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Who Is "Driver" and What Constitutes "Operating" or "Driving" Within the Meaning of Statutory Offenses

In a recent Georgia case, *Mitchell v. State*,¹ the defendant and other persons had planned a race between an automobile belonging to the defendant and an automobile belonging to one Walden, both vehicles to be driven by persons other than the owners themselves. During the race the defendant and Walden rode in their respective cars, alongside the selected drivers. The race proceeded on the highway at speeds ranging up to 75 and 95 miles per hour to a point where Walden's car turned over several times, killing its driver. The defendant was prosecuted and convicted of the misdemeanor of driving an automobile upon a public highway in excess of the prescribed speed limit. At the trial the court charged the jury that in all misdemeanors the participants are principals, and the court further instructed the jury to the effect that if the defendant aided and abetted the operation of the automobile he thus became a principal. The Court of Appeals of Georgia affirmed the judgment and held that the charge presented explicitly and fairly the law of principal and accessory as applied to the evidence in a misdemeanor case; also, that from the evidence the jury were authorized to find the defendant guilty of "operating" an automobile at a greater rate of speed than that prescribed by law.

In civil cases involving automobile accidents, similar rules of law are applied when negligence is imputed to a passenger. The law is that the negligence of the operator of an automobile is not attributable to a guest or passenger, whether gratuitous or for hire, where such guest or passenger has no right of control over the operator or machine, and exercises no control over either.² However, there is an exception allowing imputation of negligence in the case of one riding with his servant or agent as driver, and this exception is grounded upon the fact that the negligence of the servant is the negligence of the master; in other words, the master (passenger) is operating the machine through the agency of the servant (driver). The test whether the negligence of the driver is to be imputed to the one riding depends upon the latter's control, or right of control, of the actions of the driver, so as to constitute in fact the relation of principal and agent or master and servant, or his voluntary, unconstrained, noncontractual surrender of all care for himself to the caution of the driver.³ If an occupant of an automobile controls, or has the right of control over, the operation of the car in matter of detail, he is chargeable with the operator's negligence. The operator is deemed to be the servant of such person.⁴

The instant case may also be compared to civil cases where persons are associated together in the execution of a common purpose and undertaking, and it has been held that each is the agent of the others in carrying out their plans, so that the negligence of one is attributable to the others.⁵ To constitute a joint enterprise between a passenger and the driver of an automobile, within the meaning of the law of negligence, there must be such a community of interests in the opera-

¹ — Ga. App. —, 38 S.E. (2d) 95 (1946).

² Berry, *Law of Automobiles* (7th ed. 1935) §5.141.

³ *Ibid.*

⁴ *Id.* at §5.143.

⁵ *Philadelphia & R. R. Co. v. Le Barr*, 265 Fed. 129 (C.C.A. 3rd, 1920).

tion as to give each an equal right of control. Joint enterprise is the joint prosecution of a common purpose under such circumstances that each member of such enterprise has the authority to act in respect to the control of the agencies employed to execute such common purpose.⁶

In prosecutions for motor vehicle violations, a variety of issues and complicating factors arise when a person permits another to drive the automobile while he sits by as a passenger. The question then is, what do the statutes mean by "driving" an automobile? Under such circumstances can a person be charged with "driving" an automobile? Under some state statutes the person must be actually driving,⁷ meaning physical handling of the controls of the vehicle, but under other state statutes one who aids or abets the act may be liable as principal.⁸ If the owner of a dangerous instrumentality like an automobile knowingly puts that instrumentality in the immediate control of a careless and reckless driver, sits by his side, and permits him without protest to recklessly and negligently operate the car and thereby cause the death of another, he is as much responsible as the man at the wheel.⁹ A conviction of negligent homicide by the use of a motor vehicle, under a Michigan statute, was affirmed where it appeared that the defendant sat by the side of a girl and that when the girl, just before the collision, lost control of the car in descending a hill, the defendant attempted to resume control of the car and stepped on the accelerator but was unable to avoid running into the other car.¹⁰ In another case the defendant was convicted of murder where he and his companion were "staging a drunk" in the car of the defendant who sat beside the driver companion in the front seat, the episode culminating in the death of an infant.¹¹

In a recent case the defendant was convicted of involuntary manslaughter where it appeared that the truck in question belonged to the defendant who was on the front seat at the time of the collision; the court finding that even if he was not actually driving (as the defendant contended) he was guilty as a principal for aiding and abetting in an unlawful operation of the vehicle, since he was not so drunk but that he knew what was happening and must have known that the truck was being driven on the wrong side of the road in an unlawful manner.¹² A conviction has been sustained where a woman driver was at the steering wheel, but the defendant sat close beside her and both he and the woman had hold of the steering wheel.¹³ However, in a case where the car that struck the deceased was driven by an intoxicated driver, who was accompanied by the owner as a passenger, the evidence was held insufficient to sustain a conviction of manslaughter against the owner where there was no evidence that he ever saw the driver take a drink or knew that the driver was under the influence of liquor.¹⁴

A provision of the vehicle code requiring the "driver of any vehicle"

⁶ Berry, *Law of Automobiles* (7th ed. 1935) §5.158.

