
NATURAL RESOURCES JOURNAL

Volume 4
Issue 1 *New Mexico's Uniform Commercial Code*

Winter 1964

Automobiles—Torts—Guest Statute—What Constitutes Actionable Misconduct

John R. Cooney

AUTOMOBILES—TORTS—GUEST STATUTE—WHAT CONSTITUTES ACTIONABLE MISCONDUCT.*—What specific elements of his host's misconduct must a plaintiff-guest show in order to recover under the New Mexico guest statute?[1]

The host-driver's liability to his guest for injury is limited by statute in about half the states.[2] The guest statutes are divided into three main categories: (1) those that limit the guest's recovery to cases in which the driver is guilty of "gross negligence";[3] (2) those that require a showing of "willful and wanton misconduct";[4] and (3) those that require a showing of "intentional accident or heedlessness or reckless disregard of the rights of others."[5] The New Mexico guest statute,[6] which is based on Connecticut's,[7] falls into the third category. The New Mexico Supreme Court has said[8] that, when construing its guest statute, it will follow the construction given the Connecticut guest statute by the highest court of Connecticut.[9] The South Carolina Supreme Court also follows Connecticut in construing its guest statute,[10] which is identical to Connecticut's. Therefore, the decisions of the New Mexico Supreme Court should be compared with those of the courts of Connecticut and South Carolina.

---

* Valencia v. Strayer, 387 P.2d 456 (N.M. 1963); Garrett v. Howden, 387 P.2d 874 (N.M. 1963).

1. N.M. Stat. Ann. § 64-24-1 (1953):

> No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others.

2. See *Automobile Guest Laws Today, Report of the Automobile Insurance Committee—1960*, 27 Ins. Counsel J. 223 (1960), for a brief analysis of each guest statute in the United States. See also Annot., 65 A.L.R. 952 (1930), for a general discussion of the automobile host-guest relationship.

3. *Ibid.*

4. *Ibid.*

5. *Ibid.*

6. N.M. Stat. Ann. § 64-24-1 (1953), quoted in note 1 *supra*.

7. Conn. Acts 1927, ch. 308, § 1, repealed by Conn. Acts 1937, ch. 270.

8. See Smith v. Meadows, 56 N.M. 242, 242 P.2d 1006 (1952).

9. See Silver v. Silver, 108 Conn. 371, 143 Atl. 240 (1928).

10. S.C. Code Ann. § 46-801 (1962). See Fulghum v. Bleakley, 177 S.C. 286, 181 S.E. 30 (1935).

Texas has also adopted a guest statute which is identical to Connecticut's. Tex. Rev. Civ. Stat. Ann. art. 6701b (1960). However, the Texas courts have construed their statute as requiring a showing of "gross negligence." See Rowan v. Allen, 134 Tex. 215, 134 S.W.2d 1022 (1940). Therefore, this Comment will not discuss the interpretation given the Texas statute by its courts.

In *Valencia v. Strayer*,[11] the defendant and the decedent, his guest, were returning to Albuquerque late one night in the defendant's automobile. While driving on a four-lane highway, the defendant drove his automobile into another car which was parked with its taillights burning at the side of the highway, causing the decedent's death. The decendent's representative brought this wrongful death action under the New Mexico guest statute. The evidence was conflicting as to whether the car struck by the defendant was parked wholly or only partially on the highway shoulder. The plaintiff introduced the following evidence: the defendant suffered from lack of sleep, failed to heed a warning given by a bystander waving a flashlight, had been driving "too fast" or "very fast," and had been drinking beer (although a policeman testified that the defendant, who was seriously injured, did not appear drunk at the hospital; also, the defendant refused to take a blood alcohol test). The evidence also showed that the defendant had made no apparent effort to turn his automobile, and that his car, a Valiant compact, had hit a car with taillights burning parked on the shoulder and had knocked it seventy-five or eighty feet.

