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## THE DUTY OF AN AUTOMOBILE OWNER TO A GRATUITOUS GUEST

The duty of an automobile owner, and the driver, to the hitch-hiker, the social guest, and other gratuitous passengers, is a question of much interest not only to the courts and to the lawyers in its many legal aspects, but also is of much practical concern and speculation to the automobile owning layman as well. The matter is such that the legislatures of the various states are not unaffected and some have made it the subject of recent legislation.<sup>1</sup> At the present writing the issue considered herein is frequently before the courts for decision and bids to become a prolific source of tort litigation, whereas in 1917 when the case of *Massaletti v. Fitzroy*<sup>2</sup> was before the courts in Massachusetts, there were not over a half dozen precedents in the entire United States.<sup>3</sup> This is true not only because accidents are becoming more and more numerous as the automobile population increases, nor solely because guests are less appreciative of their host's dignity and good will than formerly, but to great extent because as between the insurance company which bears the brunt of the host's financial loss, and the guest, there arises no keen resentment in the breaking of a close relationship. Furthermore, the host and the guest remain friends even in battle. In support of the statement just made it might not be amiss to quote a sentence or two from the counsel's argument to the jury in a recent Vermont case,<sup>4</sup> wherein the defendant was amply insured and her girl companion was suing as the injured plaintiff. The following is a quotation from plaintiff's attorney:

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<sup>1</sup> PUBLIC ACTS OF CONN. (1927) C. 308; CODE OF IOWA (1924) § 5026, as amended 42 General Assembly, C. 119 (1927); OREGON SESSION LAWS OF (1927) C. 342 (held unconstitutional).

<sup>2</sup> 228 Mass. 487, 118 N. E. 168, L. R. A. 1918 C: 264 (1917).

<sup>3</sup> 6 VIR. L. REV. 593.

<sup>4</sup> *Landry v. Hubert*, 100 Ver. 268, 137 Atl. 97 (1927).

"I say she, (meaning the defendant) is unconcerned, that her conduct from start to finish throughout the trial shows that she is unconcerned . . . and I say now that she will be unconcerned tomorrow whatever your verdict."

Upon objection, and caution of improper argument, he added:

"Of course, that is my prediction; she may get terribly wrought up, but I doubt it."

It is not to be inferred from this that such litigation is collusive, nor lacking in a righteous claim. In fact, in the case just referred to the plaintiff had lost an eye in a collision resulting from the defendant's negligent operation of an automobile with defective brakes.

The object sought in the discussion herein is threefold. First, to point out the legal liability of an owner of an automobile to a guest injured while riding therein through the negligence of the driver when the automobile is being operated either by the owner himself, or by his agent, whether that agent be an agent in fact, or an agent evolved through the application of the family car doctrine, or by any other rule of law. Second, the duty of the owner of an automobile to his gratuitous passenger to keep his car in a safe condition, and the basis for liability to the guest, if any, for injuries caused by his defective motor vehicle. Third, to state merely, but not to discuss, the duty of the guest to keep a lookout and to otherwise use due care for his own safety.

It is to be noted that it is not the purpose of this article to discuss the merits or demerits of the "family purpose car" doctrine, nor to delve into the liability of a parent for the negligent use of his automobile by the members of his family except in so far as it conceded that such member is acting as the owner's agent under some or any rule of law. Also, what is said herein is not intended to apply to automobiles engaged in the business of common carriers of passengers such as bus lines.

In view of the fact that the doctrine of imputed negligence

as applied to passengers not having control over the driver, nor engaged in a joint enterprise with him, has been so universally repudiated, that element is eliminated from consideration.<sup>5</sup> It is to be remembered, however, that it is still well settled law in Michigan that the guest in a private vehicle, such as is the wife,<sup>6</sup> or any other gratuitous passenger for pleasure, not a minor,<sup>7</sup> is barred from recovery from a third person for injuries caused by such person's negligence when the driver of the car in which the guest is riding is also negligent. The negligence of the driver is thus charged also to the occupant.

The difficult question as to when the passenger is engaged in a joint enterprise with the driver so that the passenger is charged with the driver's negligence and, therefore, barred from recovery is discussed elsewhere in this volume.<sup>8</sup>

On the points in issue as heretofore mentioned there exist many situations as between owner, driver, and guest, which give rise to varying duties and liabilities. These must be discussed for a clear understanding of the problems involved. Three groups of factual relation are hereafter listed:

Group I. What is the legal duty of the owner of an automobile to a guest riding in his car when the owner is driving and

- (a) The guest is invited to ride by the driver
- (b) The guest is self-invited, or else is present by
- (c) sufferance.
- (d) The guest is there without the knowledge or invitation of the driver.

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<sup>5</sup> *Little v. Hackett*, 110 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652 (1885); *BERRY ON AUTOMOBILES* (6th ed. 1929) 496, § 624; *THROCKMORTON'S COOLEY ON TORTS* (1930) 663, § 334.

<sup>6</sup> *Holsapple v. Superintendents of the Poor*, 232 Mich. 603, 206 N. W. 529 (1925).

<sup>7</sup> *June v. Grand Trunk Western Ry. Co.*, 232 Mich. 449, 205 N. W. 181 (1925).

<sup>8</sup> W. D. Rollison, "*Joint Enterprise*" in the Law of Imputed Negligence, 6 *NOTRE DAME L.* 172 (1931).

Group II. What is the legal duty of the owner of an automobile to a guest when said motor vehicle is being driven by an agent when,

- (a) The owner is absent in the situations listed in the subheadings in Group I
- (b) The owner is present in the same situations as in (a) herein.

