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THE WASHINGTON GUEST STATUTE

JOHN W. RICHARDS*

The Washington Guest Statute¹ has survived seven years, four legislative sessions and thirteen opinions² comparatively unscathed, and while an appraisal of its results cannot be adequate without statistical information as to the actions which were *not* brought because of its provisions, it is at least possible, on the basis of this rather limited material and experience, to point out what has been done with it and what problems lie ahead. It is proposed to discuss two of the questions which it raises: The meaning of the term "invited guest or licensee without payment for such transportation," thereby regretfully but unavoidably being drawn into the joint adventure controversy, and the nature of the conduct on the part of the host which will render him liable to the guest.

The latter question presents few difficulties, the language of the statute, though somewhat confused,³ making it reasonably clear that before the host can be held it is necessary to prove the injury complained of was intended,⁴ the court illustrating the nature though not the degree of proof required by its statement in *Shea v. Olson*⁵ that in the absence of "evidence of any intention . . . to commit suicide, homicide, or mayhem, or to destroy property" there was no basis for

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"No person transported by the owner or operator of a motor vehicle as an invited guest or licensee, without payment for such transportation, shall have cause of action for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator: *Provided*, That this section shall not relieve any owner or operator of a motor vehicle from liability while the same is being demonstrated to a prospective purchaser." Wash. Laws 1933, c. 18, p. 145, re-enacted as Wash. Laws 1937, c. 189, § 121, p. 911; *REM. REV. STAT.* § 6360-121.

¹In chronological order, these are: *Forman v. Shields*, 183 Wash. 333, 48 P. (2d) 599 (1935); *Shea v. Olson*, 185 Wash. 143, 53 P. (2d) 615 (1936); *Carufel v. Davis*, 188 Wash. 156, 61 P. (2d) 1005 (1936); *Lassiter v. Shell Oil Co.*, 188 Wash. 371, 62 P. (2d) 1096 (1936); *Potter v. Jaurez*, 189 Wash. 476, 66 P. (2d) 290 (1937); *Buss v. Wachsmith*, 190 Wash. 673, 70 P. (2d) 417 (1937); *DeNune v. Tibbitts*, 192 Wash. 279, 73 P. (2d) 521 (1937); *Keisel v. Bredick*, 192 Wash. 665, 74 P. (2d) 473 (1937); *Syverson v. Berg*, 194 Wash. 86, 77 P. (2d) 382 (1938); *Meacham v. Gjarde*, 194 Wash. 526, 78 P. (2d) 605 (1938); *Parker v. Taylor*, 196 Wash. 22, 81 P. (2d) 806 (1938); *Lampe v. Tyrell*, 200 Wash. 589, 94 P. (2d) 193 (1939); *Carboneau v. Peterson*, 101 Wash. Dec. 299, 95 P. (2d) 1043 (1939). In five of these cases, the statute was held to apply and recovery denied; in the remaining eight, plaintiff was found not to be within the statute, the usual escape being via joint adventure.

²The statute, linking "intentional" and "accident," creates the paradox of an intended unforeseen event. See note 1, *supra*; Comment (1937) 12 *WASH. L. REV.* 138; *Parker v. Taylor*, 196 Wash. 22, 81 P. (2d) 806 (1938).

³*Shea v. Olson*, 185 Wash. 143, 53 P. (2d) 615 (1936); *Parker v. Taylor*, 196 Wash. 22, 81 P. (2d) 806 (1938); Comment (1937) 12 *WASH. L. REV.* 138; Note (1939) 14 *WASH. L. REV.* 52.

⁴185 Wash. 143, 151, 53 P. (2d) 615 (1936).