⁷ *State v. Williams*, 141 Wash. 165, 251 Pac. 126 (1926); *Commonwealth v. Gordan*, 310 Mass. 85, 37 N.E. (2d) 123 (1941).

⁸ *State v. Myers*, 207 Iowa 555, 223 N.W. 166 (1929); *State v. Sarner*, 134 Kan. 98, 4 P. (2d) 440 (1931); *State v. Cook*, 149 Kan. 481, 87 P. (2d) 648 (1939).

⁹ *Story v. United States*, 16 F. (2d) 342 (App. D.C. 1926); *Ex Parte Liotard*, 47 Nev. 169, 217 Pac. 960 (1923).

¹⁰ *People v. Ingersoll*, 245 Mich. 530, 222 N.W. 765 (1929).

¹¹ *Brewer v. State*, 140 Tex. Crim. 9, 143 S.W. (2d) 599 (1940).

¹² *Fitzhugh v. State*, 207 Ark. 117, 179 S.W. (2d) 173 (1944).

¹³ *Cochran v. State*, 141 Fla. 467, 193 So. 535 (1940).

¹⁴ *State v. Creech*, 210 N.C. 700, 188 S.E. 316 (1936).

involved in an accident resulting in injury or death to stop immediately and render assistance, has been held to apply with equal force to the defendant-owner riding as a passenger therein at the time of the accident.¹⁵

In determining liability under an automobile collision insurance policy which excluded liability if the automobile was being operated or manipulated by any person prohibited from driving or unauthorized by law to drive, it has been held that where the insured permitted a 16 year old girl with no operator's license to drive and placed his hand on the wheel or steadied or turned it, he did not thereby become the "driver" or "operator" of the automobile.¹⁶ In a similar case, however, it was held that the insured was the "driver" when just before the car struck a pedestrian he reached over, steered, and applied the emergency brake without interference from the 16 year old girl occupying the driver's seat.¹⁷

As to what amounts to the "operation" of an automobile within the meaning of a statute prohibiting "operation" under certain conditions,¹⁸ it has been held that getting into an automobile and starting the engine constitutes "operation" of the automobile;¹⁹ one who guides an automobile while it is being towed is "operating" it within the meaning of a statute prohibiting operation of such vehicle by an intoxicated person;²⁰ where one enters his automobile, steps on the starter and permits the engine to idle, while other persons are entering the car, he is "operating" the car, although it stands still.²¹ Contrary rulings have been made in some cases, however, emphasizing the principle that motion is an integral aspect of driving.²²

From a review of the cases cited, the answer to the question as to who is "driver" and what constitutes "operating" or "driving" within the meaning of the statutes, depends in each case upon the interpretation of the individual state courts as to the meaning of the words "operating" and "driving." The decisions allowing a person riding and not actually in the driver's seat, to come within the meaning of the words "operating" or "driving," appear to be based upon a fair and sound rule of law, and to give a just interpretation to the intent of the legislatures in passing such statutes for the protection of innocent persons upon the highways. The legal theories of imputed negligence, joint enterprise, aiders and abettors considered as principal, by which the courts reach this result, are old and tested legal principles.

Joel Wm. Townsend

¹⁵ *People v. Odom* (Cal. App.) 66 P. (2d) 206 (1937).

¹⁶ *Twogood v. American Farmers Mut. Automobile Ins. Ass'n*, 229 Iowa 1133, 296 N.W. 239 (1941).

¹⁷ *Lumbermen's Mut. Casualty Co. v. McIver et al.*, 27 F. Supp. 702 (S.D. Calif. 1939).

¹⁸ *Berry, Law of Automobiles* (7th ed. 1935) §5.386.

¹⁹ *State v. Ray*, 4 N.J. Misc. 493, 133 Atl. 486 (1926); *State v. Storrs*, 105 Vt. 180, 163 Atl. 560 (1933).

²⁰ *State v. Tacey*, 102 Vt. 439, 150 Atl. 68 (1930).

²¹ *State v. Webb*, 202 Iowa 633, 210 N.W. 731 (1926).

²² *State v. Hatcher*, 210 N.C. 55, 185 S.E. 435 (1936); *Wheeler v. State*, 67 Okla. Crim. 291, 94 P. (2d) 9 (1939); *People v. Kelley* (Cal. App.) 70 P. (2d) 276 (1937).