At the conclusion of the plaintiff's evidence, the defendant moved for a directed verdict, which was granted by the district court. On appeal to the Supreme Court of New Mexico, *held*, Affirmed.[12] The items of evidence, even when considered cumulatively and construed in the light most favorable to the plaintiff, did not disclose utter irresponsibility or conscious abandonment of any consideration for the safety of passengers. Ordinary negligence alone was established, and, therefore, the guest statute forbade recovery.[13]

In *Garrett v. Howden*,[14] decided by the supreme court two weeks after *Valencia*, the plaintiff and another person had been riding as guests in the defendant's auto. While driving during daylight hours, the defendant drove his auto at high speed into the rear of another auto which was travelling at a reduced speed, injuring the plaintiff and killing the other guest. The accident occurred at the beginning of a detour for highway construction. The defendant apparently ignored a detour warning, a twenty-five miles per hour speed limit sign, and a large barricade displaying a "slow" sign. The plaintiff introduced the following evidence: the defendant had been driving

11. 387 P.2d 456 (N.M. 1963).
12. Valencia v. Strayer, 387 P.2d 456, 458 (N.M. 1963).
13. *Ibid.*
14. 387 P.2d 874 (N.M. 1963).

over twenty-four hours without sleep except for an hour's nap the previous night; he had been drinking (apparently the defendant had been drinking the day before the accident, but had been stopped by a highway patrolman in California who apparently saw nothing amiss; and his drinking the day of the accident was confined to three or four drinks out of a pint bottle he had purchased at Flagstaff the night before). The evidence also showed that the defendant had been speeding (eighty miles per hour before the accident and at least sixty-five miles per hour at the time of the accident) and had ignored protests made repeatedly by both passengers regarding his drinking, lack of sleep, manner of driving, and speed. After the introduction of this testimony, the defendant moved for a directed verdict which was granted by the district court. On appeal to the Supreme Court of New Mexico, *held*, Reversed and Remanded with directions to set aside the verdict and order a new trial.[15] All of the items of evidence, taken together and construed in the light most favorable to the plaintiff, were such that the jury reasonably could have found the state of mind of utter irresponsibility or conscious abandonment of any consideration for the safety of passengers required for recovery under the guest statute. Thus, the case should have been allowed to go to the jury, and the trial court erred in directing a verdict for the defendant.[16]

It is apparent at the outset that on their facts it is difficult to reconcile *Valencia* and *Garrett* in view of the rule requiring construction of evidence in favor of the party moved against upon a motion for a directed verdict.[17] If the two cases can be reconciled at all, the

15. Garrett v. Howden, 387 P.2d 874, 882 (N.M. 1963).

16. *Ibid.*

17. Bell v. Ware, 69 N.M. 308, 310-11, 366 P.2d 706, 707 (1961):

> In reviewing a judgment based on a directed verdict for defendant at the close of plaintiff's case, the court must view the evidence in its aspect most favorable to the plaintiff, including all permissible inferences to be drawn from it; and, where reasonable minds may differ as to the conclusion to be reached from such evidence, or its permissible inferences, the question of facts is one to be decided by the jury.

As to what constitutes a "permissible inference" see Bolt v. Davis, 70 N.M. 449, 374 P.2d 648 (1962). The court in *Valencia* took the position that the evidence did not permit an inference that the defendant was intoxicated, had fallen asleep, or had violated the speed limit. Valencia v. Strayer, 387 P.2d 456, 458 (N.M. 1963). But the evidence certainly permitted an inference that the defendant was under the influence of liquor to some extent, was sleepy, and was driving too fast under the circumstances. As to the evidence of drinking, the New Mexico Supreme Court in State v. Sisneros, 42 N.M. 500, 82 P.2d 274 (1938), noted that the statute prohibiting driving while under the influence of liquor, N.M. Stat. Ann. § 64-22-2 (1953), was violated if it was shown that the defendant was under the influence of alcohol to the slightest degree. But the

only conclusion that can be reached is that the elements of misconduct present in *Valencia*[18] will not suffice to take a guest statute case to the jury unless the added element of an ignored protest by the guest is present, as was found in *Garrett*.[19]

