TORTS—NEGLIGENCE—CALIFORNIA'S GUEST STATUTE DOES NOT APPLY TO ACCIDENTS WHICH OCCUR OFF PUBLIC HIGHWAYS. *O'Donnell v. Mullaney* (Cal. 1967).

On July 20, 1963, the deceased, Peggy O'Donnell and the defendant, William Francis Mullaney, both 18 years of age, attended a picnic in Orange County, California. Late in the afternoon Mr. Mullaney invited Miss O'Donnell for a ride in his sports car. She accepted the invitation, which was entirely social in nature, with no tangible benefits or monetary consideration involved. From the picnic site the defendant drove onto a public highway, and after proceeding for a distance slightly in excess of one mile, he turned onto a private road, known only as "Mobil Oil Lease Road." The road was narrow and winding, running through the foothills in the vicinity. After driving approximately one-half mile on the private road, the defendant came to a sharp curve which he was unable to negotiate. His car left the road and plummeted several hundred feet down the side of a cliff, inflicting fatal injuries upon the deceased. The trial court rendered judgment for the defendant, holding the California guest statute applicable as a matter of law. The trial court's judgment was affirmed on appeal to the Fourth District Court of Appeal. On appeal to the California Supreme Court *held*, reversed: The California guest statute is not applicable to accidents occurring off public highways. *O'Donnell v. Mullaney*, 66 Adv. Cal. 1048, 449 P.2d 160, 59 Cal. Rptr. 850 (1967).

The sole issue presented on appeal enabled the Supreme Court to decide for the first time whether the California guest statute is applicable to an accident on a *private roadway* as distinguished from a *public highway.*

Initially adopted in 1929, the guest statute[1] was codified in 1935 as Section 403 of the California Vehicle Code.[2] As it exists in California today it provides in part that:

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[1] Act of June 13, 1929, ch. 787, § 14¾ [1929] Cal. Stats. 1580.

> Any person who as a guest accepts a ride in any vehicle, moving upon any of the *public highways* of the State of California, and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle. . . (emphasis added).

In 1931 the act was amended but that amendment, for our purposes here, was irrelevant. Basically, however, the amendment deleted gross negligence as basis for liability, therefore making it necessary for the guest to establish either intoxication or willful misconduct on the part of the owner or driver. Act of June 12, 1931, ch. 812, [1931] Cal. Stats. 1693.

[2] Act of March 25, 1935, ch. 27, § 403, [1935] Cal. Stats. 154.

> No person . . . who as a guest accepts a ride in any vehicle *upon a highway* without giving compensation for such ride . . . has any right of action for civil damages against the driver of the vehicle . . . .[3]

In codifying the 1929 statute the legislature substituted the phrase "upon a *highway*" for "upon any of the *public highways*."

Speaking for the court in *O'Donnell*, Justice Peters reasoned that although the word *public* was deleted in the 1935 codification this did not enlarge the statute's operation to encompass accidents occurring off of public roads. Since the word "highway" is defined expressly in the code as meaning a "public" highway,[4] the use of that word in the California guest statute to define that place where the statute is operative leads to the inescapable conclusion that the statute is inapplicable to an occurrence off public roads.[5]

The court asserted that in order for the defendant to avail himself of the guest statute, he must show: "(1) that the plaintiff accepted a 'ride' as a guest, (2) that the ride was 'in' a vehicle *upon a highway*, and (3) that death or injury was suffered by the guest 'during such ride.' "[6] Inasmuch as the ride was on a corporation's privately maintained road and therefore not *upon a highway*, one of the elements essential to the statute's operation was absent. Consequently, the defendant was not protected by the statute.

Pervading the problem is the well-established policy of the California Supreme Court to strictly construe statutes in derogation of the common law.[7] The court was confronted with this strong judicial policy of strict statutory construction and this supplied the catalyst for its precise action.

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[3] CAL. VEHICLE CODE § 17158 (West 1960), *as amended*, (Supp. 1966) (emphasis added) [hereafter referred to as statute].

[4] " 'Highway' is a way or place of whatever nature, publicly maintained and open to the use of the public for the purposes of vehicular travel. Highway includes street." CAL. VEHICLE CODE § 360 (West 1960).

