William & Mary Law Review

Volume 7 | Issue 2 Article 10

The Case Against the Guest Statute

O. Forrest Morgan Jr.

THE CASE AGAINST THE GUEST STATUTE

INTRODUCTION

> Lawes were not made for their own sakes, but for the sake of those who were to be guided by them; and though it is true they are and ought to be sacred, yet, if they be or are become unuseful for their end, they must either be amended if it may be, or new lawes be substituted.[1]

During the late 1920's and early 1930's a number of American states enacted what have come to be called automobile "guest statutes".[2] These acts provide essentially that in order for a guest passenger in an automobile to recover against the driver for injuries, sustained while riding in the vehicle, he must prove the operator negligent to some specified degree above and beyond what is termed "ordinary negligence." [3] The statute usually requires a showing of wantoness, willfulness or gross negligence. In essence this legislation serves simply to relieve the driver of his duty of reasonable care for the safety of his fellow man.

The statutes came about initially, in the words of Professor Prosser, "(as a) ... result of persistent and effective lobbying on the part of liability insurance companies." [4] The twofold rationale put forth by insurers as the need for statutory aid were: (1) it is unfair for a guest to seek damages from one who has benefited or accommodated him and (2) to furnish an antidote to fraudulant claims conceived by collusive host and guest.

However, there seems to be some difficulty in endeavoring to justify the guest statute from the standpoint of existing law or from the standpoint of public policy in view of today's conditions. Recent developments in the field of torts and changing social conditions have once

1. Sir Matthew Hale, *Considerations Touching The Amendments of Laws* (In Hargrove, *Law Tracts* 269).

2. See 27 Ins. Counsel J. 233 (1960) for a listing and excellent comparison of the various guest statutes.

3. A typical enactment provides:

> No person transported by the owner or operator of any motor vehicle as a guest without payment for such transportation and no personal representative of any such guest so transported shall be entitled to recover damages against such owner or operator for death or injuries to the person or property of such guest resulting from the operation of such motor vehicle, unless such death or injury was caused or resulted from the gross negligence or willful and wanton disregard of the safety of the person or property of the person being so transported on the part of such owner or operator. VA. CODE ANN., Sec. 8-646.1 (1950).

4. Prosser, Torts 190-191 (3rd ed. 1964).

again brought into question the desirability of the guest statute.

The Common Law

In absence of a statute the courts have held, almost uniformly, that a driver must adhere to a standard of at least ordinary care toward his guest.[5] When the question was first presented to the courts the problem was resolved by analogy to existing theories of tort liability. The overwhelming majority followed the precedent established in the horse drawn vehicle cases,[6] which required that reasonable care be exercised for the safety of a guest passenger.

However, a vociferous minority lead by the Massachusetts Supreme Court[7] have suggested that transporting a guest is like a bailee gratuitously carrying goods, hence he should have the same degree of liability —for gross negligence only. When the guest question came before the Indiana Court a few years later it flatly rejected the callous disregard for human life displayed in the Massachusetts approach. The Indiana Court stated that:

> 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 into motion that he shall control it with skill and care in proportion to the danger created.[8]

A second minority approach was enunciated by the Alabama Court in *Crider* v. *Yolande Coal and Coke Co.* It suggested that a guest passenger should be compared to a person visiting upon land. By this analogy the guest would be, as a visitor on land, just a "mere licensee" and hence entitled to protection from only wanton and wilful misconduct.[9] Nine years later however, Alabama recognized the gross injustice wrought by this decision and reversed itself on the grounds that human life is a more valuable consideration than property rights:

> If the plaintiff is entitled only to protection against wanton injury, then it may happen that if a person requests gratuitous transportation

5. Spivey v. Newman, 232 N.C. 281, 59 S.E.2d 844 (1950); Wurtzburger v. Oglesby, 222 Ala. 151, 138 S.E. 9 (1930); Dashiell v. Moore, 117 Md. 657, 11 A.2d 640 (1940).

6. Patnode v. Foote, 138 N.Y.S. 221 (1912).

7. Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917).

8. Munson v. Rupker, 96 Ind. App. 15, 148 N.E. 169, 174 (1923).

9. 206 Ala. 71, 89 So. 285 (1921).

