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Agency -- The Hapless Automobile Guest

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CASES NOTED

AGENCY—THE HAPLESS AUTOMOBILE GUEST

The plaintiff, a domestic servant, was injured in an automobile accident while being transported to work in the defendant's automobile pursuant to an employment contract between the plaintiff and the defendant's daughter-in-law. In defense of the subsequent suit brought by the plaintiff, the defendant asserted the Florida guest statute[1] which, in a case of gratuitous transportation, requires a showing of gross negligence or willful and wanton misconduct by the operator of an automobile before recovery may be allowed. The plaintiff alleged that the defendant was the daughter-in-law's agent during the transportation and that therefore the guest statute should not be applied. The trial court held for the defendant indicating that the plaintiff had failed to sustain the burden of proof required by the guest statute and had also failed to show any benefit passing to the defendant as a result of the trip. On appeal, *held*, affirmed: While respondeat superior makes a principal liable for the acts of his agent, the doctrine does not remove an uncompensated agent from the protection of the guest statute; thus, in the absence of a benefit conferred upon the defendant or a showing of gross negligence or willful and wanton misconduct on the defendant's part, the plaintiff is precluded from recovery. *Brown v. Killinger*, 146 So.2d 124 (Fla. 1st Dist. 1962).

At the common law the right of a non-paying guest to recover for injuries received during transportation in a private vehicle was governed by principles extracted from property law. A few jurisdictions held, under the theory of a bailment, that the driver was liable only for gross or aggravated negligence.[2] Other courts compared the passenger to a licensee[3]

1. The Florida guest statute states that:
No person transported by the owner or operator of a motor vehicle as his guest or passenger, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or willful and wanton misconduct of the owner or operator of such motor vehicle, and unless such gross negligence or willful and wanton misconduct was the proximate cause of the injury, death or loss for which the action is brought; provided, that the question or issue of negligence, gross negligence, and willful or wanton misconduct, and the question of proximate cause, and the issue or question of assumed risk, shall in all cases be solely for the jury; provided that nothing in this section shall apply to school children or other students being transported to or from schools or places of learning in this state. FLA. STAT. § 320.59 (1963).

2. *E.g.*, Slaton v. Hall, 172 Ga. 675, 158 S.E. 747 (1931); Passler v. Mowbray, 318 Mass. 231, 61 N.E.2d 120 (1945); Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917); West v. Poor, 196 Mass. 183, 81 N.E. 960 (1907); Rose v. Squires, 101 N.J.L. 438, 128 Atl. 880 (Sup. Ct. 1925); 5A AM. JUR. *Automobiles & Highway Traffic* § 498 (1956). *But see* Munson v. Rupker, 96 Ind. App. 15, 30, 148 N.E. 169, 174 (1925), where the court rejected the analogy, saying: "It will not do to say that the operator of an automobile owes no more duty to a person riding with him as a guest at sufferance, or a self-invited guest, than a gratuitous bailee owes to a block of wood."

3. Picket v. Mathews, 238 Ala. 542, 192 So. 261 (1939); Beard v. Klusmeier, 158 Ky. 153, 164 S.W. 319 (1914); Klopfenstein v. Eads, 143 Wash. 104, 256 Pac. 333 (1927).

or an invitee[4] on land. In cases in which the invitee analogy was relied on, the driver was held to be under a duty to exercise reasonable care for the protection of the guest during the operation of the vehicle.[5] In later cases recovery was governed by principles of ordinary negligence, and was subject to the defenses of contributory negligence[6] and assumption of the risk.[7]

With the increased use of automobiles[8] and the increased probability of physical harm, states were moved to adopt statutory restrictions on the liability of automobile owners to persons transported gratuitously.[9] Although the language of the guest statutes vary, they generally deny recovery to a person who is gratuitously transported unless the owner is guilty of gross negligence, or of willful misconduct.[10] The forces motivating adoption of these statutes have included: (1) the prevalence of hitchhiking in the United States during the 1920's;[11] (2) the desire to

4. Curran v. Earle C. Anthony, Inc., 77 Cal. App. 462, 247 Pac. 236 (1926); Myers v. Sauer, 116 N.J.L. 254, 182 Atl. 634 (Ct. Err. & App. 1936); R. B. Tyler Co. v. Kirby's Adm'r, 219 Ky. 389, 293 S.W. 155 (1927).

