defective and fails to exercise the appropriate care, he is liable to his guest for negligence. See Ingerick v. Mess, 63 F. (2d) 233, 95 A. L. R. 415 (C. C. A. 2d, 1933).

[12] 158 Ky. 153, 164 S. W. 319, 50 L. R. A. (N. S.) 1100, Ann. Cas. 1915 D 342 (1914).

There are, however, two jurisdictions, namely, Massachusetts and Georgia, which adhere to the proposition, sometimes referred to as the Massachusetts rule, that, independent of statute, *gross negligence* must be shown in order to hold the motorist liable for injury to his invited guest. The courts following this view seem to ground their reasoning on an analogy between the gratuitous transportation of human beings in an automobile and a gratuitous bailment of personal property.[13]

Massaletti v. Fitzroy[14] is one of the leading cases setting forth the minority view. In that case the plaintiff, at the defendant's invitation, accompanied the defendant on a ride in the latter's motor car. Through the negligence of the chauffeur, the machine overturned and the plaintiff was injured. In the suit by the guest against the car owner the jury found that the chauffeur acted as the defendant's servant[15] and that the accident was caused by the negligence of the chauffeur. The verdict, however, was for the defendant and this the Massachusetts Supreme Judicial Court refused to disturb, saying:

> "Justice requires that the one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay. There is an inherent difficulty in stating the difference between the measure of duty which is assumed in the two cases. But justice requires that, to make out liability in case of a gratuitous undertaking, the plaintiff ought to prove a materially greater degree of negligence than he has to prove where the defendant is to be paid for doing the same thing."[16]

The decision contains an extensive review of the authorities with many cases on both sides cited and commented upon, including *Fitzjarrel v. Boyd, Beard v. Klusmeier* and *Patnode v. Foote,* with which latter, the Massachusetts Court of course disagreed, placing their incorrectness on the ground of their failure to recognize the existence of

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[13] For a criticism of this view see Munson v. Rupker, 96 Ind. App. 15, 151 N. E. 101 (1926) mentioned at 47 A. L. R. 328.

[14] 228 Mass. 487, 118 N. E. 168, L. R. A. 1918 C 264, Ann. Cas. 1918 B 1088, 18 N. C. C. A. 690 (1917).

[15] Discussion of the doctrine of Respondeat Superior has been intentionally omitted from this casenote as that subject presents a separate field for examination.

[16] 228 Mass. 487, 118 N. E. 168, L. R. A. 1918 C 264, Ann. Cas. 1918 B 1088, 18 N. C. C. A. 690 (1917).

degrees of negligence.[17] What constitutes gross negligence within the contemplation of the Massachusetts rule is a matter depending upon the facts of the individual case.[18]

It was the Massachusetts rule, in substance, it may be recalled, that was invoked by the defendant in the *Fitzjarrel* case; the Maryland Court, however, refused to permit the rule to be applied in that decision. This clearly was an express rejection of the minority view, and in the instant case, the Court, in effect, has reaffirmed its adherence to the majority view by holding that the defendant was bound to use *reasonable* care to avoid injuring the plaintiff. Consistent also with these holdings which coincide with the weight of authority is the Maryland Court's statement in *Washington, Baltimore and Annapolis Railroad Co. v. State*[19] to the effect that the owner of an automobile who is not a common carrier but who operates the car for his own pleasure and purposes should *not* be held to the *highest degree*[20] of care and skill practicable under all the circumstances for the care and safety of his guest. The Court went on to quote again with seeming approval Huddy's statement[21] that a gratuitous guest is entitled to a *reasonable degree* of care for his safety.

One interesting aspect of the instant case is the status accorded the plaintiff by the Court. An examination of the record and briefs reveals some conflict in testimony and theory of the parties as to precisely what was the plaintiff's status in the defendant's automobile. The defendant's testimony and brief treat the plaintiff as a hitch-hiker on the ground that the defendant stopped in response to what he believed was a signal from the plaintiff and his friend, in the manner of hitch-hikers, indicating a desire for a

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[17] In W., B. & A. R. Co. v. State, 136 Md. 103, 111 A. 164 (1920), the Court recognized the difference in duty owed by the common or paid carrier and the gratuitous carrier. It has, however, refused to sub-divide the guest cases as is done in Massachusetts. See also Armour & Co. v. Leasure, 177 Md. 393, 410, 9 A. (2d) 572, 580 (1939) where the Court points out that the standard is really that of reasonable care under the particular factual conditions. For a comment on the "degrees of care" doctrine, see note, *The Tort Liability of the Proprietor of a Passenger Elevator* (1939) 3 Md. L. Rev. 353, 358, n. 17.

