INSTITUTE OF LAW RESEARCH AND REFORM

THE UNIVERSITY OF ALBERTA

EDMONTON, ALBERTA

REPORT No. 32

GUEST PASSENGER LEGISLATION

April, 1979

GUEST PASSENGER LEGISLATION

Table of Contents

The Institute of Law Research and Reform was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Its office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 432-5291.

The members of the Institute's Board of Directors during the time when this Report was prepared were Judge W.A. Stevenson (Chairman); W.F. Bowker, Q.C.; R.P. Fraser, Q.C.; Margaret Donnelly; W.H. Hurlburt, Q.C.; Dr. M. Horowitz; Ellen Picard; Dean J.P.S. McLaren; and W.E. Wilson, Q.C. Mrs. Donnelly and Mr. Fraser have since retired from the Board and Mr. Fraser has been replaced by D.B. Mason, Q.C. Dr. Horowitz is an ex officio member as Vice-President (Academic) of the University of Alberta and bears no responsibility for this Report.

The Institute's legal staff consists of W.H. Hurlburt, Director; Gordon Bale, Associate Director; T.W. Mapp, Deputy Associate Director; Margaret A. Shone, Counsel; Dr. O.M. Stone, Consultant; and Vijay K. Bhardwaj, J.T. Daines, A.R. Hudson, D.B. McLean, I.D.C. Ramsay, and J.M. Towle, Legal Research Officers.

GUEST PASSENGER LEGISLATION

I. INTRODUCTION

Neither the common law nor statute law has taken a consistent approach to the guest or gratuitous passenger. In Nightingale v. Union Colliery Co.,[1] the Supreme Court of Canada in 1904 held that the owner of a railway was not liable for the injuries sustained by a gratuitous passenger in the absence of gross negligence. Mr. Justice Nesbitt stated: "The rule laid down in Moffat v. Bateman is that, in the case of a gratuitous passenger, gross negligence must be shewn..."[2] Twenty-two years later, however, in Armand v. Carr, we find Anglin C.J.C. stating: "We regard this [reasonable care in all the circumstances] as the test of responsibility of one who undertakes the carriage of another gratuitously...rather than some lower standard, which counsel for the appellant argued is implied in the decision of this court in Nightingale v. Union Colliery Co."[3] In Armand v. Carr, it was clearly held that the driver of a motor vehicle owed the same duty of reasonable care to a gratuitous passenger as was owed to any other person who might be injured by the operation of a motor vehicle. With one exception, the legislatures of all the common law provinces intervened in the 1930's to restrict or to

---

1. (1905), 35 S.C.R. 65.
2. Ibid., p. 67.
3. [1926] S.C.R. 575 at p. 581.

deny completely the right of action of a guest passenger against the host driver or owner.[4]

Prior to this massive legislative intervention, the gratuitous passenger had the benefit of the reversal of the onus of proof. Section 33 of the Motor Vehicle Act of 1911-12 provided that:[5]

> When any loss or damage is incurred or sustained by any person by a motor vehicle, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of the motor vehicle.

This reversal of the onus of proof appears to be a legislative recognition that the operation of a motor vehicle involves extraordinary danger. In 1924 a revised but substantially similar section was made inapplicable in the case of a collision between motor vehicles upon a highway.[6] Consequently, a gratuitous passenger who was injured in a one-car accident simply had to prove that damage had been caused by the motor vehicle and then the owner or driver had the onus of proof that the damage did not arise through his negligence or improper conduct.

---

4. Singleton "Gross Negligence and the Guest Passenger" (1973), 11 Alberta L. Rev. 165 at pp. 168-169. Prince Edward Island was the sole exception but, in 1949, it also restricted the right of action of guest passenger by An Act to Amend the Highway Traffic Act, 1936, S.P.E.I. 1949, c. 17, s. 17.