There seems to be little reason for ascribing such a potent effect to evidence of a protest. Although evidence of an ignored protest in and of itself seems to meet the statutory test of "reckless disregard of the rights of others," to deny recovery primarily because a protest is absent leads to an incongruous result. In a case like *Garrett*, where a plaintiff-guest is merely injured by the driver's conduct, evidence of a protest, if there was one, probably will come out. However, in a case like *Valencia*, where the guest is killed, or especially in a case where both driver and guest are killed, it is not very probable that evidence of a protest will come to light. Therefore, a rule which denies recovery in the absence of an ignored protest actually protects the host-driver who is reckless enough to kill his guest in a situation where a less reckless driver might be held liable. It is true

court also noted that evidence of a dazed condition and "whiskey breath" was not sufficient to show that the defendant was under the influence of alcohol so as to justify a conviction for involuntary manslaughter based on a death occurring from the commission of an unlawful act (driving while intoxicated) not amounting to a felony, under the involuntary manslaughter statute, N.M. Laws 1907, ch. 36, § 2, now N.M. Stat. Ann. § 40A-2-3 (1953). In Gomez v. Rodriguez, 62 N.M. 274, 280, 308 P.2d 989, 993 (1957), a guest statute case, the court, in holding that a jury question was presented, noted that "the driver had imbibed sufficiently of liquor as to be not entirely free of its effect." It seems reasonable that, to show drinking as one element of misconduct in a guest statute case rather than as the sole basis for a conviction for involuntary manslaughter, the plaintiff should be required to show only that his host was under the influence of alcohol, although slightly, *i.e.*, "not entirely free of its effect." The guest should not have to establish outright drunkenness and a violation of the drunk driving statute in order to get to the jury.

As to the evidence of drowsiness or lack of sleep see Annot., 28 A.L.R.2d 12, 84 (1953), where the rule is stated that falling asleep, without more, is not sufficient to show heedless or reckless disregard of the rights of others. However, coupled with other items of misconduct, falling asleep or drowsiness which should have warned the driver to take care would seem to be an element the jury could consider in order to find the requisite state of mind.

In regard to the evidence of speed, while it is true that normally a violation of the speed limit must be shown in order to establish speed as an element of misconduct, the New Mexico Supreme Court has recognized that speed, although not necessarily in violation of the speed limit, may be so unsafe under the circumstances that it constitutes an element of misconduct tending to establish the requisite state of mind needed for recovery under the guest statute. Amaro v. Moss, 65 N.M. 373, 337 P.2d 948 (1959) (fifty-five to sixty miles per hour with poor visibility on an icy road). For the admissibility and probative effect of testimony that an automobile was going "too fast" or "very fast," see Annot., 92 A.L.R.2d 1391 (1963).

18. See notes 12-14 *supra* and accompanying text.

19. See notes 15-17 *supra* and accompanying text.

that evidence of an ignored protest is highly significant; the point is that where other elements of misconduct are present, *e.g.*, *Valencia*, where there was evidence of drowsiness, drinking, speed, ignored warnings, and inattention, the court should not allow the case to be taken from the jury merely because no evidence of a protest came to light.[20]

The *Valencia* and *Garrett* cases demonstrate that the New Mexico court follows an admittedly strict rule in regard to the evidence needed to establish the state of mind required for recovery under the guest statute. Not only is the requisite quantum of evidence high, but the required state of mind is itself strictly defined. The court has gone so far as to equate it with the state of mind necessary to convict a driver of involuntary manslaughter.[21]

---

20. Other states appear to place even more significance on evidence of an ignored protest when coupled with ignored demands to be let out of the automobile. Andrews v. Kirk, 106 So. 2d 110 (Fla. App. 1958), held that such protests and demands when unheeded terminated the host-guest relationship insofar as it is grounded upon a voluntary assumption of the guest status. *Andrews* is noted in 11 Ala. L. Rev. 342 (1959), where it is pointed out that a more widely-held view is that an ignored protest, with or without a demand for release, "equates the higher degree of misconduct required for recovery by the various guest statutes." *Id.* at 344.