[18] For a discussion of this subject, see Corish, *The Automobile Guest* (1934), 14 Boston Univ. L. Rev. 728.

[19] 136 Md. 103, 117, 111 A. 164, 169 (1920).

[20] In making this declaration the Court expressly disapproved an earlier ruling on a prayer in United Rwys. & Elec. Co. v. Crain, 123 Md. 332, 91 A. 405 (1914). The prayer allowed in that case stated that it was the duty of the driver (of a private automobile) to exercise the highest degree of skill practicable under all circumstances for the care and safety of a passenger, who in that case was a gratuitous guest.

[21] HUDDY, *loc. cit. supra*, n. 9.

ride. The plaintiff maintained that although he and his friend had stationed themselves on the outskirts of town and attempted to "hitch" a ride, their efforts had been unsuccessful, and that they had abandoned their solicitations and were on their way back to the center of town when the defendant came along and, without signal from them, invited them to get in his car. The Court concluded that the evidence permitted a finding that the plaintiff was an invitee, yet the language used in other passages of the opinion suggests that the plaintiff might also be regarded as either a self-invited guest,[22] a hitch-hiker,[23] or as a guest at sufferance.[24] The willingness of the Court in permitting recovery under this latitude of status suggests the possibility that in Maryland there does not exist the distinction drawn by some courts between the invited guest and one who himself requests the motorist to carry him. Such courts have held that to this latter class of occupant the motorist owes no duty other than to refrain from wilful or wanton acts.[25] This rule, which thus imposes a lesser obligation on the motorist with respect to the self-invited guest, represents the minority view. The basis for the refusal by the majority of the courts to recognize any distinction between invitee and self-invited guest has been set out by the Mississippi Court in *Green v. Maddox*[26] as follows:

> "There was a division among the earlier authorities on this question, but the modern decisions are almost unanimous in the holding, with which we agree, that there is no admissible distinction between the self-invited guest, one who himself invites the favor, and the guest who is first invited by the host, for in either case the person being transported is accepted by the owner or authorized driver into his care and keeping, and the latter is in control of an instrumentality which when put in motion becomes dangerous if not handled with proper caution, whereas the person being transported is without control or power to save himself from the illegitimate dangers created by the negligence of the driver in acting otherwise than with due and reasonable care."[27]

[22] 177 Md. 657, 664, 11 A. (2d) 640, 644 (1940).
[23] 177 Md. 657, 664, 11 A. (2d) 640, 644 (1940).
[24] 177 Md. 657, 671, 11 A. (2d) 640, 646 (1940).
[25] HUDDY, CYCLOPEDIA OF AUTOMOBILE LAW (1931) Sec. 134, n. 56, citing Lutvin v. Dopkus, 94 N. J. Law 64, 108 A. 862 (1920).
[26] 168 Miss. 171, 151 So. 160 (1933).
[27] 168 Miss. 171, 151 So. 160, 161 (1933).

As intimated by the Maryland Court in its opinion in the instant case, the problem noted here is affected in some states by the so-called guest statutes. These statutes, by declaring that any person riding in a motor vehicle as a guest or by invitation and not for hire assumes as between the motorist and himself the *ordinary* negligence of the motorist, have the effect of relieving the motorist of liability for injury to his guest unless he has been guilty of conduct identifiable as or equivalent to *gross negligence*.[28] The requisite misconduct is variously described in the several forms of statutes now in force in this country, as "gross negligence", "wilful misconduct", "intoxication", "intentional act", "heedlessness", "reckless disregard of rights", "wanton misconduct" and various combinations of these epithets.

A person's status as a guest is determined under practically all of the statutes by the test of whether or not there was compensation or payment for the accommodation. The term "guest" is defined in the Arkansas statute, however, as a "self-invited guest or guest at sufferance".[29] At first blush this would seem less comprehensive in scope than the other statutes; however, the Supreme Court of Arkansas has held in *Ward v. George*[30] that the statute applied to persons riding in another's car with or without an invitation to do so, thus erasing the distinction that the bare language of the statute suggests. In respect to this problem of determining who is a guest under the statutes, Blashfield has said that one important element is "the identity of the person or persons advantaged by the carriage. If, in its direct operation, it confers a benefit only on the person to whom the ride is given, and no benefits, other than such as are incidental to hospitality, companionship, or the like, upon the person extending the invitation, the passenger is a guest within the statutes; but, if his carriage tends to the promotion of mutual interests of both himself and the driver and operator for their common benefit, or if it is primarily for the attainment of some objective or purpose of the operator, he is not a guest within the meaning of such enactments".[31] By this test and in the light of the purpose of such legislation to narrow the field

[28] Thus it appears that the guest statute is essentially a codification of the Massachusetts (minority) rule.

