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In Defense of the Colorado Guest Statute

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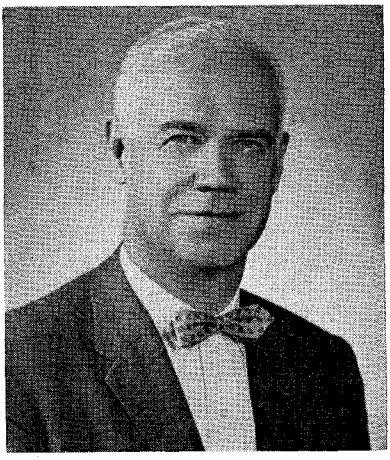

Kenneth M. Wormwood received his LL.B. degree from the University of Denver College of Law in 1926. He is a member of the Denver, Colorado and American Bar Associations and has served as president of the Denver Bar in 1953-54. Mr. Wormwood now serves on the board of directors of the Federation of Insurance Counsel and is one of three Colorado members of the American College of Trial Lawyers.

Perhaps the above title is misleading because in the writer's opinion, the Colorado guest statute needs no defense. It is my opinion that it has served a useful purpose in the past, is still serving a useful purpose and should be retained as the law of Colorado.

The guest statute to which I refer reads as follows:

> "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 such owner or operator or caused by his intoxication, or by negligence consisting of a willful and wanton disregard of the rights of others. The provisions of this Section shall not relieve a public carrier or any owner or operator of a motor vehicle, while the same is being demonstrated to a prospective purchaser, of responsibility for any injuries sustained by a passenger being transported by such public carrier or by such owner or operator."[1]

It is interesting to note that this statute was passed by the Colorado Legislature and became law on April 29, 1931, and although criticized at times by individual members of our supreme court, and criticized severely by some plaintiffs' attorneys, this statute has never been amended, much less repealed.

At the present time, twenty-seven states have guest statutes, varying, of course, in certain degrees in their range. Massachusetts, while having no guest statute, applies a common law rule to the effect that there must be gross negligence before the guest can recover. This means that twenty-eight states at the present time have laws either statutory or judicial preventing recovery of damages by the guest from the host for simple negligence.

[1] Colo. Rev. Stat. § 13-9-1 (1953).

As far as I am advised, only one state which formerly had a guest statute has repealed it, that state being Connecticut. It will thus be seen that in the majority of the states a guest cannot recover damages from his host for simple negligence.

Guest statutes were first enacted in the "Roaring Twenties." Iowa, Connecticut, Oregon and Vermont were four of the first states to enact such statutes. As noted above, the Colorado Legislature passed the guest statute in 1931, and in that same year our neighboring states of Wyoming, Nebraska, North Dakota and Montana also enacted guest statutes.

It is interesting to note various reasons given for the enactment of guest statutes. The United States Supreme Court in *Silver v. Silver*,[2] holding that the Connecticut guest statute was constitutional, stated that the reason for a statute of this nature was as follows:

> "The use of the automobile as an instrument of transportation is peculiarly the subject of regulation. We cannot assume that there are no evils to be corrected or permissible social objects to be gained by the present statute. We are not unaware of the increasing frequency of litigation in which passengers carried gratuitously in automobiles, often casual guests or licensees, have sought the recovery of large sums for injuries alleged to have been due to negligent operation. In some jurisdictions it has been judicially determined that a lower standard of care should be enacted where the carriage in any type of vehicle is gratuitous. . . . Whether there has been a serious increase in the evils of vexatious litigation in this class of cases, where the carriage is by automobile, is for legislative determination and, if found, may well be the basis of legislative action further restricting the liability. Its wisdom is not the concern of courts."[3]

Our own Colorado Supreme Court speaking through Mr. Justice Burke in 1947 stated the purpose of guest statutes thus:

> "It will help to bear in mind the purpose of these guest statutes. Clearly they were enacted to prevent recovery by those who had no moral right to recompense, those carried for their own convenience, for their own business or pleasure, those invited by the operator as a mere generous gesture, 'hitch-hikers' and 'bums' who sought to make profit out of soft hearted and unfortunate motorists. Prior to the passage of these acts court dockets were cluttered with such suits."[4]

It will be noted that while the cluttering of the courts by litigation of this sort is one of the reasons, the main reason seems to be the moral issue involved and, of course, the question of whether or not there is a disruption between friendly relationships of parties by suits of this kind. The moral issue of whether or not guests should sue their hosts for simple negligence was undoubtedly in the minds of many people long before the days of automobiles. For instance, Shakespeare in King Lear has his character state:

> "I am your host; with robber's hands my hospitable
> favours you should not ruffle thus."[5]

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2 280 U.S. 117 (1929).
3 Id. at 122, 123.
4 Dobbs v. Sugioka, 117 Colo. 218, 185 P.2d 785 (1947).
5 King Lear, Act III, Scene VII.

Much criticism has been directed at guest statutes on the theory that it is improper to take away a person's right to recover damages for the negligent act of another. Guest statutes are not unique in this particular. There are many other situations where the law, either by common law, judicial decision or statute, prohibits the recovery of damages even though there is negligence involved. For example, this distinction between a gratuitous performance of services and the performance of such services for hire may be found in the law as between the gratuitous bailee and the bailee for hire and between the innkeeper and the ordinary social host.

Here in Colorado we recognize the differences between an invitee, a licensee and a trespasser. Each of these parties is in a different position in regard to recovery of damages even though the negligence on the part of the landowner may be exactly the same as to all three of them.