finding an "intentional accident." Proof of such intent must, of necessity, normally be by way of inference from what the defendant did, and evidence showing merely heedlessness, recklessness, or gross negligence will, of course, not support an inference of the character required in order to impose liability, but it is possible that the court may have gone too far when, in *Parker v. Taylor*,⁶ it said, with reference to the driver's intent, "proof that he intentionally did the act which resulted in the injury is not sufficient to fix liability. It must be made to appear that he intended to injure." In that case defendant deliberately speeded up his car as he approached a hump in the road for the express purpose of giving his small nephews, riding in the back seat, a thrill by bouncing them in the air; very likely he succeeded, for the resulting impact was so severe it broke his sister's back. The facts, as the court points out, do not indicate that this result was either intended or anticipated, and it is not suggested that the driver should have been held liable for the injury under the Guest Statute. But that statute, after all, merely limits the host's liability to his guest to that for battery, and it is familiar learning that the element of intent in battery is satisfied either by showing that the act which brought about the harmful contact was done for the purpose of bringing it about, or with knowledge on the part of the actor that such contact was substantially certain to be produced.⁷ Granted such substantial certainty of harm, the proof of intent to injure is made out, and the court's requirement met; but the common habit of incorporating without much discrimination literal excerpts from opinions into instructions to the jury for use in cases which may present vital differences of fact, with consequent danger of misconstruction, makes it seem not hypercritical to suggest a modification of the rule along the lines indicated.⁸

The other question, as to what constitutes an "invited guest or licensee, without payment for such transportation," has not been raised in such a fashion in the cases decided under the statute as to permit a definitive answer. Of the thirteen cases, in four the plaintiff was so obviously a guest, the point was not discussed;⁹ in one, the court felt

⁶196 Wash. 22, 25, 81 P. (2d) 806 (1938).

⁷RESTATEMENT, TORTS (1934) § 13 (a), comment d.

⁸One other matter might be mentioned in this connection. As showing lack of intent to injure, the court, in *Parker v. Taylor*, 196 Wash. 22, 81 P. (2d) 806 (1938), at page 24 of the state report, said that, "Defendant and his sister, the plaintiff, were then, and the evidence shows have since been, on the friendliest terms." This is largely beside the point, since, as the RESTATEMENT, TORTS (1934) § 13, comment e, points out, "If an act is done with the intention [stated] . . ., it is immaterial that the actor is not inspired by any personal hostility to or a desire to injure the other." The illustration, of course, is that of the practical joker, liable to his injured victim though innocent of malicious intent.

⁹*Shea v. Olson*, 185 Wash. 143, 53 P. (2d) 615 (1936) (trip to dance at roadhouse); *Carufel v. Davis*, 188 Wash. 156, 61 P. (2d) 1005 (1936) (social

that, since the plaintiff was clearly either a passenger for hire or a joint adventurer, she could not be a guest, hence left her status undecided;¹⁰ in one, plaintiff was a fellow-servant of the driver;¹¹ in six, the issue was guest or joint adventurer and, accordingly, the latter point alone was considered,¹² the court having held in the first case under the statute that a joint adventurer was not a guest.¹³ Thus preoccupied with determining whether the plaintiff was something else—with constructing a definition of guest by the process of exclusion—little direct aid has been given by discussion of the guest status except in a single case.¹⁴

The general outlines of the answer are, of course, provided by the language of the statute itself. It seems clear that the terms "invited guest" and "licensee" are used indifferently; one may be either, and the legal consequences are not affected by the fortuitous presence or absence of an invitation, which merely affords an opportunity for nicety in description.¹⁵ Indeed, it is very likely that the "invited guest" is, legally speaking, a "licensee,"¹⁶ assuming that there could ever be occasion for such classification in connection with automobile cases. The qualifying phrase, "without payment for such transportation," seems to be the operative part of the statutory definition, limiting the ambit of the terms "invited guest or licensee," and hence that of the statute, to persons in the vehicle by the invitation or consent of the owner or operator and whose carriage is gratuitous.¹⁷ There must be "payment", and moreover it must be "for such transportation",¹⁸ before

drive to resort); *Lassiter v. Shell Oil Co.*, 188 Wash. 371, 62 P. (2d) 1096 (1936) (lift given to stranger in tavern); *Parker v. Taylor*, 196 Wash. 22, 81 P. (2d) 806 (1938) (sisters on family outing).

¹⁰*Potter v. Jaurez*, 189 Wash. 476, 66 P. (2d) 290 (1937) (stranger given transportation on agreeing to share expenses).

¹¹*Buss v. Wachsmith*, 190 Wash. 673, 70 P. (2d) 417 (1937).