> for himself and also for a basket of apples, the gratuitous private carrier may be liable for injury to the property, but not for injury to him, although he committed his person to the keeping of the carrier as fully as he did the property.[10]

Perhaps the most pointed indictment of this "licensee on land" theory is in the words of the Indiana Court in *Munson* v. *Rupker* where it stated that:

> The rule as to trespassers and licensees upon real estate, with all of its niceties and distinctions, is not to be applied to one riding in an automobile . . . a trespasser and licencee 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 enter thereupon.[11]

Consequently it seems clear that were it not for the statutory prohibition, now present in the form of guest statutes in about thirty jurisdictions,[12] the safety of the guest passenger would be protected by the inherently more just common law requirements that the motor vehicle operator exercise ordinary and reasonable care[13] for the protection of his passengers.

Development in a Collateral Area

As noted previously, at the turn of the century a licensee on land was entitled only to protection from wanton and wilful abuse. From this inhumane rule came the basis for one of the minority automobile views.[14] However as this country has moved further into the Twentieth Century there has become more concern about the rights of individuals as opposed to the rights of property. This concern has been reflected in a changing attitude on behalf of the courts in regard to the safety of the licensee on real property. The decisions now hold generally that when a land owner or his agent engages in any active operations he has an affirmative duty to exercise reasonable care for the protection of a

10. Wurtzburger v. Ogleby, 222 Ala. 151, 130 So. 9 (1930).

11. Munson v. Rupker, *supra*, note 8.

12. 27 Ins. Counsel J. 223 (1960).

13. Apparently only two states still adhere to the minority rule that the standard of care owed to a guest passenger is slight care: Georgia, Citizens and Southern National Bank v. Huguley, 100 Ga. App. 75, 110 S.E.2d 63; and Massachusetts, Lanza v. Scarpa, 336 Mass. 629, 146 N.E.2d 899.

14. Cleveland, C.C. and St.L.R. Co. v. Patter, 113 Ohio St. 591, 150 N.E. 44 (1925).

licensee.[15]

Consequently even if the premise were accepted that an automobile guest is analogus to a licensee on land, as did some of the early minority common law guest passenger cases, recent developments in the law would now require that the test of reasonable care be imposed in the automobile guest situation. But the guest statute has prevented such a development in automobile law.

The Social Guest and the Duty to Inspect

Another paradox in the law of torts is the position of a social guest in one's home; although invited, he is a "licensee" rather than an "invitee". The legal significance of this distinction is that he is owed no duty of inspection of the premises for potential hazards and no affirmative duty of care.[16] However there seems to be no little concern about the sufficiency of the existing rule; some authorities argue that it contravenes the reality of social customs[17] and others suggest that such a social visitor be elevated to the status of an invitee.[18] As yet, however, few states have gone as far as the writers would like. Louisiana, the first state to adopt the stricter test observed:

> It is . . . suggested that the concepts of these rigid classifications unnecessarily concern the courts in minute examinations of the theoritical status of the injured person, based often on unrealistic and fictional distinctions,[18a] without sufficient realistic inquiry into whether the conduct under the particular circumstances involved an unnecessary risk to the safety of others avoidable by the exercise of due care.[19]

15. Kentucky and W. Virginia Power Co. v. Stacy, 291 Ky. 325, 164 S.W.2d 537 (1942); Davis v. Treadwell, 347 Pa. 341, 32 A.2d 411 (1943); Restatement (Second), Torts § 341 (1965):

> a possessor of land is subject to liability to his licensees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety, but only if,
>
> (a) he should expect that they will not discover or realize the danger, and
>
> (b) they do not know or have reason to know of the possessors activities and of the risk involved.

16. Meyer v. Mitchell, 248 Minn. 397, 80 N.W.2d 450 (1957); Krause v. Alpe 4 N.Y.2d 518; 176 N.Y.S.2d 349, 151 N.E.2d 895 (1958).

17. Laube v. Stevenson, 137 Conn. 469, 78 A.2d 693, 25 A.L.R.2d 592 (1951).

18. 25 Conn. Bar J. 123 (1951).

18a. It is arguable that the guest statute makes a similar unrealistic distinction between paying and non paying guests for they are both subject to the same dangers and will have to endure any injuries suffered.

