

2001

# JAY A. THOMAS, for himself, and JESSICA MAY THOMAS, an infant, through her guardian, JAY A. THOMAS v. Union Pacific Railroad : Brief of Respondent

Utah Supreme Court

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Jackson Howard; Howard, Lewis, & Petersen; Attorney for Plaintiff-Appellants.

Ray H Ivie; Ivie & Young; Attorney for Defendant-Respondent.

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SEP 16 1973

IN THE SUPREME COURT OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

JAY A. THOMAS, for himself, :  
and JESSICA MAY THOMAS, an :  
infant, through her guardian, :  
JAY A. THOMAS, :

Plaintiffs- :  
Appellants, :

vs. :

UNION PACIFIC RAILROAD :  
COMPANY, a corporation, :

Defendant, :

CAROL PAYNE HANSEN, :

Defendant- :  
Respondent. :

Case No. 14,224

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BRIEF OF RESPONDENT

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AN APPEAL FROM THE JUDGMENT OF DISMISSAL OF THE  
FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,  
STATE OF UTAH, HONORABLE J. ROBERT BULLOCK, JUDGE

---

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAY A. THOMAS, for himself,  
and JESSICA MAY THOMAS, an  
infant, through her guardian,  
JAY A. THOMAS,

Plaintiffs and Appellants,

vs.

Case No. 14,224

UNION PACIFIC RAILROAD COMPANY,  
a corporation,

Defendant,

CAROL PAYNE HANSEN,

Defendant and Respondent.

---

BRIEF OF RESPONDENT

---

NATURE OF THE CASE

Respondent agrees with appellants' statement of the Nature of the Case.

DISPOSITION IN THE LOWER COURT

Respondent agrees with appellants' statement of the Disposition in the Lower Court.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the court affirm the lower court's judgment.

STATEMENT OF FACTS

Respondent agrees with appellants' Statement of the Facts.

## ARGUMENT ON APPEAL

Respondent contends the law in Utah on the Guest Statute is a settled matter. The Supreme Court of the State of Utah has declared the Guest Statute constitutional and has ruled on both points raised by appellants.

### POINT I

UTAH GUEST STATUTE IS CONSTITUTIONAL AND IS NOT IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF UTAH.

The Utah Court in the case of Cannon v. Oviatt, 520 P. 2d 883 (Utah, 1974), declared the Guest Statute constitutional, said opinion being more fully set forth as follows:

Jacki CANNON, Plaintiff and Appellant,  
v.

Paula OVIATT et al., Defendants  
and Respondent.

Eugene W. MARTIN, Guardian ad litem for  
Jackie A. Martin, a minor, Plaintiff  
and Appellant,

v.

Jay G. JACKSON and Harold C. Russell,  
Defendants and Respondents.

Nos. 13368, 13379.

Supreme Court of Utah.

March 28, 1974.

Separate actions challenging constitutionality of the automobile guest statute. The Third District Court, Salt Lake County, G. Hal Taylor and S. Mark Johnson, JJ., upheld the constitutionality of the statute, and consolidated appeals were taken. The Supreme Court, Callister, C. J., held that automobile guest statute did not deny injured guests the equal protection of the laws.

Affirmed.

Henriod, J., concurred and filed opinion.

Crockett, J., concurred specially and filed opinion.

#### 1. Automobiles ⇨181(1)

Automobile guest statute was enacted to provide some protection to a generous host, who is sued by his invited guest for ordinary negligence, when the rider has given no compensation as an inducement for making the trip or furnishing the carriage for the rider, to subservice the valid legislative purpose of encouraging hospitality in the use of the public highways. U. C.A.1953, 41-9-1.

#### 2. Automobiles ⇨181(1)

Automobile guest is not placed in a distinctive classification under automobile guest statute, so as to require a finding that the automobile guest alone, as a recipient of generosity, is deprived of the duty of due care by his host. U.C.A.1953, 41-9-1.

#### 3. Automobiles ⇨181(1)

Automobile guest statute does not create a distinctive classification for automobile guests as compared to others insofar as collusive lawsuits are concerned. U.C.A.1953, 41-9-1.

#### 4. Constitutional Law ⇨211

Equal protection clause does not compel a state to attack every aspect of a

problem or to refrain from any action at all; it is sufficient that the state's action be rationally based and free from invidious discrimination. Const. art. 1, § 24; U.S. C.A. Const. Amend. 14.

