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## The Washington Automobile Guest Statute

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## COMMENTS

### THE WASHINGTON AUTOMOBILE GUEST STATUTE

The ordinary rules of negligence, applied in actions brought by a guest against his host for injuries suffered in an automobile accident, bring about results which are rather generally thought to be unsatisfactory. On the basis either of fairness,<sup>1</sup> that the guest is an ingrate if, willing to accept the accommodation of the ride, he is unwilling to take his chances with his host, or policy,<sup>2</sup> stemming from the more or less collusive nature of many such actions

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<sup>1</sup>See, for example, *Crawford v. Foster*, 110 Cal. App. 81, 293 Pac. 841 (1930) where it was said: "The proverbial ingratitude of the dog which bites the hand that feeds him finds counterpart in the many cases that arose where generous drivers . . . later found themselves defendants. Undoubtedly the legislature in adopting this act reflected a certain natural feeling as to the injustices of this situation." And compare *Cleary v. Eckart*, 191 Wis. 114, 210 N. W. 267 (1926); *O'Shea v. Lavoy*, 175 Wis. 456, 185 N. W. 525 (1921).

<sup>2</sup>See *Walker v. Adamson*, 62 P. (2d) 199 (Cal. 1936): "The purpose of the guest statute is to rid the courts of litigation arising out of auto

in which the theoretical adversaries cooperate in a friendly fashion to shift the burden to the insurance carrier, there has been a strong trend toward restriction upon recovery in a majority of the states, either by statute or by decision.<sup>3</sup> In Washington the limiting device employed by the court was the requirement that gross negligence be shown for recovery,<sup>4</sup> the rather unhappy history of this method coming to an end when the legislature assumed control over the situation by the enactment of Ch. 18, Laws of 1933:<sup>5</sup>

"Sec. 1: No person transported by the owner or operator of a motor vehicle as an invited guest or licensee without payment for such transportation shall have a cause of action for damages against such owner or operator for injuries, death, or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator."

Aside from the minor matter of the draughtsman's curious choice of words, by which "accident" and "intentional" are linked to create the paradox of an intended unforeseen event,<sup>6</sup> the statute raises two problems:<sup>7</sup> (1) what proof will sufficiently show inten-

accidents in which close relatives and associates sue others and engage in what in reality is a collusive suit for the ultimate spoilation of the insurer." In *Shea v. Olson*, 185 Wash. 143, 154, 53 P. (2d) 615 (1936) it is said: "It is a matter of common knowledge that, since 1926, when the gross negligence rule was first applied to host and guest cases, litigation arising out of such relations, where automobiles were involved, has steadily increased. It is also a matter of common knowledge that many owners and operators of automobiles carry liability insurance, and that, in many instances, the injured guest institutes an action against the host for the purpose of recovering damages from the insurance company. It has been asserted that collusion frequently takes place between host and guest . . ."

<sup>3</sup>Ala. Code (1936) § 1397 (224); Ark. Acts. (1935) § 179; Cal. Gen. Laws (Deering 1931) Art. 5128 § 141¾; Colo. Comp. Laws (1932) § 1384.22; Conn. Gen. St. (1930) § 1628; Del. Rev. Code (1935) § 5713; Idaho Ann. Code (1932) §§ 48-901, 48-902; Ill. Rev. St. (1935) c. 95a § 47-5; Ind. Ann. St. (Burns, 1933) §§ 47-1021, 47-1022; Iowa Code (1935) c. 251 § 5026-b1; Kans. Laws (1931 Supp.) c. 81; Ken. St. (Baldwin 1936) § 12-7; Mich. Comp. Laws (1929) § 4648; Mont. Rev. Codes (1935) §§ 1748.1-1748.4; Neb. Laws (1935) § 39-1129; Nev. Laws (1933) c. 34; N. M. Laws (1935) c. 15; N. D. Laws (1931) c. 184, p. 310; Ohio Gen. Code § 6308-6; Ore. Code (1930) § 55-1209, 1210; S. C. Code (1932) § 5908; S. D. Laws (1933) c. 147, p. 154; Tex. Ann. Civ. St. (Vernon 1936 Supp.) § 6701b p. 504; Utah Laws (1935) c. 52; Vt. Pub. Laws (1933) § 5113; Wyo. Rev. St. (1931) § 72-701. Liability under these acts is based upon units or combinations of heedless disregard, intentional act, heedlessness, wilful misconduct, gross negligence, or intoxication.