¹²*Forman v. Shields*, 183 Wash. 333, 48 P. (2d) 599 (1935); *DeNune v. Tibbitts*, 192 Wash. 279, 73 P. (2d) 521 (1937); *Keisel v. Bredick*, 192 Wash. 665, 74 P. (2d) 473 (1937); *Meacham v. Gjarde*, 194 Wash. 526, 78 P. (2d) 605 (1938); *Lampe v. Tyrell*, 200 Wash. 589, 94 P. (2d) 193 (1939); *Carboneau v. Peterson*, 101 Wash. Dec. 299, 95 P. (2d) 1043 (1939).

¹³*Forman v. Shields*, 183 Wash. 333, 48 P. (2d) 599 (1935): ". . . this section does not purport to bar recovery by any but invited guests or licensees."

¹⁴*Syverson v. Berg*, 194 Wash. 86, 77 P. (2d) 382 (1938).

¹⁵But see *DeNune v. Tibbitts*, 192 Wash. 279, 281, 73 P. (2d) 521 (1937), where the court, countering appellant's assertion that plaintiff was a guest, remarks, as seemingly determinative of the point, that, "In view of such contention, one would expect to find in the record direct and undisputed evidence of invitation, or, at least, direct and positive proof of some fact from which an inference of invitation must necessarily follow. There is no such evidence."

¹⁶RESTATEMENT, TORTS (1934) § 331, comment *a*. This refers to the status of the person on land. There would seem to be no reason for different treatment in automobile cases.

¹⁷See *Buss v. Wachsmith*, 190 Wash. 673, 683, 70 P. (2d) 417 (1937).

¹⁸That is, it must be directed toward the carrying of the occupant; if such transportation is merely incidental, payment does not change the

the bar of the statute is removed. It need not be by the person transported,¹⁹ it need not be in the form of money, but it must be "compensation to the operator or owner in a business sense";²⁰ in the sense of a material benefit. The point is made in *Syverson v. Berg*,²¹ in which a mother, in order to subserve the proprieties and permit her daughter to go on an overnight trip with a young man, went along in his car as chaperon, it being arranged that the party, in order to save expense, should stay over night with the daughter's grandmother on the way. En route an accident occurred, injuring the mother; in her action against the driver, she urged that the Guest Statute did not apply where "a person is transported for the mutual benefit of both the passenger and the operator of the automobile, or for the benefit of the operator alone . . ." The benefit suggested was the pleasure of the daughter's company, and the free lunch which the mother had provided before the start. The court said: "This was a purely social automobile trip. It was not taken in expectation of material gain . . . No business advantage or material consideration accrued to the host in the transportation resulting in the injury . . . It is quite true that benefit is anything that does one good, and that whatever promotes the welfare or pleasure of one is a benefit. This is not a case of an agreement to share expenses and where, by reason of such an agreement, a material benefit is conferred upon the driver . . . The mother did not sell to the host driver the pleasure of the society and the companionship of her daughter."²²

It is submitted that the entire solution of the problem lies in that case. Two requirements are set forth as necessary to show "payment for such transportation": (1) an actual or potential benefit in a material or business sense resulting or to result to the owner or operator, and (2) that the transportation be motivated by the expectation of such benefit. The first requirement seems sufficiently obvious, since anything short of such material, business benefit—social benefit, for

status. *TeSelle v. Terpstra*, 180 Wash. 73, 38 P. (2d) 379 (1934) (plaintiff hired defendant to transport furniture; rode along on the truck. Held to be a guest.); *Klopfenstein v. Eads*, 143 Wash. 104, 254 Pac. 854, 256 Pac. 333 (1927) *semble*; *Clendenning v. Simerman*, 220 Iowa 739, 263 N. W. 248 (1935) (driver hired to drive car to town; injured occupant went along for a ride). In these cases the trip would have been taken irrespective of the occupant.

¹⁹It is assumed that if the person transported does not himself make "payment" he must be a member of the class for which "payment" is made. See *Weber, Guest Statutes* (1937) 11 U. OF CIN. L. REV. 24, 41. *McGuire v. Armstrong*, 268 Mich. 152, 255 N. W. 745 (1934) (patient transported by county nurse not a guest though he did not pay for transportation); *Smith v. High School District*, 118 Cal. App. 673, 5 P. (2d) 930 (1931) (student riding in school bus not a guest).

²⁰*Weber, supra* note 19, at 40.

²¹194 Wash. 86, 89, 77 P. (2d) 382 (1938).