5. The Motor Vehicle Act, S.A. 1911-12, c. 6.

6. The Vehicles and Highway Traffic Act, 1924, S.A. 1924, c. 31, s. 66(2).

However, in 1934 the Alberta legislature deprived the gratuitous passenger in a private motor vehicle of any cause of action against the owner or driver of the motor vehicle.[7] In 1941, the right of a gratuitous passenger to bring an action against the owner or driver was partially reinstated but only where the accident was caused by the gross negligence or wilful and wanton misconduct of the owner or operator of the motor vehicle.[8] Basically the same provision is in effect today.[9]

Another statutory provision should be mentioned as it flows from the restriction upon the rights of the guest passenger against his host driver or owner. In 1951, The Contributory Negligence Act was amended to provide that where the guest passenger has no cause of action against the owner or driver of a motor vehicle, no damages, contribution or indemnity shall be recoverable from any person for the portion of the loss or damage caused by the negligence of the host driver or owner.[10] The guest passenger was thus identified with the negligence, but not the gross negligence, of the host driver or owner. It was as a

---

7. The Vehicles and Highway Traffic Act, 1924, Amendment Act, 1934, S.A. 1934, c. 62, s. 9.

8. The Vehicles and Highway Traffic Act 1941, S.A. 1941, c. 5, s. 102.

9. The Highway Traffic Act, 1975, S.A. 1975, c. 56, s. 160 and The Motor Vehicle Administration Act, S.A. 1975, c. 68, s. 77.

10. An Act to amend The Contributory Negligence Act, S.A. 1951, c. 16, s. 2

result of this provision that our Working Paper, entitled Contributory Negligence and Concurrent Tortfeasors, asked the question: "Should Alberta's guest passenger legislation and the complementary section in the Contributory Negligence Act be repealed?".[11] We subsequently decided that despite the presence of this section in the Contributory Negligence Act, this topic is unrelated to contributory negligence and should not be included in a Report on that subject. We therefore decided to issue this Report on the guest passenger legislation.

---

11. Working Paper, Contributory Negligence and Concurrent Tortfeasors (March, 1975), p. 55.

II. ARGUMENTS IN FAVOUR OF THE GUEST PASSENGER LEGISLATION

1. Fairness to the Driver

In Shortt v. Rush, Mackenzie J.A. stated: "This legislation was doubtlessly prompted by a general feeling that it was unjust that a passenger should be able to recover damages from a generously minded motorist who had given him a lift".[12] It may well be that in the 1930's when these statutes spread throughout the common law provinces, they were directed at the hitch-hiker. Today many, if not most, guest passengers are friends, relatives, neighbours and work mates and it is frequently expected that they will reciprocate and provide rides in the future to the driver. Thus one answer to the argument based on the injustice to the driver is that large number of guest passengers do not get "something for nothing" and that the probability of reciprocal benefit makes it fair to impose liability on the driver for his negligent conduct. A second answer is that it is primarily the insurer who is protected by the guest passenger legislation and that the insured driver who has been negligent is often anxious to see the guest passenger compensated, particularly if the passenger is a friend or relative. A third answer is that there is no reason to think that the driver's right to drive negligently is part of the bargain accepted by the passenger. A fourth answer is that it is not part of our general law that a

---

12. [1937] 4 D.L.R. 62 at p. 66 (Sask. C.A.).

person who receives a gratuitous benefit is deprived of a right of action for negligence; an occupier host, for example, owes a duty of reasonable care to his visitors.[13]

2. Prevention of Collusion

Another argument for the guest passenger section is that it is necessary in order to prevent collusion between the motorist and the passenger. One answer to that argument is that it would not be much more difficult for them to collude to prove gross negligence than to prove ordinary negligence. A second answer is that the courts will usually be able to distinguish between the fraudulent and the honest claim and that there is no justification for denying rightful claims where the driver has been negligent merely because of the possibility that a few claims might involve collusion. A third answer is that in the absence of the section, the need for collusion would arise only if the host driver is not at fault and then only if there is not another insured driver who was negligent. It should also be noted that there are a number of safeguards against collusion. Most persons will be very reluctant to perjure themselves. A host driver will not usually be willing to accept blame when he is without fault. The natural desire to appear not to have been negligent will be reinforced by his unwillingness to expose himself to the higher insurance premiums that are likely to

---

13. The Occupiers' Liability Act, S.A. 1973, c. 79, s. 5.

follow a successful claim upon his insurance. A host driver is also deterred from accepting blame because of the fear of criminal or quasi-criminal liability. Finally, the fear of collusion has not prevented the institution of "no-fault" accident benefits.

The argument that it would be unjust for a passenger to recover from the generous motorist who gave him a lift and the argument that it is necessary to prevent collusion do not sit well together. The first assumes that the guest passenger and the host driver will have such divergent interests that the host driver will consider it unseemly for the guest to claim against him for his negligence while the second assumes their interests are so convergent that they will collude.[14] It is of course the existence of adequate insurance coverage by the host driver which might tend to cause their interests to converge.

