Since Boggs v. Plybon - The Automobile Guest in Virginia

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Since the decision rendered by the Supreme Court of Appeals in the case of *Boggs v. Plybon*, Virginia has been committed to the rule that an owner or operator of an automobile is liable to a guest only for injuries resulting from gross negligence. This rule was given statutory approval by the Virginia Legislature in 1938 in the form of a "Guest Statute."^2

Much has been written criticizing this limitation on a guest's right of recovery in such cases^3 and it is not the purpose of this note to re-examine the respective merits of the gross negligence rule and of the rule that ordinary negligence is sufficient for a recovery by a guest in automobile accident cases. It is directed, rather, toward applications of the "Guest Statute" of Virginia and, where necessary, those of other states which have statutes of similar import with a view toward clarification of some of the more difficult problems involved in construing the statute.

Code of Virginia § 8-646.1 (1950) provides: "No person transported by the owner or operator of any motor vehicle as a guest without payment for such transportation . . . shall be entitled to recover damages for death or injuries . . . unless such was caused by or resulted from the gross negligence or wilful and wanton disregard of the safety of the person or property of the person being so transported on the part of such owner or operator."

Who is a "guest" within the purview of the statute? The Restatement, Torts § 490, cited by the federal court^4 in applying the Virginia statute defines "guest" as "The word . . . used to denote one whom the owner or possessor of a motor car or other vehicle invites or permits to ride with him as a gratuity, that is, without any financial return, except such slight benefits as it is customary to extend as a part of the ordinary courtesies of the road."

Despite general acceptance, the definition does not completely solve the problem, for a line must be drawn to denote the point at which the driver or owner receives financial return other than those prescribed by the ordinary courtesies of the road.

The North Carolina Court, in construing the Virginia Statute,

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1. 157 Va. 30, 160 S.E. 77 (1931).
3. E.g. 18 Va. L. Rev. 342 (1932); 20 Va. L. Rev. 326 (1934).
has held that if the carriage is primarily for the attainment of some objective or purpose of the owner or operator of the automobile, then the passenger is not a "guest" within the meaning of the statute.5

No guest-host relationship existed where a part-time employee was driven home to get something to eat by an agent of her employer.6 Nor was such a relationship existing where plaintiff received a salary of $3.00 per week, meals, and transportation from her employer, defendant.7

In its treatment of the statute in Morse v. Walker,8 the court held that where an agreement, entered into between the driver and his passenger, obliges the passenger to purchase gas and oil to be consumed on the trip, such agreement being a condition or consideration without which the trip would not have been undertaken, such payment constituted "payment for transportation" within the meaning of the Virginia Statute.9 It is not enough, however, to remove the plaintiff from the "guest" category that he merely pays his own expenses and agrees to share the burden of driving.10 Even where the one transported understands that he is to share the expenses of a social trip he is still a "guest" within the purview of the statute unless there is an actual contractual relationship.11 Thus while it has never been decided by the Virginia Supreme Court of Appeals, it would seem reasonable to conclude, from the cases at hand construing the Virginia Statute, as well as those involving comparable statutes of other states12 that the effect of the sharing of expenses by the one transported is dependent upon its voluntary nature.

Benefits accruing to the driver or owner were held not substantial enough to remove the person transported from the guest category in Gale v. Wilbur13 where plaintiff was invited to accompany defendant to meet her husband; in Brown v. Branch14 where plaintiff assisted defendant, superintendent of a Sunday School which gave free transportation to a picnic to plaintiff and

8. 229 N.C. 778, 51 S.E.2d 496 (1949).
11. 27 VA. L REV. 560 (1941).
12. 60 C.J.S. Motor Vehicles § 399(5).
13. 163 Va. 211, 175 S.E. 739 (1934).
others but required them to pay for their food; nor in Miller v. Ellis\textsuperscript{15} where plaintiff had made a neighborly offer to defendant to help move material in a truck.

While one may start the journey as a guest, his status may change during the course of the trip. Thus in Braxon v. Flippo\textsuperscript{16} where plaintiff, an 18-year-old boy in defendant’s employ, requested defendant to take him to a friend’s house when he left work, and defendant undertook to do so, plaintiff’s status became no longer that of a guest when, on developing engine trouble, defendant told plaintiff to take the wheel while he poured gasoline into the carburetor. It was held that recovery could be had for the resulting injury if ordinary negligence could be proved.