5. Automobiles ⇨ 181(1)  
Constitutional Law ⇨ 243

Automobile guest statute did not deny an injured guest equal protection of the laws. U.C.A. 1953, 41-9-1; Const. art. 1, § 24; U.S.C.A. Const. Amend. 14.

Anthony M. Thurber, Salt Lake City, for Cannon.

Curtis K. Oberhansley and Stephen W. Cook, of Kinghorn, Oberhansley & O'Connell, Salt Lake City, for Martin.

D. Gary Christian and Steven H. Gunn, of Kipp & Christian, Salt Lake City, for Oviatt.

Don J. Hanson, Salt Lake City, for Hellsley, Moffat and Moffat.

David E. West, of Armstrong, Rawlings, West & Schaerrer, Salt Lake City, for Jackson and Russell.

CALLISTER, Chief Justice:

The appeals of the plaintiffs, which arose out of separate and unrelated actions, have been consolidated since they involved one common question of law, namely, was Section 41-9-1, U.C.A. 1953, unconstitutional? Each plaintiff, while a guest in a motor vehicle, moving upon a public highway in this state, sustained personal injuries in a vehicular accident. Each plaintiff initiated an action against his host, the driver of the vehicle, to recover damages for the negligent operation of the vehicle. Each host asserted Section 41-9-1, U.C.A. 1953, as a defense and denied liability. Each plaintiff urged unsuccessfully before the trial court that the Guest Statute, 41-9-1, U.C.A. 1953, denied him equal protection of the law under the Constitution of the United States (14th Amendment) and the Constitution of Utah (Article I, Section 24).

1. 8 Cal2d 844, 108 Cal.Rptr. 333, 308 P.2d 212 (1957).

On appeal each plaintiff relies on the reasoning set forth in *Brown v. Merlo*,<sup>1</sup> wherein the Supreme Court of California held that the proffered justification for that jurisdiction's guest statute did not constitute a rational basis for the differential treatment accorded by the statutory scheme of classification and was therefore a denial of equal protection of the law. The *Brown* decision set forth two distinct justifications for the statute, the protection of hospitality and the prevention of collusive lawsuits. The court found the protection of hospitality rationale fatally defective on the grounds: (1) It failed to explain why the statute accorded differential treatment to automobile guests as distinguished from other guests. (2) In light of recent developments in comparable legal doctrines, the interest in protecting hospitality could not rationally justify the withdrawal of legal protection from guests. (3) It ignored the prevalence of liability insurance coverage today, which undermines any alleged rational connection between prevention of lawsuits and the protection of hospitality. The prevention of collusive lawsuits rationale was determined defective as overinclusive, since it barred valid suits along with the fraudulent claims. The court further found that the classification was aggravated by a series of limiting loopholes, which stayed the operation of the statute under a variety of diverse and illogical circumstances. The court explained that the numerous exceptions produced an absurd and illogical pattern which eliminated any rationality which might conceivably be claimed for the statute.

The California court stated that the statute established three distinct levels of classification: (1) The act treated automobile guests differently from paying passengers. (2) It treated automobile guests differently from other social guests and recipients of generosity and withdrew from auto guests the protection from negligently inflicted injuries generally enjoyed by a guest in other contexts. (3) The act distinguished between subclasses of auto guests, withholding recovery from guests injured while "in a vehicle" "during a ride" "upon a pub-

lic highway" but permitted recovery by the guest injured under other circumstances. According to the court, the rationality of the tripartite classification scheme must be evaluated in the light of the purposes of the legislation. No other case had adjudicated the constitutional issue on this basis.

The court stated that the hospitality justification provided an inadequate explanation for the differential treatment accorded to automobile guests as distinguished from other guests. Under California law, guests or recipients of hospitality may generally demand that their hosts exercise due care so as not to injure them.<sup>2</sup> In a footnote<sup>3</sup> the court explained that in 1929, the time of enactment, the guest statute had a closer relationship to general tort doctrine, since at that time property owners owed a duty of ordinary care only to invitees (business visitors) and owed only some lesser duty of care to licensees (social guests). Presently, in California, the general duty of ordinary care governs a landowner's duty to all those injured on his property, social guests and business visitors alike. Since the general tort doctrine has been modified, the guest statute singles automobile guests for a special burden and thus creates an arbitrary and unreasonable classification. The court reasoned that no realistic state purpose supported the classification scheme of the statute, since persons situated with respect to the purpose of the law (recipients of hospitality) do not receive like treatment.

