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Liability in Guest-Owner Cases

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This article is to be strictly confined to cases in which the guest[1] in an automobile sues the owner thereof, herein known as "guest-owner" cases; and not cases in which the guest sues some third party involved in an accident, through which the guest sustained damages.

The distinction between these two types of cases must be clearly borne in mind in studying cases in which the guest sues, as the law, as applied, is far different. It seems as if the courts are extremely reluctant in permitting a guest to recover from a third party, as so many exceptions have been made to the general rule, such as contributory negligence, imputed negligence, master and servant, principal and agent, common purpose, joint enterprise, testing the danger; and to these general exceptions many divisions and subdivisions have been made;[2] but are more generous in guest-owner cases as there is but one exception. The only apparent reason for this divergence is that in almost all guest-owner cases the owner is protected by insurance, and the maxim: "Let the insurance company pay" apparently is followed.

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[1]A guest is one who, with the knowledge of the owner, is in the owner's automobile. The guest may be expressly invited and urged by the owner (297 Pa. 458) or invited by implication, as in a taxicab (92 Pa. Super. Ct. 356) or be a passenger without an invitation (75 Pa. Super. Ct. 333; 300 Pa. 225) or request the owner to permit him, the guest, to ride (297 Pa. 30).

If a person is in an automobile without the owner's knowledge, then he is not a guest, such as where the driver, not within the scope of his authority, asks or permits a person to ride (285 Pa. 72; 291 Pa. 588; 297 Pa. 86).

[2]See 290 Pa. 288; 298 Pa. 352, for lists of cases on some of these exceptions.

In guest-owner cases the general rule is: If the owner does not use due, reasonable and ordinary care under the circumstances for the safety of the guest, then he is liable.[3] To this general rule the first exception made was contributory negligence on the part of the guest.

One of the earliest Pennsylvania cases on this subject is *Cody v. Venzie, 263 Pa. 541.* On page 548 Justice Simpson states the rule and exception as follows:

> "If upon the whole case the jury should find that defendant was guilty of a want of ordinary care, to which the plaintiff did not contribute, they should find a verdict for the plaintiff; otherwise they should find a verdict for the defendant."

In the next case in point of time, *Vespe v. Rosen, 75 Pa. Superior Ct. 332,* the only point involved was whether the host was negligent. No question as to contributory negligence was raised.

The case of *Ferrell v. Solski, 278 Pa. 565,* was decided solely on the point whether the host was negligent. The host raised the question of contributory negligence, and in referring to it the Court, on page 570, stated:

> "This conclusion makes unnecessary an extended consideration of the second question raised. Appellant insisted deceased was guilty of contributory negligence, which prevents recovery. He was a guest to whom, as already noticed, the exercise of ordinary care was owed; *Cody v. Venzie, supra.* It was his duty to avoid apparent perils, and, if reasonably possible, hinder the attempted commission of negligent acts, carrying with them the likelihood of injury, if a recovery was to be had: *Renner v. Tone, 273 Pa. 10; Martin v. P. R. R. Co., 265 Pa. 282.* In the present case, Ferrell was on the rear seat, and traveling at the same speed as maintained throughout the trip. The accident occurred from inability to quickly straighten the car, after the de-

[3]Citations need not be made as in all of the cases herein dealt with, the general rule is set forth.

pression was encountered. No effective protest could then have been made by him, and it cannot, therefore, be fairly said the deceased invited the harm by not giving some warning to the driver. At least this was a question for the jury, under the circumstances, and it found for the plaintiff."

It should be noted that the guest in this case sat in the back seat of the automobile.

The general rule, without the exception of contributory negligence, was applied in the case of *Simpson v. Jones, 284 Pa. 596.* In deciding whether the host was negligent the theory of unavoidable accident was applied, as it had been in *Ferrell v. Solski, supra.*

In the case of *Wagenbauer v. Schwinn, 285 Pa. 128,* the verdict was in favor of the owner. On appeal the Court, desiring to sustain a verdict, held that the guest, who sat in the front seat, "concurred in any negligent act of his host" (page 131) but not feeling certain of its position, undoubtedly due to the peculiar facts in the case, immediately added that the condition of the road may have been the immediate factor, and not the speed at which the host was driving.