Professor Linden has stated that:[15]

> It is possible that the subsection was passed to offset the damage done to insurance companies by earlier legislation that made the owner of a motor vehicle responsible for loss or damage caused by it in addition to the driver, and shifted the onus of proof to the owner or driver in pedestrian cases.

Professor Linden certainly did not seek to justify the

---

14. Vetri, "The Case for Repeal of the Oregon Guest Passenger Legislation" (1976-77), 13 Willamette L.J. 53 at p. 59.

15. Comment (1962), 40 Can. Bar Rev. 284 at p. 286.

legislation on this basis. An answer to the argument that fairness to insurance companies necessitates such legislation is that if earlier legislation has imposed greater risk on insurance companies, insurance companies should charge higher premiums and not thrust the burden upon guest passengers through a limitation on their right to bring an action against the host driver or owner.[16]

3. Cost to the Driving Public

The abolition of the guest passenger section is likely to increase the total amount of claims paid by insurers, and if the increase is substantial, it is likely to be reflected in increased premiums. In a letter to the Institute dated February 18th, 1976, the Insurance Bureau of Canada estimated the increase in "pure claims costs" at 5 per cent and if the Insurance Bureau's estimate is right, the portion of the premium for insurance against personal injury claims would presumably rise by that percentage. Since the date of that letter, there has been an increase in the "no-fault" accident benefits under which the guest passenger is compensated without proof of negligence of any kind, gross or otherwise, and this part of the cost of compensating guest passengers is presumably included in existing premiums. In view of this and the way in which the distinction between ordinary and gross negligence has been whittled away, we

---

16. Gibson, "Guest Passenger Discrimination" (1967-68), 6 Alberta L. Rev. 211 at p. 214.

hope that the estimate may prove to be high. However, even if it is not, we think that there is no justification for discriminating against the guest passenger.

III. ARGUMENTS IN FAVOUR OF REPEALING THE GUEST PASSENGER SECTION

1. Fair Compensation for the Injured Guest Passenger

The arguments in favour of abolishing the discrimination against the guest passenger are almost too obvious to state. The most important function of the law of torts is to provide compensation for persons who are injured by the negligence of others. The guest passenger provision interferes with this important function. It often denies or reduces recovery with the result that persons who have little capacity to bear the loss are compelled to do so. The loss spreading function of the law of torts and of insurance is unreasonably restricted by the guest passenger section and the injustice of the section is obvious.

2. The Antipathy of the Courts to Guest Passenger Legislation

The protection accorded to the host driver or owner by the guest passenger provision has been gradually eroded. The Supreme Court of Canada in McMillan v. Pawluk[17] reversed the judgment of the Appellate Division of the Alberta Supreme Court and restored that part of the judgment of the trial judge which held that passengers in one of the cars were not guests without payment and therefore they could recover damages from the negligent driver. The passengers were involved in an informal car pool. Martland J. who wrote the unanimous decision of the Supreme Court quoted

---

17. [1976] 2 S.C.R. 789.

with approval the dissenting decision of Johnson J.A. that: "When transportation is provided pursuant to a mutual undertaking to repay by providing further transportation, it cannot be said to be 'social only.'"[18] Thus the Supreme Court of Canada purposefully narrowed the class of gratuitous passengers in order to permit recovery by a person who does not pay for a ride in cash but does so in kind.

Dorosz and Dorosz v. Koch[19] is another case in which the category of guest passengers was confined more narrowly through judicial interpretation. In this case, the daughter of the plaintiffs was killed while being driven home after baby-sitting at the defendant's home. The defendant had sent the daughter home unescorted after a prior baby-sitting session and her mother had extracted a promise that her daughter would receive transportation home. The Ontario Court of Appeal held that the action was brought against the defendant not in his capacity as owner of a motor vehicle but as a party to a contract of employment. The full rigour of the guest passenger provision has thus been mitigated by judicial interpretation, which, however, has the disadvantage of making the law uncertain.

Another device which the courts have used to restrict the scope of the section is to place the onus of proof that a person

---

18. Ibid., p. 794.

19. (1962), 31 D.L.R. (2d) 139 (Ont. C.A.).

was a gratuitous passenger upon the person so alleging. The burden of proof will often be decisive in cases in which there are no survivors in a car. In Yasinski's Estate v. Deneschuk's Estate[20] the action arose out of a head-on collision between two motor vehicles in which there were no survivors. The plaintiffs brought an action against the estates of both drivers for the death of their daughter. Their daughter, age 19, was travelling in the motor vehicle driven by Deneschuk, of the same age, whom she had known since childhood. In spite of their many years of friendship, Dechene J. did not think he could draw the inference that there was no payment for the transportation and the plaintiffs were able to recover without proving gross negligence.

