Another Decade Under the Guest Statute

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IN THE NINE YEARS which have passed since the writer ventured to express in these pages his views on the Guest Statute,¹ sixteen cases have been decided which deal either with the statute, with joint adventure, or with both. Some of these cases represent major changes in the field, and while no one would for a moment suggest that they have not been carefully noted by the profession there is nevertheless some hope, based not only on reading the opinions, but in some instances on the briefs which led to them, that it might be useful to revisit the topic and bring it up to date. If nothing significant is suggested as to final solutions or future developments, that may be laid to the fact that the writer is gradually becoming somewhat more cautious, and has been made painfully aware that, given the right combination of circumstances, anything may happen in a lawsuit. The primary problem is perennial: what (or who) is “an invited guest of licensee without payment for such transportation,”² and it is convenient to consider this problem first, leaving the highly specialized topic of joint adventure for later discussion.

¹ The Washington Guest Statute, 15 WASH. L. REV. 87 (1940).
² The statute reads as follows: “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 a 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.” REM. REV. STAT. Vol. 7A, § 6360-121 [P P C. § 295-95].
The general outline of the answer appeared in *Buss v. Wachsmith,* in which it was remarked that the statute was intended to cover only "gratuitous transportation," but the so-called landmark case is that of *Syverson v. Berg,* in which the court first attempted to define what constituted "payment." It must, says the court, amount to a "business advantage or material consideration" accruing to the host as the result of the transportation, a formula later elaborated in *Fuller v. Tucker,* the first of the cases to be considered in detail. What emerges from the *Fuller* case are two requirements: "(1) An actual or potential benefit in a material or business sense resulting or to result to the owner, and (2) that the transportation be motivated by the expectation of such benefit." The facts of the case are too complicated to warrant re-telling, but it is clear that the requirements were not met; there was no "tangible" benefit in any sense, and the transportation was undertaken, as the court observes, purely from "hospitable, neighborly, and friendly motives only."

If the whole matter could be done over and a completely fresh start made, there is considerable force to the argument that the *Fuller* rule is entirely too soft. The purpose of the statute, the court has said from the beginning, is to prevent collusive suits in fraud of defendant's insurance carrier, and bearing that purpose in mind it may be that nothing short of an out-and-out commercial transportation for hire is enough to meet the danger. Nothing, of course, can eliminate it, short of the coming of a Golden Age in which everyone (including the jury) is honest, or, even better, a compensation scheme for automobile injuries independent of fault; in the meantime, perhaps the current rule is the best that could be concocted. Granted its premise—that this

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3. 190 Wash. 673, 70 P.(2d) 417 (1937).
4. 194 Wash. 86, 77 P.(2d) 382 (1938).
5. 4 Wn.(2d) 426, 103 P.(2d) 1086 (1940).
8. The theory here is similar to that in workmen's compensation acts, now nearly universal since injuries are an inevitable result of the operation of automobiles it would be just to distribute these losses among all the operators of automobiles, even though it would be unjust to visit them severally upon those individuals who had happened to be the faultless instruments causing them. The tort solution to the inevitable loss problem merely shifts that loss, so that the social benefit is nil, moreover, it is time and money-consuming, with highly unpredictable results. The compensation scheme not only protects the victim, but substitutes for the driver a certain, calculated, and reasonable cost for the chance of ruinous loss through liability. See Report by Committee To Study Compensation For Automobile Accidents (Columbia University Council for Research in the Social Sciences 1932), 6 Publications Of New York State Constitutional Convention Committee 580 et. seq. (1938). An extremely interesting article touching the matter in connection with a broader field is James, *Accident Liability Reconsidered: The Impact of Liability Insurance* 57 Yale L. J. 549 (1948).
is what the legislature intended when it set up the definition of "guest or licensee without payment for such transportation"—the rule is simple, as workable as most, and with enough flexibility to handle with some degree of grace the so-called "hard" case. The requirement of business benefit tends to eliminate, as it should, if the statute is to have any meaning at all, simply social benefit or a purely nominal contribution to expenses. The requirement that the expectation of such benefit motivate the transportation poses an extremely difficult problem for the trier of fact in most of the cases to which the test is applied, that of the basically social expedition by automobile. What is required in the way of motivation? The difficulty is inherent since people are involved, and people nearly always act from mixed motives; it becomes then a matter of degree, to which in truth most tort rules resolve themselves. Certainly if the requirement means that the sole motive of the transportation is the expectation of a business benefit, either plaintiff will never escape the statute in the nonbusiness transportation case, or juries will more frequently than ever bring in false verdicts. The solution is very likely to be found in the method used to handle one phase of the causation problem: if the expectation of the benefit was a substantial factor in inducing the transportation, that should be enough. Admittedly this does not dispose of the difficulty, but it at least emphasizes that the motivation factor is of real importance and that the twin requirements of the Fuller rule are not met by merely the fact or the expectation of benefit.

