Louisiana Law Review

Volume 5 | Number 3
December 1943

Torts - Liability of Automobile Driver to Gratuitous Guest

J. S. D.

TORTS — LIABILITY OF AUTOMOBILE DRIVER TO GRATUITOUS GUEST—Plaintiff, while accompanying her sick daughter to the hospital, fell from an ambulance owned by the State Department of Public Welfare. She had entered the ambulance at the request of the attending physician, but without permission from the driver. The accident occurred when the side door of the ambulance flew open through no fault of the driver nor defect in the lock of the door. Plaintiff contends that because the vehicle was state-owned and operated for the benefit of Louisiana citizens, the driver owed a higher degree of care to his passengers. *Held,* "But there is no distinction made under the law between a person who requests and obtains the privilege of riding as a gratuitous passenger in an ambulance, state-owned or otherwise, and a passenger who requests and obtains the privilege of riding as a gratuitous passenger in any other kind of motor vehicle. In either case, the person is a gratuitous passenger or guest to whom the driver of the motor vehicle owes the same duty." The driver owed only the duty to exercise the ordinary care of a reasonably prudent man in the operation of a motor vehicle. *Morales v. Employer's Liability Assurance Corporation,* 202 La. 755, 12 So.(2d) 807 (1943).

An analysis of the multitude of automobile guest cases in Louisiana shows a considerable variation of decision. In the leading case of *Jacobs v. Jacobs,*[1] which involves the liability of a driver to a gratuitous guest, the court based recovery upon Civil Code Articles 2315 and 2316; and enunciated the following rule: "With regard to the care due by the driver of an automobile for the safety of a passenger riding as his guest, *we do not recognize the distinction* referred to in some jurisdictions *between gross or willful negligence and the ordinary negligence or imprudence* referred to in the provisions of our Civil Code, Articles 2315 and 2316."[2] (Italics supplied.)

Despite this seemingly definite statement of law we find that a number of judicial opinions are written in terms of "gross negligence." In one case, where the defendant passed a school bus on the right side at forty miles an hour, the court purported to base the plaintiff's recovery upon "gross negligence."[3] In another often cited case the court spoke of the "gross carelessness and negligence" of the defendant who had been unable to stop within the

1. 141 La. 272, 74 So. 992 (1917).
2. 141 La. 272, 286, 74 So. 992, 997 (1917).
3. Kimbro v. Holladay, 154 So. 369 (La. App. 1934).

range of his own vision.[4] Again in a case where, if the defendant had used the means at hand she could have controlled her car, the court held her neglect to be "not only lack of ordinary care, but gross negligence," and yet cited the *Jacobs* case where the court refused to recognize the distinction.[5]

However, the greater number of Louisiana cases have followed the course indicated by the *Jacobs* decision and have held the driver liable for the lack of ordinary care. The often cited case of *Lorance v. Smith*[6] states that the gratuitous guest occupies the status of a stranger, to whom the driver owes a duty to use "ordinary care" not to injure. The test similarly applied in several other cases has been did the host motorist exercise reasonable and ordinary care for the guest's safety.[7] The court has almost as frequently applied the reasonably prudent man test.[8] In one recent case where the defendant driver contended that he was not guilty of "culpable negligence," the court overruled his contention, citing at length the *Jacobs* case.[9] Another case followed the *Jacobs* case and held the host liable for slamming the car door on his guest's hand.[10] In one very recent case the court ambiguously declared that the driver owed the duty of "ordinary care and not to wilfully injure" his guest.[11]

In recent years a large number of states have altered these rules by legislation, commonly referred to as "Automobile Guest Statutes." They provide that operators of automobiles shall be liable for injuries to gratuitous guests only for "gross or wilful negligence"; with a further proviso, in some statutes, continuing liability for want of ordinary care where the host is driving while intoxicated.[12] Such statutes make an exception to the general common law rule which defines actionable negligence as the failure to take ordinary care under the circumstances. The controlling policy favoring such statutes is that the driver who gives a

4. Quatray v. Wicker, 134 So. 313 (La. App. 1931).
5. Lawson v. Nossek, 130 So. 669 (La. App. 1930).
6. 173 La. 883, 138 So. 871 (1931).
7. Delaune v. Breaux, 174 La. 43, 139 So. 753 (1932); Levy v. Leopold, 142 So. 191 (La. App. 1932); Monroe v. D'Aunoy, 143 So. 716 (La. App. 1932); Aden v. Allen, 3 So.(2d) 905 (La. App. 1941); Guillory v. Perkins, 6 So.(2d) 177 (La. App. 1942).
8. Christos v. Manos, 134 So. 713 (La. App. 1931); Leiser v. Thomas, 150 So. 81 (La. App. 1933); Haley v. Black, 152 So. 805 (La. App. 1934).
9. Duncan v. Pedare, 161 So. 221 (La. App. 1935).
10. Moore v. Davis, 196 So. 566 (La. App. 1940).
11. Rushing v. Mulhearn Funeral Home, 200 So. 52 (La. App. 1940).
12. Ala. Code Ann. (Michie, 1940) tit. 36, § 95; Ark. Dig. Stat. (Pope, 1937) §§ 1302-1304; Fla. Comp. Gen. Laws Ann. (Skillman, Supp. 1938) § 1296(a); Iowa Code (1939) § 5037.10; Mich. Comp. Laws (Mason, Supp. 1940) § 4648(10); Ohio Gen. Code Ann. (Page, 1938) § 6308-6.

free ride to the prevalent hitchhiker or to some other casual invitee should not be liable to the recipient of his hospitality if an accident results from his ordinary negligence. Otherwise he pays a rather high price for his Good Samaritanism. The Louisiana legislature, especially in these times when drivers are encouraged to share their cars, would do well to get in step by the enactment of such a statute.

J.S.D.

THEFT—CUMULATION OF SEVERAL MISAPPROPRIATIONS—Defendant was charged in the indictment with having, through a series of misappropriations, embezzled $3,274.06 of public money. The indictment charged defendant with violating Sections 903 and 904 of the Louisiana Revised Statutes of 1870. The various misappropriations were lumped together in determining the amount of the alleged embezzlement, in accordance with the rule set out in Article 225 of the Louisiana Code of Criminal Procedure as re-enacted by Act 57 of 1940. Attorneys for defendant filed a motion to quash the indictment on the ground that public embezzlement was not a graded offense; and that Act 57 of 1940 was therefore inapplicable. The trial judge refused to quash the indictment, but did order the district attorney to amend the indictment so as to charge each of the acts of misappropriations in a separate count. The district attorney applied for a writ of certiorari which was granted. *Held,* it was lawful to cumulate the aggregate amount of the embezzlement into one count. *State v. Doucet,* 13 So. (2d) 353 (La. 1943).

In *State v. Rodosta*[1] the Louisiana Supreme Court had declared that Article 238 of the Code of Criminal Procedure was unconstitutional since it effected a change in the substantive law governing parties to crimes. The constitutional mandate under which the Code of Criminal Procedure was adopted expressly provided that the Code was to be a Code of Procedure, and this purpose did not include changes in the substantive law.[2] It would therefore seem that Article 225, which permitted a cumulation of various separate thefts to determine the grade of the crimes of embezzlement, larceny, obtaining money by false pre-

1. 173 La. 623, 138 So. 124 (1931), noted in (1932) 7 Tulane L. Rev. 144. That article was held unconstitutional insofar as it abolished the distinction between an accessory before the fact and the principal, thereby changing the substantive law.

2. Constitutional amendment proposed by La. Act 262 of 1926, adopted November 2, 1926. Cf. La. Act 276 of 1926 (enabling act).