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NEGLIGENCE - OVERCROWDING OF AUTOMOBILE AS CONTRIBUTORY NEGLIGENCE PREVENTING RECOVERY BY GUEST

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NEGLIGENCE — OVERCROWDING OF AUTOMOBILE AS CONTRIBUTORY NEGLIGENCE PREVENTING RECOVERY BY GUEST — Plaintiff, an eighteen-year-old girl, was riding in the front seat of a Ford coupe with three young men on a clear night. The car, driven by defendant, was going sixty to sixty-five miles per hour and in rounding a curve struck another car. Plaintiff was thrown out and injured. The driver of the second car was joined as co-defendant. *Held*, when more than three persons occupy the front seat of a car, overcrowding it and hampering the driver, those overcrowding it are guilty of contributory negligence as a matter of law; and where the accident was caused by lack of due care by the driver it is not necessary to show that the overcrowding was a proximate cause, as it is common knowledge that overcrowding interferes with reasonable control of the car. *McIntyre v. Pope*, 326 Pa. 172, 191 A. 607 (1937).

In holding that overcrowding the front seat of an automobile is, by itself,[1]

[1] The additional factor that the driver was drunk or inexperienced to the knowledge of the guest when he entered the car makes a stronger case for holding the guest guilty of contributory negligence in merely entering the car. Franco v. Vakares, 35 Ariz. 309, 277 P. 812 (1929); Besserman v. Hines, 219 Ill. App. 606 (1920).

contributory negligence as a matter of law, preventing recovery by a guest, this court seems to be going against the weight of authority.[2] There are, however, a few decisions, including one from the same state, supporting it.[3] Although the cases bearing on the question do not do so, an analysis of the question is helped by placing them in two categories: actions by the guest against his host and actions by the guest against the driver of the other car, as it would seem that the principles of law applicable to the two situations should be different. (1) In an action by the guest against his host, the question of overcrowding, properly considered, would seem to be one of assumption of risk rather than of contributory negligence.[4] Knowing of the danger in hampering the free action of the driver by overcrowding the front seat, the guest has elected to accept the ride notwithstanding, and thus assumed the risk of an accident to which the overcrowding, and consequent hampering of the driver, was a contributing cause. This risk, whether subjection to it be negligence or not, has been assumed and the only real question in this class of cases is whether the overcrowding did actually interfere with the driver's control of the car so as to be a cause of the accident.[5] Although this is strictly a question of fact, the court in the principal case refused to let it go to the jury and conclusively presumed that the overcrowding was a contributing cause.[6] It is submitted that

[2] 4 BLASHFIELD, CYCLOPEDIA AUTOMOBILE LAW 285 (Perm. Supp. 1931). "The crowded condition of an automobile is not, standing by itself, however, ordinarily a circumstance from which negligence of a guest can be inferred."

[3] Lorance v. Smith, 173 La. 883, 138 So. 871 (1931); Mahoney v. Pittsburgh, 320 Pa. 44, 181 A. 590 (1935).

[4] See Knipfer v. Shaw, 210 Wis. 617, 246 N. W. 328, 247 N. W. 320 (1933), where the court sets up as the elements necessary to assumption of risk by the automobile guest preventing a recovery from the driver: (1) a hazard or danger inconsistent with the safety of the guest; (2) knowledge and appreciation of the hazard by the guest; and (3) acquiescence or a willingness to proceed in the face of danger. In this case the principle was applied to prevent the recovery of a guest who voluntarily rode in a car on a very foggy night.

Although HARPER, TORTS, § 131 (1933), and 2 TORTS RESTATEMENT, § 466, comments (d) and (e) (1934), agree that voluntary exposure to an unreasonable risk is a form of contributory negligence, and as illustrations use cases of a guest riding with a driver known to be drunk or reckless, or riding on a dark night without lights, overcrowding, by itself, would not seem to be such an unreasonable risk. In any case, however, whether the risk be reasonable or unreasonable, negligence or not, the guest has elected to take it.

[5] 2 TORTS RESTATEMENT, § 466, comment (e) (1934): "Thus, if a plaintiff rides in an automobile knowing that the driver is drunk, ignorant of driving or habitually reckless or careless or that the machine has insufficient brakes or headlights, he can ordinarily not recover against the defendant through whose negligence an accident occurs, *if the drunkenness, incompetence or carelessness of the driver, or the bad condition of the vehicle is a contributing factor in bringing about the accident.*" (Italics ours.)

