1935

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NOTES

AN AUTOMOBILE GUEST STATUTE IN KENTUCKY

In a recent Kentucky case action was brought against the owner and operator of an automobile to recover damages for injuries to the plaintiff sustained by him while riding in the automobile. Defendant pleaded that plaintiff was, at the time of the injury, riding in his automobile as a guest. Upon demurrer to this plea the question as to the constitutionality of the guest statute passed by the Kentucky Legislature in 1930 was definitely raised. It provides, "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 any injuries received, death, or any loss sustained, in case of accident, unless such accident shall have resulted from an intentional act on the part of said owner or operator." The statute was held unconstitutional. So the law in Kentucky as to the liability of the owner or operator of an automobile for injuries to his guest, in case of accident, is to be found solely in the judges' interpretation of the common law as laid down in their decisions.

The Kentucky court holds that the driver of an automobile owes to a guest the duty of exercising reasonable care in its operation so as not to increase the hazards of travel or to create any new dangers. This is in accord with the general rule as to the common law liability in such cases. In a Federal case

1 Ludwig v. Johnson, 243 Ky. 533, 49 S. W. (2d) 347 (1932).
5 Ingerick v. Mess, 63 Fed. (2d) 233 (1933).
it was held that it was negligence, for which the guest might recover, for the driver of the automobile to fail to warn the guest of the bad condition of the tires. A minority, consisting of four states, requires proof of gross negligence on the part of the driver before a guest can recover. It seems that this result is reached by analogy to the common law liability of a gratuitous bailee.

Statutes in nine states limit the driver's liability to a guest to cases where injuries are caused by accident resulting from the willful misconduct or gross negligence of the driver. Statutes in ten states allow recovery to the guest only in cases where the accident causing the guest's injury resulted from willful or wanton misconduct of the driver. A statute of this kind was passed by the legislature of Maryland in 1931, but it was vetoed by the governor.

The court in reaching the decision that the Kentucky statute was unconstitutional considered three sections of the state constitution: Sections 241, 14, and 54. Section 241 provides, "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case damages may be recovered for the injury." Section 14 provides that "every person, for injury done him in his lands,

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5 Yearwood v. Yearwood, 45 Ga. App. 293, 164 S. E. 105 (1932); Semons v. Towne, 188 N. E. 605 (1934); Collins v. Robinson, 169 S. E. 690 (1933); Eubanks v. Kielmeier, 171 Wash. 484, 18 Pac. (2d) 48 (1933).

6 Masseletti v. Fitzroy, 228 Mass. 487, 118 N. E. 168 (1917); West v. Poor, 196 Mass. 183, 81 N. E. 960 (1907).


9 Laws of Maryland, 193 C. 391, p. 978.
goods, person, or reputation shall have remedy by due course of law". Section 54 provides, "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death or for injuries to person or property." The court referring to section 54 said, "When that section is read in connection with other sections of the same instrument, such as sections 14, and 241, the conclusion is inescapable that the intention of the framers of the constitution was to inhibit the legislature from abolishing rights of action for damages for death or injuries caused by negligence". It was then decided that, since the guest statute abolished a guest's right of action for injuries resulting from an accident caused by the driver's negligence, it was unconstitutional.

The court relied principally upon an Oregon case, Stewart v. Hauk, in which the Oregon court held a guest statute unconstitutional on the ground that it took away the guest's right of action arising from an accident caused by the driver's negligence. The court held that the statute violated Art. I, Section 10 of the Oregon Constitution which provides, "Every man shall have remedy by due course of law for injury done him in his person, property or reputation." The court said, "The purpose of this provision is to save from legislative abolishment those jural rights which had become well established prior to the enactment of our constitution." It then held that the statute was unconstitutional because it abolished a guest's right of action for injuries caused by the driver's negligence.

On a motion for rehearing the Connecticut case, Silvers v. Silvers, was called to the Oregon court's attention. In that case the Connecticut Guest Statute was held constitutional and Connecticut has a constitutional provision similar to that of Oregon. But Connecticut's guest statute limited the driver's liability to cases in which injuries were caused by intentional misconduct of the driver, or his heedlessness or recklessness; and the Connecticut court held it only freed the host from liability to a guest for injuries caused by ordinary negligence.

After considering the Connecticut case the Oregon court said, "Since the act preserved liability in instances where the injury was inflicted intentionally, heedlessly, or through reck-
less disregard for the rights of others, and withheld liability only to a nonpaying guest for ordinary negligence, the court reasoned that the purpose of the act was to fix the measure of care a host owed to his guest—and it sustained the validity of the act.”