Another problem raised by the rule at once becomes apparent: how substantial must the basis for the expectation of benefit be in order to suffice? The issue has been raised in two late cases, but it cannot be said to have been settled, since the opinions point in different directions. In *Scholz v. Leuer*, defendant's nephew was carrying her country paper route in her absence. On the early morning delivery on a Sunday he took along with him on the route his fourteen-year-old cousin; she sat beside him in the car, consulted the route book, handed papers from the back seat, and stuck them into customers' containers when those happened to be on her side of the car. She was killed when the driver negligently ran into the back of a truck. Was she a guest, and so within the statute? The jury said "No," and this was affirmed by a court divided five to four. The majority held that the services performed by

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8 The "cause-m-fact" problem, particularly where two or more efficient forces cooperate to bring about the harm. See *Restatement, Torts* (1934) §§ 431 ff., *Prosser, Torts* (1941) 318, 324.

107 Wn.(2d) 76, 109 P.(2d) 294 (1941).
the girl constituted a material benefit in a business sense within the Fuller rule, and to establish the element of motivation relied on the fact that in persuading the girl's mother to let her go on the expedition the nephew had said that she "could help him" in deliveries, although it was not shown that the girl was aware of these importunities. The minority was unable to agree; without specifically finding that the services were not a "benefit" in the Fuller sense, they could see only evidence that the girl went along as a lark, and for the enjoyment of the early morning drive—that whatever she did was not agreed on in advance and was nothing more than any guest would have done in assisting the driver.

The dispute is more than factual, if it were only that, the case would warrant merely casual mention. What the minority is insisting upon is that a unilateral expectation or hope, uncommunicated to and not agreed upon by the passenger, of a benefit to the driver in the form of services, is not enough to meet the requirements of the rule. It must be bottomed on an arrangement in advance before it can be significant in affecting the guest status. This is not to say that there must have been a legally enforceable contract between the parties, which would bring in an element totally foreign to the rule, but simply that both parties should be aware, in advance, that the expected benefit is in a sense a condition of the transportation.11

Basically the same problem appeared in Coerver v. Haab,12 in which plaintiff and defendant were members of a five-man car pool, operating on a share-the-ride basis from their homes in Yakima to and from their employment in Hanford. Plaintiff was injured when defendant's car came into negligent collision with another; defendant relied on the Guest Statute as a defense. Judgment for plaintiff was affirmed on appeal, but the majority opinion makes no reference to either the Fuller or the Scholz cases, being based instead on the theory that the share-the-ride plan was a benefit to the driver, and that the agreement, as least so far as it was executed, was a binding contract. The minority split away on the latter issue, feeling that the agreement, as shown in the testimony, was not binding at all. Curiously, two of the three dissenting justices were with the majority in the Scholz case, where a mere uncommunicated hope of benefit was held to be enough! Certainly actual participation in the car pool goes far beyond this in establishing

11 The requirement was made in Potter v. Juarez, 189 Wash. 476, 66 P. (2d) 290 (1937).
12 23 Wn. (2d) 481, 161 P. (2d) 194 (1945).
motivation based upon an expectation of benefit. In any event, the cases leave the present status of the requirement uncertain.

The other "payment" cases in the period under discussion present no difficulties. In *Engel v. Interstate Transit Co.*, plaintiff did not herself pay for the transportation, but it was furnished as a matter of legal obligation by defendant; hence she was not a guest. *Iron v. Sauve* and *Davis v. Brown* were both clearly within the Guest Statute; in neither was there any benefit to the driver, who was acting purely for the accommodation of the guests. *Rose v. Chapman* deserves special mention, if only to illustrate the possibility in this sort of situation of winning a Pyrrhic victory. Plaintiff's counsel saved her from the Guest Statute by showing that she paid for her transportation by promising to do the driver's washing free, and at the same time invalidated the driver's liability insurance under a clause which excluded coverage where the car was used "for carrying persons for a charge"—a somewhat more shattering experience, one suspects, than to have lost the case in the first place.

The last three cases to be discussed all raise novel issues, and are particularly interesting for that reason, since the court, unable to rely on authority, is required in each of them to add new content to the theory of the relationship which falls within the Guest Statute. In *Taylor v. Taug* plaintiff was a passenger in defendant's car en route to a dance with four other people. Defendant and his partner occupied the front seat and plaintiff was seated on the lap of her escort, directly behind defendant, in the back seat. Some three miles from the start, the driver lost control of the car and it left the road, injuring the plaintiff, who claimed that as a result of her injuries she could remember nothing of what happened on the journey. However, another girl in the back seat testified that some two miles from the start, the

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18 9 Wn.(2d) 590, 115 P.(2d) 681 (1941) Plaintiff was a guest in one Snyder's car, which broken down on a trip due to the negligent repair of defendant; defendant on learning of this, sent out a car and driver to bring the party home, and the driver's negligence injured plaintiff on the return trip.

14 27 Wn.(2d) 562, 179 P.(2d) 327 (1947) purely as an accommodation to some unwanted itinerant workers who had come to his ranch seeking employment, defendant sent them back to their labor camp in his truck; the injury occurred on the way, due to the negligence of the driver.

15 20 Wn.(2d) 219, 147 P.(2d) 263 (1944) this is not strictly a guest case, since defendant was the driver of the other car; however, plaintiffs were guests of their driver in an evening of dancing, and hence joint adventure could not impute his negligence, if any, to them.

16 19 Wn.(2d) 745, 144 P.(2d) 248 (1943) The result, of course, depends entirely on the type of exclusionary clause in the policy, which is not uniform.