5. Pigeon v. Lane, 80 Conn. 237, 67 Atl. 886 (1907); Mayberry v. Sivey, 18 Kan. 291 (1877); Fitzjarrel v. Boyd, 123 Md. 497, 91 Atl. 547 (1914); Atwell v. Winkler, 196 App. Div. 946, 188 N.Y. Supp. 158 (1921); Patnode v. Foote, 153 App. Div. 494, 138 N.Y. Supp. 221 (1912); Lochhead v. Jensen, 42 Utah 99, 129 Pac. 347 (1912); Moorefield v. Lewis, 96 W. Va. 112, 123 S.E. 564 (1924); Glick v. Baer, 186 Wis. 268, 201 N.W. 752 (1925).

See also Annot., 1918C L.R.A. 276, 277:

> The carrier of goods becomes an insurer of their safety only when he is paid to become so; but the carrier of the passenger is bound to the utmost care and caution whether paid by the passenger or not; and this distinction is based upon wholly different reasons of public policy, being in the one case the value which it puts upon human life and personal safety, and in the other the necessity of preventing frauds and combinations, to the 'undoing of all persons' who may have dealings of that kind with the carrier.

6. *E.g.*, Mattingly v. Meuter, 275 Ky. 294, 121 S.W.2d 676 (1938); Wilson v. Oscar H. Kjorlie Co., 73 N.D. 134, 12 N.W.2d 526 (1944); Note, *Contributory Negligence of Automobile Passengers*, 12 CLEV.-MAR. L. REV. 447 (1963); Mechem, *Contributory Negligence of Automobile Passengers*, 78 U. PA. L. REV. 736 (1930).

7. *E.g.*, Powell v. Berry, 145 Ga. 696, 89 S.E. 753 (1916) (intoxicated driver); Sloan v. Gulf Ref. Co., 139 So. 26 (La. App. 1924) (bad lights); Clise v. Prunty, 108 W. Va. 635, 152 S.E. 201 (1930) (poor chains and brakes); Krueger v. Krueger, 197 Wis. 588, 222 N.W. 784 (1929) (sleepiness of driver); Cleary v. Eckart, 191 Wis. 114, 210 N.W. 267 (1926) (inexperienced driver); Annot., 51 A.L.R. 581 (1927). *But cf.* Note, 38 N.D.L. REV. 599 (1962).

8. The use of automobiles increased appreciably after the courts upheld their legality regarding the use of public roads. "That the use of the street must become extended to meet the modern innovations of rapid locomotion is evident, and we do not mean to suggest that an automobile or any other of the present means of conveyance is an unlawful or improper user. . . ." Mason v. West, 61 App. Div. 40, 41, 70 N.Y. Supp. 478, 480 (1901).

9. See Hamilton, *Rights and Liabilities of Gratuitous Automobile Passengers*, 10 CHI.-KENT L. REV. 1 (1931).

10. The North Dakota statute is representative in defining the type of conduct necessary for recovery; it states that the "owner" or "driver" is liable to a guest for injury resulting from "wilful misconduct, or gross negligence of such owner . . . ." N.D. REV. CODE § 39-1503 (1943).

11. Evidence of hitchhiking is seen by the attempts to curb it; see Annot., 18 A.L.R.2d 1447 (1951). For construction and effect of anti-hitchhiking laws in actions by hitchhikers for injuries, see Annot., 18 A.L.R.2d 1447 (1951).

protect the automobile owner from liability for injuries to occupants of his car, unless he has been compensated for his services;[12] (3) the effort to prevent fraud and collusion between pasengers and owners to the detriment of insurance companies;[13] and (4) the increased number of claims and suits brought by guests in automobiles.[14]

In response to these motivating factors, Connecticut in 1927 adopted the first guest statute in the United States.[15] Other states followed the Connecticut precedent,[16] and in 1937 Florida followed suit.[17] Although their constitutionality has been challenged,[18] these statutes have been upheld as a valid exercise of the states' police power.[19] At the present time twenty-seven jurisdictions have enacted guest statutes.[20] Two other

12. Bennington, *The Ohio Guest Statute*, 22 OHIO ST. L.J. 629, 630 (1961):

> [I]t can be readily seen that the purpose of all guest statutes is twofold: (1) to protect against fraud and collusion, and (2) to protect the motorist (or owner) against liability for injuries to his occupants, unless he is compensated for the transportation in an amount commensurate with the cost of the transportation . . . .