[29] Pope's Digest of the Statutes of Arkansas (1937) Sec. 1303.

[30] 195 Ark. 216, 112 S. W. (2d) 30 (1938).

[31] BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE, Sec. 2292. See also MALCOLM, AUTOMOBILE GUEST LAW STATUTES AND DECISIONS (1937) Secs. 21-27.

of persons to whom the motorist is liable, it would seem that under the statutes no distinction would exist between invitee, self-invited guest, hitch-hiker or guest at sufferance.

The history of this statutory movement is relatively recent. Its progress has been generally attributed to the automobile liability insurance companies who have sought relief from the fast growing burden of mala fide suits brought by automobile guests, often amicable in nature and with the assistance of their defending hosts.[32] The earliest guest statutes were enacted in 1927 in the states of Connecticut, Iowa and Oregon. Connecticut, however, is no longer among the ranks, having repealed its guest law in 1937. Today there are twenty-eight states[33] which have adopted and not repealed such statutes. In one of these states, Kentucky, the guest law has been declared unconstitutional[34] and is therefore ineffective. The constitutionality of the Connecticut statute, which before its repeal, was similar in many respects to existing guest laws, was upheld by the United States Supreme Court.[35] The statutes of several other states have been challenged on constitutional grounds but have successfully resisted such attacks.[36] The record in this respect may be summarized with the statement that where the guest statutes "do not wholly deny a gratuitous guest a right of action against

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[32] MALCOLM, *op. cit. supra*, n. 31, Sec. 4. See also Ward v. George, 195 Ark. 216, 112 S. W. (2d) 30 (1938) in which the Court said the automobile guest statute was intended to prevent collusive suits where the real defendant was an insurance company and both host and guest were interested in establishing liability.

[33] These states are Alabama, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington and Wyoming.

[34] Ludwig v. Johnson, 243 Ky. 534, 49 S. W. (2d) (1932) (two judges dissenting).

[35] Silver v. Silver, 280 U. S. 117, 74 L. Ed. 221, 50 S. Ct. 57, 65 A. L. R. 939 (1929), affirming 108 Conn. 371, 143 A. 240, 65 A. L. R. 943 (1928).

[36] Birmingham-Tuscaloosa Railway & Utilities Co. v. Carpenter, 194 Ala. 141, 69 So. 626 (1915) (Strictly not a guest law case but affects the principle of guest law statutes); Robertson v. Robertson, 193 Ark. 669, 101 S. W. (2d) 961 (1937); Forsman v. Colton, 136 Cal. App. 97, 28 P. (2d) 429 (1933); Gallegher v. Davis, 7 W. W. Harr. 380, 183 A. 620 (Del., 1936) (upholding amended Delaware statute); Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A. L. R. 1189, 30 N. C. C. A. 179 (1931); Rogers v. Brown, 129 Neb. 9, 260 N. W. 794 (1935); Smith v. Williams, 51 Ohio App. 461, 1 N. E. (2d) 643 (1935); Perozzi v. Ganiere, 149 Ore. 330, 40 P. (2d) 1009 (1935) (upholding constitutionality of amended Oregon statute); Elkins v. Foster, 101 S. W. (2d) 294 (Tex. Civ. App. 1937); Shea v. Olson, 185 Wash. 143, 53 P. (2d) 615, 186 Wash. 700, 59 P. (2d) 1183, 111 A. L. R. 998 (1936).

the owner or operator of an automobile for an injury they are generally held constitutional."[37]

The instant case thus affords an opportunity to present what appears at first glance as a tripartite problem but which actually resolves itself into a two-sided proposition: viz. (1) the majority common law view that the motorist is liable to his guest for simple negligence, and (2) the minority common law view, which in some states has been codified in the form of guest statutes, to the effect that the motorist is liable to his guest only where gross negligence or the equivalent is shown. Maryland, it is seen, casts its lot with the first group. Which is the better solution, it is not the purpose of this note to attempt an answer. Whether the advantage, provided by the minority view or the guest statutes, of sometimes stifling collusive suits which adversely affect the liability insurance companies is sufficient to offset the cost of surrendering a former right is another of the countless social problems with respect to which there are today such strongly opposing views.

[37] See 111 A. L. R. 1011.