The court stated that the statutory purpose of fostering hospitality cannot rationally justify the lowering of protection for one class, namely, automobile guests as distinguished from paying passengers. The court relied on *Rowland v. Christian*<sup>4</sup> and stated that just as it was unreasonable to lower the standard of care to a visitor on private property because he was a social guest rather than a "paying" invitee, it was unreasonable to single out an automobile

guest and expose him to greater danger from negligence than a paying passenger. The fact that the guest paid nothing did not provide a reason to excuse the negligence of the host.

The court further explained that the characterization of the guest's lawsuit as an act of ingratitude had been completely eroded by the development of almost universal automobile liability insurance coverage in recent years. Today, the insurance company and not the generous host, was the recipient of the protection of the guest statute. The court was of the opinion that the elimination of the guest doctrine would in most cases shift the burden of loss from the injured individual to the motoring public rather than to the negligent host personally. The court concluded that the discriminatory treatment of automobile guests could not be upheld against the constitutional attack on the basis of the hospitality justification.

*Brown v. Merlo*<sup>5</sup> is a logical consequence in that jurisdiction, stemming from their prior determination to abandon the traditional tort doctrine that the status of a person determined the duty owed to him. In this jurisdiction the distinction between "invitees" or "business visitors" and "licensees" or "social guests" has been preserved.<sup>6</sup> Thus the classification of an automobile guest in Section 41-9-1, U.C.A. 1953, does not single out this one group for treatment different than accorded to other guests. Likewise, the distinction between a paying passenger and an automobile guest has been retained in the correlative distinctions between an invitee and licensee. Thus, in this jurisdiction, an automobile guest has not been isolated from all other guests and recipients of generosity and alone denied a duty of due care by his host.

As previously noted, the court in *Brown v. Merlo*<sup>7</sup> relied extensively on *Rowland v. Christian*<sup>8</sup> to prove the invalidity of the hospitality justification for the guest stat-

2. *Rowland v. Christian*, 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 581, 32 A.L.R.3d 496 (1968).

3. No. 6 at p. 395 of 106 Cal.Rptr., no. 6 at p. 219 of 503 P.2d.

4. Note 2, *supra*.

5. Note 1, *supra*.

6. *Stevens v. Salt Lake County*, 25 Utah 2d 168, 478 P.2d 406 (1970). *Utah v. J. Reuben Clark Law School, BYU*, 1970-1, 503 P.2d 124 (1973).

Utah 2d 279, 333 P.2d 630 (1958); *Tempest v. Richardson*, 5 Utah 2d 174, 298 P.2d 124 (1956); *Hayward v. Downing*, 112 Utah 508, 189 P.2d 442 (1948).

7. Note 1, *supra*.

8. Note 2, *supra*.



ute. This case is cited in 32 A.L.R.3d 513, as part of the general trend in the field of tort laws to eliminate technical status positions, which had the effect of insulating certain classes from liability. In an explanatory footnote,<sup>9</sup> it is stated:

This movement is probably a result of a general shift in the theory of tort law from the emphasis on the regulation of rights between individuals on the basis of relative fault toward a viewpoint which regards *tort law as a device for social engineering*, primarily concerned with allocation of liability in such a manner as to most satisfactorily protect the social fabric from the impact of such injuries as are a necessary or probable consequence of the complicated organization of society. [Emphasis added.]

Brown v. Merlo, in effect, elevated this device for social engineering to the level of a constitutional doctrine. First, by this device as utilized in Rowland v. Christian, the traditional distinction between invitees and licensees was nullified, resulting in the automobile guest alone being denied the duty of ordinary care by his host. Secondly, to nullify the hospitality justification, the court directly incorporated the underlying rationale of social engineering, namely that there should be an allocation of liability so as to protect the society from the impact of such injuries. The court stated that the widespread use of liability insurance shifted all or part of the burden of loss from the injured individual to the motoring public. Through this process of social engineering a legislative enactment in the area of economics and social welfare was thrust into conflict with the modified tort doctrine promulgated by the court. The court was of the opinion that the statutory classification caused discriminatory treatment to automobile guests and violated the equal protection guarantees of the California and United States Constitutions.

In evaluating the determination of the California court that the statute was unconstitutional, there are two decisions of the United States Supreme Court that support an opposite conclusion.