The great weight of authority throughout the United States is to the effect that a minor child cannot maintain an action against its parent to recover damages for torts alleged to have been committed by the parent in the course of the family relation and resulting in injury to the child. The reason for this rule of intrafamily immunity was stated in a New Jersey case as follows:

> "In any event, the great weight of authority unquestionably sustains the proposition that a minor child cannot sue one of his parents, at least during minority, for the negligent act of such parent from which the child suffers injury to his person. This rule is undoubtedly founded upon a sound public policy, and is based upon the interest that society has in preserving harmony in domestic relations, an interest which has been manifested since the earliest organization of civil government, an interest inspired by the universally recognized fact that the maintenance of harmonious and proper family relations is conducive to good citizenship, and therefore works to the welfare of the state."[6]

Is not this rule even harsher than our guest statute, if our opponents care to call the guest rule harsh? Under this rule a minor child cannot recover, whereas under our Colorado court's interpretation of the Colorado guest statute, a child of tender years is not capable of becoming a guest and can recover.[7]

[6] Mannion v. Mannion, 3 N.J. Misc. 68, 129 Atl. 431 (Cir. Ct. 1925).
[7] Green v. Jones, 319 P.2d 1083 (Colo. 1957).

Many other examples of inability to recover damages for negligence or the limitation of such recovery could be cited. Among these are the rule of sovereign immunity, the Colorado wrongful death statute limiting damages to $25,000,[8] the Colorado statute limiting the amount of damages that an employee may recover from his employer for the negligence of a co-employee to $10,000,[9] and the judicial rule that a wife may not recover for loss of consortium by reason of a third party's negligent injury to her husband.

As pointed out by our Supreme Court in the case of *Green v. Jones,* "The status of 'guest' under the statute is acquired only by knowingly and voluntarily accepting the invitation to become so."[10] In other words, what this really amounts to is that our legislature has said that a guest assumes the risk of ordinary negligence. Consequently, as everyone is presumed to know the law, any guest who desires to accept a ride with a host driver does so knowingly and voluntarily, assuming the risk of the driver's ordinary negligence. If a person does not care to assume that risk then he does not have to accept the ride. While our legislature has gone this far, our supreme court has gone even farther in that, while the guest statute lists intoxication as one of the exceptions to the non-liability of the host, still if the guest accepts a ride knowing that the host is intoxicated, he assumes that risk and cannot recover.[11]

We are not unmindful of the recent case of *Noakes v. Gaiser,*[12] where the Honorable Albert T. Frantz, of the Colorado Supreme Court, wrote a dissenting opinion in which he took the position that our Colorado guest statute is unconstitutional, recognizing, however, that the overwhelming weight of authority has sustained this type of legislation on the theory that it is a proper exercise of the police power. With due regard to Mr. Justice Frantz' opinion, we most heartily disagree with his conclusion and agree with the United States Supreme Court that guest statutes of this nature are constitutional.

In that dissenting opinion, Mr. Justice Frantz gave his thoughts on the policy behind guest statutes to be as follows:

> "The compelling idea for the sanction of such legislation is the notion that guests have been guilty of collusion, fraud and bad faith in advancing claims. In other words, presumptively guest and host frequently connive in the pressing of claims in order to mulct the insurance carrier. Admittedly, such instances have occurred and will occur, but what should be done with the great number of bona fide claims based upon negligence? Such presumption of dishonorable conduct on the part of host and guest is contrary to the presumption generally prevailing of fair dealing and common honesty."[13]

We most respectfully submit that that is only one of the reasons for the enactment of guest statutes, but that, in our opinion, is a very cogent reason. In a recent Harper's Magazine article entitled "Damage Suits: A Primrose Path to Immorality," Morton M. Hunt wrote:

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[8] Colo. Rev. Stat. § 41-1-1 (1953).
[9] Id. § 80-6-4.
[10] 319 P.2d 1083, 1086 (Colo. 1957).
[11] Haller v. Gross, 135 Colo. 218, 309 P.2d 598 (1957).
[12] 315 P.2d 183 (Colo. 1957).
[13] Id. at 189.

"A considerable number of plaintiffs, lawyers, and jurors have come to feel that the defendant's ability to pay is the main point at issue. Even if the injury be invisible, even if the defendant's fault is hard to prove, the key issue is this: can he afford to pay? If so, let him. Jurors thus often play a kind of Robin Hood role; but however noble theft may seem in the legend, it is still theft. And when it becomes common practice, it can destroy the social order it preys upon."[14]

". . .

"Judges interpret the law in the light of the morality of their own times. If our courts are broadening liability to a frightening extent, it is because too many Americans like it that way."[15]

Woodrow Wilson in 1893 stated that "law is the crystallization of the habit and thought of society." In our opinion, the crystallization of the thought of society at the time the Colorado guest statute was enacted was that the greatest good to the greatest number would be served by having these guest statutes. The reasons for the enactment of the guest statute have not diminished. In fact, the reasons have become stronger than ever, and it is my opinion that the guest statute should be kept on our statute books irrespective of whether the host does or does not have insurance. The question of insurance should not enter into the problem. If a plaintiff is entitled to recover damages from a defendant, he should be allowed that recovery irrespective of whether or not the defendant is insured. Neither the right of recovery nor the amount of recovery should rest upon the question of insurance.

The fact that the majority of the states do have guest statutes and have had them for years and that only one state legislature has repealed its guest statute is evidence that the majority of the people still feel that it is to the best interest of the public that such laws be maintained.

If society desires to do away with such defenses as assumption of risk, contributory negligence and sovereign immunity, or if it desires to allow the recovery of damages without fault, well and good. Until society so decides, I believe our guest statute should remain as part of the law of this state. I respectfully submit that the most good to the most people will be obtained by the continuance of the guest statute rather than by its repeal.

[14] Harper's, Jan. 1957, pp. 67, 68.
[15] Id. at 70.