Torts - Automobile Guest Passengers - Contributory Negligence as Bar to Recovery From Third Parties

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and defined the relevant market as a seven-state area. When the anticipated coal requirements of the plaintiff were compared with the amount of coal furnished out of this area, the resultant percentage figure was less than 1% — "conservatively speaking, quite insubstantial."29

The instant case points up the extremely important place occupied by a correct determination of the relevant market in which a given product competes. It may be even more valuable in the future, however, because of some statements in the opinion which seem to indicate that the Court may reconsider its position in Standard Stations. This inference is premised upon a passage in the Court’s opinion in which it inferred that it may weigh valid business purposes before invalidating requirements contracts under Section 3.30 The Court also quoted favorably from the parts of the opinion in Standard Stations which recognized desirable features of requirements contracts.31 The instant case may well provide a laudable and sorely needed element of flexibility in the application of Section 3 to requirements contracts, and will help bring the judicial standard of legality under this provision closer to that which has been administratively employed for some time.

James A. George

TORTS — AUTOMOBILE GUEST PASSENGERS — CONTRIBUTORY NEGLIGENCE AS BAR TO RECOVERY FROM THIRD PARTIES

Plaintiff sued to recover for personal injuries resulting from a collision involving an automobile in which he was a guest passenger and a bus owned by the defendant. The plaintiff and his host had been drinking together before the accident occurred. The court of appeal of Louisiana found the negligence of plain-

29. Id. at 631. The Court in this case did not make a determination of the line of commerce affected by the contract because of its disposition of the relevant market question. Rather, it assumed that it was bituminous coal.

30. The passage under consideration is: "In judging the term of a requirements contract in relation to the substantiality of the foreclosure of competition, particularized consideration of the parties' operations are not irrelevant." Id. at 632. Another statement of interest: "[A]t least in the case of public utilities the assurance of a steady and ample supply of fuel is necessary in the public interest." Ibid.

31. Id. at 631.
tiff’s host to have been a proximate cause of the accident\(^1\) and held, for the defendant. The action of a guest passenger, who voluntarily rides with a driver whom he knows or should know to be under the influence of intoxicants, constitutes contributory negligence which will bar his recovery from third persons involved in an automobile collision due to the host’s negligence.\(^2\) Otis v. New Orleans Public Service, Inc., 127 So.2d 197 (La. App. 4th Cir. 1961).

For the defense of contributory negligence to be available, it must be shown that the plaintiff’s failure to take reasonable care to avoid a foreseeable risk was a cause of his injury, and that his injury resulted from that particular risk.\(^3\) Though it is settled that the negligence of the driver will not be imputed to his guest passenger,\(^4\) the guest’s own conduct may amount

\(^1\) In a companion case, based on the same facts but involving a suit by the host driver against the same defendant, the court said that they did not necessarily disagree with the trial court’s finding of no negligence on the part of the defendant. But they preferred to base their decree for the defendant on the host’s contributory negligence. Hooker v. New Orleans Public Service, Inc., 127 So.2d 199, 201 (La. App. 4th Cir. 1961). In the instant case the court likewise pointed out that it had not necessarily disagreed with the trial court’s finding of no negligence on the part of the defendant. See Otis v. New Orleans Public Service, Inc., 127 So.2d 197, 198 La. App. 4th Cir. 1961).

\(^2\) It is to be noted that the court in the instant case did not affirm the trial court’s finding that there was no negligence on the part of the defendant, but barred the guest by reason of his contributory negligence. Otis v. New Orleans Public Service, Inc., 127 So.2d 197, 198 (La. App. 4th Cir. 1961).

\(^3\) “Contributory negligence is, as the phrase signifies, negligence which contributes to the accident, that is, negligence which has causal connection with it, and but for which the accident would not have occurred.” D & D Planting Co. v. Employers Cas. Co., 240 La. 684, 694, 124 So.2d 908, 912 (1960). See also Leonard v. Holmes & Barnes, Ltd., 232 La. 229, 94 So.2d 241 (1957); Vowell v. Manufacturers Cas. Ins. Co., 229 La. 798, 86 So.2d 909 (1956); White v. State Farm Mut. Auto. Ins. Co., 222 La. 994, 64 So.2d 245 (1953); Dickson v. Peters, 87 So.2d 187 (La. App. 2d Cir. 1956); Hebert v. Martinich, 80 So.2d 141 (La. App. 1st Cir. 1955).

to contributory negligence which may bar his recovery from his host or third persons. A passenger's contributory negligence may consist of an act or omission immediately preceding the accident resulting from a failure to protest or warn in the presence of a hazard he should have observed. It has been held that a guest passenger who voluntarily rides with a driver, whom he knows or should know is intoxicated, may not recover from his host driver for injuries sustained in an accident caused in part by the host's intoxication.

