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Notes

Negligence — Guest Statute — Owner As A Guest — Wife As A Guest

In *Naphtali v. Lafazan*,¹ defendant and his wife accepted the invitation of plaintiffs, husband and wife, to accompany them on a pleasure trip in an auto owned by plaintiff-husband. It was understood that the expenses of operating the auto were to be borne by plaintiff-husband. As the party proceeded along an Ohio highway, with the defendant driving, the auto left the highway and overturned, injuring the plaintiffs. Suit was instituted in New York, alleging defendant's ordinary negligence and praying damages for the injuries sustained. Defendant relied upon the Ohio Guest Statute,² arguing that plaintiffs were "guests" in the auto and therefore could not recover in the absence of proof of defendant's gross negligence. Two interesting questions were thus presented: (1) Was the plaintiff-owner a "guest" in his own auto, and (2) was the owner's wife a "guest"? Though there were no Ohio cases in point, the New York Supreme Court held, *inter alia*, that the owner might recover on proof of defendant's ordinary negligence, as it was not the intention of the Ohio Legislature to make an owner a "guest" in his own auto. On complicated reasoning, however, plaintiff-wife was found to be a guest and was denied recovery, since there was no proof of defendant's gross negligence.

¹ *Naphtali v. Lafazan*, 165 N.Y.S. 2d 395 (Sup. Ct. 1957).

² Page's Ohio General Code, § 6308-6, 1945: (with slight modification, this statute is now § 4515.02, Ohio New Revised Code) "[Liability of owners and operators of motor vehicles to guests; exception] The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest while being transported without payment therefor in or upon said motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the wilful or wanton misconduct of such operator, owner, or person responsible for the operation of said motor vehicle."

³ "To hold that if the owner of an automobile is riding therein and a friend is driving, the owner is the guest of the friend simply because the friend is driving, would be to import into the statute a meaning not expressed by the legislature." *Glendhill v. Connecticut Co.*, 121 Conn. 102, 183 Atl. 379, 381 (1936).

I. THE OWNER AS A GUEST

Though decisions supporting the court's position were available from Connecticut,³ Pennsylvania,⁴ and California,⁵ the court did not consider them, professing an inability to locate such cases.⁶ Instead, reliance was placed upon certain Ohio cases to the effect that the guest statute was in derogation of the common law⁷ and must be strictly construed.⁸

The construction given by the court appears unduly strict and

⁴ *Lorch v. Eglin*, 369 Pa. 314, 85 A.2d 841 (1952), in which the Pennsylvania court relied not only upon the notion of unseemliness in holding the owner to be a guest as expressed by the Connecticut court, note 3 supra, and later by the New York court in *Naphthali*, but also upon the alternative argument that the owner, by furnishing the use of his auto, acquired the status of a "passenger" and so became exempt from the guest statute on that basis. The court stated: ". . . that not only would it be contrary to any ordinary meaning of the term guest to hold that the owner of a car was the 'guest' of his friend who was driving it, but it cannot be said that such an owner is being transported 'without payment for such transportation,' since he is furnishing the use of his automobile and thereby contributing to the cost of the transportation the equivalent of the rental value of the car." *Id.* at 319 and 843.

⁵ *Ray v. Hanisch*, 306 P.2d 30 (Dist. Ct. App. Cal., 1957). Although the court reversed a judgment for the plaintiff-owner upon a procedural ground, the court left no doubt as to its position on the merits: "We think the reasoning of the *Glendhill* and *Lorch* cases is logical and unanswerable." 306 P.2d at 34. This reliance and acceptance by the court of the Connecticut and Pennsylvania decisions, notes 3 and 4 supra, has been attacked on the ground that such cases rely upon a social or dictionary definition of the term guest while California had previously developed a different and more specific definition. See 57 U.C.L.A. L. Rev. 652 (1957). Be this as it may, the court, citing the *Ray* case as authority, has just squarely held that an owner cannot be a guest within his own auto. *Ahlgren v. Ahlgren*, 313 P. 2d 88 (Dist. Ct. App. Cal., 1957).

⁶ A statement from *Anderson v. Burkhardt*, 275 N. Y. 281, 283, 9 N. E. 2d 929 (1937) misleadingly paraphrased and incongruously relied upon in the *Lorch* and *Ray* cases, notes 4 and 5 supra, should also be noted: "A passenger may recover for injuries received in a collision between two automobiles even though both drivers were at fault. . . . This is the so-called 'guest rule'. It does not apply, however, to the owner who is being driven in his own car; he is no guest." No guest statute was involved and the court was obviously referring to the New York rule that a guest-driver's negligence is imputed to the owner to bar the latter's recovery against a negligent third party. Far from supporting the view that an owner may not be a guest within his own auto for guest statute purposes, the case, to the extent that it is at all relevant, supports the contrary view.