17 17 Wn.(2d) 533, 136 P.(2d) 176 (1943).
plaintiff, alarmed at the speed of the car, asked that defendant stop and let her out, since she did not wish to be in an accident. He did not do so, and the question raised is obvious: admitting that plaintiff was a guest at the beginning of the drive, did that relationship terminate when she asked to be let out? It is equally obvious that the answer is of high theoretical importance, since it involves the whole concept of the host-guest relationship.

The discussion begins with a description of that relationship. "The relationship of host and guest in its inception carries with it the concept of a gratuitous offer of service by a host, or a request for service on the part of a guest and an acceptance, followed by an overt act. While it cannot be held that the relationship is founded upon contract, still in its very nature it must be based upon a meeting of the minds of the host and the intended guest, followed by an act which manifests an intent to proceed with the journey." This looks as though it might be a preliminary warm-up for an argument like this: since the relationship is gratuitous, and consensual though not contractual, it follows that it may be terminated by either party on request, and it is for the jury to say whether such a request was made by plaintiff and heard by defendant. Unfortunately the statement is not followed by any argument at all, the court, in rapid sequence: (1) rejects a Georgia case, apparently the only one decided on the issue, with the statement that "We are unable to agree with the reasoning", (2) quotes Parker v. Taylor to the effect that a guest assumes the risk of all injuries except intentional ones caused by the driver; (3) says there was no showing of intentional injury here; (4) states that the court has never held that the host-guest relationship is terminated when a guest protests the manner in which the car is driven; (5) says that the "contention of [plaintiff] is answered by the quotation from Parker v. Taylor, supra, which we have set out. When [plaintiff] accepted a ride with [defendant], she became a guest for the entire journey. To hold otherwise would nullify the plain wording and meaning of the

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18 Ibid., 537
20 196 Wash. 22, 25, 81 P. (2d) 806 (1938) this is the only case involving the question of what constitutes the "intentional accident" of the statute. Held, where defendant speeded up his car over a bump in the road to give his small nephews a thrill, the injury to his sister, riding with them in the back seat, was not "intentional."
21 This is accurate, but unfortunately not involved in the principal case; it was not a protest, but a request to get out, which was relied on by appellant. The numerous cases cited in the opinion all relate to the effect of protest or failure to protest on the issue of the passenger's contributory negligence.
host-guest statute”; and (6) anyway, there was no evidence to go to the jury on the issue of whether the defendant heard the request, or “that he refused” it.

It is hard to see why the Parker case has anything to do with the issue here. That case decided merely that when the statute said intentional injury it meant intentional injury, and the quoted portion of the opinion was simply a somewhat unfortunate attempt to describe the effect of the statute—denying a guest a cause of action against his host except for injury intentionally caused—in terms of the doctrine of assumption of risk, which deals with an entirely different sort of problem. Moreover, it is curious to say that a contrary holding in the instant case would “nullify” the statute; the statute simply fixes the liability of a host to his guest, and to find that a passenger is not a guest leaves the statute inapplicable, it is true, but unscathed. Finally, the question of whether or not defendant heard and refused the request was surely for the jury, since it was addressed to the defendant from a few inches away and heard by a witness in a much less favorable position to do so.

In any event, the decision calls for a radical revision of what one would suppose to be the concept of the host-guest relationship, that is to say, a gratuitous, voluntary, consensual but noncontractual relation, terminable at any time at the will of either party. The new rule indeed turns out to be a trap for the guest, who is unable to escape either the expedition or the status until the end of the journey as set by the host; not only will it no longer be false imprisonment to refuse to permit a guest to leave the car, but if the opinion is taken on its own terms and assumption of risk thought to have something to do with the matter, that doctrine itself will be altered; it becomes “involuntary” assumption, with no terminus except that fixed by the defendant.

Upchurch v. Hubbard is an equally interesting case, having to do with the inception rather than the termination of the host-guest relation. Defendant was a postal employee driving a mail truck in Spokane; in violation of a state statute, a city ordinance, and Post Office

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22 Note 17, supra, at p. 539.
23 The latest and certainly the most elaborate statement of the doctrine of voluntary assumption of risk is found in Walsh v. West Coast Coal Mines, 131 Wash. Dec. 366, 197 P. (2d) 233 (1948). It is fundamental that before the doctrine is operative, the risk which is said to be assumed must be either known or obvious to the plaintiff, and certainly the assumption can be terminated at will by plaintiff.
regulations, he permitted plaintiff's decedent, a boy of eight, to ride on the running board of his vehicle. While moving at a speed of from twelve to twenty miles an hour, the boy voluntarily stepped backwards off the truck and was killed when his head struck the pavement. The jury, presumably out of sympathy and because of the age of the boy, found that this was not contributory negligence, and hence plaintiff was entitled to recover unless the Guest Statute prevented him.