In Silver v. Silver,<sup>10</sup> the Connecticut guest statute was claimed to deny equal protection of the law on the ground that it distinguished between gratuitous passengers in automobiles and those in other classes of vehicles. The court responded:<sup>11</sup>

The use of the automobile as an instrument of transportation is peculiarly the subject of regulation. We cannot assume that there are no evils to be corrected or permissible social objects to be gained by the present statute. We are not unaware of the increasing frequency of litigation in which passengers carried gratuitously in automobiles, often casual guests or licensees, have sought the recovery of large sums for injuries alleged to have been due to negligent operation . . . . Whether there has been serious increase in the evils of vexatious litigation in this class of cases, where the carriage is by automobile, is for legislative determination and, if found, may well be the basis of legislative action further restricting the liability. Its wisdom is not the concern of courts.

. . . . Whether there has been serious increase in the evils of vexatious litigation in this class of cases, where the carriage is by automobile, is for legislative determination and, if found, may well be the basis of legislative action further restricting the liability. Its wisdom is not the concern of courts.

In regard to the alleged discriminatory classification, the court stated:<sup>12</sup>

. . . there is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied—that the legislature must be held rigidly to the choice of regulating all or none. [Citations] In this day of almost universal highway transportation by motor car, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit. [Citations] It is enough that the present statute strikes at the evil where it is felt, and reaches the class of cases where it most frequently occurs.

9. Footnote 3, p. 513 of 32 A.L.R.3d.

10. 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929).

11. At pp. 122-123 of 280 U.S., at p. 53 of 50 S.Ct.

12. At pp. 123-124 of 280 U.S., at p. 59 of 50 S.Ct.



A similar interpretation has been recently set forth in *Dandridge v. Williams*,<sup>13</sup> wherein the court stated:

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." [Citation] "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." [Citation] "A statutory discrimination will not be set aside if any state of facts may be conceived to justify it." [Citation]

\* \* \* \* \*

. . . But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. [Citation] It is enough that the State's action be rationally based and free from invidious discrimination . . .

The use of the motor vehicle upon the public highways has been validly subjected to legislative regulation. The presence of the guest in this area would itself create a basis for a distinct classification from other guests located where there was no overwhelming public interest. The motor vehicle exerts a dominant influence in contemporary society and its use creates many economic and social problems. In a state such as Utah a significant portion of our economic resources must be devoted to the construction and maintenance of highways; the economic burden bears a direct relationship to the number of vehicles and the total cumulative mileage on the highways each year. The guest statute encourages hospitality and directly affects the number of vehicles present on the highways, thus avoiding traffic congestion and wear to the surfaces of the roadway. The guest stat-

ute promotes the conservation of petroleum and other natural resources consumed in highway travel. The suggestion that the burden of the injured guest should be borne by the motoring public through liability insurance is an economic and social solution that is properly subject to legislative determination. The Legislature is the proper forum to consider the alternative solutions for the problem of the injured guest. The No Fault Insurance Act, 31-41-1 et seq., U.C.A. 1953, provides a compromise, the guest receives limited compensation for injuries, while hospitality is encouraged by not exposing the host to unlimited liability and staggering insurance rates. The suggested simplistic solution that the motoring public should bear the costs of the injured guests ignores the economic consequence that increased claims will be reflected in increased insurance rates, creating an economic hardship on the generous host and chilling hospitality.

[1,2] Section 41-9-1, U.C.A. 1953, was enacted to provide some protection to a generous host, who is sued by his invited guest for ordinary negligence, when the rider has given no compensation as an inducement for making the trip or furnishing the carriage for the rider.<sup>14</sup> This act subserved a valid legislative purpose to encourage hospitality in the use of the public highways. Furthermore, the automobile guest in this jurisdiction is not placed in a distinct classification, where he alone as a recipient of generosity is deprived of the duty of due care by his host.

[3] In *Brown v. Merlo*<sup>15</sup> the court stated that the second justification for the guest statute was the prevention of collusive lawsuits. The classification in the statute was allegedly predicated on the concept that a driver who gave a free ride to a passenger was motivated by his close relationship with his guest, and the driver might admit liability to assist the guest in collecting from the insurance company. The court rejected this rationale on the ground that though prior caselaw intra-family tort immunity had been rejected.

13. 397 U.S. 471, 483, 486-487, 90 S.Ct. 1133, 1161, 25 L.Ed.2d 491 (1970).

14. *Jensen v. Hower*, 4 Utah 2d 328, 294 P.2d 683 (1956).