⁷ *Dorn v. Village of North Olmstead*, 133 Ohio St. 375, 381, 14 N.E.2d 11, 14 (1938).

⁸ *Miller v. Fairley*, 141 Ohio St. 327, 335, 48 N. E. 2d 217, 221 (1943).

does violence to the legislative intent. As the court recognized, guest statutes are enacted for two basic reasons: (1) to prevent collusion between friendly parties to the detriment of liability insurance companies, and (2) to avoid the supposed impropriety involved in permitting a guest to recover for his host's ordinary negligence.⁹ Where the owner is allowed to sue his agent-driver, the possibility of collusion at the expense of an insurance company is equally as great as where the guest sues the host. Again, it is as "improper" to permit an owner to sue his agent-driver for the latter's ordinary negligence as for the guest to be allowed to sue his host for ordinary negligence. The court's unduly strict construction is further highlighted by the circumstance that, as a matter of first impression, a guest statute might well be considered as remedial in nature and entitled to a "liberal" construction.

Another weakness of the decision lies in the court's apparent position that *an owner may never be a guest in his auto*, presumably not even where he has leased his auto for consideration. Whatever general view be taken of the owner's guest-statute status, to hold him to be outside the statute in the case supposed appears wholly untenable. Apart from this, however, it would seem that the policy considerations underlying the guest statute require that the owner be considered as a guest unless, of course, he can show "passenger" status¹⁰ upon the same basis as a non-owner. A further

⁹ Prosser, Torts, 450-452 (2 ed. 1955) ". . . guest statutes . . . have been enacted under the impetus of a feeling that the gratuitous guest is entitled to no claim against his host for the ordinary mishaps of modern traffic, and under the impetus of the claim of liability insurance companies that frequent collusion between host and guest has increased insurance claims."

¹⁰ The distinction between "guest" and "passenger" under the guest statutes is generally said to depend upon whether or not the occupant has conferred a "benefit" upon the owner or operator. A "passenger" is one who has conferred such a benefit while the "guest" is one who has not. The "passenger," of course, is without the statute. The problem of what constitutes a benefit has been the subject of many conflicting decisions. Certainly, no single definition is all encompassing. The Nebraska court has stated the distinction thusly: ". . . we conclude that a person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity, and no recovery can be had under our statute except for gross negligence. However, if his carriage contributes such tangible and substantial benefits as to promote the mutual interests of both the passenger and the owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest." *Van Aucker v. Steckley's Hybrid Seed Corn Co.*, 143 Neb. 24, 27, 8 N. W. 2d 451, 454 (1943).

objection to the position that the owner can never be a guest is noted below.¹¹

As yet, this issue has not arisen under the Nebraska Guest Statute.¹² However, our Supreme Court has used the term "guest" to describe the owner-occupant of an auto driven by a guest where the owner-occupant was injured by the negligence of a third party.¹³ The problem in such cases was whether at the time of the accident the owner-occupant had such a degree of "control" over the guest-driver that the latter's negligence could justifiably be imputed to the owner in order to bar his recovery against the third party. This is quite different from declaring the owner to be a guest within the meaning of the guest statute. Aside from a case where an owner-occupant has leased his auto for a consideration, guest status under the guest statute has nothing to do with the question of the owner's "control." Accordingly, the issue must arise in Nebraska as one of first impression.

II. THE WIFE AS A GUEST

The position taken by the wife was that no husband today considers his wife as a guest when she accompanies him in his auto. In rejecting this argument and holding the wife to be a guest, the court reasoned: (1) that the wife was a guest of her owner-husband; (2) that in any suit by the wife against the husband, he would have the defense of the guest statute; (3) that the guest-driver of the

¹¹ *Infra*, page 471.

¹² Neb. Rev. Stat. § 39-740 (Reissue 1952).