Dobbs v. Sugioka, 117 Colo. 218, 220, 185 P.2d 784, 785 (1947):

> Clearly they [guest statutes] were enacted to prevent recovery by those who had no moral right to recompense, those carried for their own convenience, for their own business or pleasure, those invited by the operator as a mere generous gesture, hitch-hikers and bums who sought to make profit out of softhearted and unfortunate motorists.

13. Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 581 (1931); Houston Belt & Terminal Ry. Co. v. Burmester, 309 S.W.2d 271 (Tex. Civ. App. 1957); Notes: 18 CALIF. L. REV. 184 (1929); 18 IOWA L. REV. 78 (1932); 1 WYO. L.J. 182 (1947).

14. MALCOM, AUTOMOBILE GUEST LAW 2 (1937):

> Today there are thousands of claims made by guest passengers against insurance companies often with the aid of their hosts . . . upon the belief that the insurance company will settle for something, which they do frequently on the basis of business expediency and not always because of legal liability.

15. Conn. Pub. Acts 1927, ch. 308. Ten years later Connecticut repealed its guest statute.

16. See statutes cited note 20 *infra*.

17. Fla. Laws 1937, ch. 18033, at 671. Contrast the law in Florida prior to enactment of the guest statute; see cases cited in Summerset v. Linkroum, 44 So.2d 662 (Fla. 1950).

18. *E.g.*, Silver v. Silver, 280 U.S. 57 (1929); Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 581 (1931); Shea v. Olson, 186 Wash. 700, 59 P.2d 1183 (1936); Annot., 111 A.L.R. 1011 (1937). *Contra*, Emberson v. Buffington, 306 S.W.2d 326 (Ark. 1957); Coleman v. Rhodes, 35 Del. 120, 159 Atl. 649 (1932); Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347 (1932); Stewart v. Houk, 127 Ore. 589, 271 Pac. 998 (1928).

19. A representative case is the Florida decision of McMillan v. Nelson, 149 Fla. 334, 5 So.2d 867 (1942) which upheld the validity of the Florida guest statute as a valid exercise of the state's police power. See also Annot., 111 A.L.R. 1011 (1937).

20. ALA. CODE tit. 36, § 95 (1958); ARK. STAT. §§ 75-913 (1947); CAL. CODE § 17158 (1959); COLO. REV. STAT. ANN. § 13-9-1 (1953); DEL. CODE ANN. tit. 21, § 6101 (1953); FLA. STAT. § 320.59 (1963); IDAHO CODE ANN. § 49-1401 (1953); ILL. REV. STAT. ch. 95½, § 9-201 (1957); IND. ANN. STAT. § 47-1021 (1929); IOWA CODE § 321.494 (1958); KAN. GEN. STAT. ANN. § 8-122(b) (1949); MICH. COMP. LAWS § 256.29 (1948); MONT. REV. CODE ANN. §§ 32-1113 to 32-1116 (1947); NEB. REV. STAT. § 39-740 (1943); NEV. REV. STAT. tit. 3, § 41.180 (1936); N.M. STAT. ANN. § 64-24-1, 2 (1953); N.D. REV. CODE § 39-1503 (1943); OHIO REV. CODE § 4515.02 (1953); ORE. REV. STAT. § 30.115 (1963); S.C. CODE § 46-801 (1962); S.D. CODE § 44-.0362 (1939); TEX. REV. CIV. STAT. art. 6701-b (1948); UTAH CODE ANN. §§ 41-9-1, 2 (1953); VA. CODE ANN. § 8-646.1 (1950); VT. CODE ANN. tit. 23, § 1491 (1959); WASH. REV. CODE § 46-08.080 (1937); WYO. COMP. STAT. ANN. § 31.233 (1957).

