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Automobiles—Guest Statute—Non-Operating Owner

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AUTOMOBILES—GUEST STATUTE—NON-OPERATING OWNER*—Automobile guest statutes have been enacted to change the common law in more than half the states.[1] The gratuitous guest is limited in recovery to situations where the host is more than ordinarily negligent—that is, the host has committed some form of aggravated misconduct. New Mexico has adopted such a statute.[2] This Comment is concerned solely with the liability of a non-operating owner for his act of negligent entrustment of his automobile and the protection afforded to the non-operating owner under the guest statute; the Comment is *not* concerned with the vicarious liability of the non-operating owner for the conduct of the person driving the automobile. Will ordinary negligence of the non-operating owner in entrusting a defective automobile make him liable to the operator's guest who is killed or injured in an accident resulting from this defective condition? Or must the conduct of the non-operating owner in entrusting the defective automobile amount to the "heedlessness or reckless disregard of the rights of the others" specified in the New Mexico guest statute[3] to make him liable to a guest who is killed or injured?

In *Lewis v. Knott*,[4] the administrator of the estate of his daughter filed a complaint against two defendants—the non-operating owner and the operator of an automobile—for damages for the death of his daughter. The plaintiff's daughter was killed in an automobile accident in which one defendant had been driving. The owner was the operator's father.[5] The accident occurred when the left front tire blew out and caused the automobile to skid and over-

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* Lewis v. Knott, 405 P.2d 662 (N.M. 1965).

1. Prosser, Torts § 33, at 190 (3d ed. 1964).

2. N.M. Stat. Ann. § 64-24-1 (Repl. 1960), entitled "An Act Releasing Owners of Motor Vehicles From Responsibility for Injuries to Passengers Therein," provides:

> No person transported by the owner or operator of a motor vehicle as his guest 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 intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others.

For a discussion of other questions raised under the New Mexico guest statute, see Comments, 3 Natural Resources J. 170 (1963); 4 *id.* 168 (1964).

3. N.M. Stat. Ann. § 64-24-1 (Repl. 1960).

4. 405 P.2d 662 (N.M. 1965).

5. In *Lewis*, the operator was the son of the owner of the automobile. The owner permitted his son to use the automobile for his pleasure. New Mexico has adopted the "family purpose doctrine." *E.g.*, Burkhart v. Corn, 59 N.M. 343, 284 P.2d 226 (1955). However, the application of this doctrine was not raised in *Lewis*.

turn. Testimony during the trial tended to show that both defendants, the owner and the operator, knew that the left front tire was smooth.[6]

At the conclusion of the plaintiff's case, the trial court sustained the defendant's motion for directed verdict against the plaintiff. Judgment was entered upon the verdict and the plaintiff appealed. The New Mexico Supreme Court, *held,* Judgment for the owner affirmed; judgment for the operator reversed.[7]

The supreme court was divided in its reasoning for affirming judgment in favor of the non-operating owner. Justice Compton, in delivering the opinion of the court, affirmed on the strength of the 1964 New Mexico case of *Gallegos v. Wallace.*[8] Justice Compton held that the court's opinion in *Gallegos* supported this rule: "Where the owner is not the operator no cause of action exists against him for the negligence of the operator."[9] Justice Moise, joined by Chief Justice Carmody, concurred specially in the result of the opinion of Justice Compton, but did not concur with his reasoning.[10] The concurring justices in *Lewis* reasoned that "ordinary rules of statutory construction require a conclusion that the owner is covered . . . [under the guest statute] whether driving or not, when suit is brought by a guest, whether his own or the operator's."[11] The concurring justices found support for their con-

6. Record, pp. 80, 89, Lewis v. Knott, 405 P.2d 662 (N.M. 1965).

7. 405 P.2d at 664.

8. 74 N.M. 760, 398 P.2d 982 (1964). In *Gallegos,* a suit was brought by the personal representative of a guest who had been killed in an automobile accident. The trial court granted summary judgment to the defendants and dismissed the complaint. On appeal, the New Mexico Supreme Court, *held,* Reversed and remanded for further proceedings. The granting of summary judgment was held to be incorrect because there was inconsistent testimony in the record as to who was driving the automobile at the time of the accident. The court said that if the automobile were being driven by the owner, heedlessness and reckless disregard of the rights of others would be necessary for liability. If the operator of the automobile were not the owner, only ordinary negligence would have to be established.