<sup>4</sup>See *Craig v. McAtee*, 160 Wash. 337, 295 Pac. 131 (1931); *Shea v. Olson*, *supra*, note 2, and authorities there cited; 2 WASH. L. REV. 197; 5 WASH. L. REV. 91; 7 WASH. L. REV. 337.

<sup>5</sup>REM. REV. STAT. § 6297-1. Sec. 2 of the act, excepting owners or operators of cars being demonstrated to prospective purchasers, is not quoted.

<sup>6</sup>The confusion arises because of the use of the word "accident" in the lay sense, as meaning "wreck"; such usage of the word is recognized in *Shea v. Olson*, *supra*, note 2.

<sup>7</sup>The problem of constitutionality is not treated in this comment; an excellent discussion is found in *Shea v. Olson*, *supra*, note 2.

tion to permit recovery under the statute, and (2) what circumstances will bring the plaintiff within or without the status of "invited guest or licensee without payment for . . . transportation."

The first question is answered by the three cases which have been decided under the statute. In *Shea v. Olson*<sup>9</sup> it was urged that it was for the jury to say whether or not it was defendant's intention to injure plaintiff, and that where the omission to exercise care is so gross that it shows an utter disregard for the safety of others, it will justify a finding of intention to accomplish the result,<sup>10</sup> a rule with which the court does not quarrel. But that, the opinion goes on to say, is not the question here; we are not concerned whether wilful or wanton misconduct may be held to be "intentional", "but whether the legislature, when it used the words 'unless such accident shall have been intentional on the part of the owner or operator', meant anything other than that the owner or operator must have purposely brought about the 'accident' ".<sup>11</sup> That it did mean exactly that the court feels is plain from the fact that the statute is obviously an attempt "to limit still further the liability" of the host to his guest "by withdrawing the question of negligence altogether and limiting the liability to cases where the owner or operator purposely caused a wreck or disaster."<sup>12</sup> Applying this construction to the case in question, since "there was no evidence of any intention on the part of defendant to commit suicide, homicide, or mayhem, or to destroy property, we conclude that there was no basis for holding defendant liable as for an 'intentional accident' ".<sup>13</sup>

As a decision on the impropriety of an inference of intent from the facts of the particular case, this is perfectly satisfactory;<sup>14</sup> as a repudiation of the fiction whereby courts escape the consequences of contributory negligence or a lack of duty to use ordinary care by imputing to the defendant a purposeful state of mind from facts indicating simply recklessness, it is admirable; but if it means that the jury may never, from the character of the defendant's conduct, properly infer an intent to bring about a wreck, then the legislature's attempt "to limit still further the

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<sup>9</sup>In order of decision, these are: *Shea v. Olson*, *supra*, note 2 (Jan., 1936); *Carufel v. Davis*, 88 Wash. Dec. 112, 61 P. (2d) 1005 (Oct., 1936); *Lassiter v. Shell Oil Company*, 88 Wash. Dec. 299, 62 P. (2d) 1096 (Dec., 1936).

<sup>10</sup>The page citations following are to the report of the case in 185 Wash. 143.

<sup>11</sup>At page 149.

<sup>12</sup>P. 150.

<sup>13</sup>P. 150.

<sup>14</sup>P. 151.

<sup>15</sup>Plaintiff was defendant's partner in a party of ten who drove in two cars to a roadhouse near Yakima for a dance. Arriving there, it was found to be crowded; and the party decided to go somewhere else; the other car left first, and defendant, who had been drinking, in an attempt to overtake the others drove 60 miles an hour at night on a dusty gravel road with five people in his coupe, did not see a curve, and went over the bank. Recklessness and gross negligence is clear, but as the court points out there is nothing from which an intent to drive over the bank may be inferred.

liability of owners and operators of motor vehicles to invited guests" has borne strong fruit indeed. Short of a declaration of intent by the driver, the guest's action must necessarily fail, and the difficulty of proving "an intention . . . to commit suicide, homicide, mayhem, or to destroy property" is multiplied a hundredfold by depriving the plaintiff of his usual evidence. This result is so extreme and unreasonable it seems probable that the holding should be interpreted to mean no more than this: (1) only intentional injury is actionable, (2) plaintiff must prove this intent specifically, in the sense but not to the degree required in cases of suicide, homicide, or mayhem, and (3) this burden is not sustained merely by showing recklessness, heedlessness, or gross negligence, since the jury cannot reasonably infer the necessary intent to injure—the "purpose to do something" as opposed to "indifference whether something is done or not"—from these alone.