It is interesting to note that the guest statutes in their original form were all adopted between 1927 and 1939, 39 MARQ. L. REV. 390 (1952).

jurisdictions have accomplished the same result by case decision.[21]

The applicability of the guest statute depends upon whether or not the person transported is a "guest."[22] The most significant factor in determining the "guest" status is whether "payment" has been made for the transportation.[23] In the event of payment or when a substantial benefit is derived by the owner or operator of the auto, the statute will not be applied because it is resorted to only when the transportation is furnished gratuitously.[24] Having established the absence of "payment" to be entitled to recover, the guest must then show that the owner or operator was guilty of either gross negligence,[25] heedlessness and recklessness,[26] willful and wanton misconduct,[27] or driving while intoxicated.[28] The type of conduct which must be shown varies according to the jurisdiction.[29]

Proponents of the guest statutes contend that these "free-loading" passengers should not be allowed to "bite the hand that feeds them," by suing the auto owner.[30] The possibility of fraud and collusion between the passenger and the owner to the detriment of the insurance companies has influenced the courts in reasserting the merits of such statutes.[31]

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21. Epps v. Parrish, 26 Ga. App. 399, 106 S.E. 297 (1921); Duval v. Duval, 307 Mass. 524, 30 N.E.2d 543 (1940).

22. For one court's comprehensive definition, see Crawford v. Foster, 110 Cal. App. 81, 85, 293 Pac. 841, 842 (1930):

> We think the meaning of the language used is that a guest is one who is invited, either directly or by implication, to enjoy the hospitality of a driver of a car; who accepts such hospitality; and who takes a ride either for his own pleasure or on his own business, without making any return to or conferring any benefit upon the driver of the car, other than the mere pleasure of his company.

23. Payment need not be in the form of money but may consist merely of the conferring of some substantial benefit on the owner or driver of the auto. See Annot., 10 A.L.R.2d 1351 (1950); Note, *What Constitutes Payment,* 41 ORE. L. REV. 133 (1962).

24. Katz v. Ross, 117 F. Supp. 523 (W.D. Pa. 1953); Annot., 59 A.L.R.2d 336 (1958); 3 FLA. JUR. *Automobiles and Other Motor Vehicles* § 155 (1955).

25. *E.g.*, Manica v. Smith, 138 Cal. App. 695, 33 P.2d 418 (1934); Nangle v. Northern Pac. Ry. Co., 96 Mont. 512, 32 P.2d 11 (1934); Younger v. Gallagher, 145 Ore. 63, 26 P.2d 783 (1933); Sorrell v. White, 103 Vt. 277, 153 Atl. 359 (1931).

26. *E.g.*, Doody v. Rogers, 116 Conn. 713, 164 Atl. 641 (1933); Schepp v. Trotter, 115 Conn. 183, 160 Atl. 869 (1932); Coconower v. Stoddard, 96 Ind. App. 287, 182 N.E. 466 (1932); McQuillen v. Meyers, 213 Iowa 1366, 241 N.W. 442 (1932).

27. *E.g.*, Gibson v. Easley, 138 Cal. App. 303, 32 P.2d 983 (1934); Schlesinger v. Miller, 97 Colo. 583, 52 P.2d 402 (1935); Goss v. Overton, 266 Mich. 62, 253 N.W. 217 (1934); McLone v. Bean, 263 Mich. 113, 248 N.W. 566 (1933).

28. *E.g.*, Earley v. Wolf, 10 Cal. App. 2d 224, 51 P.2d 203 (1935); Noble v. Key Sys., 10 Cal. App. 2d 132, 51 P.2d 887 (1935); Foster v. Redding, 97 Colo. 4, 45 P.2d 940 (1935); Schlesinger v. Miller, 97 Colo. 583, 52 P.2d 402 (1935).

29. For a survey of the guest statutes presently in force and the type of conduct needed for recovery under each, see Automobile Insurance Comm. *Automobile Guest Laws Today,* 27 INS. COUNSEL J. 223 (1960).

30. Crawford v. Foster, 110 Cal. App. 81, 87, 293 Pac. 841, 843 (1930):

> As the use of automobiles became almost universal, the proverbial ingratitude of the dog that bites the hand that feeds him, found a counterpart in the many cases that arose, where generous drivers, having offered rides to guests, later found themselves defendants in cases that often turned upon close questions of negligence.

31. *E.g.*, Kitchens v. Duffield, 149 Ohio St. 500, 79 N.E.2d 906 (1948); Upchurch v.