19. Alexander v. General Accident Fire and Life Ins. Co., 98 So.2d 730, 733 (La. 1957).

We note again that the thrust of the present law is directed toward the safety of the individual and is developing an even more strict requirement to enforce the personal protection against injury afforded the individual human being. Against this background the grim absurdity of the guest statute becomes evident when it is realized that as a visitor to a neighbor's house there is a full remedy against negligent injury until the instant his car is entered, then one is open to anything short of a full fledged wanton or willful tort. If a social guest on a house is protected, why then not a social guest in an automobile? [20]

THE DUTY TO INSPECT THE VEHICLE AND THE COMMON LAW

In 1921, Wisconsin decided the classic case of *O'Shea* v. *Lavoy*[21] which established the rule that, whether or not an automobile host is held to a standard of reasonable care for active negligence while actually driving the car, he is not bound to furnish a sound vehicle or make any inspection to determine its safety. The decision was put on the then socially acceptable grounds that any other conclusion would discourage motorists from sharing rides with friends at a time (1921) when cars were still few in number.[22] Several jurisdictions have followed this lead.[23]

However, in 1962 *O'Shea* was overruled by *McConville* v. *State Farm Mutual Auto Insurance Co.*,[24] in which the Wisconsin court announced the recognition of a substantial change in public policy. In 1921 there were few cars, today there are millions; much of the population then rural, today is predominately urban; the roads at that time were few

20. One of the reasons put forth for extension of the rights of a social guest beyond their present standing is the increasing presence of the home owners liability insurance policies which are available to indemnify the occupier of the land for any financial loss he may sustain as a consequence of a guest injury. If it is true that history repeats itself then we can expect to see a rash of guest statutes applying to visitors to homes.

21. 175 Wis. 456, 185 N.W. 525 (1921).

22. 185 N.W. 525, 527 (1921):

> The automobile is an instrumentability of recent creation which has rapidly established itself in the desires of the people. No other agency has so effectively appealed to their favor. Nothing contributes so much to the comfort and pleasure, the welfare and happiness of the family. . . . There are many who cannot afford to own an automobile. There are few who do not covet the comfort, pleasure and the recreation thereby afforded. It is an act of kindness and consideration for the owner of a car to lend its comfort and pleasure through an invitation extended to his less fortunate neighbors. . . . This is a species of hospitality which should be encouraged rather than discouraged.

23. Higgins v. Mason, 255 N.Y. 104, 174 N.E. 77 (1930); Marple v. Haddad, 103 W.Va. 508, 138 S.E. 112 (1927); Olson v. Buskey, 220 Minn. 155, 19 N.W.2d 57 (1945).

24. 15 Wis.2d 374, 113 N.W.2d 14 (1960).

and sparsely used; the cars in 1921 were slow simple machines, today's automobiles are high speed instruments which are frequently quite destructive; in the twenty's fatal automobile accidents and serious injuries were something of a rarity, today there are 47,000 traffic deaths[25] in a single year.

The most persuasive argument set forth by the court for a change in policy is contained in the observation that today there is widespread use of automobile liability insurance. In the early days of automobiles it was argued that it was just plain anti-social to ask a host to be responsible for any injuries to a gratuitous passenger.[26] Today most states require proof of financial stability, usually in the form of a certain minimum amount of insurance coverage or the ownership of property of a certain value. Failure to meet these requirements results in loss of the right to drive. Clearly public policy has changed and now holds in disfavor anyone who will not or cannot assume the financial obligations inherent in operating a motor vehicle.[27] The advent of insurance has taken the burden from the individual driver and distributed it among all owners of motor vehicles. Certainly automobile accidents will happen and consequently someone must bear the cost. In absence of liability insurance most victims would be otherwise uninsured[28] and would therefore have to meet the costs themselves,[29] or, if unable to so do, have them passed on to society through public welfare or private charity. The preferable alternative has been to spread the losses among the highway users through insurance.[30] Hence the social policy of the early twenties was properly held inapplicable in *McConville* and a broader

25. Bureau of Statistics, Stat. Abs. at 119 (1965).

26. Massaletti v. Fitzroy, *supra* note 7.

27. Grad, *Recent Developments in Automobile Accident Compensation*, 50 COLUM. L. REV. 300 (1950).

28. Report by the Committee to Study Compensation for Auto Accident Victims, 26 CONN. B. J. 70 (1952). Statistics indicate that most of the losses sustained by victims which are not covered by liability insurance are absorbed by the individual and not affected by other forms of insurance such as wage continuation plans, health insurance or accident insurance. ". . . It is believed that much of the economic loss from automobile accidents, estimated at 6½ billion dollars in 1960, ... still falls upon individuals," Pedrick, *Taken for a Ride*: The Automobile Guest and Assumption of Risk, 22 LA. L REV. 91 (1961).

29. It should be noted that liability insurance is based broadly on the theory of indemnification for legal loss so that even a guest passenger who has an auto liability policy himself, even with an uninsured clause, cannot recover unless he can maintain a cause of action. A possible exception to this would be a medical payments provision.