Group III. What is the legal duty of the owner of an automobile to his gratuitous guest when the car is defective, and the guest is injured because of that defect when,

- (a) The owner and guest both have knowledge of the defect.
- (b) Neither the owner nor guest have such knowledge
- (c) The owner has knowledge of the defect, but the guest has not.

At the outset it can be stated that the great weight of authority on the duty which the owner of an automobile owes to an *invited guest* when driving is to exercise ordinary and reasonable care in its operation, and not unreasonably to expose the guest to danger and injury by increasing the hazard of travel.

This rule with various ramifications due to facts is upheld in the following states: Alabama,<sup>9</sup> Arizona,<sup>10</sup> Arkansas,<sup>11</sup> California,<sup>12</sup> Connecticut, (now changed by statute),<sup>13</sup>

<sup>9</sup> Thomas v. Carter, 218 Ala. 55, 117 So. 634 (1927).

<sup>10</sup> Central Copper Co. v. Klefisch, 34 Ariz. 230, 270 Pac. 629 (1928).

<sup>11</sup> Bennett v. Bell, 176 Ark. 690, 3 S. W. (2d) 996 (1928).

<sup>12</sup> Brown v. Davis, 84 Cal. App. 180, 257 Pac. 877 (1927) (by Civil Code § 2096).

<sup>13</sup> Davis v. Margolis, 107 Conn. 417, 140 Atl. 823 (1928). Rule is now changed by statute. Under Chapter 308, PUBLIC ACTS OF CONN. (1927), there is no liability to the gratuitous passenger in an automobile except for intentional injury or reckless disregard of the rights of others. Held constitutional in Silver v. Silver, 108 Conn. 371, 143 Atl. 240 (1928). Upheld in U. S. Supreme Court (1929) 280 U. S. 117, 50 Sup. Ct. Rep. 57.

Florida,<sup>14</sup> Idaho,<sup>15</sup> Illinois,<sup>16</sup> Indiana,<sup>17</sup> Iowa, (now changed by statute),<sup>18</sup> Kansas,<sup>19</sup> Kentucky,<sup>20</sup> Louisiana,<sup>21</sup> Maine,<sup>22</sup> Maryland,<sup>23</sup> Michigan,<sup>24</sup> Minnesota,<sup>25</sup> Montana,<sup>26</sup> Nebraska,<sup>27</sup> Nevada,<sup>28</sup> New Hampshire,<sup>29</sup> New Jersey,<sup>30</sup> New York,<sup>31</sup> North Carolina,<sup>32</sup> North Dakota,<sup>33</sup> Ohio,<sup>34</sup> Oregon,<sup>35</sup> Pennsylvania,<sup>36</sup> Tennessee,<sup>37</sup> Texas,<sup>38</sup> Vermont,<sup>39</sup>

<sup>14</sup> See *Boyle v. Dolan*, 97 Fla. 219, 120 So. 334 (1929).

<sup>15</sup> *Dale v. Jaeger*, 44 Ida. 576, 258 Pac. 1081 (1927).

<sup>16</sup> *Waitrovich v. Black*, 254 Ill. App. 49 (1929); *Richardson v. Moore*, 254 Ill. App. 511 (1929); *Masten v. Cousins*, 216 Ill. App. 268 (1919).

<sup>17</sup> *Munson v. Rupker*, 148 N. E. 169 (Ind. App. 1925). Rehearing denied, 151 N. E. 101 (1926).

<sup>18</sup> *Codner v. Stowe*, 201 Iowa 800, 208 N. W. 330 (1926). Changed by statute, CODE OF IOWA (1924) § 5026, as amended 42 G. A. C. 119 (1927). Owner is liable for automobile even in hands of bailee, but not liable to guest unless injury is caused by driver being under the influence of liquor, or by his reckless operation. Statute is interpreted in *Puckett v. Paulthorpe*, 207 Iowa 613, 223 N. W. 254 (1929).

<sup>19</sup> *Ferguson v. Lang*, 126 Kan. 273, 268 Pac. 117 (1928); *Mayberry v. Siney*, 18 Kan. 291 (1877) (buggy).

<sup>20</sup> *Chambers v. Hawkins*, 233 Ky. 211, 25 S. W. (2d) 363 (1930).

<sup>21</sup> *Lawrason v. Richard*, 129 So. 250 (La. App. 1930).

<sup>22</sup> *Prinn v. De Rice*, 149 Atl. 580 (Me. 1930).

<sup>23</sup> *Pearson v. Lakin*, 147 Md. 1, 127 Atl. 387 (1925).

<sup>24</sup> *Hemington v. Hemington*, 221 Mich. 206, 190 N. W. 683 (1922). (Imputed negligence doctrine of Michigan not treated.) Action was by guest (mother) against host (daughter) and did not involve a third party.

<sup>25</sup> *Fink v. Baer*, 180 Minn. 433, 230 N. W. 888 (1930).

<sup>26</sup> *Hornbeck v. Richards*, 80 Mont. 27, 257 Pac. 1025 (1927).

<sup>27</sup> *Bauer v. Gries*, 105 Neb. 381, 181 N. W. 156 (1920).

<sup>28</sup> *Thorne v. Lampros*, 288 Pac. 601 (Nev. 1930).

<sup>29</sup> *Chamberlain v. Pickering*, 148 Atl. 466, 469 (N. H. 1929).

<sup>30</sup> *Paiewonsky v. Joffe*, 101 N. J. L. 521, 129 Atl. 142 (1925).

<sup>31</sup> *Higgins v. Mason*, 255 N. Y. 104, 174 N. E. 77 (1930).

<sup>32</sup> *Ballinger v. Thomas*, 195 N. C. 517, 142 S. E. 761 (1928).