Other courts argue that when one gets into a private automobile for a free ride he should be held to have assumed the risk involved.[32] A final and appealing argument to the layman is that guest statutes reduce the insurance premiums and rates, by reducing the number of suits.[33]

The remaining twenty-two jurisdictions[34] do not have guest statutes and recovery is based on simple negligence.[35] Although the owner is not under a duty to disclose patent defects in the auto,[36] he must exercise reasonable care in its operation.[37]

The abovementioned arguments which favor the guest statutes are vigorously refuted by the opponents of the statutes. Since most drivers now carry liability insurance, it is argued that a suit by a guest does not amount to "biting the hand" that feeds him.[38] In view of the use of present investigative techniques and discovery procedures, perhaps the possibility of fraud is not as great as insurance companies contend.[39] Opponents of the statutes assert that it is ridiculous to advance the fiction that everyone who rides gratuitously in an automobile assumes the risk, when even a child has been held to be a guest.[40] Even though the passenger

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Hubbard, 29 Wash. 2d 559, 188 P.2d 82 (1947); Parker v. Taylor, 196 Wash. 22, 81 P.2d 806 (1938); Houston Belt & Terminal Ry. Co. v. Burmester, 309 S.W.2d 271 (Tex. Civ. App. 1957).

32. Cases cited note 7 *supra.*

33. Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 581 (1931); Notes: 18 CALIF. L. REV. 184 (1929); 18 IOWA L. REV. 78 (1932); 1 WYO. L.J. 182 (1947).

See MALCOM, AUTOMOBILE GUEST LAW 3 (1937):

> Thus, the aim of the statutes and the courts is to protect honest guest claimants on the one hand, to prevent thievery on the part of fraudulent claimants on the other, and to bring down the cost of carrying automobile liability insurance protection.

34. Alaska, Ariz., Conn., D.C., Hawaii, Ky., La., Me., Md., Minn., Miss., Mo., N.H., N.J., N.Y., N.C., Okla., Pa., R.I., Tenn., W. Va., and Wis.

35. 60 C.J.S. *Motor Vehicles* § 399(1) (a) (1949):

> In the absence of a guest statute, the general rule in almost all jurisdictions is that the person operating or responsible for the operation of an automobile must use reasonable and ordinary care for the safety of a guest therein and is liable for injuries proximately caused by negligence in the operation of the vehicle.

See also, Jordan v. Marsee, 256 S.W.2d 25 (Ky. Ct. App. 1953); Jones v. Indemnity Ins. Co., 104 So.2d 197 (La. Ct. App. 1958); Nadeau v. Fogg, 145 Me. 10, 70 A.2d 730 (1950); Sullivan v. Le Blanc, 100 N.H. 311, 125 A.2d 652 (1956); Jesselson v. Moody, 309 N.Y. 148, 127 N.E.2d 921 (1955).

36. Cases cited note 42 *infra.*

37. See authorities cited note 35 *supra.*

38. See Note, 10 U. FLA. L. REV. 68 (1957): "Spurred by these state laws [financial responsibility laws] and perhaps by a sensible desire to protect their pocket-books, most automobile owners now carry some type of motor vehicle liability insurance."

39. See White, *The Liability of an Automobile Driver to a Non-Paying Passenger*, 20 VA. L. REV. 326, 333 (1934), wherein the author suggests that the charge of perjury and collusion between driver and passenger is a matter peculiarly for the criminal courts and furnishes no sound reason for altering the substantive rights and duties of the driver and passenger.

40. Faggioni v. Weiss, 99 N.J.L. 157, 122 Atl. 840 (Ct. Err. & App. 1923); Welker v. Sorenson, 209 Ore. 402, 306 P.2d 737 (1957); Annot., 16 A.L.R.2d 1304 (1951); Note, 11 U. FLA. L. REV. 124 (1958); 8 DRAKE L. REV. 156 (1958).

might be held to have assumed the risk of weather conditions[41] or patent defects in the automobile,[42] he should not be held to have assumed the risk that the driver will act negligently.[43] In answer to the final contention it is argued that guest statutes do not appreciably reduce the insurance rates.[44]

The question confronting the court in the instant case was whether the plaintiff was a "guest" within the meaning of the Florida guest statute.[45] Although the oral contract of employment between the plaintiff and the defendant's daughter-in-law included transportation to and from work, the carriage was made without monetary compensation to the defendant.[46] The court rejected the plaintiff's theory that the implied-in-law relationship of master-servant between the defendant and her daughter-in-law rendered the guest statute inapplicable.[47] The justices did not wish to see the statute extended beyond the cure of the evils which induced its enactment. In this case the person benefited by the carriage was the daughter-in-law, not the defendant. Further, the plaintiff had the option of bringing an action against the daughter-in-law under the theory of respondeat superior, but instead chose to sue the defendant. The majority of the court concluded its opinion by holding that the law which imposes vicarious liability upon the principal is not determinative of the agent's liability for his tortious acts.[48]

