NOTES AND COMMENTS

AUTOMOBILES

INDIANA AUTOMOBILE GUEST STATUTE CONSTRUED

Plaintiff alleged in her amended complaint that she was a guest of the defendant in an automobile operated by him; that he drove onto a familiar railroad crossing at night without looking or slackening his speed; that the crossing flasher signal was operating and clearly visible; and that the car collided with a locomotive then proceeding over the crossing resulting in personal injuries to the plaintiff. Evidence was admitted without objection to the effect that the defendant was warned of the danger by other occupants of the car in time to have avoided the collision, but that he made no effort to stop or reduce speed. Judgment for plaintiff was affirmed by the appellate court,[1] and the cause was transferred to the supreme court. The defendant contended that the amended complaint merely charged negligence, and that the facts alleged were insufficient to charge "wanton or wilful misconduct" within the meaning of the automobile guest statute.[2] Held, affirmed. In determining what constitutes wanton or wilful misconduct within the statute, it is not necessary to prove that the motorist deliberately intended to injure the guest, but it is sufficient if it is shown that indifferent to consequences, the motorist intentionally acted in such way that the probable and natural consequences of his act were injury to the guest. Bedwell v. DeBolt, ——Ind.——, 50 N.E. (2d) 875 (1943).

Prior to the enactment in Indiana of a so-called "guest statute" the law relative to the liability of a motorist to his non-paying gnest was settled by the case of Munson v. Rupker.[3] This case held that "the owner or operator of an automobile owes to an invited guest the duty of exercising reasonable care in its operation and not unreasonably to expose him to danger and injury by increasing the hazards of travel."[4] While at common law the relationship of a gratuitous passenger of a private automobile to the owner or operator thereof was treated as analogous to various other common law relationships, it is generally conceded by the legal writers that, insofar as the operation of the car was concerned, the driver owed the guest a duty not to be negligent.[5]

With the growth of automobile transportation and the concomitant increase in accidents and litigation arising out of resulting injuries, it became necessary as a matter of policy to partially relieve owners

1. —— Ind. App. ——, 47 N. E. (2d) 176 (1943).
2. Acts 1937, c. 259, §1, Ind. Stat. Ann. (Burns, 1933) §47-1021.
3. —— Ind. App. ——, 148 N.E. 169 (1925).
4. —— Ind. App. ——, 148 N.E. 169, 171 (1925). See Coconower v. Stoddard, 96 Ind. App. 287, 182 N.E. 466 (1932).
5. See Prosser, "Torts" (1941) 633; Harper, "Law of Torts" (1933) 202; Weber, "Guest Statutes" (1937) 11 U. of Cin. L. Rev. 24, 25.

and operators from liability in guest cases.[6] Indiana's guest statute, as originally enacted in 1929, relieved the owner or operator from liability for injuries sustained by his guest except where the accident was " . . . intentional on the part of such owner or operator or caused by his reckless disregard of the rights of others."[7] The statute was first construed in the case of Coconower v. Stoddard in which it was held that "reckless disregard of the rights of others" connotes misconduct of a kind more culpable than negligence,[8] and further asserted that contributory negligence was, consequently, no defense to an action based on the statute.[9] Logic supports this conclusion since degrees of negligence had long since been discarded in this state[10] and it was properly assumed that the legislature intended to change the then existing law.[11] The court defined conduct to which liability attached under the statute as that by which the actor " . . . evinces an entire abandonment of any care, and a heedless indifference to results which may follow, and . . . recklessly takes the chance of an accident happening without intent that an accident occur."[12] This case was consistently followed until the statute was amended.[13]

The 1937 amendment provides for liability of the owner or operator to his injured guest only when his misconduct is "wanton or

6. For a discussion of the reasons underlying this policy and a summary of the statutes enacted by many of the states, see Comment (1934) 12 Tex. L. Rev. 303.

7. Acts 1929, c. 201, §1, Ind. Stat. Ann. (Burns, Supp. 1929) §10142.1. "That no person who is 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 reckless disregard of the rights of others."