The instant case appears to be the first Louisiana decision on the question of whether a guest passenger, whose negligence consists merely of riding with an intoxicated driver, may recover

5. White v. State Farm Mut. Auto. Ins. Co., 222 La. 994, 64 So.2d 245 (1953); Scurry v. Baldwin, 191 La. 249, 155 So. 14 (1938); Delaune v. Breaux, 174 La. 43, 159 So. 753 (1932); Lorance v. Smith, 173 La. 886, 139 So. 571 (1932); Lawson v. Richard, 172 La. 696, 155 So. 759 (1932); Churchill v. Texas & Pacific Ry. Co., 151 La. 726, 92 So. 314 (1922); Hubble v. Bourg, 68 So.2d 639 (La. App. 1st Cir. 1953). The negligent conduct found in these cases was the failure of guests to use ordinary care, including the exercise of their own senses of sight, hearing and perception, to warn the host of impending danger.


7. At times the Louisiana courts have barred the guest passenger under the doctrine of contributory negligence. See Lyell v. United States Fidelity & Guaranty Co., 117 So.2d 290 (La. App. Orl. Cir. 1960); Richard v. Canning, 158 So. 598 (La. App. Orl. Cir. 1935); Livaudais v. Black, 127 So. 129 (La. App. 2d Cir. 1930).

At other times, the Louisiana courts have barred the guest passenger under the doctrine of assumption of risk. See White v. State Farm Mut. Auto. Ins. Co., 222 La. 994, 64 So.2d 245 (1953); Dowden v. Bankers Fire and Marine Ins. Co., 124 So.2d 251 (La. App. 2d Cir. 1960); McBride v. Travelers Ins. Co., 121 So.2d 283 (La. App. 1st Cir. 1960); Woods v. King, 115 So.2d 232 (La. App. 2d Cir. 1959); Lightell v. Tranchina, 115 So.2d 890 (La. App. Orl. Cir. 1959); Elba v. Thomas, 59 So.2d 732 (La. App. Orl. Cir. 1952). "[A]ssumption of risk . . . is used to refer to at least two different concepts . . . which . . . often produce the same legal result. (1) In its primary sense the plaintiff's assumption of risk is only the counterpart of the defendant's lack of duty to protect the plaintiff from that risk. In such a case plaintiff may not recover for his injury even though he was quite reasonable in encountering the risk that caused it . . . (2) A plaintiff may also be said to assume a risk created by the defendant's breach of duty towards him, when he deliberately chooses to encounter that risk. In such a case . . . plaintiff will be barred from recovery only if he was unreasonable in encountering the risk under the circumstances." 2 HAPNER & JAMES, TORTS § 21.1 (1956).

In Upshaw v. Great American Indemnity Co., 112 So.2d 125 (La. App. 2d Cir. 1959); Dickson v. Peters, 87 So.2d 187 (La. App. 2d Cir. 1956); and in White v. State Farm Mut. Auto. Ins. Co., 222 La. 994, 64 So.2d 245 (1953), the Louisiana courts have quoted James, Assumption of Risk, 61 YALE L.J. 141 (1952), saying that recovery of a guest may be refused against his host when the guest has assumed a particular risk, such as riding with an intoxicated driver, and that the courts have indiscriminately used this as contributory negligence.

This confusion of terminology is further shown in Cormier v. Angelle, 119 So.2d 876 (La. App. 1st Cir. 1960), where the court stated that under such circumstances the guest assumed the risks arising from such driving, and that the guest was contributorily negligent in riding with a drunken driver. And in Hill v. National Union Indemnity Co., 123 So.2d 812 (La. App. 2d Cir. 1960), the theory under which the guest passenger was barred was not named.
from a negligent third person even though the host driver's negligence due to intoxication was a contributing cause of the accident. The court apparently reached its negative conclusion on the theory that since the plaintiff was negligent in exposing himself to the risk of being harmed by his host's probable negligence, and since his host's negligence was a contributing cause of the accident, he could not recover for injury received in that accident. This rationale would seem to regard as unimportant the fact that the plaintiff's injury did not result entirely from the risk presented by the host driver's inebriated state, but combined with the defendant's negligence to produce the injury. In any event, it would appear that a just result was attained, for the court indicated that there were other adequate grounds leading to the same conclusion.