The answer to the second question presents difficulties which only time and a series of decisions can determine. The three cases to which the statute has already been applied offer slight clues to its solution, since in none of them could the issue be seriously contested.<sup>15</sup> It is clear that the hiring of the vehicle, or its use to further the business purposes of the owner or operator<sup>16</sup> are not within the statute; it is clear that a purely social ride is within it; but the infinite factual variations between these two extremes will present knotty problems to the court. The wording of the statute itself is of comparatively little help. One point has been established by the case of *Forman v. Shields*,<sup>17</sup> though it would seem, in any event, explicit in the statute: the provision does not affect the liability of owner or operator of the automobile to any one standing in any other relationship than that of "invited guest or licensee without payment for . . . transportation." This means, as applied in the *Forman* case, that a joint adventurer does not come within its terms, which is consistent with the earlier holdings of the court dealing with the gross negligence formula.<sup>18</sup> In this connection it is probable that the nebulous concept of joint adventure will need

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<sup>15</sup>In the *Shea* case, as already indicated the parties were on a purely social expedition, paid for, so far as operation expenses are concerned, by defendant; in *Carufel v. Davis*, *supra*, note 8, plaintiff and family were invited by defendant and family to accompany them to a bathing beach near Spokane; and in *Lassiter v. Shell Oil Company*, *supra*, note 8, the driver, buying beer in Wenatchee, was overheard by plaintiff's decedent saying that he was going to Ellensburg; on the suggestion that decedent would like to ride along and visit his wife, the invitation followed. The court points out that "there is not a scintilla of evidence" (p. 300, Wash. Dec.) that this was other than a purely social invitation.

<sup>16</sup>Sec. 2 of the statute expressly excepts owners or operators demonstrating cars to prospective purchasers, a result which would seem to follow without explicit provision in the light of the holding in *Dahl v. Moore*, 161 Wash. 503, 297 Pac. 218 (1931), wherein the court refused to apply the gross negligence formula to a plaintiff while being carried in defendant's car to see a piece of real estate defendant proposed to sell; stress is laid on the fact that wherever the transportation is for the business benefit of the operator, the occupant, whatever else he may be, is not a guest.

<sup>17</sup>183 Wash. 333, 48 P. (2d) 599 (1935).

<sup>18</sup>See, for example, *O'Brien v. Woldson*, 149 Wash. 192, 270 Pac. 304 (1928); *Lloyd v. Mowery*, 158 Wash. 341, 290 Pac. 710 (1930).

modification in order to effectuate the purpose of the statute, for it is difficult to see wherein the purely social joint adventure,<sup>19</sup> whether or not involving the sharing of expenses arranged in advance,<sup>20</sup> avoids the evils recognized by court and legislature as calling for the enactment of the guest statute. Neither the shocking ingratitude of the guest nor the dangers of collusive action to fleece the insurance carrier can be avoided with any success unless much stricter limits are placed upon the doctrine than the Washington court now recognizes. The minimum requirement would seem to be a business advantage to at least the host in the transportation resulting in the injury; to permit a recovery on the basis of joint adventure taking the plaintiff out of the guest status where the friend, picnic bound, agree each to buy a gallon of gasoline,<sup>21</sup> or, on a goose shooting expedition, jointly to contribute to expenses,<sup>22</sup> is to emasculate the statute and defeat what can only be found to be the declared intention of the legislature.

A similar danger lies in the possibilities of the phrase "payment for such transportation". The term "payment" should not, of course, be limited merely to the delivery of money; rather, it should be construed to mean "compensation", which is the word used in the California and North Dakota acts.<sup>23</sup> But not any "compensation" should be enough to constitute the "payment" of the statute; certainly "reciprocal generousities" consisting of the purchase of gasoline, oil, meals, or accommodations should not do so,<sup>24</sup> and incidental services such as helping to change a tire or giving road directions<sup>25</sup> should not be enough. Nor should the fact that

<sup>19</sup>As in *Lloyd v. Mowery*, *supra* note 18 (hunting trip); *O'Brien v. Woldson*, *supra* note 18 (pleasure trip to Seattle from Spokane); *Forman v. Shields*, *supra* note 17 (senior class picnic).