Virginia has never had occasion to test the applicability of the “Guest Statute” to the “car pools” and “share the ride programs” which were so abundant in World War II and which still exist in a limited number. However, in those states where the issue has been raised, the weight of authority seems to be with the view that the rides given to one’s fellow workers in such a pool are not given gratuitously but are in exchange for transportation and thus the character of the guest-host relationship is not assumed\textsuperscript{17}. Likewise, one who paid the owner of the automobile $3.00 per week and signed ration applications to help defendant secure gas and tires was held not to be a guest\textsuperscript{18}. And in Bond v. Sharp\textsuperscript{19} where two parties agreed to alternate weekly in the use of their automobiles with a five dollar penalty on the driver who failed to drive during his week, and where subsequently one of the vehicles broke down and each party agreed to drive for two weeks, held: the party being transported was a “passenger” and not a “guest.” Even so, there is authority for the proposition that such transportation involves only social amenities between fellow workers and that the guest-host relationship does exist, even though one member of the group, being without a car, pays a set amount each week to the driver\textsuperscript{20}.

\textsuperscript{15} 188 Va. 207, 49 S.E.2d 273 (1948).
\textsuperscript{16} 183 Va. 839, 33 S.E.2d 757 (1945).
\textsuperscript{18} Dennis v. Wood, 357 Mo. 886, 211 S.W.2d 470 (1948).
\textsuperscript{19} 325 Mich. 460, 39 N.W.2d 37 (1949).
\textsuperscript{20} Everett v. Burg, 301 Mich. 734, 4 N.W.2d 63 (1942).
Not the least of the problems involved in construing the Virginia Guest Statute is that of determining what constitutes gross negligence. It is for the plaintiff to sustain the burden of proof on the issue of gross negligence and where no primary negligence is shown, the measure of duty owed to the guest is immaterial. There is no well defined dividing line between simple negligence and gross negligence but the distinction is one of degree. Gross negligence has been defined as "an utter disregard of prudence amounting to complete neglect of the safety" of the guest, "heedless and reckless disregard of the rights of the guest," and conduct "such as to shock fairminded men." A degree of care which is sufficient under one set of circumstances may amount to gross negligence under others. The breach of one, two, or more statutory duties will not in itself sustain a finding of gross negligence within the meaning of the "Guest Statute" but if a number of acts of omission and commission are combined in such a manner that reasonable and fairminded men might differ as to whether the cumulative effect thereof constitutes gross negligence then the question is for the jury.

Whether or not there has been gross negligence is usually for the jury and has been so held in Thomas v. Snow where defendant went into the left lane to avoid a collision and did not return to the right in time to avoid the accident in question; in McGehee v. Perkins where defendant struck a truck parked and with a flare burning, and in Mountjoy v. Burton where the automobile was worn with use and had defective parts in the front end which made high speeds hazardous and where defendant was traveling at a high speed when the accident occurred. One who goes to sleep while driving may be found grossly negligent by the jury.

29. Ibid.
32. 188 Va. 116, 49 S.E.2d 304 (1948).
33. 185 Va. 936, 40 S.E.2d 803 (1947).
as may one who passes a number of cars on a curve while traveling at a fairly high rate of speed and runs into a stopped car without diminishing his speed. Of course these are merely illustrative cases and each case must depend upon its peculiar facts.

Where only one reasonable inference may be drawn from the facts of the case then the question of gross negligence becomes one of law. In *Kent v. Miller*, where the door of a new car became unlatched, causing injury to the plaintiff, such was termed an unforeseeable event and not gross negligence as a matter of law.

In *Dinges v. Hannah* the court ruled out gross negligence where defendant exceeded the wartime speed limit of 30 m.p.h. and after being warned of an oncoming car in center lane of a three-lane highway had an accident, it not appearing that a car was coming in the center lane until a collision was imminent.

In *Hill v. Bradley* there was no gross negligence as a matter of law where the defendant was driving carefully at a fair rate of speed around a curve and the rear wheels of his car caught in ruts caused by streetcar tracks, causing him to lose control of the car.

Among the cases holding that the facts thereof constitute gross negligence as a matter of law are *Steel v. Crocker*, in which defendant drove in the left lane to pass three snow plows on a curve at the crest of a hill, "ignoring statutory requirements and all ordinary rules of safety" and *Remine et al v. Whited* wherein it was held that driving a car across an arterial highway without keeping a lookout when the car was full of women and children was gross negligence.

It appears that as regards "gross negligence" as well as the determination of who is a "guest," the court finds it easier to submit the facts of a case to a determination which will preclude recovery than to one which will permit it.

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35. *Wright v. Osborne*, *supra*.
38. 167 Va. 422, 189 S.E. 332 (1937).
40. 186 Va. 394, 43 S.E.2d 29 (1947).
42. 180 Va. 1, 21 S.E.2d 743 (1942).