The question of a guest being the servant of an owner was introduced in the case of *Campagna v. Ziskind, 287 Pa. 403.* In this case the servant was a guest of the owner and was riding in the owner's automobile. The Court did not consider the rule under discussion, but dwelt upon the question of whether a suit at common law could be maintained. The Court held that as the guest was a servant of the owner, his remedy was under the Workmen's Compensation Act, and not at common law.

In the case of *Schomaker v. Havey, 291 Pa. 30,* the guest was standing on the runningboard of the automobile. The Court applied the exception of contributory negligence but based its conclusion upon cases in which people stood in dangerous places.

The general rule was reiterated as dicta in the case of

Conroy v. Commercial Casualty Insurance Co., 292 Pa. 219, 228.

In the case of *Brown v. Cunningham Cab Company, 92 Pa. Superior Ct. 356,* the general rule, without any exceptions, was applied.

The exception of contributory negligence to the general rule was discussed in the case of *Moquin v. Mervine, 297 Pa. 79.* In that case the host, who was the appellant, advanced the exception and the Court considered it but declared that the guest was not contributorily negligent.

In the case of *Lloyd v. Noakes, 96 Pa. Superior Ct. 164,* the Court distinctly recognized the exception of contributory negligence to the general rule.

From the foregoing cases we can assume that the only exception advanced to that date to the general rule, was contributory negligence, and in determining whether the guest contributed to the negligence, we must consider only guest-owner cases and dare not consider guest-third party cases.

In the case of *Lloyd v. Noakes, supra,* decided April 10th, 1929, the Superior Court intimates that another exception to the general rule exists, namely, common purpose, or otherwise known as joint enterprise. At page 167 the Court states:

> "As the parties were not engaged in a joint enterprise * * * * the negligence of the driver is not imputable to the plaintiff";

thus leaving one to surmise that if the parties had been engaged in a common purpose, negligence of the owner could be imputed to the guest. This intimation was based upon guest-third party cases.

Very shortly after the *Lloyd-Noakes* case, namely, on May 27th, 1929, the theory of common purpose in guest-owner cases was argued before the Supreme Court, in the case of *Hilton v. Blose, 297 Pa. 458.* It is evident from a reading of this case that the Court in its opinion filed July 1st, 1929, did not know what position to take—whether to state that common purpose did or did not apply; and con-

cluded to hold the matter in abeyance by deciding upon the facts. The uncertainty of the Court is shown by the statement on pages 460-461:

> "It appears that both plaintiff and defendant were interested in the pastime of bowling, and on the evening in question were going to a common destination to play this game; but they were not to engage in the same game nor were they on the same team. While they had a similar purpose in view in making the trip—that is, to bowl—yet their purpose was not a common one, since they were to play in different teams and bowl in different games."

This hair-fine and minute distinction that there was no common purpose, is difficult to understand, especially when one reads the case of *Martin v. Penna. R. R. Co., 265 Pa. 282.* In that case the owner and guest had gone to a ball game and on the return therefrom the accident occurred. A third party was sued. Without discussion the Court immediately stated that there was a common purpose. The only reasonable conclusion is that the Court believed that the guest should recover in a suit against the owner and not against the Pennsylvania Railroad Company. The *Hilton* case left the question as to whether the exception of common purpose applied to the guest-host cases, in a far worse position than before. The Common Pleas judges were in a quandry, and in deciding cases on this subject most have resorted to the maxim: "Let your conscience be your guide."

This uncertainty of position was not clarified by the case of *Campagna v. Lyles, 298 Pa. 352,* decided November 25th, 1929, which was a guest-third party case. This case contained dicta to the effect that in a guest-owner case, if the parties were engaged in a joint enterprise, then the guest could "not be considered as an invited guest with the resulting limited liability for negligent acts of the driver". (page 356) This conclusion was based solely upon the case of *Campagna v. Ziskind, supra.* This dicta was not accorded any great weight for the reason that in the *Ziskind* case the sole question was whether or not suit could be brought at

common law; second, that in the *Ziskind* case there was not a single statement in the Opinion referring to or even intimating that a joint enterprise existed, and third, that in the *Lyles* case it was pure dicta and in no way could be connected with the *ratio descidendi.* The profession and lower courts were still in a quandry concerning the rule.