It is submitted, however, that a sounder analysis would permit recovery to the guest passenger whose only negligence consisted of riding with an inebriate. Otherwise, the passenger will be held to foresee, in addition to the possible negligence of his intoxicated host, the superadded risk of a third party's negligence. The rule of the instant case could be justified on the

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8. After the court cited numerous cases concerned with suits by the guest passenger against his host driver involving assumption of risk, and cited Richard v. Canning, 158 So. 598 (La. App. Orl. Cir. 1935), quoting from the latter as follows: "If it is actionable negligence to rent or loan an automobile to one who is manifestly intoxicated (Baader v. Driverless Cars, Inc., 10 La. App. 310, 120 So. 515 (1929)), then it is certainly negligence, which will prevent recovery, to ride with a driver obviously under the influence of liquor," the court concluded: "The same reasoning is applicable here." See Otis v. New Orleans Public Service, Inc., 127 So.2d 197, 199 (La. App. 4th Cir. 1961).

9. Whenever two negligent motorists collide, it can be said that "but for" the negligence of either party, the accident would not have occurred. In the instant case, therefore, it seems plausible to say that if the defendant had not been negligent, the host driver would not have hit the defendant's bus, and the plaintiff would not have been injured in an accident involving these parties. See RESTATEMENT, TORTS § 463 (1934), quoted in note 3 supra.

10. The court, by way of dictum, said that "the plaintiff was guilty of further independent negligence, which by itself would bar his recovery, in failing to discharge his duty as a guest passenger . . . to protest, observe and warn," but found it unnecessary to rule upon that feature of the case. See Otis v. New Orleans Public Service, Inc., 127 So.2d 197, 199 (La. App. 4th Cir. 1961).

11. The jurisprudence does not seem to support the proposition that the automobile guest is held to foresee the negligence of a third party.

In Robinson v. Miller, 177 So. 440 (La. App. Orl. Cir. 1937), an automobile guest passenger sued his host driver and a third party for personal injuries sustained in a collision. The trial court had sustained the defendant's exceptions of no cause or right of action. The court of appeal overruled these exceptions and remanded the case, thus not deciding the issue of the defendant's negligence. However, the defendant third party had contended that the plaintiff was contributorily negligent in riding on the running board of his host's automobile. The court, in answering this contention, said that though it is negligent for a person to ride on a running board, that circumstance does not of itself establish contributory negligence so as to preclude recovery from the owner of the automobile.
ground that public policy discourages the use of the public roads by those who have been drinking, and discourages the public from riding with them. However, if it is desirable legislative policy to protect the casualties of automobile accidents, this would appear to be an unsound position.

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which collided with the automobile on whose running board the guest was riding.

In Elliot v. Coreil, 158 So. 698 (La. App. 1st Cir. 1935), an automobile guest passenger sued the third party for personal injuries sustained in a collision between the guest's host driver and the third party. The host's negligence was not an issue in the case. Here, the guest was occupying a place in his host's "turtle shell." The defendant did not plead the plaintiff's contributory negligence, but did emphasize the plaintiff's position and prompted the court to mention the issue. The court said that if the defendant had pleaded contributory negligence on the part of the plaintiff, it would have been to no avail. The court then said, in connection therewith, that the guest passenger assumes only such risks as are incident to the operation of the automobile in which he is riding, and not the danger involved by the negligent driving of another automobile.

In Wirth v. Pokert, 140 So. 234 (La. App. Orl. Cir. 1932), an automobile guest passenger sued the third party for personal injuries sustained in a collision between the guest's host driver and the third party. In this case the host was not negligent. Here, the defendant contended that the plaintiff was contributorily negligent in that she was seated on a soap box in the rear of her host's automobile from which the side door had been removed, and that she was injured as a result of having fallen or being thrown from such a position onto the pavement. The court held that the guest passenger could not be held contributorily negligent on that account, for in so sitting she assumed only such risk as was incident to the operation of the car in which she was seated, and not such as was occasioned by the negligence of a third party.

Though in none of these cases was the host driver found to be negligent, it seems that the rule that the automobile guest passenger is not held to foresee the negligence of a third party would still apply even if the host were found to be negligent.