<sup>33</sup> *Bolton v. Wells*, 58 N. D. 286, 225 N. W. 791 (1929).

<sup>34</sup> *Bailey v. Parker*, 34 Oh. App. 207, 170 N. E. 607 (1930).

<sup>35</sup> *Stewart v. Houck*, 127 Ore. 589, 271 Pac. 998, 61 A. L. R. 1236 (1928). *Session Laws* (1927) C. 342, abolishing all duty of care to gratuitous guest held contrary to CONST. ART. 1, § 10. Court distinguishes Connecticut statute which was held constitutional.

<sup>36</sup> *Cody v. Venzie*, 263 Pa. 541, 107 Atl. 383 (1919).

<sup>37</sup> *Schwartz v. Johnson*, 152 Tenn. 586, 280 S. W. 32 (1926). ("Family purpose doctrine" applied.)

<sup>38</sup> *Offer v. Swancoat*, 27 S. W. (2d) 899 (Tex. Civ. App. 1930).

<sup>39</sup> *Supra* note 4.

Virginia,<sup>40</sup> West Virginia,<sup>41</sup> Wisconsin,<sup>42</sup> and Wyoming.<sup>43</sup>

A minority holding requires that the driver must be guilty of gross negligence before liability shall be imposed on him for injuries caused to the invited guest.

The states requiring gross negligence for liability are the following: Georgia,<sup>44</sup> Massachusetts,<sup>45</sup> Washington.<sup>46</sup>

A number of states, as has already been indicated, have made statutory changes in the law relating to the duty owed by the owner and driver to the gratuitous guest.<sup>47</sup> These alterations of the existing law have, in the main, been in the owner's behalf. In most instances he is held responsible under the legislative acts only where he is wilfully and wantonly negligent, or guilty of reckless operation of the motor vehicle, or intoxicated. At least one state attempted to do away with the duty to use any care to the guest, but the statute was held contrary to the provisions of the state constitution.<sup>48</sup>

While New Jersey and Alabama are listed *supra* under the majority rule requiring ordinary and reasonable care on the part of the driver of an automobile toward an invited guest, the courts of those states limit the rule to guests invited. Where the guest is self-invited or is present by sufferance liability is made to depend on wilful and wanton injury.

Thus in the New Jersey case of *Faggioni v. Weiss*,<sup>49</sup> where the plaintiff, a minor, was in defendant's car, either by invi-

<sup>40</sup> *Morris v. Peyton*, 148 Va. 812, 139 S. E. 500 (1927).

<sup>41</sup> *Marple v. Haddad*, 103 W. Va. 508, 138 S. E. 113, 61 A. L. R. 1248 (1927).

<sup>42</sup> *Olson v. Hermansen*, 196 Wis. 614, 220 N. W. 203, 61 A. L. R. 1243 (1928).

<sup>43</sup> *Collins v. Anderson*, 37 Wyo. 275, 260 Pac. 1089 (1927).

<sup>44</sup> *Meddin v. Karsman*, 152 S. E. 601 (Ga. App. 1930); *Peavy v. Peavy*, 36 Ga. App. 202, 136 S. E. 96 [CIVIL CODE (1910) § 3473].

<sup>45</sup> *Mason v. Thomas*, 174 N. E. 217 (Mass. 1931).

<sup>46</sup> *Welch v. Auseth*, 156 Wash. 652, 287 Pac. 899 (1930).

<sup>47</sup> See *supra* notes 13 and 18.

<sup>48</sup> *Supra* note 35.

<sup>49</sup> 99 N. J. L. 157, 122 Atl. 840 (1923).

tation, or as a mere permitted licensee, it was held that the driver of a private vehicle owes no duty to a trespasser or mere licensee except to abstain from acts wilfully injurious. The court, not knowing whether the plaintiff was present by invitation or by self-invitation, that is, at his own request, said:

"If then, the young plaintiff was invited, in the legal sense of the word, to ride on defendant's car, the trial judge properly charged that defendant owed him the duty of reasonable care in transporting him, so long as that status continued."

The court, however, said further:

"There was, however, another theory of the case open for consideration by the jury, viz. that the infant plaintiff was at best a mere licensee in the car and on that theory it was agreed that the defendant owed him no duty except to abstain from acts wilfully injurious. Such was the rule in the recent supreme court case of *Lutvin v. Dopkus* 94 N. J. Law, 64, 108 Atl. 862, where plaintiff solicited a ride and defendant simply acceded to their request."

Alabama interprets the rule in a similar fashion. In *Thomas v. Carter*,<sup>50</sup> where the defendant, owner and his wife invited a friend, Jewel Thomas and her daughter, the plaintiff, to accompany them on a trip, and due to the negligence of Jewel Thomas, who was permitted to drive, the car overturned and injured the plaintiff, recovery was permitted on proof of lack of due care. The court distinguished the case cited by the defendant, *Crider v. Yolande Coal & Coke Co.*,<sup>51</sup> which required proof of wilful injury to the guest in order to hold the owner liable. In refusing the defendant's requested instructions, the court said:

"They proceed upon the theory that if appellant (plaintiff) was a mere licensee, or was riding in the defendant's automobile for her own pleasure, she could not recover for injuries inflicted through the negligence of the defendant or his driver. Appellant (plaintiff) according to the undisputed evidence, was in the automobile on the express invitation of the defendant owner—she was an invitee, and the fact that it was her pleasure to accept the invitation did not relieve defendant

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<sup>50</sup> 218 Ala. 55, 117 So. 634 (1927—rehearing 1928).