It did not, said the Supreme Court; the boy was not a guest or licensee. He was not a guest

because the purpose of the statute was to prevent collusive action between host and guest, committed with the intent to defraud casualty insurance companies, it was not the purpose of the statute to promote fraud or injustice by permitting one to claim immunity from liability for his negligence on the ground that he occupied a relationship which was exempt from liability, when that very alleged relationship was created by his own unlawful act. We believe that the legislature meant, and that the statute should be construed to mean, that to exempt the owner or operator of a motor vehicle from liability for the injury to or the death of a person transported by him, the relationship alleged to exist between the owner or operator and the person transported must be a lawful one, or at least not an unlawful one, nor one dependent upon its creation upon some unlawful act of the owner or operator himself. To hold otherwise would make the statute an instrument of gravest injustice, operating not as a shield but as a sword. 28

The demonstration that the boy was not a licensee is somewhat less stirring, being in the form of a syllogism. To be a licensee, one must have lawful authorization to do an act which would otherwise be illegal, the statute made this authorization unlawful, therefore, not having lawful authorization, the boy was not a licensee. 27

The result is eminently sound, but the means used to reach it will inevitably involve the court in some embarrassment when the first hitchhiker case turns up. The statute 28 makes it unlawful not only to solicit rides upon the highway but to give rides as the result of solicitation, putting the driver-defendant in the same position as that occupied by Hubbard in the instant case. Perhaps the counter will be pars delicto, if it is unjust to allow the driver to rely on a relation created by his own unlawful act, then it is equally so when plaintiff tries to escape the bar of the statute by similar unlawful conduct. In any event, it is regrettable that the case was not, as it could have been, made the

26 Ibid., 566.
27 Ibid., 567
28 REM. REV. STAT. § 6360-100 [P P C. § 295-51].
vehicle for an investigation of the troublesome question as to the effect of infancy on the host-guest relationship. Presumably some capacity is necessary in order to enter into the relationship, and if, as here, the boy had not the capacity to recognize the danger in stepping backwards off a moving vehicle—presumably the basis on which the jury relieved him of contributory negligence—it might be argued that he equally lacked the capacity to enter into the host-guest relation. It may be that the problem is without substance; certainly if, as has been said in the cases, the key to who is within the statute is found in the phrase "without payment for such transportation," then, putting illegality or involuntary presence aside, capacity or lack of it should be of no importance.

The last and latest of the cases in this group, Finn v. Drtina, poses a question which, curiously enough, has apparently been raised only three times before in the entire country: may a member of the driver's family be a guest within the statute? Plaintiff was injured when a car owned by her mother and negligently driven by her brother was in collision while en route to her grandmother's house on a family birthday outing. Trial resulted in a verdict for defendant, the ground being that plaintiff came within the Guest Statute. On appeal, plaintiff's counsel made a valiant try at showing joint adventure, attempting to get the Supreme Court to ignore all its joint adventure cases since that doctrine had any content at all by the somewhat remarkable method of ignoring them himself; his failure to do so cleared the way for the decision of the main question as stated above.

The result was based entirely on a Connecticut case, under a statute substantially similar to that of Washington. The facts were stated at length, and the opinion specifically approved as to both the reasoning of the court and its statement of the purposes for which such statutes were passed, quoting: "The purpose of this legislation was to deny a recovery for negligence against one transporting in his automobile a member of his family, a social guest, or a casual invitee in an action brought by the recipient of his hospitality. The automobile was a family car, owned and driven by one of the members and used for a purpose in which all were interested. This is precisely the type of case to which the 'guest statute' was intended to apply." The Washington court then makes its decision. "We are of the opinion the

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80 Bradley v. Clarke, 118 Conn. 641, 174 Atl. 72 (1934), family expedition in family car to inspect family burial plot; one sister killed by another sister's negligence in driving.
instant case is certainly one type of case to which our guest statute should, and in our opinion does, apply.¹

There can be no questioning the soundness of this holding. Although the court was kind enough not to say so, this is precisely the type of case in which the danger of collusion is most apparent, and the fact that the interfamily suit was filed at all substantially guarantees that a liability insurer was in the background. Moreover, the result scarcely breaks new ground, being implicit in the statute, so that while the Connecticut case was a comforting staff it was not a necessary one; the gratuitous nature of the transportation, re-emphasized from our earlier cases, would lead to the same conclusion.

II

The most marked change during these ten years has come in the field of joint adventure. It has not been in the content of the formula—that has been fixed since the Rosenstrom² case, certainly since Carbonneau v. Peterson³—but in a shifting of emphasis upon, and to some degree a shifting of interpretation of, its various elements. It has not been a happy period for anyone concerned. Despite doughty efforts by the court it has proved impossible to reconcile the decisions, all purporting to operate under the same rule, confusion now possibly resolved by the last case in the series in somewhat the same fashion as that adopted by Charles Lamb’s Chinaman, who burned down his house to roast his pig.

The source of the difficulty is reasonably obvious. However appropriate and realistic the requirements of the doctrine may be in the business setting from which it was taken, in the field into which it was thrust—that of the social or at least nonbusiness expedition by automobile—it is an exotic. At least two of its four elements—those of contract and right of control—must normally be found in the same way in which a stage magician pulls a rabbit out of his hat—by putting it in there first. It is no answer to say that these elements may be “implied” from the conduct of the parties; that is simply another way of describing the act of stuffing in the rabbit. It may very well be an awareness of this, coupled with a realization that the doctrine had gotten badly out of control, that led to Judge Simpson’s suggestion

¹ Note 29, supra, at p. 779.
² Rosenstrom v. North Bend Stage Lines, 154 Wash. 57, 280 P. 932 (1929) this was the first case in which the court attempted a definition of joint adventure as applied to automobile cases.
³ 1 Wn.(2d) 347, 95 P.(2d) 1043 (1939).
of limiting it to business enterprises in his dissent in the Manos case, and to the then Chief Justice Robinson's eloquent jeremiad in his dissent to the same opinion. In any event, the latest decision, that of Poutre v. Saunders, seems finally to have brought the doctrine firmly back to its original compass with a rigor of requirement which should substantially eliminate it in the Guest Statute cases.