[5] O'Donnell v. Mullaney, 66 Adv. Cal. 1048, 1051, 449 P.2d 160, 161, 59 Cal. Rptr. 840, 842 (1967). "Thus, the conclusion is inescapable that the term 'highway' in section 17158 must be interpreted to mean a public roadway and does not include private roadways."

[6] *Id.* at 1051, 449 P.2d at 162, 59 Cal. Rptr. at 842 (emphasis added).

[7] Prager v. Isreal, 15 Cal. 2d 89, 93, 98 P.2d 729, 731 (1940). "The common law right of having redress for injuries wrongfully inflicted, being lessened by such 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." McCann v. Hoffman, 9 Cal. 2d 279, 282, 70 P.2d 909, 911 (1937); Smith v. Pope, 53 Cal. App. 2d 43, 48-49, 127 P.2d 292, 295-96 (1942); Rocha v. Hulen, 6 Cal. App. 2d 245, 254, 44 P.2d 478, 483 (1935).

Absent a controlling statute, the driver of a motor vehicle has a duty to exercise ordinary, reasonable care to avoid injuries to his guests.[8] The claims of frequent collusion between the driver and the guest in a suit against the driver's insurer, and the resultant skyrocketing automobile insurance premiums has led to the adoption of guest statutes[9] in twenty-six states limiting the driver's liability.[10] These statutes limit a guest's cause of action for injuries sustained in an automobile accident, to certain types of conduct, such as intoxication, gross negligence, and willful misconduct on the part of individuals specified in the various statutes.[11] The issue of a guest statute's application to an accident occurring on private property has been adjudicated in only four other jurisdictions.[12] Three of these four courts have found nothing in the applicable statutes which would restrict the operation of the statute to "public" highways.

In *Fishback v. Yale*,[13] the fact that the defendant was operating

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8 *See generally* W. PROSSER, TORTS § 34 (3d ed. 1964).

9 W. PROSSER, TORTS § 83 (3d ed. 1964).

> The automobile guest statutes . . . which are largely the work of insurance companies in the legislatures, have tended to cut down on liability to guests; and where there are no such statutes, a clause in the policy may do so.

Id.

10 ALA. CODE tit. 36, § 95 (1959); ARK. STAT. ANN. § 75-913 (1959); CAL. VEHICLE CODE § 17158 (West 1960);COLO. REV. STAT. ANN. § 13-9-1 (1964); DEL. CODE ANN. tit. 21, § 6101 (1953); FLA. STAT. F.S.A. § 320.59 (1955); IDAHO CODE ANN. § 49-1001 (1948); ILL. ANN. STAT. ch. 95½, § 9-201 (1955); IND. ANN. STAT. § 47-1021 (1966); KAN. GEN. STAT. ANN. § 8-122(b) (Corrick, 1949); MICH. STAT. ANN. § 256.29 (1948); MONT. REV. CODES ANN. 332-1113 (1954); NEB. REV. STAT. § 39-740(1) (1952); NEV. REV. STAT. § 41.180 (1958); N.M. STAT. ANN. § 64-24-1 (1960); N.D. REV. CODE § 39-15 (1943); OHIO REV. CODE ANN. tit. 45, § 4515.02 (1953); ORE. REV. STAT. § 30.115 (1953); S.C. CODE tit. 46, § 801 (1962); S.D. CODE § 44.0362 (1939); TEX CIV. STAT. ANN., art. 6701b (Supp. 1966); UTAH CODE ANN. § 41-9-1 (1960); VT. STAT. ANN. tit. 23, § 1491 (1947); VA. CODE ANN. § 8-646.1 (1957); WASH. REV. CODE § 46-08.080; WYO. COMP. STAT. ANN. § 60-1201 (1945).

11 *See* 96 A.L.R. 1479 (1935).