Fortunately Chief Justice Moschzisker, in a very able opinion filed May 12th, 1930, definitely decided the point in the case of *Johnson v. Hetrick, 300 Pa. 225.* On pages 231, 232 and 233 he stated:

> "Even should the view be taken that plaintiffs' and defendants' descendents were engaged in a joint enterprise at the time of the accident, if Johnson's (guest) death was due to the negligence of Hetrick, (driver) the latter would be liable in damages * * * * The controlling principle is simply that, be it a case of master and servant,[4] co-servants, principal and agent, or participants of any character in a common or joint enterprise, no person may negligently injure another without being responsible for damages".

Citing from a Washington case, the Opinion, on page 233, states:

> "When the action is brought by one member of the enterprise against another, there is no place to apply the doctrine of imputed negligence. To do so would permit one guilty of negligence to take refuge behind his wrong".

It can now be assumed that the common purpose theory is not an exception to the general rule in guest-owner cases.

Thus we can conclude that a person in an automobile with the knowledge of the owner, can recover damages if the owner did not use due, reasonable and ordinary care under the circumstances for the safety of that person, provided that that person did not contribute to the negligence.

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[4]See Campagna v. Ziskind, supra.

Apportionment of Property and Indebtedness Under The School Code

White Township School Directors' Appeal, 300 Pa. 422 is the first appellate court decision on the above subject since the School Code was enacted in 1911 and it may prove to be the last one. Sec. 114 (P. L. 312) of the Code provides that the decision of the court upon exceptions to the report of commissioners shall be final, "without any right of appeal". Appellate review is accordingly confined to questions of jurisdiction alone. "We may determine whether the given act is properly within the scope of their power, but the manner of its performance, or the propriety or fairness of the conclusion, is not the subject of review." The judgment of the court below was accordingly affirmed, since the Code clearly confers jurisdiction upon the court below to hear, consider and determine the questions involved.

The language of the Code gives little guidance to commissioners and lower courts and though the above case was decided on the ground indicated, statements in the opinion as to the effect of the Code upon the rules laid down in decisions under prior laws are of importance. The Court states that section 111 of the Code changed the prior laws as to payments by one district to the other. The earlier acts were the Acts of April 11th, 1862, P. L. 471 and of June 24th, 1895, P. L. 259. These acts made no provisions for compensation to a new or outgoing district for an undue proportion of school properties left within the bounds of the old district. These acts provided for compensation to the old district for any undue proportion of school property located in the territory withdrawing but made no provision for the reverse situation.

In *Munhall Boro. School District v. Mifflin Township School District, 207 Pa. 638,* it was held that the Act of 1895 contained no authority to decree a balance due to the outgoing district for an undue proportion of school property remaining in the old district. It was suggested as a reason

for this apparently one sided provision that the legislature assumed that the withdrawing territory would so adjust the line of division as to get its full share of school property. Justice Kephart cites this decision in the *Munhall Boro.* case as an instance of the changes made in the prior laws by the School Code.

The relevant provisions of the Code are contained in sections 110, 111 and 112. Section 110 provides that when the land of a school district is divided between two or more districts or where land is taken from one district and added to another or where a new district is carved out of one or more old districts, then a *"just and proper* adjustment and *apportionment of all school property,* real and personal, including funds, as well as indebtedness, if any, shall be made to and among such school districts".

Section 111 provides that in making such adjustment of the amount payable by one district to another and in the apportionment of indebtedness there shall be *"taken into consideration"* the amount and assessed value of the annexed territory and of the other land "in the districts" as well as the value of all school property "in such districts". During the first school year after the change of boundaries the adjustment may be made by the boards of school directors of the school districts concerned.

Section 112 provides that if the directors cannot make the adjustment within the time stated, the Court of Common Pleas shall, upon petition, appoint "three disinterested commissioners, residents and tax payers of the county," not residents of the affected districts, who, after a hearing, shall report an apportionment *"of all school property,* as well as indebtedness", among the districts affected, stating the amount payable from one to another and the amount of indebtedness, if any, be assumed by the annexing district.