The process began with Carbonneau v. Peterson, in which an exhaustive review of all previous decisions prefaced a summary of the doctrine in brief usable form which raised some hope that its major problems had been settled. "A joint adventure," said the court, "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." This statement was followed by a somewhat detailed discussion as to each of these elements listed, and the opinion ended with a concise and persuasive application of them to the facts of the particular case, a highly satisfactory and useful performance, with the exception of one thing. Unfortunately the court did not overrule any of the cases which it reviewed; there was a mild deprecation of some of them, but the failure to strike down boldly left the doctrine encrusted with a gloss of weak and inconsistent decisions making future embarrassment inevitable.

It came in less than five months. Moen v. Zurich Gen. Accident Etc. Ins. Co. required the court to pass on a judgment sustaining a demurrer and dismissing an action based on the theory of joint adventure—an unusual but effective vehicle for testing the rule of the Carbonneau case. The complaint alleged: "That the said Francis G. Carlson on

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84 Manos v. James, 7 Wn. (2d) 695, 712, 715, 110 P. (2d) 887 (1941). The opinion is later discussed at length in the text.
85 19 Wn. (2d) 561, 143 P. (2d) 554 (1943). The opinion is later discussed at length in the text.
86 Note 33, supra, at p. 374.
87 Ibid. at p. 374. "Although, from what appears in the opinions in some of the cases, it may be difficult to demonstrate that the rule has at all times been consistently applied in its full extent and vigor, there can be no doubt of the prevalence and fixity of the rule itself."
88 3 Wn. (2d) 347, 101 P. (2d) 323 (1940).
the 20th day of October, 1934, entered into an oral agreement with the said Pope and Floyd whereby the said Frances G. Carlson did contribute and pay to Pope and Floyd a portion of the operating expenses of the above referred to automobile in consideration of receiving transportation in said car from Wenatchee to Seattle. That the purpose of said agreement was to obtain transportation to Seattle for all parties referred to at the lowest possible expense.\footnote{Ibid. at p. 349.} In affirming judgment of dismissal, the contract element was accepted as sufficiently alleged, but the court was unable to find the requisite common purpose, community of interest, and equal right of control—a definite stiffening of requirements in these matters which appellant could hardly have anticipated, in view of previous decisions still presumably binding. "The complaint does not disclose the purpose which any of the people had in planning their trip to Seattle. Each may have had an entirely different and independent reason for so travelling. Their final destinations may have been equally diverse.\footnote{Ibid. at p. 352.} "There is nothing from which it necessarily and logically follows that [Mrs. Carlson] was entitled to exercise control in the selection of the route which they were to follow or the manner in which the car was to be operated, that she delegated her right in these matters to the two men, or that she assumed equal responsibility with them for the manner in which the enterprise was to be performed.\footnote{Ibid. at p. 354.}

So far as the Carbonneau case is concerned, nothing in the discussion there requires an extension of the common purpose and community of interest beyond the mere fact of transportation itself, nor from that opinion would there seem to be any reason why a "one way" joint adventure, terminating at destination, should not be recognized. The equal right of control as likewise assumed a new importance; heretofore it had been at best an incident of the relationship, the conventional gambit being to say that it was of course delegated to the driver. Nor was appellant without direct authority. \textit{Kessel v. Bredick},\footnote{192 Wash. 665, 74 P.(2d) 473 (1937).} which was cited, and \textit{Meacham v. Gjarde},\footnote{194 Wash. 526, 78 P.(2d) 605 (1938).} which was not, both supported his position. In the \textit{Meacham} case, two ladies, residents of Seattle, arranged to drive to Tacoma together, one to furnish the car, the other the gasoline and lunch, one was to visit her cousins, the other her daughter. There is nothing here to suggest common purpose or com-
munity of interest other than in the very transportation itself, and certainly not a hint of any equal right of control, yet joint adventure was found without the slightest hesitation. The Kessel case is even clearer; eleven men, working as a crew on Tatoosh Island, arranged to take advantage of 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, and presumably had no interest in the other’s holiday pursuits; yet the court had no difficulty in finding a common purpose, that of going to Bremerton, and a common objective, that of doing it as cheaply as possible. Again, equal right of control was slighted. Appellant’s theory was plainly bottomed on this case; unless it was overruled, which it was not, or could be distinguished by saying that it had been, which was the method adopted by the court,44 appellant was entitled to win.

If the Moen case represented a stiffening of requirements to show joint adventure, it was all undone, and more than undone, in a case which was decided less than a year later. In Manos v. James,45 plaintiff and defendant were strangers until a chance encounter in a Spokane tavern; defendant overheard plaintiff say that he was going to Seattle, and suggested that plaintiff might like to ride with him, each paying half the expenses and thereby making it cheaper for both of them. Plaintiff agreed; on Vantage Hill, defendant lost control of his car and plaintiff was injured. His attorney obviously misconceived the theory of the case, choosing joint adventure instead of payment for transportation as the escape from the Guest Statute, but under appropriate instructions plaintiff won and the Supreme Court felt compelled to affirm, though not without the soul-searching which comes with a 5 to 4 decision.