12 *See* Fishback v. Yale, 85 So. 2d 142 (Fla. 1955). The plaintiff and defendant had entered upon the land of one A. A. Fiezel in order to gain access to a game preserve. While standing in front of defendant's auto unlocking a gate, plaintiff was struck by defendant's auto. Hall v. Bardol, 260 App. Div. 982, 23 N.Y.S.2d 596, *aff'd.*, 285 N.Y.S. 726, 34 N.E.2d 895 (1940) (where defendant had been driving with his guest when, in order to avoid a car ahead, he skidded off the road and onto private property, where the car traveled 100 feet or more before overturning and injuring plaintiff); Kitchens v. Duffield, 149 Ohio St. 500, 37 Ohio OPS 200, 79 N.E.2d 906 (1948) (where plaintiff was riding as defendant's guest on a United States air base, the court pointing out that the guest statute was not limited in its operation to motor vehicles on public roads or highways); Hayes v. Bower, 39 Wash. 2d 372, 235 P.2d 482 (1951) (where the court explained, in answer to defendant's contention, that although defendant had entered plaintiff's auto on private property, the guest statute arose then and was not changed when the car was driven onto a public way).

13 85 So. 2d at 142-43.

his automobile on private property did not serve to remove him from the operation of the statute. In that case, the court was presented with much the same problem as was the court in *O'Donnell*, since the term "motor vehicle" as used in the Florida guest statute[14] is defined as follows:

> "Motor Vehicle" includes automobiles, motorcycles, motor trucks and all other vehicles operated over the *public* highways and streets of this state . . . .[15]

The court postulated that to limit the applicability of the statute to public roadways would lead to many absurd situations in which the driver's liability would vary according to whether he left the road for a brief moment. To use the courts illustration:

> [I]f the owner of an automobile, while operating it on a public highway with two guests A and B, should find the highway blocked or washed out, making it necessary to leave the highway and detour a hundred yards over private property and while making such detour guest A was injured by the simple negligence of such owner guest A would have a cause of action for simple negligence, but if the host was before leaving the highway onto such detour or immediately upon returning onto the highway guilty of simple negligence and thereby guest B was injured, guest B would have no cause of action against such operator. We are unable to agree that the legislature in the enactment of our guest statute intended to limit or restrict its application in such a manner as to create situations such as above illustrated, or that it is so limited or restricted . . . .[16]

The Supreme Court of Ohio in *Kitchens v. Duffield*,[17] held that state's guest statute applicable to accidents occurring on private ways, thus barring recovery for ordinary negligence in the operation of an automobile on a United States military facility. The *Kitchens* decision is unique in that the Ohio statute,[18] of the four judicially interpreted, is the only one which is silent on the problem of public versus private ways. The court observed:

> The General Assembly has not seen fit to limit it in terms to the operation of motor vehicles on public roads or highways, and, if this

14 FLA. STAT. ANN. § 320.59(1) (1955).

15 *Id.* (emphasis added).

16 85 So. 2d at 146.

17 149 Ohio St. 500, 37 Ohio OPS 200, 79 N.E.2d 906.

18 OHIO REV. CODE ANN. tit. 45, § 4515.02 (1953).

> 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, resulting from the operation of said motor vehicle, while such guest is being transported without payment therefor in or upon said motor vehicle, 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.

> court were to do so by a process of reasoning, which to say the least would be questionable, it would be exceeding its proper functions.[19]

Hayes v. Brower[20] represents another jurisdiction's approach to the problem. It was appellant's contention that defendants could not take advantage of the guest statute because their car was not being lawfully operated on the public highway. The court answered this objection, saying that the status of a guest becomes fixed at the moment of entry into the automobile.[21]

The fourth jurisdiction to be confronted with this problem was New York.[22] However, New York does not have a guest statute, and in this case the court was construing a Canadian guest statute. The accident took place in Canada where the controlling Ontario statute[23] provided that the owner of a motor vehicle should be liable for loss or damage sustained by others as a result of "the operation of such motor vehicle on a highway." The defendant contended that the statute precluded the plaintiff from maintaining an action whether the negligence occurred on or off the highway. The plaintiff framed his complaint so that he sought relief for only that negligence which occurred on private property. The court did not really deal with the problem, but rather directed the verdict for the defendant, apparently[24] on the theory that the negligent operation

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19 149 Ohio St. at 502, 37 Ohio OPS at 201, 79 N.E.2d at 908.

20 39 Wash. 2d 372, 235 P.2d 482.