The Code could not be clearer in requiring an apportionment of property as well as of indebtedness. By express terms it repeals the Acts of 1862 and 1895. But the desire of the courts to lean upon precedents has led to some decisions which appear to ignore the plain language of

the Code.

The Act of June 1st, 1887, P. L. 285, provided that when a borough annexed adjacent land, the court should appoint an auditor to report *inter alia* the liabilities of the school districts affected and to adjust these together with the value of the property held or acquired, *"justly and equitably"*. This act authorized decreeing a balance due to the outgoing territory for an undue proportion of school property remaining in the old district. See *Darby Borough School District's Appeal, 160 Pa. 79,* and *Sugar Notch Borough, 192 Pa. 349.*

The Code merely provides that the adjustment shall be *"just and proper"* and that two things shall be taken into consideration, first, the proportion of the assessed value of the lost territory to that of the whole district from which it is taken, and second, the value of school property in the detached and remaining territory.

Justice Kephart states that the Code makes no change in the reasons justifying a decree requiring a payment from one district to another and this is true, since a district receiving less than its fair proportion of the school property in a divided district always had a good reason for asking that the inequality be adjusted by a proportionate assumption of indebtedness or by a money payment, when this was necessary to equalize the adjustment.

He further states that the Code is not to be construed as laying down a list of the exclusive factors to be considered in making an adjustment between districts. Assessed values are not to be final. Values may be otherwise shown. Nor is it a mere problem in proportion, since this may not produce a *"just and proper adjustment."* The commissioners, under the direction of the court of common pleas, must take testimony as to all factors which may "enlighten the question". The court may take additional testimony to aid it in disposing of exceptions or may refer the matter back to the commissioners to do so and to amend their report in the light of the new testimony. There is "no limit on the scope of the investigation," but the judgment of the court below is, "short of fraud", final.

In *Petition of Mifflin Twp. School District, 71 P. L. J. 227,* Judge Shafer remarked that the Code sets up a proceeding entirely different from those which were provided by the former acts and seems to intend to provide for a sort of *equitable arbitration upon a "general survey of the affairs of each* of the districts" affected, and so the amount be determined which *"either district should pay to the other."* He recommitted the case to the commissioners and instructed them to take testimony as to the school property and indebtedness of the *annexing* school district, to ascertain what burden its taxpayers were already bearing and to ascertain whether the school population in each district would be cared for by the existing school houses at the time of the annexation or whether their distribution might have been so disturbed by the annexation that new buildings might be necessary in one of the districts. In short, equity requires a survey of the entire school situation in both districts, and of the burden of debt each bore before the change and the effect upon this burden of any proposed decree.

The correctness of the result arrived at in some of the reported cases decided under the Code may now be considered. The first decision is that of *School Dist. of Mifflin Township, 65 P. L. J. 489, (1917),* a case in which a borough annexed adjacent territory in which there was no school property. Judge Carpenter thought that the value of school property was not to be taken into consideration in a case in which no such property was located in the annexed territory. Even under the Act of 1895, which required that debt be apportioned in accordance with the proportion which the assessed value of the detached territory bore to the assessed value of the whole, when it appeared that the debt was the result of a new building in the old district, the annexing district was not required to assume any of this debt. *(Re Cheswick Boro. School District, 52 P. L. J. 91).* But in such cases there may be no debt and much valuable school property may remain in the old district, for which property the taxpayers in the detached territory have made proportionate payment. Why should they not receive enough to equal their proportionate in-

vestment in these properties at their present worth, cost less depreciation?

In *Sandy Township School District v. The Falls Creek Borough School District, 10 D. & C. 817,* there was no school property in a portion of the township annexed to the borough. The commissioners reported money due the borough on account of the school property left in the township. The court on exceptions held that the borough must assume a portion of the old district's debt and that this was to be ascertained by the proportion of the assessed value of the annexed territory to that of the whole district from which it was taken. No allowance was made for the fact that the residents in the detached territory were losing school facilities for which they had paid in part. They were required to complete their share of full payment without a chance to benefit from such payment. The court could not see in the School Code an intention to change the rule laid down in the *Munhall Borough* case, so followed it and the *Mifflin Twp.* case in *65 P. L. J. 489.* Of course these cases would have been differently decided if the judges had had the benefit of Justice Kephart's construction of the Code.