Speaking of the fatal features of the Oregon guest statute, the court said, “It seems to us that these identify our act, not as an effort of the police power to regulate the operation of automobiles by prescribing the duty of host to guest, but as one wherein this element of the situation remains untouched, and the sole change effected is the denial of the remedy to an injured guest. In our case, the act does not endeavor to re-adjust the duty, but attempts to abolish the remedy; in the Connecticut case, the act revised the duty, and afforded redress to all injured through a breach thereof.” The court therefore concluded that there was no conflict between its decision and the decision of the Connecticut court.

In the following year (1929) the Oregon Legislature passed another guest statute, but in that act the guest’s right of action is denied “unless such accident shall have been intentional on the part of said owner or operator or caused by his gross negligence or intoxication or his reckless disregard of the rights of others.” This statute has been applied three times since its passage, and as far as the writer can find, its constitutionality has never been attacked in the court of last resort.

Oregon and Connecticut, like Kentucky, have constitutional provisions prohibiting the legislature from abolishing rights of action for damages for death or injuries caused by negligence. From the cases referred to it is evident that in these two states the courts consider that the test, as to whether a guest statute is constitutional or not, is, whether the statute merely regulates the duty owed by the driver to the guest in cases of negligence, or, abolishes the guest’s right of action altogether in such cases. If the statute provides that the guest shall have no cause of action for damages for injuries in case of accident unless such accident shall have resulted from an intentional act, or willful misconduct, such a statute is unconstitutional for it abolishes the guest’s right of action altogether in cases of negligence. If on the other hand, the statute provides that the guest shall have no cause of action for damages for injuries, in case of accident,
unless such accident shall have resulted from an intentional or wrongful act or the gross negligence of the owner or operator of an automobile, such a statute would be constitutional, for it merely regulates the duty which the driver of an automobile owes to the guest and does not abolish the right of action.

The California Court has also held that a guest statute which limits the guest’s right of action to cases in which injury or death resulted from intoxication, willful misconduct, or gross negligence of the host, does not take away a cause of action, which the guest would otherwise have had, but only changes the proof required to permit a recovery. The California Court has also held that a guest statute which limits the guest’s right of action to cases in which injury or death resulted from intoxication, willful misconduct, or gross negligence of the host, does not take away a cause of action, which the guest would otherwise have had, but only changes the proof required to permit a recovery. The California Court has also held that a guest statute which limits the guest’s right of action to cases in which injury or death resulted from intoxication, willful misconduct, or gross negligence of the host, does not take away a cause of action, which the guest would otherwise have had, but only changes the proof required to permit a recovery.

Later when this guest statute was amended by eliminating gross negligence and leaving only intoxication and willful misconduct as grounds for the guest’s recovery, the court still held that it did not destroy the right of action against the host for wrongful death of the guest, but merely changed the nature of proof required. The cause of action in two of the above mentioned California cases arose under a death statute which provided a cause of action for wrongful death and the California Court decided that if the legislature took away the cause of action both for ordinary negligence and gross negligence, it did not take away a cause of action given by the statute, but merely changed the nature of proof required. In one of these cases the California statute was held constitutional.

The Kentucky court has definitely decided that the Kentucky constitution guarantees a cause of action for negligent injury, or death, but it would seem that the legislature could change the nature of the proof required—or change the degree of duty owed—and limit a guest’s right of action to cases in which the accident causing the injury results from the willful misconduct or gross negligence of the driver.

The writer suggests the following guest statute for Kentucky:

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

14 Stotts v. Blickle, 30 Pac. (2d) 392 (1934); Forsman v. Colton, 28 Pac. (2d) 429 (1934).
death, or for any injuries received, or for any loss sustained, in case of accident, unless such accident shall have resulted from the intentional misconduct or gross negligence of said owner or operator.

The suggested statute merely adds to the statute of 1930 a provision for liability in cases where the accident is the result of "gross negligence" on the part of the driver of the automobile.

The question now arises, can the constitutionality of this statute be supported by the Kentucky cases? The distinction between ordinary negligence and gross negligence is recognized in Kentucky by Section 6 of the Kentucky statutes which provides for punitive damages in case of death caused by gross negligence. This section of the statute was passed to carry into effect Section 241 of the Kentucky Constitution. The distinction between the degrees of negligence is pointed out in the cases decided under this section of the statute. It is also recognized in Kentucky that, while a willful act and a negligent act are different causes of action, ordinary negligence and gross negligence are only different degrees of the same cause of action. This is shown by the following quotation:

"The words 'wrongful act' of the constitution, and 'wilful act' of the statute do not primarily refer to an act of negligence, which is the opposite of those terms. The word 'gross' when used to qualify the word 'negligence' is a relative one, and is supposed to emphasize merely the want of due care and negligence, as 'gross' or 'ordinary' according to the circumstances, relations, and conditions under which the due care is omitted to be exercised."

