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## Liability of Driver of Vehicle to Guest Statutory Construction

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LIABILITY OF DRIVER OF VEHICLE TO GUEST—STATUTORY CONSTRUCTION.—Action by the administrator of the estate of Raymond Stoddard, a minor, to recover damages for the death of Stoddard alleged to have been caused by reason of defendant's operation of an automobile in which Stoddard was riding as a guest. The accident happened while decedent was asleep beside the defendant. The defendant also dropped asleep and was awakened just before the automobile he was driving, and which had gone into a ditch, hit a tree. The trial judge made no distinction in his instructions between the liability as defined by statute and the liability for ordinary negligence. He also gave the instruction that contributory negligence was a bar to recovery. Verdict and Judgment for plaintiff and defendant appealed. *Held*, it was error to instruct that negligence and contributory negligence were in issue; that the liability imposed by statute was not a liability based on negligence, and that contributory negligence was not a defense.<sup>1</sup>

The general rule, in the absence of a guest statute, is that the operator of an automobile owes the duty to an invited guest to exercise reasonable care in its operation and not unreasonably to expose him to danger and injury.<sup>2</sup> Some jurisdictions have made a distinction between a mere licensee and an invited guest. In the case of a licensee the driver owes no other duty than to refrain from willful or wanton wrong; while in the case of the invited guest the driver owes the duty of ordinary care to the guest.<sup>3</sup> This distinction applies not only in case the licensee is an adult, but also where the licensee is an infant of tender years.<sup>4</sup> The test used to tell whether a passenger is a licensee or an invited guest is whether the passenger asks to ride or whether the driver has invited the passenger.<sup>5</sup>

Again, in some jurisdictions, following the rule applied in the case of gratuitous bailments, and in the absence of statute governing the situation, a private person, who invites another to ride gratuitously in his automobile and carries him pursuant to such invitation, is required merely to use slight diligence to avoid injury to the passenger, and is held liable only for such an injury in case he has been guilty of gross negligence, this rule of liability as indicated, not resting on any theory that the invited guest is a mere licensee, but being one to determine the liability assumed in case of gratuitous undertaking.<sup>6</sup> In these jurisdictions, the rule of ordinary care applies if the passenger injured was riding at the request and for the benefit of the owner.<sup>7</sup>

These rules which permit an automobile driver to be free from liability for ordinary negligence to a gratuitous guest have much in their favor, but are impossible in states that do not recognize degrees of negligence. In order to arrive at a similar result and relieve automobile drivers from

<sup>1</sup> *Coconower v. Stoddard*. Appellate Court of Indiana, September 30, 1932, 182 N. E. 466.

<sup>2</sup> *Pearson v. Lakin* (1925), 147 Md. 1, 127 Atl. 387; *Stout v. Lewis* (1929), 11 La. App. 503, 123 So. 346; *De Wels v. Kuntz* (1929 Cal. App.), 280 Pac. 552.

<sup>3</sup> *Woodruff v. Lawlor* (1928, N. J.), 140 Atl. 430.

<sup>4</sup> *Faggioni v. Weiss* (1923), 99 N. J. Law 157, 122 Atl. 840.

<sup>5</sup> *Woodruff v. Lawlor* (1928, N. J.), 140 Atl. 430.

<sup>6</sup> *Harris v. Reed* (1923), 30 Ga. App. 187, 117 S. E. 256; *Marcinowski v. Sanders* (1925), 252 Mass. 65, 147 N. E. 275.

<sup>7</sup> *Lyttle v. Monto* (1924, Mass.), 142 N. E. 795.

liability for negligence to guests, who do not pay a compensation for the transportation, the legislatures of Connecticut, Iowa and Indiana have passed statutes, defining by the statute the liability of an automobile driver to his guest.

The Connecticut statute passed in 1927 relieves automobile drivers from liability to guests "unless such accident shall have been intentional on the part of said owners or operators or caused by his heedlessness or his reckless disregard of rights of others."<sup>8</sup> The classification of gratuitous guests in motor vehicles was held to be a proper classification for the purpose of regulation when the constitutionality of the statute was upheld.<sup>9</sup> In construing this statute the Connecticut courts have held that the liability is entirely separate from negligence liability, and therefore, the contributory negligence of a guest does not bar his recovery.<sup>10</sup> In *Ascher v. H. E. Friedman*<sup>11</sup> the court said: "Conduct arising from momentary thoughtlessness, inadvertance, or from an error of judgment does not indicate a reckless disregard of the rights of others."

The Iowa statute provides: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, unless damages are caused as a result of the driver of said motor vehicle being under the influence of intoxicating liquor or because of the reckless operation by him."<sup>12</sup> In construing this statute the courts have construed it so that "reckless operation" means almost exactly what the phrase "reckless disregard for rights of others" means in the Connecticut statute. The court has said: "It is apparent, we think, that the legislature intended the word 'reckless' therein to mean proceeding without heed of or concern for consequences. To be 'reckless' one must be more than 'negligent.' Recklessness may include 'wilfulness' or 'wantonness' but if conduct is more than negligent it may be reckless without being 'willful' or 'wanton.' Reckless implies no care coupled with disregard for consequences."