²²*Ibid.*

example, or a purely nominal contribution to expenses—if held to constitute payment would simply abrogate the statute without benefit of legislative repeal. Yet the second requirement seems equally important, if only to take care of those cases in which a purely social venture may have its overtones of material benefit. In the *Syverson* case itself, for example, though the court minimized the matter, it cannot be denied that the prospect of being freed from paying for two nights' lodging for himself and his young lady, together with the meals which went with them, was a distinct material benefit, as much so in a business sense as though the plaintiff mother had given him their value in cash. But it is abundantly clear that the expectation of this saving was merely incidental in the driver's undertaking to transport her—that it did not motivate such transportation—and hence could not reasonably be found to be "payment" for it. Had it done so, a different result would be justified.

Admittedly, the most difficult cases are those in which each member of the party contributes to the expenses or the entertainment. The person transported pays for gasoline, oil, or lunch; does he thereby lose his status as guest? It all depends, says the court, on whether it was arranged in advance. In *Eubanks v. Kielsmeier*,²³ which came up during the reign of the gross negligence rule, the guest on a purely social trip to another city suggested that she pay for the gas and oil consumed, an arrangement which was not carried out. But even if it had been, said the court, that would not of itself have been significant; "Standing alone, it would have been simply an expression of courtesy and appreciation that a guest often evinces and manifests."²⁴ This is purely reciprocal generosity; it is the return of a gift for a gift, not payment for transportation, and accordingly cannot affect the guest status.²⁵ Yet in *Potter v. Juarez*²⁶ it is said: "If one rides with a friend, or even with a stranger upon his invitation, having no *pre-existing understanding* as to sharing the expense, he is a guest only, and will so remain even though he gratuitously offers some return favor such as paying for a meal, paying for gas, or providing the cigarettes. Such return of favors does not of itself destroy the relation of host and guest." It is difficult to see why a pre-existing understanding should make any difference in the result. "Standing alone," the purchase of the gas is simply a reciprocal courtesy; is it any less one if offered and accepted in advance? It would seem to be so only if one of two situations is present: (1) a binding contract is entered into between the parties, or (2) the offer to pay part of the expenses motivates the furnishing of

²³171 Wash. 484, 18 P. (2d) 48 (1933).

²⁴*Eubanks v. Kielsmeier*, 171 Wash. 484, 487, 18 P. (2d) 48 (1933).

²⁵Weber, *supra* note 19, at 39.

²⁶189 Wash. 476, 481, 66 P. (2d) 290 (1937). Italics supplied.

transportation. If the second is present, the result is clear; instead of a social venture, with incidental benefit by way of lessened expense, we have a venture undertaken for material benefit, with incidental social aspects, and the guest status, within the meaning of the *Syverson* case, does not exist. If a legally binding agreement is found, it is very likely that a resort to the doctrine of joint adventure is indicated as an escape from the statute, since it is at this point that the problem of payment and the problem of joint adventure overlap; if the other requisites for that relation are not present, it should be comparatively easy to find the material benefit aspect of the transportation so important, in view of the parties having entered into a contract concerning it, as to be the motivating factor. But how often can the existence of a binding contract between the parties plausibly be argued? No reason is apparent why there should be any difference in arranging for an automobile trip and arranging for a dinner party, yet it is clear that if *A* invites *B* to dinner, and *B* accepts, there is no legal obligation created giving *A* an action for breach of contract if *B* fails to come, since neither party, though going through the form of offer and acceptance, intended a binding legal obligation to arise. Surely there must be a similar lack of advertence to the legal consequences when arranging for a picnic or a pleasure trip on the basis of "Dutch treat," with equally fatal consequences to a binding contract between the parties.