In dissent, Justice Sturgis contended that the defendant was indeed the servant of her daughter-in-law and that the plaintiff need not sue them both as joint-tortfeasors.[49] He further emphasized the trial judge's

41. *E.g.*, Miller v. Mathis, 233 Iowa 221, 8 N.W.2d 744 (1943); Elkey v. Elkey, 234 Wis. 149, 290 N.W. 627 (1940); Knipfer v. Shaw, 210 Wis. 617, 246 N.W. 328 (1933).

42. *E.g.*, Higgins v. Mason, 255 N.Y. 104, 174 N.E. 77 (1930); Clise v. Prunty, 108 W. Va. 635, 152 S.E. 201 (1930); Pawlowski v. Eskofski, 209 Wis. 189, 244 N.W. 611 (1932).

43. *E.g.*, Coffey v. Lalanne, 20 So.2d 614 (La. Ct. App. 1945); Lindley v. Sink, 218 Ind. 1, 30 N.E.2d 456 (1940); Rogers v. Brown, 129 Neb. 9, 260 N.W. 794 (1935); Cambell v. Cambell, 316 Pa. 331, 175 Atl. 407 (1934); Harrison v. Graham, 21 Tenn. App. 189, 107 S.W.2d 517 (1937); Steele v. Lackey, 107 Vt. 192, 177 Atl. 309 (1935).

44. See the survey and accompanying chart in Tipon, *Florida's Automobile Guest Statute*, 11 U. FLA. L. REV. 287, 305 (1958). See also Bennington, *The Ohio Guest Statute*, 22 OHIO ST. L.J. 629, 643 (1961).

45. In Peery v. Mershon, 149 Fla. 351, 5 So.2d 694 (1942), the Florida court laid down the standards for determining the injured person's status under the guest statute.

46. A recent Florida case indicates that the compensation need not be monetary. Raydel, Ltd. v. Medcalfe, 162 So.2d 910 (Fla. 3d Dist. 1964).

47. While the doctrine of respondeat superior may operate to make a principal liable for the acts of his agent within the scope of the agency, the doctrine does not operate in reverse and remove from an uncompensated agent . . . the protection of the Guest Statute. Brown v. Killinger, 146 So.2d 124, 129 (Fla. 1st Dist. 1962).

48. The court cited a railroad case wherein the railroad was held liable under the Florida comparative negligence statute, but its agent was allowed to assert the defense of contributory negligence.

49. It is interesting to note that Michigan, which furnished the model for the Florida statute, has held under circumstances almost identical to those presented by the instant case that the guest statute is not applicable. Peronto v. Cootware, 281 Mich. 664, 275 N.W. 724 (1937). See also Miller v. Morse Auto Rentals, Inc., 106 So.2d 204 (Fla. 3d Dist. 1958); Roy v. Bacon, 325 Mass. 173, 89 N.E.2d 512 (1950); Monison v. McCoy, 266 Mich. 693, 256 N.W. 49 (1934); O'Hagen v. Byron, 153 Pa. Super. 372, 33 A.2d 779 (1943).

error in assuming the special defense of the guest statute, and also in charging the jury that there had been no evidence offered to sustain a finding of recovery for gross negligence under the statute. The dissent continued by noting the majority's admission that had the daughter-in-law been sued recovery would have been possible; therefore, Sturgis argued, recovery should have been allowed against the defendant-servant.[50]

Even a cursory analysis of the instant case discloses that application of the Florida guest statute has caused the courts many problems.[51] Moreover there have been many criticisms of the guest statutes:[52] (1) the arguments supporting the statutes are not valid; (2) the problems in statutory construction have been insuperable; and (3) the policy considerations underlying the statutes are not sound. In view of the doubts which have been expressed, two questions must be asked: (1) are justifiable ends being served by continued resort to the statutes, and if not, (2) what can be done to remedy the inequities wrought by the statutes?