3. The Uncertain Distinction between Gross Negligence and Ordinary Negligence

As has previously been noted, there are many judges who believe the guest passenger legislation is out of harmony with the general development of tort law and should be restrictively construed. This restrictive construction has resulted in a tendency for the distinction between gross negligence and ordinary negligence to be eroded.

In Engler v. Rossignol,[21] the Ontario Court of Appeal reversed the trial judge and found gross negligence. The

---

20. (1977), 6 A.R. 335 (S.C.).

21. (1976), 10 O.R. (2d) 721 (C.A.).

majority decision of MacKinnon J.A. indicated discontent with the existing guest passenger legislation. MacKinnon J.A. stated:[22]

> It may be that the demarcation line between gross and ordinary negligence is getting more difficult to define or establish in particular cases. It may also be that the time has come for the Legislature to review the relevant legislation. However, on the particular facts of this case, I have no doubt but that they clearly establish "gross negligence", as those words have been defined and expounded by the Supreme Court of Canada, on the part of the respondent driver.

The dissenting judgment of Evans J.A. is a clear call for legislative abolition of the guest passenger provision so that the judiciary does not need to distort concepts in order to provide recovery. Evans J.A. stated:[23]

> There appears to be little judicial support for a clear line of demarcation between negligent conduct which is termed ordinary negligence and that which is characterized as gross negligence. Perhaps our rising social consciousness tends to disregard an arbitrary standard which is not subject to precise delineation, or it may be that circumstances which gave birth to the restrictive, gratuitous-passenger legislation are no longer applicable in our present society where the legislative trend is to hold responsible everyone who injures another as a result of his negligent conduct. In any event, if the distinction between ordinary and gross negligence is to be disregarded as a matter of policy, then in my view it would be preferable that it should be effected by legislation rather than by a succession of judicial decisions which make it impossible to determine with any degree of certainty whether there remain in the law of Ontario any degrees of negligence in those cases in which damages are sustained by gratuitous passengers through the negligent conduct of the driver motorist. A return to

---

22. Ibid., p. 732.

23. Ibid., pp. 726-727.

> the common law concept would eliminate the strained and occasionally unnatural interpretation which the Courts have placed upon the legislation. Uniformity is much more desirable for the litigant than the uncertainty of judicial creativity.

If there ever was any clear distinction between gross and ordinary negligence, the restrictive guest passenger legislation has produced case law which makes it virtually impossible to make any confident prediction about the delineation which a court will draw. Writers have perceived a trend toward the reduction of the protection afforded the driver or the driver's insurance company through the finding of gross negligence when it is far from clear that there has been the "very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves"[24] which Duff C.J.C. in the well-known case of McCulloch v. Murray thought was necessary to show it.

In addition to finding gross negligence in circumstances where it might be thought difficult to infer that the conduct was anything more than simply negligent, the courts have also resorted to the maxim of res ipsa loquitur. In Walker v. Coates, Ritchie J. stated:[25]

> If the rule of res ipsa loquitur is accepted in cases where proof of "negligence" is in issue, I can see no logical reason why it should not apply with equal force

---

24. [1942] S.C.R. 141 at p. 145.

25. [1968] S.C.R. 599 at p. 603.

> when the issue is whether or not there was "very great negligence" provided, of course, that the facts of themselves afford "reasonable evidence, in the absence of explanation by the defendant, that the accident arose" as a result of "a very marked departure from the standards" to which Sir Lyman Duff referred to in the McCulloch case.

The use of the maxim res ipsa loquitur to establish a prima facie case of gross negligence also tends to blur any distinction between gross negligence and negligence.[26] It was applied in the recent case of Stevens v. Kachman[27] to shift the evidential burden from the plaintiff, a passenger in a motor vehicle, to the defendant, who failed to negotiate a turn, drove across the centre line and down a steep embankment.

Guest passenger legislation is perceived as so contrary to the basis of negligence law that many courts are likely to interpret it restrictively so as to avoid applying it. Certainty in the law and fairness to the guest passenger can only be achieved by a return to the common law position that the host driver owes the same duty of care to a guest passenger as to any other person who may be injured by the operation of the motor vehicle.