<sup>51</sup> 206 Ala. 71, 89 So. 285 (1921).



or his agent of the duty to exercise at least ordinary care for her safety . . . . Appellee (defendant) cites *Crider v. Yolande Coal Co.* . . . . but in that case the plaintiff was on defendant's truck, not by invitation of the owner, nor indeed by the invitation of the driver of the truck, but merely by the tolerance of the driver—wherefore that case differs materially in its facts and legal aspects from the case in hand."

The distinction the courts in New Jersey and Alabama make in holding that there is a different kind of care owed to a gratuitous guest depending upon whether the guest is invited or requests the invitation, (self-invited), or is permitted to ride without anything said about an invitation, (sufferance) seems untenable especially when based upon the theory that one is a legal invitee, and the others licensees. It is not the invitation that distinguishes a legal invitee from a licensee, but the mutuality of benefit. In law the invited gratuitous guest for social purposes is not a legal invitee, but a licensee in the same manner as the guest who is self-invited, or for that matter present by sufferance. The guest, whether invited because the driver is naturally charitable, or because he is stirred to charity by a request, or if the guest is just merely permitted to get and stay on, is yet a licensee. Any such guest is not there for the legal benefit of the driver. There is no legal mutuality of interest, though the conversation engendered may be the beginning of a long friendship. When a guest is invited for the evening to play bridge, or any other such purpose, the duty owed by the owner of the premises is the duty owed not to the invitee, but that owed to the licensee.<sup>52</sup> This matter is well considered in the case of *Greenfield v. Miller*,<sup>53</sup> where the defendant invited the plaintiff and her husband to spend New Year's Eve and New Year's Day at the home of the defendant. The home had been recently finished, the floors highly polished, and covered with oriental rugs. The plaintiff slipped on one of the rugs and was injured. She sued for

<sup>52</sup> *Southcote v. Stanley*, 1. Hurl. & Nor. 247 (1856).

<sup>53</sup> 173 Wis. 184, 180 N. W. 834 (1921).

damages and it was attempted to show that she was a legal invitee, but the court stated that there must be some benefit to the invitor, some mutuality of interest, to constitute the guest a legal invitee, and if the interest is such that only concerns the person entering, then he is but a mere licensee. It is also stated therein that the guest or friendly visitor enters on no better footing than a bare licensee in so far as the question of invitation is concerned.<sup>54</sup>

It is not my contention that the invited passenger should be barred from recovery, because he is a licensee, but that no distinction should be drawn between the invited and the self-invited guests, or the guest by sufferance. In most states there is no distinction made in the duty owed by the owner of an automobile to the gratuitous guest on grounds of the manner of invitation. Whether the guest is invited, self-invited, or a guest at sufferance is not a decisive factor. This is the rule in most jurisdictions whether they follow the minority or the majority ruling on the question of the degree of care. If as under the majority rule ordinary care is required and owed to the invited guest, so then is ordinary care owed to the self-invited guest. If as under the minority view slight care is owed to the social invitee, so then is slight care owed to the self-invitee. Thus, we find in the Arkansas case of *Black v. Goldweber*,<sup>55</sup> where the plaintiff asked the defendant to be permitted to accompany him on a journey to a certain point so that she could see her children, the trial court was reversed for instructing a verdict for the defendant. The trial court went on the theory that the only duty the defendant owed the plaintiff while riding in his automobile as a self-invited guest was to refrain from injuring her wilfully or wantonly. Justice Humphreys in reversing the decision said that though the doctrine of the lower court was supported by decisions in New Jersey and two or three other states which had adopted that view that:

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<sup>54</sup> See BIGELOW, *TORTS* (8th ed.) 160, 161.

<sup>55</sup> 172 Ark. 862, 291 S. W. 76 (1927).

"The prevailing rule, approved by recent decisions requires drivers of automobiles to exercise ordinary care in the operation thereof to transport their passengers safely, *whether guests by sufferance, self-invited guests, or invited guests.*"

In the same case Judges Hart and Kirby concurred in the result, but held to the view that in a gratuitous carriage for the sole benefit of the guest, the law requires only slight diligence, and makes the owner liable only for gross negligence. They based their view on the Massachusetts and Pennsylvania cases considered hereafter, but in *Bennett v. Bell*,<sup>56</sup> decided the following year, the same Justice Kirby stated:

"The driver of an automobile or motor vehicle is bound to the exercise of *ordinary care* in the operation thereof for the safe transportation of his guests and other passengers and to avoid personal injury to them, and this duty extends to all such passengers *whether guests by sufferance, invited, or self-invited.*"

Most courts which have considered the principles involved in the host-guest cases refuse as in the Arkansas decision to draw any line of demarcation between invited and self-invited guests.<sup>57</sup> The self-invited party and the guest at sufferance are not such outlaws as to be treated any the less as human beings. No one is legally permitted upon principles of well established law to take a person into his custody and control in any manner and then be actively negligent toward him, or to increase the hazard accepted. The law requires from all persons reasonable care for the safety of life and limb of any other person and it makes no exemption to those who render gratuitous services or free automobile rides. Even the guest at sufferance is entitled to due care according to the exigencies of the particular case, and in *Grabau v. Pudwill*,<sup>58</sup> where the plaintiff, a minor, received no invitation, but was permitted with full knowledge of the

<sup>56</sup> *Supra* note 11.

<sup>57</sup> *Munson v. Rupker*, *supra* note 17; *Rappaport v. Stockdale*, 160 Minn. 78, 199 N. W. 513 (1924); *Grabau v. Pudwill*, 45 N. D. 423, 178 N. W. 124 (1920); *Marple v. Haddad*, *supra* note 41; *Mitchell v. Raymond*, 181 Wis. 591, 195 N. W. 855 (1923).