15. *Notes* 1, *supra*.  
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The court cited *Klein v. Klein*<sup>16</sup> wherein it rejected a claim that the possibility of fraudulent lawsuits between a husband and wife served as a sufficient justification to bar all interspousal negligence actions. In *Pubalcava v. Gisseman*,<sup>17</sup> this court held that a wife may not maintain a tort action against her husband or his estate. This court declined to follow *Klein v. Klein* and stated that the legislature and not this court was the proper forum to change this rule. Thus in Utah the guest statute does not create a distinct classification for automobile guests as compared to others insofar as collusive lawsuits are concerned.

The court stated in *Brown v. Merlo*<sup>18</sup> that the numerous statutory exceptions had rendered recovery or lack of recovery under the guest statute largely fortuitous and added another element of irrationality to the statutory scheme. The court explained that the relationship giving rise to liability between the driver and occupant might fluctuate during the course of a single ride, as circumstances brought them within and without the language of the statute. The court observed that the statute distinguished guests on the basis of (1) whether or not the journey had come to a momentary halt; (2) whether the guest was physically located inside or outside the car; (3) whether the car was on a public highway or private land. The court found that these statutory exceptions operated so illogically as to cause serious inequality and that they did not bear the remotest relation to either the objective of protecting hospitality or preventing collusive lawsuits. The court concluded that under these circumstances, the limiting provisions of the statute constituted further denial of equal protection.

In *Andrus v. Allred*,<sup>19</sup> this court stated that Section 41-9-1, U.C.A. 1953, should be given a sufficiently practical and reasonable application to cover incidents which occur as an integral part of the ride. This court declined to give the statute such a narrow and literal interpretation as to eliminate incidents which might occur

while the vehicle was stopped, however briefly and for any purpose. This court stated:<sup>20</sup>

It is our opinion that a sensible and realistic application of this statute, in conformity with its objective, requires that the protection extend over the entire host-guest relationship in connection with the giving and taking of the ride. . . . the host-guest relationship here must also include getting into the car at the beginning and getting out of it when the ride is completed and any incidents which happen in the course of and arising out of the ride . . . .

[4,5] The interpretation of the guest statute by this court has averted the alleged irrationality in the statutory classification which disturbed the court in *Brown v. Merlo*. Furthermore, the Equal Protection Clause does not compel the State to attack every aspect of a problem or to refrain from any action at all; it is sufficient that the State's action be rationally based and free from invidious discrimination.<sup>21</sup>

The rulings of the trial courts in these actions sustaining the constitutionality of Section 41-9-1, U.C.A. 1953, are affirmed. Costs are awarded to defendants.

ELLETT and TUCKETT, JJ., concur.

HENRIOD, Justice (concurring).

I concur, except to say that I can see no relevancy whatever in the case of *Andrus v. Allred*, cited in the opinion, as to the facts or problems involved in the instant case.

CROCKETT, Justice (concurring specially).

I am impelled to forswear joining in expiation upon a case of a sister state, which we decline to follow anyway. In addition to not being binding on us in any event, it is decided against a background of law significantly different from our own, and it impresses me as mainly concerned with rationalizations toward a

16. 53 Cal.2d 692, 26 Cal.Rptr. 102, 376 P.2d 70 (1962).

17. 14 Utah 2d 344, 384 P.2d 330 (1963).

18. Note 1, *supra*. Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.

Machine-generated OCR, may contain errors. 21. *Dandridge v. Williams*, note 13, *supra*.

19. 17 Utah 2d 106, 404 P.2d 972 (1965).

20. At p. 110 of 17 Utah 2d, at p. 974 of 404 P.2d.

desired result of repudiating their statute.

Consequently, I desire to state briefly my own reasons for refusing to strike down our own:

- (1) Our guest statute was enacted by the legislature advisedly, to alleviate actual abuses which had occurred, and were occurring.<sup>1</sup>

1. See discussion of justification of this statute based on the use of automobiles as such an essential and important aspect of modern living that it is an appropriate subject for special classification and legislation thereon, and the salutary purposes justifying the statute as set forth by Justice Worthen in *Jensen v. Mower*, 4 Utah 2d 328, 294 P.2d 633; and see also *Andrus v. Allred*, 17 Utah 2d 108, 404 P.2d 972.

- (2) Although it has not completely cured the ills it was aimed at, when properly applied, it has had the salutary effect of minimizing them.

