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Negligence -- Duty of Guest in Automobile

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While public policy should protect the freedom of debate and expression of opinion on the merits of the case in order that the evidence may be thoroughly considered,[5] such policy does not require the protection of a juror who gives additional evidence as in the case of *In re Nunns*.[6] Although Mr. Wigmore contends that no such limitation should be placed upon privileged communications,[7] it would seem to be the better rule that statements of personal knowledge, which should be given by the juror as a witness in open court under oath and upon cross-examination, should not be privileged. Therefore, it is believed that it would be more desirable to adopt a middle view, namely, that only certain communications should be privileged.

In the principal case the Circuit Court of Appeals,[8] though admitting that there was authority *contra,* was content to say that such communications should not be privileged. The Supreme Court did not deny that such a privilege existed or that the communications were those that should be protected, but held that since the defendant had fraudulently entered into the relation giving rise to the privilege she was not entitled to the protection of that privilege. It was thought that the policy of protecting jurors from disclosure of the course of their deliberations was outweighed by the necessity of preserving the jury from corrupting influences, and this view is believed to be sound.

JULE MCMICHAEL.

Negligence—Duty of Guest in Automobile.

Plaintiff was the guest of the defendant in the rear seat of the latter's automobile. Although the plaintiff was aware that the night was foggy and the road narrow and winding, she did not protest the defendant's maintenance of a dangerous rate of speed. Defendant lost control of the car, which went over an embankment, and the plaintiff was injured. *Held:* No recovery; an automobile guest, failing to protest the driver's action in encountering possible danger, reasonably apparent to both, is guilty of contributory negligence.[1]

[5] In the case of *In re* Cochran, *supra* note 3, 143 N. E. at 213, the court said: "It is not alone as to the final result—the verdict—that they are protected. Public policy requires that they be given the uttermost freedom of debate as it requires in the case of the Legislature."

[6] *Supra* note 3.

[7] WIGMORE, EVIDENCE §2354 (b); *cf. In re* Cochran, *supra* note 3.

[8] 61 F. (2d) 695 (C. C. A. 8th, 1932).

[1] Adams v. Hutchinson, 167 S. E. 135 (W. Va. 1932).

It is now well settled that such contributory negligence on the part of a gratuitous passenger or guest is not the negligence of the driver imputed to the guest, where the latter has no control over the car or driver,[2] but the independent negligence of the guest arising from his duty to take some precaution for his own safety.[3] The weight of authority is to the effect that both driver and guest must exercise reasonable care under the circumstances,[4] although the guest is usually held to a lesser degree of care than the driver.[5] Authority is somewhat at variance, however, as to what conduct should be required of the guest in order to fulfill his duty. New York imposes on the guest a duty to keep as strict a lookout for danger as the driver.[6] Wisconsin requires the guest to keep a proper lookout, holding, however, that what constitutes such a lookout depends upon the circumstances of the case, and that the guest is not held to the same degree of care in this respect as the driver.[7] Connecticut holds that a guest on the rear seat has no duty to keep a lookout.[8] Whatever may be the duty of the guest to maintain a watch so as to discover danger, he is generally required to warn the driver of obvious danger,[9] unless the driver apparently is cognizant of the peril and

[2] Albritton v. Hill, 190 N. C. 429, 130 S. E. 5 (1925); Nash v. Seaboard Air Line R. Co., 202 N. C. 30, 161 S. E. 857 (1932); Charnock v. Reusing Lighting and Refrigerating Co., 202 N. C. 105, 161 S. E. 707 (1932); 2 R. C. L. 1207.

[3] Blanchard v. Maine Cent. R. Co., 116 Me. 179, 100 Atl. 666 (1917); Schroeder v. Public Service Ry. Co., 118 Atl. 337 (N. J. 1921); Howe v. Corey, 172 Wis. 537, 179 N. W. 791 (1920); HUDDY, AUTOMOBILES (8th ed. 1927) 974.