The contract element of the Carbonneau rubric was found without trouble: “It seems apparent that appellant and respondent had intended to, and did, enter into a mutually binding contract, informal though it was, to jointly effect the transportation of their persons from Spokane to Seattle.”46 As to the rest: “The common purpose which the parties had in their undertaking was to transport themselves from one place to another. In this purpose, and it might be said identified with

44 Note 38, supra, at p. 354 “The facts in the two cases are dissimilar, and the [Kessel] case has no application to the one under discussion.” The dissimilarity pointed out is that in the Kessel case the men talked over the journey “at some length,” decided how they would make it, and selected the cars—none of which touches the point in controversy.
45 Note 34, supra.
46 Ibid. at p. 701.
it, they had a community of interest, because it was to their mutual advantage to be carried to their common destination, also, it would seem, they had, as a further common interest, their mutual purpose of making the journey expeditiously and with a mutual saving of expense to each of them." They had a community of interest, because it was to their mutual advantage to be carried to their common destination, also, it would seem, they had, as a further common interest, their mutual purpose of making the journey expeditiously and with a mutual saving of expense to each of them.\footnote{Ibid.}

This is straight \textit{Keisel v. Bredick}, the rest of the paragraph is aimed unmistakably at the \textit{Moen} case: "It is true that appellant and respondent had not intended to do the same things after their arrival in Seattle, but, under the circumstances, that is not a controlling factor. The undertaking of the parties, under the terms of their contract, was to travel to Seattle together in appellant's automobile. Upon their arrival in that city, the contract would have been fully performed and the undertaking wholly accomplished. What the parties may have intended to do thereafter was entirely immaterial and could in no way have affected the validity of their contract of joint adventure."\footnote{Ibid. at p. 702.}

As to the final element—equal right of control—that is, in effect, shrugged off: It "may be inferred from the terms of the contract between the parties \[It is true that respondent did not exercise, nor attempt to exercise, any control over the car.] but that does not negative his right of control under the contract. Only one person at a time can safely drive an automobile, and, customarily, joint adventures entrust the task of operating the vehicle to one of their own number as agent. The principle is particularly applicable to the present case because the record shows that the respondent had never driven an automobile."\footnote{Ibid. at p. 706.}

The \textit{Rosenstrom}, \textit{Carbonneau}, and \textit{Moen} cases were distinguished on a factual basis, and judgment was affirmed.

This substantially blew the top on joint adventure—any two people, now, could create that relationship by agreeing to go to the same place on a share-the-cost basis—and a four-judge minority reacted with vigor. A dissent by Justice Simpson, concurred in by Justice Jeffers, protested the lack of common purpose and community of interest as previously interpreted in the \textit{Rosenstrom} case, but carefully avoided any mention of the \textit{Keisel} and \textit{Meacham} cases on which the majority took its stand, as though to ignore them would exorcise them;\footnote{Ibid. at p. 712.} Justice Steinetz found no equal right of control;\footnote{Ibid. at p. 715.} and Chief Justice Robinson found in the majority opinion evidence of utter confusion, but was consoled by the prophetic thought that it "might drive the court to
more solid ground," inducing it "to hold that a joint adventure is an association of two or more persons to carry out a single business enterprise for profit."

The next three cases concerning the doctrine failed to furnish an occasion for re-appraisal of the Manos opinion. Paulson v. McMillan, despite the efforts of respondent's counsel, the trial judge, and the jury, did not involve joint adventure at all. The fifteen-year-old plaintiff, driven by his nineteen-year-old sister in the family car, went to the woods to retrieve an axe which they had left there on an earlier trip to cut a Christmas tree; on the way home, plaintiff was injured by the combined negligence of his sister and the defendant. It was urged that the children were joint adventurers, thereby imputing contributory negligence to the plaintiff, and the jury, with the blessing of the trial court, so found; actually, not a shred of evidence supported even the contract element. The Supreme Court so held, but the opinion was nevertheless made the occasion for a lucid discussion of the effect of infancy on the relationship, and reached the sound result, on the basis of the partnership cases, that it had no effect at all. The holding is undoubtedly dicta, being unnecessary to the decision of the case, but under the current Washington practice of citation that classification is in any event academic; for practical purposes the point may be considered at least temporarily settled.

Edwards v. Washkuhn, next in the series, involved death to two and injuries to five other boys when the coupe in which they were riding collided with defendant's truck on the Sunset Highway, en route to Seattle from a week-end camping trip. In affirming judgment for defendant the court was on solid ground when it found evidence of contributory negligence on the part of all the plaintiffs, but the handling of the alternative ground—imputed negligence through joint adventure—was not quite so happy. The Manos-out-of-Kessel reading of common purpose and community of interest was approved, mention was made of the "mythical" element of control being satisfied, and the court showed a somewhat disturbing willingness to infer a contract of joint adventure in the teeth of denials from the surviving occupants of the coupe of any such agreement. It may very well be that such testimony was, as the court intimates, disingenuous, but surely mere disbelief in a denial should rarely be regarded as affirmative evidence.