The effect of infancy on the guest status has yet to be discussed. Involuntary presence in the automobile clearly deprives one of the status,²⁷ so that if the infant is required to go, irrespective of his wishes, he is not a guest.²⁸ Moreover, if the relation is one which must be voluntarily assumed, presumably some capacity is necessary before it may be. A California case²⁹ indicates that a child of five has no capacity to accept a ride in a legal sense, under the California statute applying to those who "accept" a ride, but the problem has received little attention. A writer³⁰ has suggested that "one, to be a guest, must not only be received and entertained by another but must also have sufficient mental age to be able to accept that hospitality with a realization that he is receiving a favor for which he should be grateful. Such construction does not seem to be unwarranted or strained if one considers the general policy in favor of infants which pervades the legal structure

²⁷*Blanchard v. Ogletree*, 41 Ga. App. 4, 152 S. E. 116 (1930) (request by passenger to leave vehicle, refused, revoked guest status). See *Berman v. Berman*, 110 Conn. 169, 147 Atl. 568 (1929); *Manser v. Eder*, 263 Mich. 107, 248 N. W. 563 (1933); *Kastel v. Stieber*, 215 Cal. 37, 297 Pac. 932 (1931), 8 P. (2d) 474 (1932).

²⁸*Hart v. Hogan*, 173 Wash. 598, 24 P. (2d) 99 (1933).

²⁹*Rocha v. Hulen*, 6 Cal. App. (2d) 245, 44 P. (2d) 478 (1935).

³⁰Weber, *supra* note 19, at 44.

and the purposes of this particular legislation.³¹ More important, perhaps, would be the capacity to recognize the risk involved in automotive transportation, and the legal consequences of sharing it as a guest. If, as the court has said in *Parker v. Taylor*,³² "the statute means that one who accepts another's invitation to ride in his car assumes the risk of all injuries except those intentionally caused by the owner or driver," it must certainly be a prerequisite to its application that the person affected should be able to know, appreciate, and intelligently assume such risks.

The problem of when one becomes a guest has not yet been raised in Washington, nor has the question of under what circumstances the relation continues. The statute is not specific on the matter, but within limits the inferences are reasonably clear. For example, it seems obvious that the social guest driving to a picnic and injured by the operation of the car is within the statute; it seems equally obvious that the same guest, injured after arrival by tainted food negligently supplied by the host, is not within it. Something connected with the transportation must be the source of harm. But what of the plaintiff who, told by the owner to get into his car and wait until he had finished his dinner, when he would take her home, was injured by a door which fell off as she attempted to enter it?³³ What of the plaintiff whose hand is injured by his host's negligence in slamming a door on it before the car is set in motion?³⁴ What of the plaintiff injured trying to crank the car, while it was in gear,³⁵ or by having the car suddenly start forward from where it was parked on a grade due to improper brakes as the plaintiff, having finished her lunch in the back seat, is trying to get into the front seat preparatory to resuming the journey?³⁶ These cases are not easy to decide in the absence of explicit statutory language, but it seems probable that if the injury occurs during the performance of any act which is an incident to the transportation—such as entering, starting, riding in, sitting in, or leaving the vehicle—the statute should apply.

³¹That is, to lessen the danger of collusive suits, and strike at the vice of ingratitude. See Comment (1937) 12 WASH. L. REV. 138.

³²196 Wash. 22, 25, 81 P. (2d) 806 (1938).

³³*Puckett v. Pailthorpe*, 207 Iowa 613, 223 N. W. 254 (1929) (*Held*: not a guest, since the statute required more than mere entering into the conveyance in order to become a passenger, and there could be no trip or transportation without a driver).

³⁴*Nemoitin v. Berger*, 111 Conn. 88, 149 Atl. 233 (1930) (*Held*: when he entered the car for the purpose of transportation he was a guest).

³⁵*Hunter v. Baldwin*, 268 Mich. 106, 255 N. W. 431 (1934) (*Held*: since he cranked at owner's request and for his benefit, he was not a guest); *Moreas v. Ferry*, 135 Cal. App. 202, 26 P. (2d) 886 (1933) (*Held*: not a guest, since statute was limited by its terms to injuries while "riding" as a guest).

³⁶*Prager v. Israel*, — Cal. —, 98 P. (2d) 729 (1940) (*Held*: statute does not apply, since a person with one foot on the ground and one over the vehicle is not "riding" therein).

One problem, that of the doctrine of joint adventure, remains to be considered, not because it is directly connected with the Guest Statute, but because the successful operation of that statute is imperilled every time it is raised. It has served as the escape device *par excellence*, as it did in the days, fortunately past, when gross negligence was the basis for a host's liability; it seemed for a time to threaten the statute's eventual judicial repeal, but there are clear indications in the last two cases which have come down that the danger, if not eliminated, is at least substantially reduced. It is not proposed to discuss in detail either its operation or its history, except insofar as that is necessary in connection with its use in Guest Statute cases. Indeed, its groping and fitful development is summarized so thoroughly, its contradictions and difficulties so devastatingly exposed in *Lampe v. Tyrell*³⁷ and *Carboneau v. Peterson*³⁸ that such a discussion would be a work of supererogation.³⁹ It will be sufficient for present purposes to accept the doctrine in its present state of development and examine its elements as set forth in the two cases just named.