8. 96 Ind. App. 287, 182 N.E. 466 (1932).

9. 96 Ind. App. 287, 298, 182 N.E. 466, 471 (1932). Also expressly held in Hoeppner et al. v. Saltzgaber et al., 102 Ind. App. 458, 471, 200 N. E. 458, 464 (1936). See Berry, "Law of Automobiles" (7th ed. 1935) 2.340; Harper, "Law of Torts" (1933) 325.

10. Coconower v. Stoddard, 96 Ind. App. 287, 182 N.E. 466 (1932); Union Traction Co. of Indiana v. Berry, Administrator, 188 Ind. 514, 121 N.E. 655 (1919); The Bedford, S., O. & B. R. R. v. Rainbolt, 99 Ind. 551 (1885). That this is the better view, see Harper, "Law of Torts" (1933) 170; Salmond, "Law of Torts" (8th ed. 1934) 461; Pollock, "Law of Torts" (13th ed. 1929) 457; Prosser, "Torts" (1941) 258; 1 Street, "Foundations of Legal Liability" (1906) 99; 1 Beven, "Negligence" (4th ed. 1928) 15.

11. 96 Ind. App. 287, 296, 182 N.E. 466, 470 (1932).

12. 96 Ind. App. 287, 296, 182 N.E. 466, 470 (1932). This definition was quoted with approval in Sheets v. Stalcup, 105 Ind. App. 66, 13 N.E. (2d) 346 (1938) and in Armstrong v. Binzer, 102 Ind. App. 497, 199 N.E. 863 (1936).

13. Kettner v. Jay, 107 Ind. App. 643, 26 N.E. (2d) 546 (1940); Jay v. Holman, 106 Ind. App. 413, 20 N.E. (2d) 656 (1939); Blair v. May, 106 Ind. App. 599, 19 N.E. (2d) 490 (1939); Sheets v. Stalcup, 105 Ind. App. 66, 13 N.E. (2d) 346 (1938); Johnson v. Peddicord, 105 Ind. App. 71, 10 N.E. (2d) 295 (1938); Hettmansperger v. Hettmansperger, 103 Ind. App. 632, 5 N.E. (2d) 685 (1937);

wilful."[14] Query then, how did the amendment change the existing law? It may be said that in the general tort field three types of culpable conduct are recognized: (1) negligence, (2) that intermediate "kind" which is here designated as "recklessness," and (3) intentional misconduct.[15] As pointed out above, the court, in construing the guest statute as originally enacted, refused to recognize degrees of negligence[16] and apparently established "recklessness" as the type of conduct to which liability attached.[17] Since in the instant case the court did not construe "wanton or wilful" as purely intentional misconduct,[18] the court is either guilty of inconsistency by classifying "recklessness" or it did not, by its interpretation of the Act, permit the existing law to be altered.[19] The latter course has often been taken by courts in other jurisdictions where the statute sought to make the motorist liable only for "gross negligence,"[20] and the court here would seem

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Kraning v. Taggart et al., 103 Ind. App. 62, 1 N.E. (2d) 689 (1936); Hoeppner et al. v. Saltzgaber et al., 102 Ind. App. 458, 200 N.E. 458 (1936); Armstrong v. Binzer, 102 Ind. App. 497, 199 N.E. 863 (1936).

14. Acts 1937, c. 259, § 1, Ind. Stat. Ann. (Burns, 1933) § 47–1021. "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 such motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the wanton or wilful misconduct of such operator, owner, or person responsible for the operation of such motor vehicle."

15. "While the courts, in modern decisions, have properly refused to recognize 'degrees' of negligence, a distinction is commonly made between 'mere negligence' and what is frequently called 'reckless and wanton,' or 'wilful and wanton' conduct. Such expressions are employed to designate acts or omissions which involve a higher degree of culpability than that generally understood by negligence. It is limited . . . to conduct 'in reckless disregard of the safety of persons or property of another by failing, after discovering the peril, to exercise ordinary care to prevent the impending injury'." Harper, "Law of Torts" (1933) §151.