<sup>20</sup>The court has said that the relation must originate in contract (*Rosenstrom v. North Bend Stage Lines*, 154 Wash. 57, 280 Pac. 932 (1929)), a requirement which is most conveniently shown by an arrangement in advance concerning expenses. But such an arrangement is not necessarily decisive, as the court points out in *Eubanks v. Kielsmeier*, 171 Wash. 484, 18 P. (2d) 48 (1933), since it may be "simply an expression of courtesy and appreciation that a guest often evinces and manifests" (p. 487). Possibly the weight to be attached to this statement in the *Eubanks* case is lessened by the importance seemingly given to the *absence* of such an arrangement as indicative of the guest status in the *Lassiter* case, *supra* note 8, but it would seem clear that in any event the sharing of expenses should not alone serve to take the purely social undertaking into the class of joint adventure.

<sup>21</sup>As in *Forman v. Shields*, *supra* note 17. It is interesting to note that the agreement was never carried out, a circumstance commented on in the *Eubanks* case, *supra* note 20, in finding no joint adventure.

<sup>22</sup>As in *Lloyd v. Mowery*, *supra* note 18. The parties, "friends of long standing", were accustomed to hunt together each season; can it be plausibly argued that the danger of a collusive suit is avoided because the expeditions were on the basis of "Dutch treat"?

<sup>23</sup>*Supra* note 3.

<sup>24</sup>See the court's statement in *Eubanks v. Kielsmeier*, *supra* note 20; *McCann v. Hoffman*, 62 P. (2d) 401 (Cal. App., 1936); *Ernest v. Bellville*, 53 Ohio App. 110, 4 N. E. (2d) 286 (1936); *Olefsky v. Ludwig*, 242 App. Div. 637, 272 N. Y. Supp. 158 (1934); 95 A. L. R. 1180.

<sup>25</sup>As in *Gruber v. Cater Transfer Company*, 96 Wash. 544, 165 Pac. 491 (1917), where plaintiff went along to give directions. But see *Lerma v. Flores*, 60 P. (2d) 546 (Cal. App., 1936), where it was held that plaintiff was not a guest because he gave directions as to route in order to avoid

such matters are offered or agreed upon in advance necessarily be decisive.<sup>26</sup> What is to be looked for is "compensation to the operator or owner in a business sense by the occupant's presence, and the fact that the carriage was undertaken by reason of that compensation";<sup>27</sup> given either by the occupant or in his behalf. Only thus may the danger of collusion be lessened; short of this the occupant is still a "guest" insofar as that word has real significance in the working of the legislative purpose.

Other types of problems suggest themselves. One example will suffice: under the gross negligence rule it is held that the infant child, "who has no option other than to accompany her mother", is not a guest.<sup>28</sup> But what will be decisive of the matter when the "option" formula will not serve? The plaintiffs in both the *Shea*<sup>29</sup> and *Forman*<sup>30</sup> cases were infants, though in neither was that fact mentioned as being significant in determining their status. Presumably some capacity is necessary in order to become a guest;<sup>31</sup> shall it be similar to the capacity to contract, to commit a crime, to be negligent? Preferably no arbitrary rule as to age should be adopted, but some quantitative measurement of the necessary understanding must be evolved.

Such questions may be multiplied to limits set only by ingenuity or industry. But it must be realized that upon their decision hinges the success or failure of the statute. The court has begun its task of application reasonably, carefully, and courageously; if it brings to later cases similar traits in equal measure, the legislative policy expressed in the guest statute will be fulfilled.

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traffic. If the occasion for transporting the occupant is the use of his information, the holding is probably correct; if the purpose is social, the information incidental to the ride, it seems improper.

<sup>26</sup>See comment in note 20 *supra*.

<sup>27</sup>Weber, "*Guest Statutes*" (1937) 11 UNIV. OF CINN. L. REV. 24, 40.

<sup>28</sup>Hart v. Hogan, 173 Wash. 598, 24 P. (2d) 99 (1933); the child was 12 years old. The basis for the holding is the involuntary nature of the occupancy. Kastel v. Stieber, 215 Cal. 37, 297 Pac. 932 (1931). Hence it has been held that a guest achieves the "no guest" status by a request to leave the vehicle: Blanchard v. Ogletree, 41 Ga. App. 4, 152 S. E. 116 (1930).

<sup>29</sup>*Supra* note 2.

<sup>30</sup>*Supra* note 17.

<sup>31</sup>Rocha v. Hulen, 6 Cal. App. (2d) 245, 44 P. (2d) 478 (1935); contains dictum to the effect that a five-year-old child has no capacity to "accept" a ride in a legal sense; held, that the guest statute did not apply.