- (3) It has been in effect for over 40 years.<sup>2</sup>

Inasmuch as it came into being as an expression of the will of the people through legislative enactment, if there is to be any such substantial and important change in the law it should be by that same process, and not by judicial pronouncement.<sup>3</sup>

2. Originally enacted in Chap. 52, S.L.U.1933.

3. See statement *Stanton v. Stanton*, 30 Utah 2d 315, 517 P.2d 1010, and authorities therein cited.

## POINT II

THE DECEDENT CHILD WAS A GUEST WITHIN THE MEANING OF THE UTAH GUEST STATUTE.

Utah, by decision, in the case of Favatella v. Poulsen, 403 P. 2d 918, has settled the law in Utah that a child is a guest within the meaning of the Utah Guest Statute, said opinion being more fully set forth as follows:

Diane FAVATELLA, by and through her guardian ad litem, Felix E. Favatella, Plaintiff and Respondent,

v.

Jean W. POULSEN and Mary Ellen Carter, Defendants and Appellants.

No. 10264.

Supreme Court of Utah.

July 7, 1963.

Petition by motorist to dismiss action on ordinary negligence brought against her by passenger for injuries sustained in collision. The Third District Court, Salt Lake County, Stewart M. Hanson, J., denied the petition, and the motorist appealed. The Supreme Court, Henriod, C. J., held that where motorist was driving a seven-year-old girl to school, with consent and solicited approval of parents, and was involved in an accident, guest statute precluded passenger's recovery for injuries sustained.

Appeal sustained with order to enter judgment of no cause of action.

Automobiles 181(2)

Where teacher was driving a seven-year-old girl to school, with consent and solicited approval of parents, and was involved in an accident, guest statute precluded passenger's recovery for injuries sustained. U.C.A.1953, 41-9-1.

Raymond M. Berry, Ernest F. Baldwin, Jr., Salt Lake City, for appellants.

Dwight L. King, Salt Lake City, for respondent.

HENRIOD, Chief Justice.

Interlocutory appeal from an order denying defendants' petition to dismiss. The appeal is sustained and the trial court is ordered to enter judgment of no cause of

action in favor of defendant Carter, with no costs on appeal awarded.

Carter, a teacher, with the consent and apparently solicited approval of the parents, customarily drove the latter's seven-year-old girl to school. The teacher was involved in an accident, and the little girl was injured. The girl sued, bottoming her complaint on ordinary negligence, and it was conceded that there was no question as to drunkenness or wilful misconduct. Miss Carter countered by saying that our "guest" statute<sup>1</sup> precluded recovery. We think

she is right, as a casual reading of that legislation will indicate.

Plaintiff relies heavily on *Smith v. Franklin*,<sup>2</sup> decided by this court recently. A casual reading of that case emphasizes its complete dissimilarity.

To espouse plaintiff's theory of nonconsensuality of a minor in the "guest" statute sense would be to allow recovery by a gestating, unborn, injured infant, where its mother, truly a guest, suffers a miscarriage, the facts of life of which may have been a complete mystery to the Good Samaritan host.

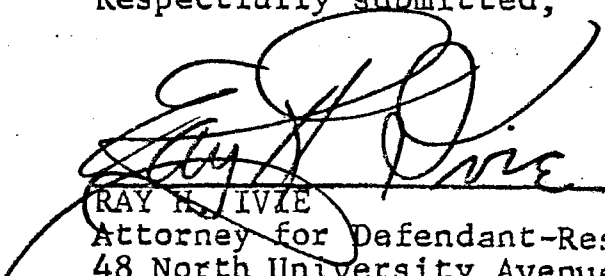
MCDONOUGH, CROCKETT, WADE,  
and CALLISTER, JJ., concur.

1. Title 41-9-1, Utah Code Annotated 1953.
2. 14 Utah 2d 16, 378 P.2d 541 (1962); see also *Haarstrich v. O. S. L. RR.*, 70 Utah 552, 262 P. 100 (1927); *Welker v. Sorenson*, 209 Or. 402, 308 P.2d 737 (1957).

### CONCLUSION

Utah, by judicial decision, has ruled that the Guest Statute, Section 41-9-1, Utah Code Annotated, 1953, is constitutional and is not a violation of the Constitution of the United States and the Constitution of the State of Utah, and has further declared that a child is a guest within the meaning of said Guest Statute.

Respectfully submitted,



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