Thus when the Indiana court was called upon to construe our "guest statute,"<sup>14</sup> although the term "reckless has been applied to such a wide range of conduct that any satisfactory limitation or definition of what it covers elsewhere was rendered almost impossible, the meaning was fairly definitely understood as used in the "guest statutes." The court followed the definition of the term "reckless disregard of rights of others" as used in the other statutes and thus established an absolute liability upon automobile drivers to guests, when their conduct violated the statute. This liability under the statute is not "gross negligence," since contributory negligence is no defense.

Although, contributory negligence is no defense under our "guest statute" is the voluntary assumption of risk a bar to recovery? This

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<sup>8</sup> Chapter 308 of the Public Acts of Connecticut, 1927.

<sup>9</sup> *Silver v. Silver* (1929), 280 U. S. 117, 74 L. Ed. 221, 50 Sup. Ct. 57.

<sup>10</sup> *Silver v. Silver* (1928), 108 Conn. 371, 143 Atl. 240; *Grant v. MacLelland* (1929), 109 Conn. 517, 147 Atl. 138; *Bordenaro v. Senk* (1929), 109 Conn. 428, 147 Atl. 136.

<sup>11</sup> (1929) 110 Conn. 1, 147 Atl. 263.

<sup>12</sup> Acts 421 Gen. Assem., Ch. 119, Code 1927, Sec. 5026-61.

<sup>13</sup> *Siesseger v. Puth* (1931, Iowa), 239 N. W. 46.

<sup>14</sup> Burns' Ann. St. Supp. 1929, Secs. 10142.1 and 10142.2.

question has not as yet been decided under any of the "guest statutes." In Indiana the doctrine of voluntary assumption of risk is not confined to master-servant cases, but extends to other cases sounding in tort.<sup>15</sup> In the cases where a statute requires employers to guard dangerous machinery the doctrine of assumption of risk can apply,<sup>16</sup> even though liability imposed upon the employer who fails to comply with the statute is absolute and not based upon negligence. Again, the keeper of wild animals is held to strict liability for injuries caused by those animals, yet the injured person may have assumed the risk and be barred from recovering from the keeper of the animals.<sup>17</sup> Thus, both under liability imposed by statute and by common law, assumption of risk has been held to bar recovery. Reasoning from these analogies it follows that assumption of risk, in a proper case, might bar recovery under the "guest" statutes. C. A. R.

NEGLIGENCE—INFANT TRESPASSERS—ATTRACTIVE NUISANCE DOCTRINE.—The plaintiff brought this action against the defendant to recover damages for the death of his infant son eleven years old. It appeared from the plaintiff's complaint that the defendant was the owner of twenty acres of land, on which there was an abandoned mine. The entrance to the mine shaft was covered by a shed, which with a number of other abandoned buildings made an inviting place for children to play; and children did come on the premises and played about the buildings, frequently, with the knowledge of the defendant. Gasses ("damps") of a poisonous character formed in the shaft and the shed. Their presence could not be seen or ascertained, and they were highly dangerous. The defendant knew of the location of the shaft, and open door, the "damps," and the frequency of the presence of children; or by the exercise of a reasonable care could have known of their presence. Defendant negligently left the door open. The plaintiff child, through no negligence of the plaintiff, entered the shed and was suffocated by the gases. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained and the plaintiff appeals. Held, the complaint stated facts sufficient to constitute a cause of action under the attractive nuisance doctrine.<sup>1</sup>

The Supreme Court of the United States decided that a railway company was liable in an action by a child six years of age when he hurt himself upon a turntable notwithstanding the contention that the child was a trespasser to whom the company owed no duty to make its premises safe.<sup>2</sup> This decision created a particular exception to the general rule that there is no affirmative duty on the part of the landowner to make his land safe for trespassers but only the duty to refrain from intentionally or wantonly injuring them.<sup>3</sup> Since that case the majority of the juris-

<sup>15</sup> *Indiana Natural Gas & Oil Co. v. O'Brien* (1903), 160 Ind. 266, 65 N. E. 918, 66 N. E. 782.

<sup>16</sup> *Montieth v. Kokomo Enameling Co.* (1902), 159 Ind. 149, 64 N. E. 610.

<sup>17</sup> *Malloy v. Starin* (1906), 113 App. Div. 852, 99 N. Y. Supp. 603.

<sup>1</sup> *Drew v. Lett*, Appellate Court of Indiana, October 6, 1932.

<sup>2</sup> *Sioux City & Pacific R. Co. v. Stout* (1873), 17 Wall. 657, 21 L. Ed. 745.

<sup>3</sup> Thompson, *Law of Negligence*, 871, 874; *Penx v. McCormick* (1890), 125 Ind. 116, 25 N. E. 156, 21 A. L. R. 271, 9 L. R. A. 313; *Indianapolis, Peru & Chicago*