9. Lewis v. Knott, 405 P.2d 662, 663 (N.M. 1965).

10. As a basis for disagreeing with the reasoning of Justice Compton, Justice Moise said:

> While I agree with the result reached in the opinion prepared by Justice Compton, I do not agree that our recent case of Gallegos v. Wallace . . . settles appellant's point 1, to the effect that the guest statute does not protect an absent non-driver owner. As a matter of fact, an inference might be drawn from what was said in Gallegos v. Wallace, supra, that only an owner driver was entitled to the protection afforded by the statute.

Lewis v. Knott, 405 P.2d 662, 664-65 (N.M. 1965).

11. 405 P.2d at 665.

clusion by reference to the legislative intent expressed in the title of the guest statute.[12]

Similar cases from other jurisdictions have produced opposite results from that reached by the New Mexico court in *Lewis*. In *Bisoni v. Carlson*,[13] a Kansas case, the defendant-father was held liable for the injuries to the operator's guest caused by the negligence of his minor son. A Kansas statute[14] imposed liability on the owner of a vehicle for damages caused by the negligent driving of an operator under sixteen. The entrustment of a vehicle to an incompetent driver is certainly analogous to the entrustment of a defective vehicle, the situation suggested by *Lewis*. The Kansas guest statute is practically identical with the New Mexico statute.[15] The Kansas court said that the *only* "owner" referred to in the guest statute must be the "one who *is transporting* a person who claims damages."[16] Although the father was the owner, the court held that the father was not protected under the guest statute because he was not the operator.

In *Benton v. Sloss*,[17] the court ruled on the application of the California guest statute[18] to the non-operating owner. The court imposed liability on the non-operating owner for his negligence in entrusting a car with defective brakes that caused an accident resulting in injuries to the operator's guest. Commenting on the *Benton* case, the California court later said that *Benton* "holds

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> We are impressed that it was intended by the legislature that owners should be relieved of liability to guests in a motor vehicle unless the accident resulted from intentional conduct, or heedless or reckless disregard of the rights of others. . . .
>
> That this must have been the intention of the legislature is evident from the broad title to the legislation. . . .

405 P.2d at 665. For the title to the New Mexico guest statute, see note 2 *supra*.

13. 171 Kan. 631, 237 P.2d 404 (1951).

14. Kan. Gen. Stat. Ann. § 8-222 (1949).

15. Kan. Gen. Stat. Ann. § 8-122b (1949):

> No person who is transported by the owner or operator of a motor vehicle, as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or damage, unless such injury, death or damage shall have resulted from the gross and wanton negligence of the operator of such motor vehicle.

16. Bisoni v. Carlson, 171 Kan. 631, 237 P.2d 404, 407 (1951). (Emphasis the court's.) *Accord*, Ware v. State Farm Mut. Auto. Ins. Co., 181 Kan. 291, 311 P.2d 316 (1957); Greenwood v. Gardner, 189 Kan. 68, 366 P.2d 780 (1961). See generally Annot., 91 A.L.R.2d 323 (1963).

17. 38 Cal. App. 2d 399, 240 P.2d 575 (1952).

18. Cal. Vehicle Code § 17158 protects the "driver of the vehicle" and "any other person legally responsible for the conduct of the driver" except in cases of "intoxication or wilful misconduct of the driver."

that the guest statute immunizes the person legally liable for the conduct of such driver from a vicarious liability to the guest but *not from direct responsibility for his own negligence.*''[19] Even though the owner is not liable for the ordinary negligence of the operator under the guest statute in California, the owner is liable for his own acts of negligent entrustment.