<sup>58</sup> 45 N. D. 423, 178 N. W. 124 (1920).

defendants to ride on the running board of the car, in full view of the driver, he was permitted a recovery in spite of the fact that he was a *guest merely at sufferance*. The court stated that even though the plaintiff was a gratuitous passenger present only by acquiescence, still the defendants were not relieved from the *exercise of ordinary care for the plaintiff's safety*.

The court also indicates in the above case that active negligence is not an essential to recovery, but it should be noted that active and affirmative negligence was clearly present.

A well considered and a leading case on the host-guest duties is the Indiana decision of *Munson v. Rupker*.<sup>59</sup> Perhaps no better comment could be made than to quote the words of the court:

"It seems to us that the only sensible and humane rule is that an owner and driver of an automobile owes a guest at sufferance the duty of using reasonable care so as not to injure him. The rule as to trespassers and licensees upon real estate, with all its niceties and distinctions, is not to be applied to one riding in an automobile at the invitation of or with the knowledge and tacit consent of the owner and operator of the automobile. A trespasser and licensee going upon a tract of land—an inert, immovable body—takes it as he finds it, with knowledge that the owner cannot and will not by any act of his start it in motion and hurl it through space in a manner that may mean death to him who enters thereon. He who enters an auto to take a ride with the owner also takes the automobile and the driver as he finds them. But when the owner of the auto starts it in motion, he, as it were, takes the life of his guest into his keeping and in the operation of such car, he must use reasonable care not to injure anyone riding therein with his knowledge and consent. It will not do to say that the operator of an automobile owes no more duty to a person riding with him as a guest at sufferance, or as a self-invited guest, than a gratuitous bailee owes to a block of wood. The law exacts of one who puts a force in motion that he shall control it with skill and care in proportion to the danger created. This rule applies to a *guest at sufferance* as well as a guest by invitation."

It is submitted that even following the rules of property in most cases there will still be the duty to use ordinary

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<sup>59</sup> *Supra* note 17.

and reasonable care, for even though the premises need not be safe for licensees and trespassers, still there rests the duty of refraining not only from wilful injury, but also to refrain from increasing the hazard toward a person once he is discovered. Active negligence even toward a discovered trespasser entails liability. The condition in which one keeps his premises is one thing, the way he acts toward a person on those premises is another.<sup>60</sup>

Pennsylvania applying rules analogous to the gratuitous bailment of personal property in the case of *Cody v. Venzie*,<sup>61</sup> obtains a result more or less a model of its own. In that case the defendant, the owner of the car, *invited* the plaintiffs who are his wife's sister and brother-in-law, to accompany him. The lower court held that the plaintiff could not recover except upon proof of wanton and wilful negligence, and entered a verdict for the defendant. The upper court reversed the judgment and awarded a new trial on the ground that the defendant's want of *ordinary care* was for jury and stated:

"It follows, therefore, that when a gratuitous carriage is for the sole benefit of the guest the law requires slight diligence and makes the carrier only responsible for gross neglect; if it is for the sole benefit of the carrier the law requires great diligence and makes the carrier responsible for slight neglect; and where it is for the benefit or pleasure of both parties as in the instant case, it requires ordinary diligence and makes the carrier responsible for ordinary neglect."

Most states do not recognize degrees of negligence and for that reason would not be in accord on that point with the instant case.<sup>62</sup> In addition it is questionable whether the analogy of gratuitous bailments of personal property should apply. The owner and driver of an automobile is not dealing with property rights, but with human life.

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<sup>60</sup> *Patnode v. Foote*, 153 App. Div. 499, 138 N. Y. S. 221 (1912); *O'Shea v. Lavoy*, 175 Wis. 456, 20 A. L. R. 1008, 185 N. W. 525 (1921).

<sup>61</sup> 263 Pa. 541, 107 Atl. 383 (1919).

<sup>62</sup> *THROCKMORTON'S COOLEY ON TORTS*, § 317; *Chi. R. I. and P. Ry. Co. v. Hamler*, 215 Ill. 525, 74 N. E. 705, 1 L. R. A. (N. S.) 674 (1905); *Union Traction Co. v. Berry*, 188 Ind. 514, 121 N. E. 655, 32 A. L. R. 1171 (1919).

It has been stated that the prevailing tendency at the present time in Pennsylvania is to hold the host liable for failure to use ordinary care, but the cases are not necessarily out of harmony with the *Cody* decision. Ordinary care was required in that case because the guest was invited and the host-guest relation was treated as an arrangement of mutual benefit and pleasure. Evidently, under the court's dictum the benefit depends on invitation, self-invitation, or sufferance. Typical of the later decisions is the case of *Moquin v. Mervine*,<sup>63</sup> where the guests were invited and ordinary and reasonable care was required, but nothing is said to indicate what the holding would be if the guests were self-invited for their own sole benefit. The soundness or unsoundness of invitation as a test of benefit has already been treated herein. The states adhering to the minority view that permit recovery only where there is gross negligence also adopt the analogy of gratuitous bailment of personal property.<sup>64</sup>

Massachusetts has adhered to the rule of gross negligence by a long line of decisions, many very recent.<sup>65</sup> The "gross negligence" rule though requiring less care on the part of the owner toward his guest than does the prevailing "ordinary care" rule, does not require wanton or wilful injury to be shown as a basis of recovery. As said in substance in *Cook v. Cole*,<sup>66</sup> gross negligence differs in a degree rather than kind from ordinary negligence and is materially more want of care than constitutes simple inadvertence, yet it need not amount to such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. It is negligence of an aggravated character, and substantially greater want of care than ordinary negligence.<sup>67</sup>

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<sup>63</sup> 297 Pa. 79, 146 Atl. 443 (1929).

<sup>64</sup> *Massaletti v. Fitzroy*, 228 Mass. 487, 118 N. E. 168 (1917).