Those elements stem from the decision of *Rosenstrom v. North Bend Stage Line*,⁴⁰ in which the court attempted its first definitive and comprehensive statement of the doctrine, and it is perhaps prophetic of the difficulties of application which have followed that it chose, as apt analogy, the commercial joint adventure. Thence came the requirement of contract, and it has been largely with reference to the finding of this element that the wide variation in the cases, ranging from the good to the ridiculous, has occurred. The court has purported to follow the *Rosenstrom* formula in each of them; in fact, its current expression represents largely an elaboration of that statement. "Briefly stated," the court said in the *Carboneau* case, "a joint adventure arises out of, and must have its origin in a contract, express or implied, in which the parties thereto agree to enter into an undertaking in the performance of which they have a common purpose and in the objects or purposes of which they have a community of interest and, further, a contract in which each of the parties has an equal right to a voice in the manner of its performance and an equal right of control over the agencies used in the performance. Thus, we note (1) a contract, (2) a common purpose, (3) a community of interest, (4) equal right to a voice, accompanied by an equal right of control."⁴¹

³⁷200 Wash. 589, 94 P. (2d) 193 (1939).

³⁸101 Wash. Dec. 299, 95 P. (2d) 1043 (1939).

³⁹See, on joint adventure, Hamley, *Joint Adventure in Washington Automobile Law* (1933) 7 WASH. L. REV. 377; Weintraub, *The Joint Enterprise Doctrine in Automobile Law* (1931) 16 CORN. L. Q. 320; Rollison, *The "Joint Enterprise" in the Law of Imputed Negligence* (1931) 6 NOTRE DAME LAWY. 172.

⁴⁰154 Wash. 57, 280 Pac. 932 (1929).

⁴¹*Carboneau v. Peterson*, 101 Wash. Dec. 299, 322, 95 P. (2d) 1043, 1054 (1939).

It must be apparent from the statement quoted that the decisive element in the conception is the contract; indeed, the court in its opinion calls it "the *sine qua non* of the relationship."⁴² But what is particularly important in view of the Guest Statute is the fact that the court proceeds to recognize that the "contract" referred to in so many of the earlier cases actually means a contract in the legal sense of the term: "A mere agreement, or concord of minds, to accompany one another upon an excursion, but without *an intent to enter into mutually binding obligations*, is not sufficient to create the relationship of joint adventure."⁴³ This represents a quiet revolution in the field of joint adventure; were it not for the fact that once the essential elements to a recovery on any particular theory are well known they tend to appear in the testimony with somewhat depressing regularity, it might be said that the court, by that statement, has limited joint adventure as a useful device to comparatively rare cases—in the field of our special interest, has confined it to purely legitimate use as an escape from the Guest Statute. This may not be immediately obvious, but it becomes so the moment earlier cases in which joint adventure was found are examined. Tested by inquiring whether, when the arrangements were made, the parties intended to enter into a mutually binding legal obligation, obligating them to perform it, subjecting them to possible action for breach of contract if they did not—applying this test in the light of common knowledge of the state of mind of ordinary people planning a pleasure trip—it is believed that not a single case decided since the doctrine first appeared in Washington and in which a purely social joint adventure has been found can be supported.⁴⁴ It is hardly an answer to this contention to say that in these cases it was for the jury to find

⁴²Carboneau v. Peterson, 101 Wash. Dec. 299, 322, 95 P. (2d) 1043, 1054 (1939).

⁴³Carboneau v. Peterson, 101 Wash. Dec. 299, 322, 95 P. (2d) 1043, 1054 (1939). Italics supplied.