The Alabama Supreme Court has construed the Alabama guest statute,[20] which is similar to the New Mexico statute, in a manner completely at variance with the construction given by the New Mexico Supreme Court in *Lewis*. In *Penton v. Favors*,[21] the Alabama court held the owner of a vehicle with defective brakes or steering liable for injuries caused to the operator's guest. The court in *Penton* used the following reasoning:

> [W]e do not think our statute was intended to limit the duty of the owner who entrusts to an incompetent driver an automobile or to a competent driver a defective automobile. . . . It is true that our guest statute applies to the 'owner, operator or person responsible for the operation of a motor vehicle.' We think that means to apply to such person as may be responsible for the *manner of its operation*; that it does not apply to the *owner* unless he is operating the car in person or it is under his immediate control or is operated by his

19. Nault v. Smith, 194 Cal. App. 2d 257, 14 Cal. Rptr. 889, 896 (1961). (Emphasis added.) *Nault* was concerned with the entrustment of an automobile to an incompetent driver. The court held that the owner was not protected by the guest statute, justifying its decision upon the following policy considerations:

> 'The common law right of having redress for injuries inflicted, being lessened by such [guest] statutes, necessitates strict construction and also *that cases be not held within the provisions of such statutes unless it clearly appears that it should be so determined.*' [Citations omitted.] In a day of increasing danger from automobile accidents . . . we see no 'considerations of policy' for *reducing* liability for fault. To broaden the absolution here in order to cover the . . . [non-operating owner] would be to grant the statute a liberal construction, which violates the court's admonition, and to introduce new considerations of policy which trespass the exclusive province of the Legislature. [Emphasis the court's.]

14 Cal. Rptr. at 897. In Jones v. Ayers, 212 Cal. App. 2d 646, 28 Cal. Rptr. 223, 226 (1963), the court said: "Section 403 [former citation of guest statute, now Cal. Vehicle Code § 17158] does not limit the common-law liability of the owner of a vehicle for his own negligence as owner."

20. Ala. Code tit. 36, § 95 (1959):

> The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest while being transported without payment therefore in or upon said motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the willful or wanton misconduct of such operator, owner or person responsible for the operation of said motor vehicle.

21. 262 Ala. 262, 78 So. 2d 278 (1955).

> servant or agent duly authorized by him. When it is not being so operated the liability of the owner is governed by common law principles.[22]

These cases from Alabama, California, and Kansas illustrate that not all courts that have considered similar questions agree with Justice Moise when he says that "ordinary rules of statutory construction require a conclusion" like the one reached by the New Mexico Supreme Court in *Lewis*.[23] A number of courts have, however, construed their guest statutes in a manner similar to the construction given by the New Mexico court in *Lewis*.[24]

Lewis v. Knott must be considered in conjunction with the New Mexico case of *Gallegos v. Wallace*,[25] decided in 1964. *Gallegos* held *only* that a non-owner operator is not protected by the guest statute. *Gallegos* did not hold, as stated by Justice Compton in *Lewis*, that "where the owner is not the operator no cause of action exists against him for the negligence of the operator."[26] Justice Moise, joined by Chief Justice Carmody, concurring specially, disagreed with Justice Compton on this very point:

> While I agree with the result reached in the opinion prepared by Justice Compton, I do not agree that our recent case of Gallegos v. Wallace . . . settles appellant's point . . . to the effect that the guest statute does not protect an absent non-driver owner. As a matter of fact, an inference might be drawn from what was said in Gallegos v. Wallace . . . that only an owner driver was entitled to the protection afforded by the statute.[27]

Gallegos stated that the New Mexico guest statute "affected only the *owner* of a vehicle and that its scope was restricted to such owners."[28] If the "owner" is the only person protected under the guest statute, "operator" must be deleted. Thus, according to *Gallegos*, the guest statute should now be considered to read as follows:

> No person transported by the owner . . . of a motor vehicle as his

22. 78 So. 2d at 284. (Emphasis the court's.)
23. 405 P.2d at 665.
24. *E.g.*, Dryeson v. Hughes, 333 Ill. App. 198, 76 N.E.2d 809 (1947); Tonti v. Paglia, 171 Ohio St. 520, 172 N.E.2d 618 (1961). See generally Annot., 91 A.L.R.2d 324 (1963).
25. 74 N.M. 760, 398 P.2d 982 (1964).
26. 405 P.2d at 663.
27. *Id.* at 665.
28. 74 N.M. at 764, 398 P.2d at 985.

> guest without payment for such transportation shall have a cause of action for damages against such owner . . . for injury, death, or loss, in case of accident, unless such accident shall have been intentional on the part of said owner . . . or caused by his heedlessness or reckless disregard of the rights of others.[29]

The only words which have been omitted in the statutory excerpt are "or operator," a deletion required by the holding of *Gallegos*. The words "his guest" in the statute must therefore apply to the *owner's guest*; the act of "transporting" can now only refer to the act of the owner. In *Lewis*, the decedent was the guest of the operator, not the guest of the owner. Thus, according to *Gallegos*, the guest statute in *Lewis* should not have been held to afford refuge and non-liability to the non-operating owner.