[6] 191 A. at 608: "Where the accident is caused by failure to exercise due care in the operation of the car, it is not necessary to show that overcrowding was the proximate cause. . . . While the high rate of speed may have been a factor, the crowded condition when emergency arose necessarily hampered his [i.e., the driver's] control of the automobile."

the guest, by assuming the risk of accidents caused by overcrowding, does not assume the risk of any accident caused by the negligence of the driver to which the overcrowding was not a contributing cause and that the question of the causal connection between the overcrowding and the accident should be left to the jury. It has been so held.[7] (2) In an action by the guest against the driver of the other car, the question is truly one of contributory negligence involving an additional issue to that considered above. Here there is no consideration of assumption of risk, for by assuming the risk of accidents caused by the overcrowded condition of the car in which he is riding, the guest has clearly not assumed the risk of negligence by the driver of another car. So, in this situation, the issue becomes one of negligence—was the risk of accident from overcrowding which the guest elected to run an unreasonable one, one which, under all the circumstances, a reasonably prudent man would not have taken? [8] Surely this depends on the circumstances, such as the size of the people, the width of the car seat, the skill of the driver, the amount of traffic on the road expected to be traveled, the length of the proposed ride and the time of day. It is a jury question which should not be conclusively determined as a matter of law.[9] Assuming that the overcrowding has been found to constitute negligence, there still remains, as in the preceding situation, the question of causation. Assuming negligence, was it contributory? [10] Here is an even clearer case for not conclusively presuming the causal connection to exist, for situations may be imagined where the accident is due entirely to the defendant's negligence and would have happened in exactly the same way had the driver of the plaintiff's car been alone in the front seat.[11] So, here also, the question whether the over-

[7] Dillabough v. Okanogan County, 105 Wash. 609, 178 P. 802 (1919). In McDowell v. Hurner, 142 Ore. 611, 13 P. (2d) 600, on rehearing, 20 P. (2d) 395 (1933), it was held that the mere fact that plaintiff was riding in the front seat with three others would not prevent a recovery, and in Webber v. Billings, 184 Mich. 119, 150 N. W. 332 (1915), that whether riding in an overcrowded car was contributory negligence was a question for the jury.

[8] Here the doctrine of Professor Harper and the Torts Restatement that assumption of an unreasonable risk is contributory negligence, supra, note 4, enters in. Unless the risk assumed here was so unreasonable as to be contributory negligence a recovery may be had, while in the first situation the only question was whether the risk assumed, reasonable or unreasonable, contributed to the accident.

[9] Washington, B. & A. R. R. v. State, 136 Md. 103, 111 A. 164 (1920); Mitchell v. Raymond, 181 Wis. 591, 195 N. W. 855 (1923); Shapiro v. Union Street Ry., 247 Mass. 100, 141 N. E. 505 (1923); June v. Grand Trunk Western Ry., 232 Mich. 449, 205 N. W. 181 (1925); City of Pampa v. Todd, (Tex. Civ. App. 1931) 39 S. W. (2d) 636; Balle v. Smith, 81 Utah 179, 17 P. (2d) 224 (1932).

[10] To the effect that a causal connection must be shown between the overcrowding and the accident, see Moore v. Jansen & Schaefer, 265 Ill. App. 459 (1932); Obrecht v. Tallentire, 43 Ohio App. 376, 183 N. E. 295 (1932); Shapiro v. Union Street Ry., 247 Mass. 100, 141 N. E. 505 (1923); June v. Grand Trunk Western Ry., 232 Mich. 449, 205 N. W. 181 (1925); Washington, B. & A. R. R. v. State, 136 Md. 103, 111 A. 164 (1920).

[11] As in Moore v. Jansen & Schaefer, 265 Ill. App. 459 (1932), where the

crowding contributed to the accident should be left to the jury. In general, then, in an action by the guest against his host the risk of overcrowding is assumed, but the question whether the overcrowding contributed to the accident should be left to the jury; while in an action by the guest against the driver of the other car not only the causal connection, but also the issue whether the overcrowding constituted negligence should be a jury question.[12]

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overcrowded car in which plaintiff was riding ran into defendant's cement mixer which was being hauled along the road late at night, took up more than half of the road, and was being towed by a truck with blinding headlights so that the mixer could not be seen by the oncoming motorist until too late to do anything about it.

[12] In line with this rule, the Wisconsin court held in Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N. W. 721 (1934), that the plaintiff-guest could recover from the defendant, driver of the other car, for his negligence and that the defendant could not get contribution from the plaintiff's negligent host because the host was not liable to the plaintiff as the plaintiff had assumed the risk of the ride.