<sup>65</sup> *Parker v. Moody*, 174 N. E. 189 (Mass. 1931); *Mason v. Thomas*, 174 N. E. 217 (Mass. 1931); *Cook v. Cole*, 174 N. E. 271 (Mass. 1931).

<sup>66</sup> See *supra* note 65.

<sup>67</sup> *Altman v. Aronson*, 231 Mass. 581, 591-3, 121 N. E. 505, 4 A. L. R. 1185 (1919).

Neither do the jurisdictions adopting the gross negligence rule draw any distinction between guests by invitation, and guests by acquiescence.<sup>68</sup> If then it is the prevailing view based on principles of sound law that no distinction should be drawn between guests invited, self-invited, or at sufferance, the duty owed to all is the duty owed to the invitee. It has already been shown that the duty owed to an invited guest is not to be actively negligent toward him, or stated in another way, the owner must use ordinary and reasonable care according to the exigencies of the case. In addition it can be said that though I may be under no legal obligation to give aid, as did the *Good Samaritan*, to the person injured by the roadside, yet once I take such a person into my custody, or undertake to care for him, I take upon myself the legal duty to use due care in the doing. Any rule that departs from this is departing from established principles of law.<sup>69</sup>

Granting that the obligation of the owner of a motor vehicle is to be ordinarily prudent to the licensee, what is his relation to the trespasser?—The duty to the trespasser who is riding in an automobile without the driver's knowledge is to refrain from wanton and wilful injury. The negligence of the driver in such a case, whether ordinary or gross, should not be ground for recovery. Any other standard of conduct in such a case would be extremely burdensome and unjust. The negligence of the owner in this situation would not be negligence to the trespasser but only negligence in the air.<sup>70</sup> There is no principle of law on which to base a duty to the unexpected and wrongdoing trespasser. If, however, the driver has knowledge of the trespasser's presence, then it

<sup>68</sup> Cook v. Cole, *supra* note 65.

<sup>69</sup> Slater v. Ill. Cent. Ry., 209 Fed. 480 (1911); Dycke v. Vicksburg, etc. R. Co., 79 Miss. 361, 30 So. 711 (1901); Bresnahan v. Lansdale Co., 51 Atl. 624 (R. I. 1900); Gates v. C. & O. Ry. Co., 185 Ky. 24, 213 S. W. 564, 5 A. L. R. 507 (1919) and note; Tullgren v. Amoskeag Co., 82 N. H. 268, 133 Atl. 4 (1926).

<sup>70</sup> Falsgraf v. Long Island Rd. Co., 248 N. Y. 339, 162 N. E. 99 (1928).

seems on principle that the same rules as heretofore discussed should apply. The trespasser when permitted to remain is no more or less than a guest at sufferance. The duty of using due and reasonable care to a person present so as not to be actively negligent toward him, and thus not to increase the existing hazard, is a well recognized standard toward all. A person need not keep his premises safe for trespassers, but once the trespasser is discovered on the premises by the owner thereof, or anyone else, there arises the duty not to actively take part in his injury without justification for after all a trespasser is not outside the protection of the law. Condition of premises, and conduct on the premises in relation to those present and known, as stated before, are two different sets of facts and governed by two different rules of law. The case of *Herrick v. Wixom*<sup>71</sup> should be decisive of the matter. In that case the plaintiff entered a circus tent without permission from the owner, and took his seat with the invitees. A clown negligently exploded a fire cracker injuring the plaintiff. There the court, admitting the principle that a trespasser who suffers an injury because of the dangerous condition of premises is without a remedy, definitely ruled that where a trespasser is discovered upon the premises by the owner or occupant he, the trespasser, is not outside the law, and that the negligent owner must respond in damages for his negligence causing injury.<sup>72</sup>

The liability of the owner of an automobile so far has been treated as if it were the same in all respects as that of the driver and vice versa. That is not necessarily true. What has been said is applicable to the driver whether owner, an agent of the owner, or bailee of the automobile. The driver's liability does not depend on ownership, but upon his conduct as a driver. It also applies to the owner naturally when the automobile is being driven by him. It is also true that the

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<sup>71</sup> 121 Mich. 384, 80 N. W. 117, 81 N. W. 333 (1899).

<sup>72</sup> *Pigeon v. Lane*, 80 Conn. 237, 67 Atl. 886, 11 Ann. Cas. 371 (1907).



owner is liable for culpable injury to a guest when the motor vehicle is driven by an agent of the owner when the agent is acting within the scope, or apparent scope, of his authority in having guests ride in the automobile. Thus if the agent of the owner whether son, daughter, another guest, or a stranger, is permitted or instructed to invite guests for a ride, whether for business or for pleasure, and through the culpability of the agent a guest is injured, the owner will be held liable to respond in damages to the injured party according to the principles as enumerated heretofore. The presence or non-presence of the owner in the event of an injury to the guest is unimportant except in so far as it bears on the question of the authority of the driver. For example, if the owner is present, and allows his agent to invite a guest for a ride, that would indicate authority or apparent authority on the part of the agent to so invite, but if the owner is absent, other evidence would be necessary to establish such authority on the part of the agent. If the agent when the owner is not present invites or permits a guest to become a passenger, and the agent is instructed not to permit or invite guests to ride, the agent is thus acting outside his authority, and the owner is not responsible for an injury to the guest caused by the agent's negligence.<sup>73</sup> In such a case, the guest is a social invitee (licensee) of the driver, but a trespasser to the owner of the automobile. The rules of liability must accordingly be applied. Thus it can easily be seen that the injured guest, though a trespasser to the owner and barred from recovery as to him, yet such guest may still have a cause of action against the driver, who invited or permitted his presence.<sup>74</sup> It was held in *Higbee Company v. Jackson*<sup>75</sup> that a guest could recover from the owner when injured by the agent's negligent driving even

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<sup>73</sup> *Rolfe v. Hewitt*, 227 N. Y. 486, 125 N. E. 804, 14 A. L. R. 125 (1920); *Walker v. Fuller*, 223 Mass. 566, 112 N. E. 230 (1916).