The New Mexico court has frequently said that it will consider the title of an act only when the language in the body of the statute is ambiguous.[30] Even by resorting to the title of the guest statute,[31] the non-operating owner in *Lewis* should not be protected because the decedent was *not his* guest. The language of section 64-24-1 is not ambiguous, even after the decision in *Gallegos*. The title of the guest statute, therefore, should not affect the contention that the non-operating owner in *Lewis* should not have been protected by the guest statute.

Intentional misconduct or heedlessness or reckless disregard of the rights of others should not have been the standard for judging the conduct of the non-operating owner in *Lewis*. Ordinary negligence is the correct test when the guest statute is inapplicable. Might the defendant non-operating owner in *Lewis* be charged with ordinary negligence because he knowingly entrusted a car with a defective tire to his son?

An owner who loans his vehicle is generally held liable for injuries sustained by a third person as the result of the defective

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29. The actual statutory language is set forth in note 2 *supra*.

30. *E.g.*, Hewatt v. Clark, 44 N.M. 453, 103 P.2d 646 (1940):

> We understand that resort may be had to the title of an act to determine the meaning of ambiguous language in the body of the act. But first the language must be ambiguous and not clear. [Citations omitted.] We know the meaning of this act must primarily be determined from the language of the act itself.

44 N.M. at 457, 103 P.2d at 649. See generally *In re* Cox's Estate, 57 N.M. 543, 260 P.2d 909 (1953); State *ex rel.* State Corp. Comm'n v. Old Abe Co., 43 N.M. 367, 94 P.2d 105 (1939).

31. "An Act Releasing Owners of Motor Vehicles From Responsibility for Injuries to Passengers Therein." N.M. Stat. Ann. § 64-24-1 (Repl. 1960).

condition of the automobile.[32] This rule is applicable when the owner knows, or in the exercise of reasonable care should have known, that the vehicle was in a defective condition.[33] This is the rule in New Mexico.[34] Although *Lewis* is a case of first impression for liability because of negligent entrustment under the guest statute, the common law principle has been established for many years.

In *Bradley v. Johnson*,[35] the plaintiff was injured when his vehicle was struck by a trailer which had come loose from an automobile. The trailer was not owned by the operator of the automobile, but had been borrowed from the co-defendant. The jury found that the accident was caused by a defective weld on the trailer, causing it to separate from the automobile. The New Mexico Supreme Court approved this instruction given by the trial court to the jury:

> If you find that the two-wheeled trailer involved in this accident was, prior to this accident, in a condition unfit for use on the public highways; and . . . if you find, further, that the Defendant . . . owned the trailer, and furnished it to others, knowing that it was to be used on the public highways; and when he knew or by the exercise of reasonable care, should have known of its defective condition, and when he knew it to be unlikely that the defective condition would be repaired before use; then Defendant . . . is guilty of negligence herein.[36]

A later New Mexico case, *Ferran v. Jacquez*,[37] reaffirmed the common law duty of not knowingly loaning a defective vehicle. The plaintiff was injured in an accident caused by defective brakes. The New Mexico statute[38] in question in *Ferran* prescribed certain standards for brake conditions. The supreme court, reversing a directed verdict for the non-operating owner, said that the condition of the brakes was a question for the jury. "If the brakes do not meet the standard set by the statute, and such failure is not excused, the owner is guilty of negligence in permitting the automobile on the highway in such condition."[39]

32. See generally Annot., 24 A.L.R.2d 161 (1952) (tire failures); Annot., 46 A.L.R.2d 404 (1956) (miscellaneous defects); 8 Am. Jur. 2d *Automobiles & Highway Traffic* § 500 (1963).

33. See authorities cited in note 32 *supra*.

34. Ferran v. Jacquez, 68 N.M. 367, 362 P.2d 519 (1961); Bradley v. Johnson, 60 N.M. 453, 292 P.2d 325 (1955).

35. 60 N.M. 453, 292 P.2d 325 (1955).

36. *Id.* at 455, 292 P.2d at 326.