52 Ibid. at pp. 716, 717.
53 8 Wn.(2d) 295, 111 P.(2d) 983 (1941).
54 Ibid. at p. 299 ff.
55 11 Wn.(2d) 425, 119 P.(2d) 905 (1941).
of the "intent to enter into a mutually binding obligation" which the Carbonneau case requires, however willing one may be to ring all the changes on the word "implied." The embattled minority of the Manos case did not rise to the bait, but after all this was a departmental and not an en banc opinion, and, moreover, obviously reached the right result on the facts—the dangerous combination of circumstances which has brought forth so many cases which later return to plague their authors.

The penultimate case in the series was one the like of which we may never see again—a social joint adventure set-piece of such classic symmetry as to rejoice the hearts of those of the Rosenstrom-Carbonneau persuasion. Pence v. Berry⁶⁸ involved an expedition by three couples in defendant's car from Spokane to Walla Walla in order to attend a college football game. Defendant, in the restaurant business, furnished the lunch, it was agreed in advance that expenses would be "prorated," with the neat added touch that defendant could not go unless they were, since he was compelled to hire extra help to take his place and that of his wife in the restaurant while they were away. The arrangements were discussed again on the trip, and two dollars and fifty cents determined as the sum which each couple should pay defendant as their shares. Walla Walla was safely reached, the lunch consumed, the game attended, and then the parties agreed to have dinner in Moscow instead of returning direct to Spokane. En route, defendant negligently turned his car over in the ditch, injuring plaintiff wife. Two days later plaintiff husband dutifully tendered his $2.50 to defendant as his share of expenses; it was refused on the ground that plaintiff had already incurred many expenses as the result of the wreck. Judgment was entered for plaintiff, the Guest Statute not applying because (1) plaintiffs were not "invited guests," and (2) they were joint adventurers with defendant.

In affirming the judgment, the court agreed that plaintiffs were not within the statute, which encompassed only "gratuitous passengers," and that whatever their status may have been was immaterial in view of that fact—thereby possibly edging in a little on the Syverson rule—and then somewhat anticlimactically proceeded to decide that they were joint adventurers. After listing the requirements, the opinion continues:

Each of the necessary elements above stated is plainly discernible in the situation presented by the evidence in this case. There was a contractual

⁶⁸ 13 Wn. (2d) 564, 125 P. (2d) 645 (1942).
relation between the parties, because appellant agreed to transport the respondents, and the latter in turn agreed and became obligated to share expenses. There was a common purpose in that the mutual objective was attendance at the football game, and not merely a desire for social companionship upon a day's drive. There was a community of interest in the carrying out of that purpose, for each and all of the parties had the common desire to be subserved in attending and witnessing the game, each received the same benefit therefrom, and all were reciprocally concerned in this particular expedition. There was an equal right to a voice as to the manner of its performance, for it is apparent that the entire arrangement was the result of mutual consideration and approval. For like reasons, each had an equal right to direct how, when, and where the automobile was to be used in the execution of the enterprise, although, of course, none had the right to interfere with the one who happened to be driving at the time.\footnote{Ibid. at p. 571, italics added.}

The opinion closes with a statement making explicit what had always been implicit in the cases: that joint adventure is not limited to commercial enterprises. "The joint venture, as a useful legal device, is not limited to strictly business transactions, but may also find application in connection with enterprises having the attainment of pleasure as their sole objective, so long as the association of the parties is not motivated merely by a desire for social companionship."\footnote{Ibid. at p. 572.}

This probably represents the peak of the development of the doctrine as an escape device from the Guest Statute, and it might be well, before considering the last and latest case, to see the practical details of how the device works out. Baldly stated, the Pence case means that any two or more persons may, by making a social engagement to go to the same place and do the same things for fun, escape the bar of the Guest Statute so long as they consent to share expenses or at least make some contribution to the expedition which may be translated into financial terms. It is as simple as that, requiring in addition only the cooperation of the jury. The contribution supplies consideration for the contract, the agreement to go along and make it the contract itself, so that when the excursion is arranged an offhand announcement that "I'll bring the lunch," or "We'll split the gas," or "Let's make it Dutch," acquiesced in by the others, makes them all parties to a "mutually binding legal obligation." The common purpose and community of interest elements have been changed slightly from the older cases; they must now be projected beyond the mere journey itself to encompass something to be done, presumably in concert, after the
destination is reached. The reason for this requirement remains obscure. If joint adventure will serve as a device for gaining pleasure, why should not each of the parties be allowed to reach that happy objective in his own fashion, one going, for example, to a football game, the other to a tennis match? It is true that now the Manos case is gone, unless the Ketsel and Meacham cases show a recrudescence and weather another siege of being "distinguished," the requirement as to common purpose must extend to something beyond the journey itself, yet it is a strange requirement. After all, the only part of the enterprise which can conceivably affect automobile litigation would seem to be that which involves transportation by automobile; so long as in that the parties are joint adventurers, it should make no difference that at some other time they pursue their separate courses to their separate ends.

The last element, that of equal right of control, has always occupied an equivocal position in the cases. Never (so far) to be found directly, it is "implied" or "inferred" or "derived" from the contract, a process illustrated as well as anywhere by the Pence opinion. Understandably enough, the parties there agreed where and in whose car they were going before starting on their journey. From this sensible and indeed necessary agreement the court derived the "mutual consideration and approval" which established the existence of the equal right of control.