<sup>74</sup> *Union Gas & Electric Co. v. Crouch*, 174 N. E. 6 (Oh. St. 1930).

<sup>75</sup> 101 Oh. St. 75, 128 N. E. 61, 14 A. L. R. 131 (1920).

when the agent was acting contrary to instruction (both real and apparent) in inviting the guest, if the guest could show wanton negligence on the part of the agent. This decision, however, is unsound on principle and was very recently overruled in *Union Gas & Electric Co. v. Crouch*.<sup>76</sup> The court acted on the rule that even a trespasser could recover for wanton, wilful injury. The rule is correct, but the wanton misconduct was not on the part of the owner, but that of the agent who was acting entirely outside of his agency, both real and apparent.

We can thus see that the owner is not liable for guests invited to ride by the chauffeur, or other agent where the owner's instructions are violated in so doing, or the agent is otherwise digressing from his employment.<sup>77</sup> The mere sending of a private car by the owner to have his driver do an errand does not give the driver authority to pick up some person he may meet casually or otherwise. If then such a guest is injured by the driver's negligence, the driver, but not the owner, is liable, if anyone. It is not the instruction that is the controlling feature, but whether the agent has the real or apparent, express or implied authority to take guests in the particular instance. Hence in those states adhering to the "family car doctrine"<sup>78</sup> where the father permits his son to take the automobile for the pleasure of his son and his guests, the father would be liable to the guests for any injury they might receive as the proximate result of the son's failure to use due care, providing the defense of contributory negligence did not intervene. Of course whether the family car theory is adopted or not, if the son or other member of the family is acting as an agent of the father, then the father is liable to the gratuitous guest.

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<sup>76</sup> *Supra* note 74.

<sup>77</sup> *Psota v. Long Island R. Co.*, 246 N. Y. 388, 159 N. E. 180 (1927); *Small v. Knop*, 182 N. W. 980 (Wis. 1921).

<sup>78</sup> *Mooney v. Cavier*, 198 Iowa 251, 197 N. W. 625 (1924); *Schwartz v. Johnson*, 152 Tenn. 586, 280 S. W. 32 (1926); *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020 (1913).

The final element for consideration is, what duty does the driver of the automobile owe the gratuitous guest to have his motor vehicle in a safe condition? In brief, this duty is almost in perfect analogy with the duty of the owner of premises. Whether we wish to admit or deny that the principles of property liability as between licensor and licensee are applicable to the host-guest relation in the management of the automobile, such rules are clearly fitting when applied to the condition of the motor vehicle itself.<sup>79</sup>

The owner of property owes no duty to a licensee to keep his premises safe. The social guest whether invited or self-invited is a licensee. The licensee takes the premises as he finds them subject to the perils. However, the owner owes the licensee the duty to notify him of any traps, or pitfalls, or hidden defects, of which he has knowledge. If the defect is known to the licensee, or is one not likely to produce injury, or is one which in the ordinary course of events the licensee would probably and reasonably discover without injury, then the owner is under no duty to inform the licensee.<sup>80</sup>

The owner of an automobile has these same duties in respect to its condition. The licensee—invited or self-invited or by sufferance—takes the automobile as he finds it, subject to all its individuating characteristics. The owner must notify his guest of any hidden perils of which he has knowledge, and the guest has not. If the guest could reasonably be expected to notice the defect or does see it, he assumes the risk.

The prevailing rule that the host is obliged not to increase the existing hazard, and to refrain from increasing the guest's danger of injury, by implication admits that the guest takes all existing risks so long as they are not increased by the

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<sup>79</sup> *Higgins v. Mason*, 255 N. Y. 104, 174 N. E. 77 (1930); *O'Shea v. Lavoy*, 175 Wis. 456, 185 N. W. 525, 20 A. L. R. 1008 (1921).

<sup>80</sup> See *RESTATEMENT OF THE LAW OF TORTS* (AMERICAN LAW INSTITUTE) TENTATIVE DRAFT No. 4, § 212.

driver. Hence the mechanism of the car and the skill of the driver are taken as is. Where the owner does not know of the defect, he is not liable because he is violating no duty. Where the guest does know of the defect, he assumes the risk. Where neither are aware of the peril, there is no liability because again there is no breach of duty that is owed by the owner to the guest. The driver, however, cannot induce a guest to enter into a trap which he, the driver, knows and the guests does not, without being remiss in his duty. Pitfalls and traps are not accepted when unknown by the guest and neither is the owner living up to his duty in failing to notify of the danger when he is aware of it. A defect such as would constitute a trap is probably nothing more than a danger which a guest who is unacquainted with the situation could not avoid by the use of ordinary skill and care.<sup>81</sup>

There is, however, no duty of inspection on the part of the owner. Thus in the recent case of *Higgins v. Mason*,<sup>82</sup> where Josephine Higgins, her husband, Robert Higgins, and defendant's wife, Grace Mason, were guests in the defendant's car on a trip, and the car was being driven by the plaintiff, Josephine Higgins the plaintiff, was denied recovery for the death of her husband who was killed when the car overturned due to a defective spindle pin. The pin held the wheel in alignment. It had been causing trouble to the owner before, and caused trouble to the plaintiff on this occasion in that it made steering difficult. All present knew something was wrong, but were unaware of anything seriously dangerous, or that any unreasonable risk was involved. The defendant exposed himself and wife to the same perils. The court said:

"Under the authorities, the defendant host, George Mason, was not liable for the death of his guest, Robert Higgins, because of a mechanical defect in the car, although Mason, *by inspection*, might have

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<sup>81</sup> *Hayward v. Drury Lane Theatre*, 2 K. B. 899, 913 (1917).