37. 68 N.M. 367, 362 P.2d 519 (1961).

38. N.M. Stat. Ann. § 64-20-41 (Supp. 1965).

39. Ferran v. Jacquez, 68 N.M. 367, 371, 362 P.2d 519, 521 (1961).

The duty of an owner not to loan a defective automobile with knowledge of the defect has been approved in most states,[40] though none of these cases were decided under a guest statute. According to *Gallegos*, the New Mexico guest statute has no application in *Lewis* because the owner was not operating the automobile. In *Lewis*, it was averred that the owner loaned his car to the co-defendant operator knowing that the tires were defective.[41] The accident and death of the plaintiff's intestate allegedly resulted from the defective tire.[42] It is submitted, therefore, that the New Mexico Supreme Court erred in affirming the directed verdict for the non-operating owner in *Lewis* because the court misapplied the holding in *Gallegos*.

What is the significance of the decision in *Lewis v. Knott*? The case should not be used as precedent because the majority of the court did not concur in the reasoning of the court's opinion.[43] The opinion of Justice Compton, when compared to the specially concurring opinion of Justice Moise, indicates that the court is not yet certain of the full import of *Gallegos v. Wallace*.[44] It is clear on reading *Gallegos* that the operator, if he is not the owner, is not protected by the guest statute, and all reference to the operator should be deleted from the guest statute in accordance with the holding in *Gallegos*. The construction of the New Mexico guest statute given by the supreme court in *Gallegos* apparently met with the approval of the 1965 legislature because none of the bills introduced to change or repeal section 64-24-1 were passed.[45] This could only mean that the legislature was content with the literal interpretation of *Gallegos*: "[T]he legislation affected only the *owner* of a vehicle and that its scope was restricted to such *owners*."[46] Even after the legislature failed to enact new legislation to change the holding of *Gallegos*, the specially concurring opinion in

40. *E.g.*, Dierks Lumber & Coal Co. v. Mabry, 128 F.2d 1005 (8th Cir. 1942); Gregory v. Ross, 214 Ga. 306, 104 S.E.2d 452 (1958); Riggs v. Roberts, 74 Idaho 473, 264 P.2d 698 (1953); Adcock v. McDonald, 224 Miss. 122, 79 So. 2d 715 (1955); Gibbs v. Gaimel, 257 N.C. 650, 127 S.E.2d 271 (1962); Delair v. McAdoo, 324 Pa. 392, 188 Atl. 181 (1936); Campbell v. Swinney, 328 S.W.2d 330 (Tex. Civ. App. 1959); Kowalke v. Farmers Mut. Auto. Ins. Co., 3 Wis. 2d 389, 88 N.W.2d 747 (1958). See generally 4 Blashfield, Cyclopedia of Automobile Law and Practice § 2333 (1946).

41. Record, pp. 80, 89, Lewis v. Knott, 405 P.2d 662 (N.M. 1965).

42. *Ibid.* However, it should be noted that there was conflicting testimony during the trial as to this point.

43. See Comment, 5 Natural Resources J. 403 (1965).

44. 74 N.M. 760, 398 P.2d 982 (1964).

45. H.R. 294, 418; S. 185, 327, N.M. 27th Leg., 1st Sess. (1965).

46. 74 N.M. at 764, 398 P.2d at 985. (Emphasis the court's.)

Lewis supported its reasoning by reference to the intent of the legislature in drafting the guest statute. This would appear to be an attempt at judicial legislation, especially in view of the non-action of the 1965 legislature, which met after the decision in *Gallegos* had been delivered in 1964.

The court should construe the guest statute strictly because it is an abrogation of the common law.[47] Because *Gallegos* held that it was unconstitutional to apply the guest statute to operators, strict construction of the remaining part of the guest statute suggests that the result in *Lewis* with respect to the non-operating owner was incorrect.

It is submitted that the result in *Lewis* is wrong insofar as it places a non-operating owner under the protection of the guest statute. Negligent entrustment by an owner which is ultimately responsible for injuries or death to an operator's guest should be governed by common law principles of ordinary negligence—not by the concepts of aggravated misconduct described in the guest statute. If the non-operating owner is to be protected from his own negligence, this decision must come from the legislature and not the courts.

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47. Prosser, Torts § 33, at 190 (3d ed. 1964).