30. Modern social theory suggests that, as in workmen's compensation, where human injury is an inherent element in the existence of a system the defendant class should provide for this expectancy through insurance.

right of action was accorded the guest passenger giving him redress for negligent injuries suffered.

INSURANCE AND COLLUSION

> (The) reference to collusion and fraud upon which his conclusions rest seems to be based upon the following statement, which shows a misunderstanding of the facts; 'Since the rule of liability announced in *Roy v. Kirn* . . . there has been considerable litigation between guests and hosts. It is conceivable that such actions are not always unattended by collusion, perjury and consequent fraud upon the court.'
>
> The statement that 'there has been considerable litigation between guests and hosts' . . . is not borne out by the records of this court. *Roy v. Kirn* was decided twelve years ago, and from that time until the present my brother is able to cite but four cases involving litigation by guest passengers. Four cases in twelve years, even though attended by fraud, collusion and perjury are hardly sufficient to create an 'absolute emergency' involving public safety. Further, what right has this court to assume that actions by guest passengers are attended by collusion, fraud and perjury? There is no justification for any such assumption appearing in or outside of the record.[31]

The dissenting opinion of Justice McDonald in *Naudzius* v. *Lahr* set out, in part, above is apparently just as true today as it was then. The insurance companies assert that since most guest passengers are usually friends or relatives, the real defendant is a corporate insurer and that there is a natural tendency toward collusion.[32] They assert further that not only is it a travesty upon the right of the insurance company to a fair trial; but also, since the number of suits brought is significant, the payment of unjust judgments is reflected in increased insurance rates that adversely affect the pocketbook of the motoring public.[33]

Thirty years after Justice McDonald's observations a comparison of insurance rates between states which have a guest statute and states which do not have a guest statute seems to indicate that his con-

31. Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 581, 74 A.L.R. 1189 (1931). The particular point of law being discussed here is the right of the Michigan legislature to make its guest statute effective immediately as an "absolute emergency" requirement involving public safety, rather than waiting the normal ninety days. This case gives an insight into the grimly ludicrous situations that were the origin of the guest statute—the unjustified state of panic and urgency built up by the lobbyists. In a very perceptive dissent, McDonald, J. notes: "No one seems to have had the remotest idea that it was destructive of the public safety until the legislature so declared. . . . It has no more to do with public safety than does the rule in Shelley's case. *Id.* at 586.

32. See majority opinion in Naudzius v. Lahr, *supra*, note 31.

33. *Id.*

clusions were sound—there is no significant rate difference.[34] Unfortunately it is difficult to make any definitive study of the statistics on more than a very general basis for apparently insurance companies do not tabulate losses according to the theory of legal liability.[35] However, enough general information is obtainable to indicate that the bellicose claims that insurance rates would increase if guest statutes were not adopted apparently, have simply not been borne out by the facts. Even if there are rate differentials, the economic benefit of the lowest possible insurance costs must be weighed against the social disability of the uncompensated victim.[36]

The possibility of a collusive suit should not be an element in determining the substantive right of the individual litigants. The rules of law are designed to promote the truth and seek out perjury. Lying under oath is a matter within the realm of the criminal law, not the civil law. To say that an innocent plaintiff is not entitled to his day in court because someone may be untruthful is to undermine the entire judicial system. Even if we assume that the courts are unable to deal with untruths and further that a guest statute may reduce some collusion, it may also defeat justice when it permits a driver to run 90 miles per hour through a stop sign killing all his guest passengers but denying recovery because there is no wantoness within the meaning of the statute. The indemnity company's argument that insurance coverage in guest cases would result in collusion is specious and begs the question. It might as well be argued that insurance companies are undesirable institutions since they encourage the automobile owner to trifle with his legal duties, since he can suffer no personal liability in damages.[37]

The State of the Guest Statute Today

Since the first guest statute was passed in 1927 the acts have proved a continuing problem in judicial interpretation. "There is perhaps no other group of statutes which have filled the courts with so many petty and otherwise entirely inconsequential points of law." [38] Much

34. Bennington, *The Ohio Guest Statute*, 22 Ohio St. L. J. 629 (1961).

35. James, *Accident Liability Reconsidered*, 57 Yale L. J. 549 (1947).
Insurance Companies do not even try to find out what part of their losses are attributable to any given legal doctrine. Rates for a locality are compared on the bases of gross losses, tendency of local jurors to give high verdicts, extent to which general population is claims conscious and the general standard of living.