[4] Quierolo v. Pac. Gas & Elec. Co., 114 Cal. 610, 300 Pac. 487 (1931); Round v. Pike, 102 Vt. 324, 148 Atl. 283 (1930); Grifenhan v. Chicago Rys. Co., 299 Ill. 590, 132 N. E. 790 (1921).

[5] Hoen v. Haines, 85 N. H. 36, 154 Atl. 129 (1931); Clarke v. Connecticut Co., 83 Conn. 219, 76 Atl. 523 (1910).

[6] Read v. N. Y. C. & H. R. R. Co., 219 N. Y. 660, 114 N. E. 1081 (1915) (guest held contributorily negligent for failure to look out at grade crossing); Noakes v. N. Y. C. & H. R. R. Co., 195 N. Y. 543, 88 N. E. 1126 (1909) (failure to look out at grade crossing).

[7] Krause v. Hall, 195 Wis. 565, 217 N. W. 290 (1928) (guest riding with collar over face to keep out night air held not contributorily negligent in failing to see obstruction in road); Glick v. Baer, 186 Wis. 268, 201 N. W. 752 (1925) (guest found contributorily negligent in not seeing obstruction in road).

[8] Weidlich v. N. Y., N. H. & H. R. Co., 93 Conn. 438, 106 Atl. 323 (1919) (guest not contributorily negligent for failure to look out at grade crossing).

[9] Tenn. Cent. R. Co. v. Vanhoy, 143 Tenn. 312, 226 S. W. 225 (1920) (guest held contributorily negligent in not warning driver of approach of train); Hill v. Philadelphia Rapid Transit Co., 271 Pa. 232, 114 Atl. 634 (1921) (guest contributorily negligent in failing to warn driver of obvious danger from street car).

striving to avoid it,[10] and to protest the driver's negligent or unlawful acts.[11] However, there are two views even as regards these duties: (1) Some courts hold that they are absolute duties on the guest's part and that failure to warn or protest is contributory negligence as a matter of law.[12] The principal case represents an application of this strict rule. (2) The other view prevailing is that whether a guest by failing to warn or protest is wanting in due care is a question for the jury.[13] This view shows a realization of the fact that in many instances the highest degree of care may be silence and inaction.[14]

There also may be a duty on the guest to request the driver to stop the car and allow him to get out, if his warning or protest goes unheeded, but this generally depends upon the circumstances.[15] The guest assumes the risk arising from defects in the vehicle known to him.[16] If he knows that the driver is incompetent, due to inexperience[17] or intoxication, [18] he may be contributorily negligent in continuing to ride with him.

Although the result in the present case is probably correct, the court, in attempting to establish a fixed rule of law to which every guest must conform, is taking a decided step away from the present trend toward the application of the general rules of negligence in such cases. The impracticability of inflexible rules of conduct in these cases, where there is such variability of pertinent facts, is ob-

[10] Schlossstein v. Bernstein, 293 Pa. 245, 142 Atl. 325 (1928); Smith v. A. & Y. R. Co., 200 N. C. 177, 156 S. E. 508 (1931).

[11] Renner v. Tone, 273 Pa. 10, 116 Atl. 512 (1922) (driving on wrong side of road); Joyce v. Brockett, 237 N. Y. 561, 143 N. E. 743 (1923) (driver maintaining excessive speed); Martin v. Pennsylvania R. Co., 265 Pa. 282, 108 Atl. 631 (1915) (driver's failure to observe stop, look and listen law).

[12] Herold v. Clendenin, 161 S. E. 21 (W. Va. 1931); Clise v. Prunty, 108 W. Va. 637, 152 S. E. 201 (1930); Hardie v. Barrett, 257 Pa. 42, 101 Atl. 75, L. R. A. 1917F, 444 (1917); Renner v. Tone, *supra* note 11 at 514.

[13] Curran v. Anthony, 77 Cal. 462, 247 Pac. 236 (1926); Codner v. Stowe, 201 Iowa 800, 208 N. W. 330 (1926); Lawrason v. Richards, 129 So. 250 (La. 1930); Quierolo v. Pac. Gas & Elec. Co., *supra* note 4 at 489; Nelson v. Nygren, 181 N. E. 52 (N. Y. 1932) (guest went to sleep with knowledge and consent of driver), noted in (1933) 31 MICH. L. REV. 717.