⁴⁴Masterson v. Leonard, 116 Wash. 551, 200 Pac. 320 (1921) (two boys on bicycle); Hurley v. Spokane, 126 Wash. 213, 217 Pac. 1004 (1923) (brother and sister driving to church); Jensen v. Chicago, M. & St. P. Ry. Co., 133 Wash. 208, 233 Pac. 635 (1925) (friends driving to prize fight, expenses shared); Lloyd v. Mowery, 158 Wash. 341, 290 Pac. 710 (1930) (friends on hunting trip, expenses shared); Shirley v. American Auto Ins. Co., 163 Wash. 136, 300 Pac. 155 (1931) (four members of family on a picnic); White v. Stanley, 169 Wash. 342, 13 P. (2d) 457 (1932) (friends on fishing trip, expenses shared); Alexiou v. Nockas, 171 Wash. 369, 17 P. (2d) 911 (1933) (family picnic party); Bates v. Tirk, 177 Wash. 286, 31 P. (2d) 525 (1934) (three high school students using father's car to go to football game); Forman v. Shields, 183 Wash. 333, 48 P. (2d) 599 (1935) (high school picnic—ten-cent contributions for car decorations); Duvall v. Pioneer Sand & Gravel Co., 191 Wash. 417, 71 P. (2d) 567 (1937) (members of lodge degree team driving to ceremony; no showing of any "concord of minds"); DeNune v. Tibbitts, 192 Wash. 279, 73 P. (2d) 521 (1937) (mother-in-law, son-in-law, sister-in-law, going to use washing machine of driver's wife); Meacham v. Gjarde, 194 Wash. 526, 78 P. (2d) 605 (1938) (two ladies driving to visit relatives; shared expenses).

whether such an intent existed, since in substantially none of them was there enough evidence of contractual intent to make a jury issue. Under the new rule, which in reality is nothing but a wholesome emphasis on a matter which was implicit in the old, it will take more than the fact that the parties were going to the same place to do the same thing,⁴⁵ or expected to make joint use of a washing machine,⁴⁶ or were members of the same family,⁴⁷ or had contributed ten cents apiece for car decorations,⁴⁸ or were cooperating in furnishing a picnic lunch,⁴⁹ or were going to a high school football game,⁵⁰ before a legally significant relationship can be established. With this new emphasis, joint adventure can operate to aid rather than circumvent the Guest Statute, and here is new hope that its purposes may be realized more fully.

The other elements mentioned by the court—common purpose, community of interest and equal right of control—would seem to be of little aid in reaching a decision in any particular case. The equal right of control, for example, appears to be merely an incident of the contract itself;⁵¹ without the contract there is no basis for finding an equal right of control, and with the contract it may easily be inferred. In any event, it is not apparent why it should be important, since nothing is made to turn on whether it is exercised or not—indeed, the conventional gambit in referring to the matter is to say that of course it was delegated to the driver—and it cannot serve as a test for the relationship since the relationship must be established before the right exists. It has been suggested that its presence in the formula is largely fortuitous, due to the borrowing from master and servant cases in the early stages of working out a basis for imputing negligence and which in turn was borrowed when the joint adventure rule was invented.⁵² The common purpose and community of interest requirements would likewise seem to fail as a means of reaching a decision, though they are undoubtedly handy in justifying the decision reached. The difficulty, of course, is that they turn so much on mere phrasing and emphasis. As an example, the court's own illustration in the *Carboneau* opinion will suffice. Discussing the need for a common purpose, the court says:⁵³ "The *Rosenstrom* case is a good single illustration of the lack of this essential. In that case, the purpose of each of the boys was to

⁴⁵*Duvall v. Pioneer Sand & Gravel Co.*, 191 Wash. 417, 71 P. (2d) 567 (1937).

⁴⁶*DeNune v. Tibbitts*, 192 Wash. 279, 73 P. (2d) 521 (1937).

⁴⁷*Shirley v. American Auto Ins. Co.*, 163 Wash. 136, 300 Pac. 155 (1931).

⁴⁸*Forman v. Shields*, 183 Wash. 333, 48 P. (2d) 599 (1935).

⁴⁹*Alexiou v. Nockas*, 171 Wash. 369, 17 P. (2d) 911 (1933).

⁵⁰*Bates v. Tirk*, 177 Wash. 286, 31 P. (2d) 525 (1934).

⁵¹*Lampe v. Tyrell*, 200 Wash. 589, 94 P. (2d) 193, 200 (1939).