36. McConville v. State Farm Insurance, *supra*, note 24.

37. Allen, *Why Do Courts Coddle Insurance Companies*, 61 Am. L. Rev. 77 (1927).

38. Prosser, Torts 191 (3rd ed. 1964).

of the problem has arisen because of the recognition[39] by the courts of the injustice inherent in the principle of the guest statute and their consequent attempts to relieve some of the harshness. For example the New York Court stated that: "(the statute) is to be construed 'strictly, albeit reasonably' against the one who invoked it . . . and any exception in its provisions which would allow a claimant to escape application of the statute is to be construed liberally in favor of the claimant." [40] Not only have the courts insisted upon strict construction but when it comes to determining who or what comes within its terms they have sought to exclude as much as possible.[41]

Some courts have proceeded so far as to alter the substantive law in order to soften the effect. For example in Illinois where the test of the statute is wilful and wanton actions the court admitted: "The conclusion is inescapable that judicial interpretation of the statute has brought within the meaning of the term 'wilful and wanton misconduct' acts which customarily would have been considered gross negligence." The Illinois Guest Statute has become something quite different from what the original proponents of guest statute legislation evidently had in mind.[42]

The result of these numerous interpretations[43] has been the creation of a unique statute in every state, modified, circumvented and buried in a mass of contradictory and confused case law.

Conclusion

A recent survey in Ohio[44] indicated that 43.2% of all injuries and 31.7% of all deaths in automobile accidents involve persons who are passengers. When one considers that more than 40,00 people are killed and many thousands more injured on our highways each year it is clear that the guest laws reach into the lives of a significant number of individuals.

As has been noted, in absence of statute the common law of automobile guests has, from its beginning, decreed a standard of reasonable care, at least as to active negligence and now frequently as to imposing

39. See quotation from Burghardt v. Watson, *Infra*, note 47.

40. Naphlali v. Lafazan, 8 A.D.2d 22, 186 N.Y.S. 2d 1010 (1960).

41. Prosser and Smith, Cases and Material on the Law of Torts, 215 (3rd ed. 1962).

42. The Illinois Guest Statute, 54 N.W. U. L. Rev. 263, 267 (1959).

43. Among the various problems confronting the courts are: can an owner be a guest in his own car if someone else is driving? What if a child is not old enough to know that he is a guest? What about a guest who wants to get out of a car but is not allowed to do so? Is a guest who is injured a moment after he leaves the car still a "guest"?

44. 8 W. Res. L. Rev. 170 (1957).

an affirmative duty of inspection. In an analogous situation, the licensee on land, the same rules now apply and the duty owed is being increased. The social guest on land is beginning to be classified as an invitee and entitled to even fuller protection. The statutory guest passenger is truly in a class by himself.

One would not think reasonable a statute which allowed a doctor to exercise a lesser degree of care when he attended charity patient than when he attended a paying patient. Yet, if the doctor were to give the charity patient a ride home he would then become a gratuitous passenger and subject to anything short of wanton injury;[45] such is the enigma of the guest statute.

The courts have attempted to alleviate the problems but as noted by the Oregon Supreme Court they are limited:[46]

> With the shift in ideas of the basis for liability from fault to compensation which seems to be prevalent, the application of the statute in the terms of its original purpose serves to accentuate the difference in treatment between the automobile guest and others in the adjudications of their respective claims. Perhaps the time has come when the jury should be permitted to treat automobile guests in same manner as it treats other injured plaintiffs; but that change must come from the legislature, not from us.[47]

The plain effect of the guest statute is to shift the burden of loss to the one who is less able to withstand it. From the standpoint of public policy this is unacceptable. The guest statute quite plainly cannot be justified either legally or socially. In the words of Sir Matthew Hale: "If (the lawes) become unuseful for their end, they must either be amended if it may be, or new laws be substituted." [48]

O. Forrest Morgan, Jr.

45. It is said that there is an elderly law professor who, being aware of the demands of tort law, makes a habit of placing a dollar bill on the dashboard of any car in which he is riding as a gratuitous passenger. If he arrives safely he takes back his dollar and thanks the host for the ride.

46. The Constitutionality of the guest statute principle was upheld as a valid exercise of the police power and not violative of the due process or equal protection clauses in Silver v. Silver, 280 U.S. 117 (1929). The emphasis was placed upon restricting the driver's duty rather than limiting the remedies of the plaintiff.

47. Burghardt v. Watson, 70 Ore. 337, 349 P2d 792, 804 (1960).

48. Connecticut, the first state to adopt a guest statute in 1927, repealed it ten years later.