Several alternative solutions are available. States simply could repeal the existing guest statutes and return to the requirement of a mere showing of simple negligence in order to sustain recovery. Such a view would place the passenger in a position identical to that of another motorist—a position from which the passenger never should have been removed.[53]

A second solution would be one of limited recovery based upon a predetermined schedule analogous to those utilized by the present workmen's compensation statutes. A statute of this type dealing with automobile accidents has been enacted in the Canadian province of Saskatchewan and has met with apparent success.[54]

If the guest statutes were repealed there is always the possibility that a few insurance companies might have to pay damages on behalf of a host who was not negligent. However sound public policy dictates that the loss sustained by a passenger should be shared by the auto-owning public rather than sustained entirely by the injured party. Thus, it can be said that "it is better that a few undeserving passengers enjoy windfalls at the expense of the general motoring public than to deny fair

50. The judge cited Miller v. Morse Auto Rentals, Inc., 106 So.2d 204 (Fla. 3d Dist. 1958).

51. For example, see the recent decision in Raydel, Ltd. v. Medcalfe, 162 So.2d 910 (Fla. 3d Dist. 1964).

52. See generally Bennington, *The Ohio Guest Statute*, 22 OHIO ST. L.J. 629 (1961); James, *History of the Law Governing Recovery in Automobile Accident Cases*, 14 U. FLA. L. REV. 321 (1962); Mundt, *The South Dakota Automobile Guest Statute*, 2 S.D.L. REV. 70 (1957); Stilliman, *Standard of Care Under the Florida Guest Statute*, 27 FLA. B.J. 298 (1953); Tipon, *Florida's Automobile Guest Statute*, 11 U. FLA. L. REV. 287 (1958).

53. Note, 2 S.D.L. REV. 70, 75 (1956): "There is no reason for the driver or owner of an automobile to be placed in a preferred position."

54. See Green, *The Automobile Accident Insurance Act of Saskatchewan*, 2 CHITTY'S

compensation for genuine injuries to a large number of passengers whose hapless fate it is to be called 'guests' under an arbitrary statutory classification."[55]

ROBERT R. BEBERMEYER

SECURITIES FRAUD—FRAUDULENT CONDUCT UNDER THE INVESTMENT ADVISERS ACT OF 1940

The respondent published an investment advisory report which it distributed to its subscribers. This report was designed to furnish analyses of various companies and their securities and to make recommendations concerning investments in these securities with a view to the realization of long term capital gains by the subscribers. On five occasions within an eight month period, the respondent purchased recommended securities several days prior to the publication of its investment report.[1] After publication, the respondent sold its securities on a rising market and thereby realized short swing profits. The respondent made no disclosures to its clients of its dealings in the recommended securities. Alleging that the respondent's activities constituted fraud or deceit within the proscription of the Investment Advisers Act of 1940, the SEC sought a preliminary injunction to require the respondent to disclose to its clients its interest in recommended securities. The district court denied the injunction on the ground that the SEC had failed to establish fraud or deceit as required by the act.[2] This decision was affirmed on different grounds by a panel of the Court of Appeals for the Second Circuit[3] and again on rehearing by the court sitting en banc.[4] On certiorari to the United States Supreme Court, *held*, reversed: the failure of a registered investment adviser to disclose transactions for his own account in securities which he recommends to his clients operates as fraud or deceit within the scope of the Investment Advisers Act of 1940 and the SEC may obtain an injunction to require disclosure of these activities.[5] *SEC v. Capital Gains Research Bureau, Inc.*, 84 Sup. Ct. 275 (1963).

L.J. 38 (1952); Lang, *The Nature and Potential of the Saskatchewan Insurance Experiment*, 14 U. FLA. L. REV. 352 (1962).

55. Note, 47 IOWA L. REV. 1049, 1063 (1962).

1. On one occasion, the respondent sold a stock short. Ten days later, in its report to its subscribers, the respondent discouraged investment in this stock. Thereafter, on a declining market, the respondent covered its short sale and thereby realized a profit.

2. SEC v. Capital Gains Research Bureau, Inc., 191 F. Supp. 897 (S.D.N.Y. 1961). The court held that fraud and deceit must be established in their technical sense and there must be an intent to injure or actual injury sustained by the clients.

3. SEC v. Capital Gains Research Bureau, Inc., 300 F.2d 745 (2d Cir. 1961). It was the opinion of the court that the test to be applied was whether the recommendation was honest when made. The SEC did not allege that the report contained misstatements or false figures.

4. SEC v. Capital Gains Research Bureau, Inc., 306 F.2d 606 (2d Cir. 1962).

5. This practice is known in the industry as "scalping."