⁵²*Weintraub*, *supra* note 39, at 334.

⁵³*Carboneau v. Peterson*, 101 Wash. Dec. 299, 323, 95 P. (2d) 1043, 1055 (1939).

get his own key. They did not have a common objective." It is true that neither of the boys was interested in the other getting his key, each being preoccupied with his own plight of being unable to get dressed for football practice, yet such individuality of interest has not proved fatal in other cases. In *Keisel v. Bredick*,⁵⁴ eleven men, working as a crew on Tatoosh Island, arranged to take advantage of the Labor Day week-end by going to Bremerton, where they all lived, in two cars, sharing expenses. Each was, of course, to visit his own family, yet the court had no difficulty in finding a common purpose, that of going to Bremerton, and a common objective, that of making the trip as cheaply as possible. With equal plausibility it might be said of the boys in the *Rosenstrom* case that it was their common purpose to go to town for locker keys, their common objective to do so as easily and quickly as possible. In *Meacham v. Gjarde*⁵⁵ two ladies in Seattle arranged to drive to Tacoma together, one to see her cousins, the other her daughter. Joint adventure was found by the jury, and nothing was said in the affirming opinion about either common purpose or objective; had a reversal been desired, the obvious peg to hang it on would have been the *lack* of those two elements. It is, perhaps, significant in evaluating their importance in the formula that their absence rather than their presence in the particular case is normally stressed in the opinions. In any event, it seems clear that they can be supplied by a little ingenuity in analysis of the facts in every case in which there is a possibility of joint adventure.

One final matter should be mentioned in connection with the contract element of joint adventure, and that is the effect of infancy on the relation. It is startling to find no mention of it in the cases, since in a least eight out of the twenty-three decided since that element was first injected into the formula some or all of the parties were infants.⁵⁶ The problem may arise in several ways. Assuming that *A* and *B* are infant joint adventurers: (1) *A* drives negligently and injures *C*; in an action against *B*, will the relationship impose vicarious liability on *B* for *A*'s negligence? (2) *B* is injured by the combined negligence of *A* and *C*; in an action against *C*, will *A*'s negligence be imputed to *B* to bar a recovery? (3) *B* is injured by *A*'s negligence; will the Guest Statute apply to defeat *B*'s recovery? In each of the three situations the joint adventure relationship is vital, but in view of the infancy

⁵⁴192 Wash. 665, 74 P. (2d) 473 (1937).

⁵⁵194 Wash. 526, 78 P. (2d) 605 (1938).

⁵⁶*Rosenstrom v. North Bend Stage Line*, 154 Wash. 57, 280 Pac. 932 (1929); *Shirley v. American Automobile Ins. Co.*, 163 Wash. 136, 300 Pac. 155 (1931); *Alexiou v. Nockas*, 171 Wash. 369, 17 P. (2d) 911 (1933); *Bates v. Tirk*, 177 Wash. 286, 31 P. (2d) 525 (1934); *Pickering v. Stearns*, 182 Wash. 234, 46 P. (2d) 394 (1935); *Forman v. Shields*, 183 Wash. 333, 48 P. (2d) 599 (1935); *Bennett v. King County*, 188 Wash. 196, 61 P. (2d) 1316 (1936); *Lampe v. Tyrell*, 200 Wash. 589, 94 P. (2d) 193 (1939).

of the parties it is not easy to see how it can be established. An infant's executory contract is not enforceable without ratification, yet "the *sine qua non* of the relationship", the court has said, is a binding contract. A status or relationship must certainly stand or fall with the contract which creates it, and since the infant's contract is not binding, no legally significant relationship could flow from it; in none of the situations suggested, therefore, could the relationship affect the result.⁵⁷ Vicarious liability could not be imposed, negligence could not be imputed and, most important for our purposes, the guest status would be unaffected. Any material contribution to the enterprise could of course amount to "payment for such transportation", but the result of barring recovery would at least proceed upon proper grounds. If it is urged that ratification is necessary only when the contract is executory, and that it ceases to be so once performance is begun—an argument which seems to misconstrue the meaning of "executory"—the results suggested above would still follow, since then a plea of infancy in avoidance of the contract would be enough.

⁵⁷Potter v. Florida Motor Lines, 57 F. (2d) 313 (S. D. Fla. 1932).