¹³ The court has held that the guest-driver's negligence is not ordinarily imputable to the owner-occupant so as to bar the latter's recovery against negligent third-parties. *Peterson v. Schneider* (On Rehearing), 154 Neb. 303, 47 N. W. 2d 863 (1941), (Plaintiff-owner being driven by a non-family guest); *Gorman v. Bratka*, 139 Neb. 718, 298 N. W. 691 (1941); *Bartek v. Glazers Provisions Co.*, 160 Neb. 795, 71 N. W. 2d 466 (1955), (Plaintiff owner-wife being driven by husband). Note, however, the recent case of *Fairchild v. Sorenson*, 165 Neb. 667, -N. W. 2d-, (1958) where the plaintiff-wife, though not the owner, was held to be responsible for the consequences of her own negligence in failing to warn her driver-husband of known approaching danger in the form of defendant's auto, and thereby barred from recovery against the defendant.

Another line of cases are those where the owner-occupant is named as defendant by a third-party injured by the negligence of the owner's guest-driver. In this situation, the court has held the owner liable by raising an almost conclusive presumption that the owner had "control." *Sutton v. Inland Construction Co.*, 144 Neb. 721, 14 N. W. 2d 387 (1944).

In none of the above cases, however, was the owner's status under the guest statute under consideration by the court.

auto was acting as the agent of the husband; and (4) that an agent, in defending against third parties, may assume the guest statute defense of his principal.¹⁴

The key to this complicated reasoning is the decision that the wife was the husband's guest, and the holding of the court cannot be criticized. A contrary decision would have guaranteed the wife's recovery by removing the husband's guest-statute defense, resulting in an immediate increase in Ohio of auto liability suits between husband and wife.¹⁵ Further, such a decision could become analogous authority for decisions that the owner's children, parents, etc., also could not be considered guests within the owner's auto. Decisions of this type would flood the courts with collusive suits between members of the owner's family, causing the destruction of the guest statute by exceptions.

Other States, including Arkansas,¹⁶ and Minnesota¹⁷ have held the wife to be a guest under similar circumstances. Nebraska has not had occasion to do so, since in this State a wife may not sue her husband for personal injuries.¹⁸ Thus a Nebraska decision holding the wife not to be the guest of her owner-husband would not have the same emasculating effect upon the guest statute that would be true in Ohio. Even so, there is no sound reason for allowing the wife to be removed from the provisions of the guest statute in the absence of proof of "passenger" status.

The fundamental weakness of the decision lies not in holding the wife to be a guest, but in basing the husband's exemption from the guest statute upon ownership alone. This basis of exemption produces two incongruous results. First, it is clear from the decision that the wife would have recovered from the defendant on the same basis as her husband, had the auto been jointly owned. The anomaly of making a paper transaction between husband and wife the basis for exemption from the guest statute is too obvious for comment. That anomaly is further highlighted in *Naphtali* by the fact that it was the husband and not the wife who was the

¹⁴ "An agent who is acting in pursuance of his authority has such immunities of the principal as are not personal to the principal." Restatement Agency, § 347.

¹⁵ Action in tort between spouses is maintainable in Ohio, *Damm v. Elyria Lodge*, 158 Ohio St. 107, 121, 107 N.E.2d 337, 344 (1952).

¹⁶ *Roberson v. Roberson*, 193 Ark. 669, 101 S.W.2d 961 (1937).

¹⁷ *Krinke v. Gramer*, 187 Minn. 595, 246 N.W. 376 (1933).

¹⁸ *Emerson v. Western Seed & Irrigation Co.*, 116 Neb. 180, 216 N.W. 297 (1927).

“prime mover” in the enterprise and that it was his agent who caused the wife’s injuries. Second, should *Naphtali* be followed in States allowing personal injury actions between husband and wife, insurance compensation will depend upon which spouse was driving at the time of the accident. If a non-owner wife is driving, her owner-husband will be exempt from the statute. But if an owner-husband is driving, his non-owner wife will be within the guest statute and may not recover in the absence of the husband’s gross negligence. In view of the fact that the husband and wife suffer equally when the family pocketbook is injured, a holding that recovery depends upon which spouse was the driver and which the owner appears indefensible.

III. CONCLUSION

Should other courts follow the *Naphtali* rule, it may safely be predicted that either remedial legislation will be enacted, or insurance companies will attempt to circumvent the rule by contract. However, there is evidence that the latter course would be viewed with disfavor by State Insurance Departments.¹⁹ A third possibility, of course, is that the companies will simply raise their rates to compensate for the new losses and the increased risk of collusive actions occasioned by such decisions. Hopefully, however, our courts will recognize that guest statutes, at least in this instance, demand a liberal construction and that ownership alone is an insufficient basis for granting an exemption.

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