The New Mexico Supreme Court has denied recovery to the plaintiff-guest in cases where the court emphasized that there was no protest by the guests. See Smith v. Meadows, 56 N.M. 242, 242 P.2d 1006 (1952); Carpenter v. Yates, 58 N.M. 513, 273 P.2d 373 (1954). The court has allowed recovery in the following cases where a protest was shown: Potter v. Wilson, 64 N.M. 211, 326 P.2d 1093 (1958); Gomez v. Rodriguez, 62 N.M. 274, 308 P.2d 989 (1957). In one case the court affirmed a judgment for the defendant even though there was evidence of a protest. Menkes v. Vance, 57 N.M. 456, 260 P.2d 368 (1953). In another case, Amaro v. Moss, 65 N.M. 373, 337 P.2d 948 (1959), there was no evidence of a protest, but the supreme court ordered reinstatement of a verdict for the plaintiff. Significantly, Justice Carmody, who wrote the opinions in both *Valencia* and *Garrett*, dissented in *Amaro*. *Id.* at 377-78, 337 P.2d at 951-52.

21. N.M. Stat. Ann. § 40A-2-3 (1953) provides in pertinent part:

> Manslaughter is the unlawful killing of a human being without malice.
>
> * * * *
>
> B. Involuntary manslaughter consists of manslaughter committed in the commission of an unlawful act not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner or without due caution or circumspection.

In State v. Clarkson, 58 N.M. 56, 265 P.2d 670 (1954), the court noted that the states of mind required to show liability under the involuntary manslaughter statute and the guest statute are "not different." It is interesting to note that in *Clarkson* the comparison was made by the court in reversing a conviction for involuntary manslaughter resulting from the reckless operation of an automobile. The context requires the conclusion that the court made the comparison merely to show that not only was it error for the defendant to have been convicted of involuntary manslaughter, but the evidence was insufficient even to impose civil liability under the guest statute. Subsequent cases under the guest statute, however, seized upon this comparison as a test. In De Blassie v. Mc-

Aside from the involuntary manslaughter detour, the state of mind required to be shown for recovery under the guest statute is defined in almost the same terms by the New Mexico, South Carolina, and Connecticut courts.[22] New Mexico has said that it follows the Connecticut court's interpretation of the guest statute and that court's rulings as to what evidence will establish the requisite state of mind.[23] On the whole, the Connecticut decisions are very strict; however, even the Connecticut courts have not taken a consistently strict approach.[24] South Carolina[25] has not been as strict as New Mexico in applying the statutory standard to analogous fact situations.[26]

It is submitted that the stricter standard followed by the New Mexico court does not follow inevitably from the fact that the New Mexico Legislature adopted the Connecticut guest statute.[27] Even if adherence to the interpretation placed on the guest statute by the Connecticut courts compels results like those reached in *Valencia* and *Garrett*, it must be remembered that the Connecticut guest stat-

---

Crory, 60 N.M. 490, 495, 292 P.2d 786, 789 (1956), the court, in affirming a judgment for the defendant, said:

> Will any one avouch that, under the present facts, had the . . . [plaintiff] died instead of suffering injury, a verdict of involuntary manslaughter against . . . [the defendant] could be upheld? We think none would so affirm.

The *Clarkson* comparison between involuntary manslaughter and guest statute states of mind has been cited in almost every New Mexico guest statute case decided after 1954. See, *e.g.*, Carpenter v. Yates, 58 N.M. 513, 273 P.2d 373 (1954); Valencia v. Strayer, 387 P.2d 456 (N.M. 1963). It makes little sense to require a showing of criminal negligence as a necessary condition to civil recovery; it makes still less sense to define the respective states of mind for involuntary manslaughter and the guest statute in terms of each other, when neither one is capable of any precise definition.

22. Smith v. Meadows, 56 N.M. 242, 242 P.2d 1006 (1952); Fulghum v. Bleakley, 177 S.C. 286, 181 S.E. 30 (1935); Silver v. Silver, 108 Conn. 371, 143 Atl. 240 (1928).