<sup>82</sup> See *supra* note 79.

discovered the fault, since Higgins in accepting the invitation to ride, must have taken the car as he found it, and no duty of inspection rested upon Mason. Mason would be liable only if he knew of the dangerous condition; realized that it involved an unreasonable risk; believed that the guests would not discover the condition or realize the risk; and failed to warn them of the condition and the risk involved. If Mason's failure to realize that the 'something' which was wrong with the automobile constituted a dangerous condition was due to his lack of mechanical knowledge, that was a risk assumed by the guests when they accepted the invitation to take the trip. Moreover, all of the guests were drivers of automobiles, so that if Mason did realize the danger indicated by the swerve, he could not have thought that his guests were unaware of it."

Where the owner does not negligently operate an automobile, but causes injury to his guest either by a defective car, or because of an error in judgment due to inexperience, he is not liable for the resulting injury. The host simply places the automobile which he has to offer at the disposal and enjoyment of his guest upon equal terms of security with himself. The guest is not on equal terms if he has no knowledge of a serious defect, and the host has. The guest cannot claim a right to greater security than the host. The guest accepts the driver whom he knows is inexperienced, and unskilled and also accepts his host's dilapidated car. So if the guest as in *Cleary v. Eckhart*,<sup>83</sup> is injured by an improper application of brakes on a gravel road due not to negligence, but to inexperience of which the host had prior knowledge; or is injured by overturning due to a defective second-hand spring while the automobile is carefully operated as in *O'Shea v. Lavoy*,<sup>84</sup> then the owner is not responsible. It must be remembered, however, that though a guest accepts the risk of a defect in the car of which he has knowledge, he does not, therefore, accept negligent operation of the car in reference to that defect. To state the same principle in another way, the driver may be using due care to the guest

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<sup>83</sup> 191 Wis. 114, 210 N. W. 267 (1926).

<sup>84</sup> 175 Wis. 456, 185 N. W. 525, 20 A. L. R. 1008 (1921).

when operating a safe car in a certain way, but negligent to the guest if operating a defective car—such as with poor brakes—in the same manner.<sup>85</sup>

Where the guest is injured by a hidden trap of which he has no knowledge, and the owner has, the owner must respond in damages. Thus in *Hennig v. Booth*,<sup>86</sup> where the accelerator was out of alignment and the owner was warned by mechanics that it was dangerous, he was held liable to his guests who were injured when the automobile collided with another automobile due to the defect. One guest was driving the defective car at the owner's request, with no knowledge of the defect, and the other guest was riding in the rear seat with the owner. Both guests recovered.

We can then readily see, following the analogy of vendors of dangerous instruments, that the owner of an automobile, even though not present, lends his motor vehicle to a guest, and fails to disclose a defect, which he himself knows, renders himself subject to respond in damages not only to the guest, but to any friends riding with the guest, if it is understood that the guest may so use the car.<sup>87</sup> In such a situation, if the guest driver is not himself negligent, but the injury is caused by the defect, the guest driver is not responsible to his own friends, but the owner is. There are many situations already mentioned where the driver, when different from the owner, is liable and the owner not. Here then is a situation where the owner is responsible but the driver not. This does not depend upon principles of agency. The owner is liable even though the defective machine is in the hands of an innocent bailee. Under the same principle, entrusting an automobile to a known inexperienced, incompetent driver may entail liability on the part of the owner

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<sup>85</sup> *Landry v. Hubert*, 100 Vt. 268, 137 Atl. 97 (1927).

<sup>86</sup> 132 Atl. 294 (N. J. L. 1926).

<sup>87</sup> RESTATEMENT OF THE LAW OF TORTS (AMERICAN LAW INSTITUTE) TENTATIVE DRAFT NO. 5, § 258.

to a guest injured by that driver, when the guest has no knowledge of the driver's incompetency.<sup>88</sup>

It should be stated in conclusion that the guest is always subject to the rules of contributory negligence and for that reason may be barred from recovery where recovery would otherwise be allowed on the foregoing principles. Even though the law does not countenance back seat management where "silence is generally golden"<sup>89</sup> there arises on many occasions the duty to warn not only of external dangers noticed by the passenger and not by the driver, but also to remonstrate with the driver for his negligent conduct in speeding or what not. It is unreasonable to expect the passenger to keep the same lookout that the driver is under obligation to do, yet he must in all cases use due care for his own safety according to the exigencies of the case.<sup>90</sup> That exigency may in extreme cases call for an abandonment of the car and the driver by the guest.<sup>91</sup>

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<sup>88</sup> *Ibid.* § 260; See also *Elliot v. Harding*, 107 Oh. St. 501, 140 N. E. 338, 36 A. L. R. 1128 (1923); *Mitchell v. Churches*, 119 Wash. 547, 206 Pac. 6 (1922).

<sup>89</sup> *Schlosstein v. Bernstein*, 293 Pa. 245, 250, 142 Atl. 324, 326 (1928).

<sup>90</sup> *Christensen v. Johnston*, 207 Ill. App. 209 (1917); *Codner v. Stowe*, 201 Iowa 800, 208 N. W. 330 (1926); *Lawrence v. Troy*, 133 Ore. 196, 289 Pac. 491 (1930).

<sup>91</sup> Italics throughout are by the writer.