In supporting the statute in Kentucky, the difficult problem is the case of death caused by ordinary negligence. Section 241 of the constitution provides "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death."

In Howard's Admr. v. Hunter, the Kentucky court, in reference to the above section of the Constitution, said,

"It was the manifest intention of the constitutional provision quoted to allow an action to be maintained whenever the death of a person was caused by the negligent or wrongful act of another and it is not within the power of the legislature to deny this right of action. The words 'negligence' and 'wrongful act' are sufficiently broad to embrace every degree of tort that can be committed against the person."

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33 Clark v. L. & N. Ry. Co., 101 Ky. 34, 39 S. W. 84 (1897); L. & N. R. Co. v. Kelley's Admr., 100 Ky. 421, 38 S. W. 852, 40 S. W. 452 (1897).
35 126 Ky. 685, 104 S. W. 723, 724 (1907).
In this case action was brought by the administrator to recover for the death of his intestate caused by an alleged careless, wanton, or malicious use of firearms by the defendant. Section 4 of the Kentucky statutes provides that the widow and minor children of a person killed by careless, wanton, or malicious use of firearms may sue for the death. The lower court sustained a demurrer to the petition on the ground that the only cause of action was vested in the widow and minor children. The Court of Appeals reversed this decision, and held that the personal representative was given a cause of action by section 241 of the Constitution, and section 6 of the Statutes was passed to carry into effect the constitutional provision. It is obvious that the sweeping language used by the court was not necessary for the decision. But it was quoted in the case in which the 1930 guest statute was held unconstitutional. From the language of the court and of the constitutional provision it might appear at first blush that it would be impossible, under the Constitution, for the legislature to limit liability in any case where death has resulted to one person by the acts or omissions of another.

It is submitted that it was never intended that such should be the result of this constitutional provision. The provision was only intended to be a substantial duplicate of Lord Campbell's act of England, which has been followed in substance in most, if not all, of the states. "The purpose of Lord Campbell's act and the various acts in this country following it was to do away with the common law principle that a civil action could not be maintained to recover damages for the death of a human being." They were "only intended to enlarge the remedy and to allow a recovery when, under the facts, the decedent might have recovered if he had not died." It was not intended that these acts should create a new cause of action, independent of and more absolute than the cause of action that would have accrued to the decedent had he lived, but rather, to afford a new remedy in favor of the personal representative for

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"Ludwig v. Johnson, supra, note 1.


"Ibid.

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substantially the same cause of action. Further evidence that it was not intended that there should be a constitutional guarantee of absolute liability in every case in which the death of one person is caused by the negligence of another is afforded by cases holding that contributory negligence is a defence to an action for wrongful death. To the same effect are those cases holding that section 241 of the Constitution does not give a right of action against a master for the death of a servant caused by the negligence of a fellow servant, and those cases holding that recovery cannot be had both for the wrongful death and the personal injuries of the deceased. Therefore the Legislature should have the power under the Constitution to limit liability in actions for wrongful death just as much as it has in actions for personal injuries of the deceased.

The court, in Howard’s Adm’r. v. Hunter, supra, continued as follows:

"In Shearman & Readfield on Negligence, Section 3, ‘negligence’ is thus defined: ‘Negligence’ constituting a cause of civil action, is such an omission by a responsible person to use that degree of care, diligence and skill which it was his legal duty to use for the protection of another person from injury, as in natural and continuous sequence causes unintended damage to the latter. The word ‘negligence’ implies a breach of duty and a person cannot be legally negligent so as to subject him to damages except in respect to others to whom he owes a duty."

From this quotation it may be seen that negligence depends upon legal duty. The very definition itself admits that the duty may vary with the law which defines that duty. The guest statute which is recommended is only intended to vary the law defining the duty owed by the driver of an automobile to his guest, and not to remove the duty altogether. It is unfortunate that there is no better way to state the change than to state it in terms of ‘gross negligence’. The statute is worded as it is, because

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of the difficulty in instructing the jury under a statute worded in any terms other than degrees of negligence. Quoting from the same case as above, "Many wrongful acts are committed in which there is no element of negligence—no breach of duty is committed." The object of the suggested guest statute is to remove from the field of legal duty owed by the driver of an automobile to his guest, those obligations the breach of which have heretofore been denominated ordinary negligence.

It is concluded that a statute which frees the driver of an automobile from liability for injuries or death of a guest, in case of accident caused by ordinary negligence on the part of the driver, would be constitutional in Kentucky.

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