16. See note 10 supra.

17. Compare the court's definition in Coconower v. Stoddard, 96 Ind. App. 287, 296, 182 N.E. 466, 470 (1932) with Professor Harper's definition in Harper, "Law of Torts" (1933) 325.

18. See instant case at 877-878.

19. The presumption is that the general assembly, by enacting new legislation, intended to change the pre-existing law. Sutherland, "Statutes and Statutory Construction" (Horack's ed. 1943) §4510. Note that the court expressly followed this rule of construction in interpreting the original guest statute. Coconower v. Stoddard, 96 Ind. App. 287, 296, 182 N.E. 466, 470 (1932).

20. Some courts, including those of Kansas, Michigan, and South Dakota, have disregarded the statutory use of the term "gross negligence" because the judiciary did not recognize degrees of negligence. Sayre v. Malcom, 139 Kan. 378, 31 P. (2d) 8 (1934); Stout v. Gallemore, 138 Kan. 385, 26 P. (2d) 573 (1933); Finkler v. Zimmer, 258 Mich. 336, 241 N.W. 851 (1932); Bobich v. Rogers, 258 Mich. 343, 241 N.W. 854 (1932); Melby v. Anderson, 64 S.D. 249, 266 N.W. 135 (1936).

to be justified in declining to recognize minute distinctions within the intermediate zone of culpable conduct, which distinctions are only designated by such terms as "wantonness," "wilfulness," and "recklessness," all of uncertain meaning and import.[21] It is very doubtful whether any valid distinction can be drawn between the "wanton or wilful" clause of the amendment and the "reckless disregard" clause of the original Act even on the basis of terminology since the terms are often used as synonomous.[22]

It is submitted that any distinction between the courts' definitions of the type of conduct to which liability attaches under the staute as originally enacted and under the statute as amended are more imaginary than real. The court justifiably declined to multiply the shadows in what is now a twilight zone in the law, and although the legislature must be assumed to have intended to change the existing law, that result has not been reached.

CARRIERS

LIMITATION OF TORT LIABILITY BY CONTRACT

Plaintiff, while a passenger on defendant's steamship, deposited cash and jewelry in the amount of $13,360 in defendant's safe-deposit box. Her ticket contained a contract limiting the carrier's liability to $250; however, insurance was offered at the rate of 1% of the excess, upon a written declaration of value, delivered to the carrier. Plaintiff did not take out any insurance, and upon demand defendant failed to return her property. Plaintiff brought action for the full value of the property, charging breach of the bailment contract and conversion. The court granted the defendant's motion for a directed verdict of $250 in favor of the plaintiff, in accordance with the special contract. Plaintiff appealed. Held, judgment affirmed. Reichman v. Compagnie Generale Transatlantique, ——N.Y.——, 49 N.E. (2d) 474 (1943).

The case first raises a question as to the circumstances under which a carrier may limit by contract its liability for negligence.[1] At

21. The cases are legion in which courts have attempted to define and distinguish these terms. See 36 Words and Phrases 489-509; 45 Words and Phrases 186-271; 44 Words and Phrases 589-623. One writer on this subject has pointed out that " . . . the terms most commonly used in automobile law may be arranged in the following ascending order of culpability: Negligence, Gross Negligence, Heedlessness, Recklessness, Wantonness, Wilfulness, and Intentional Acts. . . ." Appleman, "Wilful and Wanton Conduct in Automobile Guest Cases" (1937) 13 Ind. L. J. 131, 133-134. Any attempt to classify culpable conduct into so many types would appear only to create confusion and uncertainty.

22. For instance see Restatement, "Torts" (1934) §500 and the "special note" following; Harper, "Law of Torts" (1933) §151; Berry, "Law of Automobiles" (7th ed. 1935) §2.340.

1. Under the law of bailments, failure to return goods bailed establishes a prima facie case of negligence, and bailee must show that loss or damage was caused without fault on his part. Hackney et al. v. Perry, 152 Ala. 626, 44 So. 1029 (1907); Employers'