---

26. Singleton "Gross Negligence and The Guest Passenger" (1973), 11 Alberta L. Rev. 165 at pp. 176-178.

27. (1978), 10 A.R. 192 (S.C.).

4. Incompatibility of Guest Passenger Legislation and "No-Fault" Accident Benefits

In 1972, a system of "no-fault" benefits for automobile accident victims was introduced in Alberta which provides protection for all occupants of the insured automobile.[28] Under it a guest passenger is entitled to medical expenses and disability benefits up to the maximum provided under section 300.1 of the Act simply by proving the injury resulted from the operation of a motor vehicle, even though the owner or driver was not negligent, but in regard to any damages in excess of the maximum he must prove gross negligence. Such a discontinunity in the rights of a guest passenger to receive compensation for injury arising out of the operation of a motor vehicle cannot be justified. The "no-fault" accident benefit insurance introduced in 1972 does not discriminate against the guest passenger and neither should the general tort liability system. To permit the negligently and seriously injured guest passenger to go uncompensated for losses in excess of the "no-fault" benefit limit unless he can prove gross negligence is inequitable and inconsistent with the policy of the "no-fault" benefits, which emphasizes compensation without proof of fault, and with the general tort liability system which provides compensation on proof of negligence.

---

28. An Act to Amend The Alberta Insurance Act, S.A. 1971, c. 53, s. 7 and Alberta Regulation 352/72.

IV. CONCLUSION

1. Guest Passenger Section

It seems difficult to disagree with Professor Gibson that "Discrimination against guest passengers must be ended."[29] The Canadian Bar Association in 1965 resolved in favour of removing the restrictions on claims by guest passengers, though its Insurance Law Section was almost equally divided - the vote of the section having been 10 for removal and 9 for retention.[30] Neither Quebec nor England has ever had such legislation. In 1969, British Columbia repealed the special restrictions on claims by guest passengers.[31] The repeal in British Columbia of the guest passenger legislation appears to have resulted from the Royal Commission on Automobile Insurance headed by Mr. Justice R.A.B. Wootton which reported in July, 1968 and recommended a "no-fault" insurance scheme. Ontario, the province which retained the complete exclusion of the right of the guest passenger to sue the host driver or owner for longer than any other province, in 1977 completely eliminated any restriction on the right of the gratuitous passenger to claim against his host

---

29. "Guest Passenger Discrimination" (1967-68), 6 Alberta L. Rev. 211 at p. 218.

30. Canadian Bar Association Proceedings 1965, Vol. 48 at p. 220.

31. S.B.C. 1969, c. 20, s. 12.

driver or owner.[32]

In the United States there were 31 states at one time that had broad limitations upon the right of the guest passenger to sue his host driver or owner but the number of states that have such legislation is gradually diminishing and in 1976 there were only 12 states in this category.[33] The Supreme Court of California in Brown v. Merlo[34] declared its guest passenger provision unconstitutional as being in violation of the equal protection clause of the Fourteenth Amendment and also contrary to the California Constitution. Since 1973, there have been at least seven other states in which the guest statute has been found to be unconstitutional. Whether or not the guest passenger is being denied the "equality before the law and the protection of the law" guaranteed by the Alberta Bill of Rights,[35] we have concluded that there is no adequate rationale for discriminating against the guest passenger. The Manitoba Law Reform Commission

---

32. S.O. 1977, c. 54, s. 16.

33. Vetri, "The Case For Repeal of The Oregon Guest Passenger Legislation: (1976-77) 13 Willamette L.J. 52 at p. 54.

34. 506 Pacific 2d 212.

35. S.A. 1972, c. 1.

has stated:[36]

> [T]o deny compensation to a group of accident victims as numerically significant as guest passengers is a harsh and unnatural interference with those persons' civil rights, and an unjustified hiatus in the modern law of negligence which as a rule has abandoned special relationships or the receipt of compensation as requirements for the establishment of liability.

RECOMMENDATION #1

> **We recommend that section 160 of the Highway Traffic Act, 1975, S.A. 1975, c. 56 and section 77 of The Motor Vehicle Administration Act, S.A. 1975, c. 68 be repealed.**

2. Section 4 of The Contributory Negligence Act

It is obvious that, if the guest passenger is entitled to recover damages from his host driver or owner on the basis of negligence, it will no longer be appropriate to impute to the guest passenger the negligence of the host driver or owner.