21 *Id.* at 388-89, 235 P.2d at 492.

> Appellants apparently argue that the status of one riding in an automobile driven by another does not become fixed until the car is driven onto a public highway, and that, if the car enters such a highway in an unlawful manner, one who entered the car as a guest may no longer occupy that status, and this without regard to whether the previous arrangement for the ride and the unlawful act were anywise related.
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> If such a principle were adopted, an invited guest entering a car standing on a private driveway or in a garage might well lose that status, if the car, when it entered upon a public highway, should be mechanically defective or even if it should be unlicensed.

Id.

22 260 App. Div. 982, 23 N.Y.S.2d at 598, *citing* ONTARIO REV. STATS. ch. 288 (1937).

23 ONTARIO REV. STATS. ch. 288 (1937), which provides:

> (1) The owner of a motor vehicle shall be liable for loss or damage sustained by any person by reason of negligence in the operation of such motor vehicle on a highway unless such motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner shall be liable to the same extent as such owner.
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> (2) Nothwithstanding the provisions of subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, shall not be liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering or getting on to, or alighting from such motor vehicle.

24 260 App. Div. 982, 23 N.Y.S.2d 596. One can only assume the reason upon

of the vehicle on the public highway was the proximate cause of the entire injury.

Discernible in the cases of jurisdictions which have dealt with the application of their guest statutes, are two general policy considerations over which the courts are split.

The majority[25] view is that the ultimate purpose of the guest statutes is to lower the standard of care that is owed by the driver of an automobile to his guest.[26] These courts abide by the principle that it would be inconsistent with the essence of the statute itself to construe it strictly and, therefore interpret the statute liberally. If these courts remain consistent, they will necessarily interpret their state's guest statute as encompassing accidents which occur on private as well as public roadways.

A small minority of jurisdictions,[27] however, recognize that the guest statutes are in derogation of the common law and, therefore, that they should be strictly construed and sharply limited in their operation.[28] The states that have announced their adherence to this strict statutory interpretation have strongly articulated their support. Thus there would seem to be little chance that they would depart from this doctrine.

When the California Legislature intends to make its motor vehicle laws apply to private property in a certain circumstance, it will say so in clear and precise language.[29] Until such time as the legislature sees

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which the court based its decision, since the report only states the holding in two short sentences.

[25] These jurisdictions apparently include: Alaska, Colorado, Florida, Idaho, Illinois, Indiana, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington and Wyoming.

[26] W. PROSSER, TORTS § 34 (3d ed. 1964).

> They [automobile guest statutes] provide that the driver of an automobile is liable to one who is riding as his gratuitous guest in his car only for some form of aggravated misconduct . . . . The required form of aggravation is specified as "gross negligence," "intentional," "wanton," or reckless misconduct, acting "in disregard to the safety of others," "intoxication," or some combination of the two or more.

[27] These jurisdictions apparently include: Arkansas, California, Delaware and Michigan.

[28] Whittecar v. Cheatha, 226 Ark. 31, 33, 287 S.W.2d 578, 579 (1956), Prager v. Isreal, 15 Cal. 2d at 93, 98 P.2d at 731. "The common law right of having redress for injuries wrongfully inflicted, being lessened by such 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.*" *Accord*, Colombo v. Sech, 52 Del. 575, 577, 163 A.2d 270, 272 (1960); Piscopo v. Fruciano, 307 Mich. 433, 436, 12 N.W.2d 329, 330 (1943).

[29] People v. Stansberry, 242 Cal. App. 2d 199, 202, 51 Cal. Rptr. 403 (1966).

fit to amend the guest statute of this state, the principle case represents present California law, and the decision is consistent with the California policy of strict interpretation of statutes in derogation of the common law.

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> It must be presumed that every word employed in a statute was intended to have some meaning and to perform some useful office. . . . In Section 20002 the Legislature has not specifically enumerated particular places or classes of places followed by the general word "elsewhere." Rather, by the use of one compendious word—"highways"—followed by the words "and elsewhere," it is our opinion that the latter words mean elsewhere than on highways as defined by the Vehicle Code.

Id. (footnotes omitted).