In the case of *Patton Township School District, 67 P. L. J. 521,* a borough annexed part of the township in which there was a school building. The Commissioners viewed the school properties and appraised their values. They also took testimony relative to these values and so determined whether there had been an unequal division of the school property. They found a balance due from the borough and the court approved their findings.

In the *White Township* case the Commissioners found that the detached territory had an assessed value of about three-fourths of the whole but had within its bounds only about forty per cent of the school property. They deducted total debt from total assets of the old district and apportioned the net assets in proportion to the assessed valuation of the two sections of the divided district. Since the section with the greater value had gotten the smaller share in value of school property, they awarded to it $10,324.38 in cash and placed the entire debt on the section which had

the bulk of the school property. The result so arrived at placed a debt upon the township of over 18% of its assessed valuation. On its behalf it was contended that only quick assets should be charged against it not an undue proportion of ground, buildings and equipment. It was also contended that an indebtedness could not be placed upon the township in excess of the 7% limit fixed in Article IX, section 8 of the Constitution of Pennsylvania.

Judge McConnel pointed out that it was clear, under the terms of the Act of 1862, that the new district could be made to compensate the old for any undue proportion of school property in the new district but that the act contained no provision for the reverse situation, so that only quick assets and indebtedness were divided in proportion to assessed valuations when the new district received less than its share of school properties. (Citing *Appeal of the School District of Aleppo., 96 Pa. 76* and *Appeal of the School District of Aliquippa, 172 Pa. 81).* He further pointed out that the act of 1895 made no change in this regard but that the School Code of 1911 required a just apportionment of all school property and that either one should be required to pay the other for any undue proportion of school property located in it, and that the language of the Code was entirely different from that contained in the earlier acts. "The presumption is, then, that the words contained in the School Code are to have a different, and not the same construction as the prior acts *(Rich v. Keyser, 54 Pa. 86; Omit v. Commonwealth, 21 Pa. 426, 433; Commonwealth v. Pedder, 208 Pa. 28.)* In our opinion, therefore, under the School Code the commissioners appointed by the Court have the right to, and should consider whether there is an undue proportion of the school property remaining in either district and that each should compensate the other for such undue proportion of real estate, and in this respect the School Code is an entire change from the procedure which was authorized under the Acts of 1862 and 1895 and the commissioners are authorized and empowered and required to make a just and proper adjustment of the indebtedness

and apportionment of the school property in the two districts."

He further points out that in the *Patton Township School District* case in *67 P. L. J., 521*, the commissioners figured the proportions of the real estate in the divided sections and that the same was done in the case of *Sugar Notch Borough, 192 Pa. 349,* a case decided under the Act of 1887, which was like the School Code in that it required a "just and equitable adjustment." In that case $6,169.74 was awarded to the new school district to equalize the greater value of school property which remained in the other territory.

But he decided, as did the Supreme Court in affirming his judgment, that the adjustment is not a matter of mere mathematical calculation based on relative assessed valuations of real estate and the commissioners' appraisal of school property but that the matter is to be determined by no fixed rule but rather by the equities of the entire situation. He accordingly was induced by the consideration of the very heavy debt the award of the Commissioners placed upon the township to make a reduction in the amount of the award so as to bring it down to the 7% limit fixed by the Constitution. The costs of the proceeding were divided in the proportion of the assessed valuations of the two sections of the old district.

Taxes are paid on assessed valuations. School property is acquired only from taxes and borrowed money to be repaid from taxes. The propriety of apportioning all school property in proportion to assessed valuations of the divided sections is obvious and only such extraordinary conditions as resulted in the *White Township* case should be permitted to outweigh the equity arising from contribution to the cost of the property. Equitable power should not become an arbitrary power to take from one and give to another merely because that other might be more in need.

Carlisle, Penna. J. P. McKEEHAN