RECOMMENDATION #2

> **We recommend that section 4 of The Contributory Negligence Act, R.S.A. 1970, c. 65 as amended by section 164 of The Highway Traffic Act, 1975, S.A. 1975, c. 56 be repealed.**

---

36. Report #20, The Highway Traffic Act (1975) at p. 36.

3. Section 298 of The Alberta Insurance Act

In 1933, The Alberta Insurance Act was amended to provide that the insurer shall not be liable unless there was an endorsement on the policy for which an added premium was paid in regard to any loss or damage resulting from bodily injury or death of an automobile passenger.[37] This exception to the liability of an insurer is still provided for in section 298 of The Alberta Insurance Act.[38] However, in 1977 an amendment was made to The Alberta Insurance Act which would no longer permit an insurer to exclude from liability any loss or damage resulting from bodily injury or death of an automobile passenger.[39] However, this section is only to come into force on a date fixed by proclamation and no date has yet been fixed.

It is our opinion that a guest passenger will not receive adequate protection simply by a repeal of the guest passenger section. It is only realistic to recognize that few damage awards for serious injury to a guest passenger could be met by the average defendant driver or owner from his own resources. We also believe that it would be unfair to the driver to exclude from general insurance coverage a potential liability upon all

---

37. The Alberta Insurance Act, 1926, Amendment Act, 1933 S.A. 1933, c. 57, s.4.

38. The Alberta Insurance Act, R.S.A. 1970, c. 187, s. 298.

39. The Alberta Insurance Amendment Act, 1977, S.A. 1977, c. 76, s. 6.

drivers: we regard the spreading of the risk among all members of the driving public through automobile liability insurance as being necessary. We think that an insurer should not be able to exclude his liability in regard to any loss or damage suffered by a passenger in an insured vehicle. We therefore concur with the 1977 amendment to The Alberta Insurance Act.

RECOMMENDATION #3

> **We recommend that section 6 of The Alberta Insurance Amendment Act, 1977, S.A. 1977, c. 76 be proclaimed to be in force as soon as possible.**

4. The Timing of the Amendments

We think that the proclamation of section 6 of The Alberta Insurance Act 1977 should take effect before, or at the same time as, the restoration of the right of the guest passenger to sue the host driver or owner for ordinary negligence. We also think that the repeal of section 160 of The Highway Traffic Act, 1975 and section 77 of The Motor Vehicle Administration Act should occur simultaneously with the repeal of section 4 of The Contributory Negligence Act. The repeal should, in our opinion, be applicable to any cause of action which arises out of the operation of a motor vehicle which occurs after the coming into force of the repealing Act and that the present provisions should be preserved in regard to causes of action which have arisen out of the operation of a motor vehicle prior to the coming into force of the repealing Act.

We do not think that the repeal of section 160 of The Highway Traffic Act, 1975 and section 77 of The Motor Vehicle Administration Act should have any retroactive effect. This is because the repeal of these sections creates a right of action for a guest passenger who was injured through the ordinary negligence of the driver or owner when previously he had no right of action unless the owner or driver had been grossly negligent. If the driver or owner had arranged insurance coverage relying upon these sections, it would be unfair to create a new unanticipated liability against him. The repeal of these sections should only give rise to a right of action in the guest passenger for ordinary negligence in regard to an accident which occurs after the sections have been repealed. Similarly, repeal of section 4 of The Contributory Negligence Act should only apply prospectively. The repeal will create greater liability in the negligent driver or owner of the other car because the guest passenger will no longer have imputed to him the negligence of his own driver or owner.

RECOMMENDATION #4

> We recommend that section 160 of The Highway Traffic Act, 1975, S.A. 1975, c. 56, section 77 of The Motor Vehicle Administration Act, S.A. 1975 c. 68 and section 4 of The Contributory Negligence Act, R.S.A. 1970, c. 65 as amended be simultaneously repealed after section 6 of The Alberta Insurance Act, 1977, S.A. 1977,c. 76 has been proclaimed to be in force but that the repealed sections should continue to apply to causes of action which have arisen out of the operation of a

> motor vehicle prior to the coming into force of the repealing Act.