23. See Smith v. Meadows, 56 N.M. 242, 242 P.2d 1006 (1952); Amaro v. Moss, 65 N.M. 373, 377-78, 337 P.2d 948, 951-52 (1959) (dissenting opinion of Carmody, J.); see also Garrett v. Howden, 387 P.2d 874, 878-79 (N.M. 1963).

24. The court in *Garrett* admitted that in at least two cases the Connecticut courts did not apply as strict a standard as that generally taken in Connecticut: Peterson v. Connecticut Co., 116 Conn. 237, 164 Atl. 637 (1933); Doody v. Rogers, 116 Conn. 713, 164 Atl. 641 (1933). Garrett v. Howden, 387 P.2d 874, 879 (N.M. 1963).

25. See note 10 *supra* and accompanying text.

26. See Shearer v. De Shon, 126 S.E.2d 514 (S.C. 1962), where the defendant, having taken her eyes off the road to light a cigarette, hit another car making a left turn on a wet highway. The court held that a jury question was presented. See also Benton v. Pellum, 100 S.E.2d 534 (S.C. 1957), where the defendant, travelling at high speed, hit a car stalled on a brightly-lighted stretch of highway. The court held that a jury could reasonably infer the requisite state of mind.

27. Conn. Acts 1927, ch. 308, § 1; repealed by Conn. Acts 1937, ch. 270. The identical statute was adopted by South Carolina, which has not seen fit to follow as strict a standard as that followed in New Mexico. See note 26 *supra* and accompanying text.

ute was repealed in 1937,[28] and the last decision construing that statute by the Connecticut courts appeared in 1938.[29]

The underlying reasons for the enactment of guest statutes are (1) the idea that a host should not be required to compensate a voluntary guest for injuries suffered at the host's hands: "I am your host, with robber's hands my hospitable favours you should not ruffle thus";[30] and (2) to protect insurance companies from fraudulent claims produced from collusion between host and guest.[31] Conceding that it may be unfair to allow the guest to recover for an injury caused by his host's ordinary negligence, it seems just as unfair to require the guest to meet an almost impossible standard of proof in order to recover. It is doubtful that the host needs to be protected to the extent the New Mexico court has gone. If the host carries insurance, the second reason rather than the first applies. Although some brake on fraudulent claims is desirable, there is no reason to place insurance companies under the protective wing of the New Mexico Supreme Court to the exclusion of guests with honest claims. Since the court seems committed to the interpretation of the statute followed in *Valencia* and *Garrett*, it may become necessary to amend the guest statute[32] or simply repeal it.

JOHN R. COONEY

---

28. Conn. Acts 1937, ch. 207, repealing Conn. Acts 1927, ch. 308, § 1.

29. Ferris v. Von Mannagetta, 124 Conn. 88, 198 Atl. 167 (1938).

The New Mexico guest statute, N.M. Stat. Ann. § 64-24-1 (1953), was adopted in 1935. N.M. Laws 1935, ch. 15, § 1.

30. King Lear, Act III, Scene 7; quoted in Brief for Appellee, p. 15, Valencia v. Strayer, 387 P.2d 456 (N.M. 1963).

31. See Naphtali v. Lafazan, 8 App. Div. 2d 22, 186 N.Y.S.2d 1010 (Sup. Ct. 1959), *aff'd*, 8 N.Y.2d 1097, 171 N.E.2d 462, 209 N.Y.S.2d 317 (1960); see also Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 581 (1931); Comment, 3 Natural Resources J. 170, 174 (1963).

32. See Comment, 62 Mich. L. Rev. 506 (1964), proposing a statutory program whereby drivers without private insurance would be held to ordinary care, but guests injured in cars driven by hosts carrying private insurance would recover specified minimum amounts for medical care directly from the insurer without regard to the host-driver's fault. This proposed solution, in that it accords with sound principles of distribution of risk, appears to be more tenable than outright repeal of the guest statute; this solution also accomplishes its objective without a compulsory insurance program.