[14] See Herman v. R. I. Co., 36 R. I. 447, 90 Atl. 813, 814 (1920).

[15] Clark v. Traver, 237 N. Y. 544, 143 N. E. 736 (1923); King v. Pope, 202 N. C. 554, 163 S. E. 447 (1932); Chambers v. Hawkins, 233 Ky. 211, 25 S. W. (2d) 363 (1930).

[16] O'Shea v. Lavoy, 175 Wis. 456, 185 N. W. 525 (1921); Clise v. Prunty, *supra* note 12 at 202.

[17] Cleary v. Eckart, 191 Wis. 114, 210 N. W. 267, 51 A. L. R. 576 (1926).

[18] Lynn v. Goodwin, 170 Cal. 112, 148 Pac. 927, L. R. A. 1915E, 588; Wayson v. Ranier Taxi Co., 136 Wash. 274, 239 Pac. 559 (1925); Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32, 47 A. L. R. 323 (1926).

vious. The trend toward consideration of all of the circumstances seems decidedly the more rational view.

J. A. KLEEMEIER, JR.

Parent and Child—Suit by Child Against Parent Carrying Liability Insurance.

An unemancipated minor sues her father to recover for injuries alleged to have been sustained while riding in a school bus owned by the father and operated by him under a contract with the school board. The action is one of *assumpsit* and is based upon the theory that the father breached his contract with the board to use due care in transporting pupils. Both the father and the board carry liability insurance. *Held:* A directed verdict for defendant reversed; plaintiff may maintain the action. Since the defendant is protected by insurance in his vocational capacity, the action is not an unfriendly one and family harmony will not be disrupted.[1]

Authorities are not in agreement as to the common law rule regarding suits by minors against their parents for torts.[2] This uncertainty arises from the fact that no case involving the point has ever been litigated in England.[3] The first decision in this country appeared in 1891.[4] The problem has been before the courts several times since that date.[5] With striking uniformity courts of the United

[1] Lusk v. Lusk, 166 S. E. 538 (W. Va. 1932). Noted in (1933) DUKE BAR ASS. J. 51.

[2] Those who contend that such suits were not allowable rely on the total absence of cases involving the point, as showing the general understanding of minors' rights in this respect. Furthermore, they say, the very idea of such a recovery was repugnant to the sanctity and harmony of the English family. Lo Galbo v. Lo Galbo, 138 Misc. Rep. 485, 246 N. Y. Supp. 565 (1931); Damiano v. Damiano, 143 Atl. 3 (N. J. 1928); Belleson v. Skilbeck, 185 Minn. 537, 242 N. W. 1 (1932). Others, quoting from old English text writers to the effect that a minor could sue his father for a malicious injury, assert that this demonstrates the state of the English mind with regard to infants' rights. They also take the view that it is wholly unreasonable to assume from a lack of decisions that the remedy would have been denied had a proper case been presented. Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905 (1930), 71 A. L. R. 1055 (1931), citing 2 ADDISON, TORTS (4th ed.) 727; CLERK AND LINDSALL, TORTS (8th ed.) 199; POLLOCK, TORTS (12th ed.) 128. Note (1930) 79 U. OF PA. L. REV. 80.

[3] 1 SCHOULER, THE LAW OF DOMESTIC RELATIONS (6th ed. 1921) 718, n. 49; Note (1923) 23 COL. L. REV. 686.

[4] Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891), 13 L. R. A. 682 (1891); McCurdy, *Torts Between Persons in Domestic Relations* (1929) 43 HARV. L. REV. 1030, 1082.

[5] For a good review of the cases see Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923), 31 A. L. R. 1135 (1924). Note (1923) 30 COL. L. REV. 686; (1929) 43 HARV. L. REV. 1030 (a most careful and comprehensive study of