5. The Onus of Proof

In conclusion, we believe that we should indicate that the effect of simply repealing the discrimination against the guest passenger is that a guest passenger in a one-car accident will have the advantage of the reverse onus of proof.[40] After a guest passenger in a one-car accident has established that damage has been caused by a motor vehicle in motion, the owner or driver will have the onus of proving that the damage did not entirely arise from his negligence. We express no opinion here as to the appropriateness of the onus; we merely say here that if it

---

40. The Highway Traffic Act, 1975, S.A. 1975, c. 56, s. 158 as amended by S.A. 1976, c. 25, s. 4 and The Motor Vehicle Administration Act, S.A. 1975, c. 68, s. 75.

applies to other passengers it should also apply to the guest passenger.

W.F. BOWKER

W.H. HURLBURT

D.B. MASON

J.P.S. MCLAREN

ELLEN PICARD

W.A. STEVENSON

W.E. WILSON

BY _____
Chairman

_____
Director

April, 1979

(Mrs. Margaret Donnelly and Mr. R.P. Fraser were members of the Board when the substantive decisions about this Report were made and Mr. D.B. Mason joined the Board subsequently.)

APPENDIX A

Recommendations

RECOMMENDATION #1

We recommend that section 160 of the Highway Traffic Act, 1975, S.A. 1975, c. 56 and section 77 of The Motor Vehicle Administration Act, S.A. 1975, c. 68 be repealed.

RECOMMENDATION #2

We recommend that section 4 of The Contributory Negligence Act, R.S.A. 1970, c. 65 as amended by section 164 of The Highway Traffic Act, 1975, S.A. 1975, c. 56 be repealed.

RECOMMENDATION #3

We recommend that section 6 of The Alberta Insurance Amendment Act, 1977, S.A. 1977, c. 76 be proclaimed to be in force as soon as possible.

RECOMMENDATION #4

We recommend that Section 160 of The Highway Traffic Act, 1975, S.A. 1975, c. 56, section 77 of The Motor Vehicle Administration Act, S.A. 1975 c. 68 and section 4 of The Contributory Negligence Act, R.S.A. 1970, c. 65 as amended be simultaneously repealed after section 6 of The Alberta Insurance Act, 1977, S.A. 1977, c. 76 has been proclaimed to be in force but that the repealed sections should continue to apply to causes of action which have arisen out of the operation of a motor vehicle prior to the coming into force of the repealing Act.

APPENDIX B

The Highway Traffic Act, S.A. 1975, c. 56.

Section 160:

160.(1) No person transported by the owner or driver of a motor vehicle as his guest without payment for the transportation has any cause of action for damages against the owner or driver for injury, death or loss, in case of accident, unless

(a) the accident was caused by the gross negligence or wilful and wanton misconduct of the owner or operator of the motor vehicle, and

(b) the gross negligence or wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought.

(2) This section does not relieve

(a) any person transporting passengers for hire or gain, or

(b) any owner or operator of a motor vehicle that is being demonstrated to a prospective purchaser,

of responsibility for any injury sustained by a passenger being transported for hire or gain or sustained by any such prospective purchaser.

(3) Where the owner of a motor vehicle is being driven in his own motor vehicle by another person, subsection (1) applies as if the owner were the guest of the driver.

(Section 77 of The Motor Vehicle Administration Act, S.A. 1975, c. 68 is identical to section 160 above.)

The Contributory Negligence Act, R.S.A. 1970, c. 65

Section 4:

Where no cause of action exists against the owner or driver of a motor vehicle by reason of section 77 of The Motor Vehicle Administration Act or section 160 of The Highway Traffic Act, 1975, no damages, contribution or indemnity shall be recovered from any person for the portion of the damage or loss caused by the negligence of such owner or driver but the portion of the damage or loss so caused by the negligence of such owner or driver shall be determined although such owner or driver is not a party to the action.

Amended by: section 164 of The Highway Traffic Act, S.A. 1975, c. 56

ACKNOWLEDGMENTS

The Institute acknowledges the continuing grant from the Alberta Law Foundation which, together with the funds provided by the Attorney-General and the University of Alberta, makes the Institute's work possible.

We have been greatly assisted in the project by the excellent research paper prepared by Professor Lewis Klar of The Faculty of Law of the University of Alberta. We also wish to acknowledge our indebtedness to Miss N.L. Foster, Mr. R. Sadownik, Mr. G.C. Stewart, Mr. E.D.D. Tavender and Mr. N.C. Wittmann who served on a committee of the Canadian Bar Association, Alberta Branch and provided assistance to us.

In addition to the Director, the members of the Institute staff who have participated in the project are Mr. Gordon Bale and Mr. V.K. Bhardwaj.