It is possible that it can never do so again. In Poutre v. Saunders, last in the series, this curiously negative element took a startling leap into prominence, becoming so important as to overshadow, in a practical sense, all the other elements combined. The facts were these: defendant husband was employed in Wallace, Idaho, defendant wife in Spokane; it was her custom to drive to Wallace on some week ends to visit her husband. Learning of one of these projected trips, a friend of the husband in Wallace wrote to plaintiff in Spokane, suggesting that she visit him and that a ride might be arranged with defendant wife, with whom plaintiff was not acquainted. Plaintiff called her, the wife replied that she would be glad to have company, and on Saturday the wife picked her up and drove to Wallace. On the way, plaintiff said she would pay part of the expenses, when they were known, defendant wife replied, "That will be fine." The parties separated on arrival, each going about her own affairs; on Sunday plaintiff was again picked up at an agreed spot and the return journey began, to be interrupted by a wreck due to the driver's negligence. Plaintiff's counsel chose to try the case on the theory of joint adventure as the escape from the

59 19 Wn.(2d) 561, 143 P.(2d) 554 (1943).
Guest Statute, relying on the *Manos* case and ignoring the teachings of the *Pence* opinion as to common purpose. Under appropriate instructions the jury came through as could be expected, defendant’s motions were overruled, and judgment entered on the verdict for plaintiff.

It was a pretty thin case, even in a field where that is not unusual. Evidence of the “contract” is extremely shadowy, and it might be observed that even had the theory of escape chosen been that of “payment” rather than joint adventure, plaintiff could scarcely have met the requirements of the *Syverson* rule, since it seems clear that plaintiff was taken along for company and as an accommodation to the husband’s friend rather than in expectation of material benefit in a business sense. In any event the court on appeal found at most “an informal contract for transportation, the consideration for which was left indefinite,” and set itself to answer the question which it found appellant raised: assuming that there was a contract for transportation and that the case was tried on the theory of joint adventure, can a contract for transportation for hire constitute a case of joint adventure?

The answer in a nutshell is “No,” but it is the route taken by the court in reaching it which is important for our purposes. The difference between these two concepts, says the court, is that in joint adventure negligence can be imputed, while in transportation for hire it cannot. The reason for this difference is that in joint adventure each party is the agent or partner of the others in the conduct of the enterprise, so that each of them has an equal right of control. It is this right of control which is decisive: “The negligence of the agent is imputed to the principal because he has the right to control the acts of the agent.”

In the quoted statement the word “because” may possibly be in the wrong place; perhaps the negligence is imputed to the principal because the agent is his agent, and so acting for him, the right to control being merely an incident of the relationship between them and not the reason for the imputation at all. Indeed it would seem that lack of the right to control is the important thing in the cases, being seized upon as the “reason” for not imputing the negligence of an independent contractor to his employer, however short it may fall of actually explaining the result. Whatever the true theory, however, it is clear that the court is at least on conventional ground in its discussion, and in its

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60 Note 4, supra.
statement that "where it can be said that there is no right of control, it follows that there is no agency." Joint adventure is merely a species of agency, and therefore the existence of the right of control is the touchstone by which to determine the existence of joint adventure.

At this point there creeps into the discussion a faint suggestion of the which-came-first, hen-or-egg controversy, but at least the rule which emerges is clear: if joint adventure is established, right of control exists as a matter of law, otherwise, it must be established as a matter of fact. What will establish right of control (and hence joint adventure) as a matter of law? Only, says the court, "a joint undertaking of a business nature, for material gain or profit [which] as by the law of agency, establishes the right of control. This would constitute a joint adventure as a matter of law. No other kind of joint undertaking gives rise to such a presumption. We do not mean to say that the right of control cannot exist in a nonbusiness undertaking, but it does not exist as a matter of law based on partnership and must be proved to exist, if at all, as a matter of fact. This can be done only by proving a contract which by its terms specifically provides for the right of control. It will never be inferred from circumstances extrinsic to the contract."1

The other matters in the opinion— the overruling of the Manos case, the specific requirement that "the common purpose and community of interest in a joint adventure must be found in something beyond the transportation itself"—however important they may be, fade into insignificance to the litigant in comparison to the fact that the door is now closed to the tried and true escape from the Guest Statute. So far no one has knocked on that door in the nearly five and one-half years since the Poutre case was decided,6 and it will be a bold man with a remarkable case who does so. Never so far has there been

68 Ibid.
69 Ibid. at p. 568.

66 Purely as a matter of interest (for it does not affect the authority of the case) the remarkable split which developed over the mandate to accompany the reversal should be mentioned. The majority opinion was written by Mallory, J., and concurred in by Beals, Blake, Robinson, and Grady, J.J., it simply reversed the judgment, without directions. Millard, J., concurred but thought the trial court should be directed to dismiss the action, Grady, Beals, Blake, and Mallory, J.J., concurred but thought that respondent was entitled to a new trial, Steinetz and Jeffers, J.J., and Simpson, CJ., concurred in the reversal, while disagreeing with the reasoning of the majority opinion, but thought the action should be dismissed. The box score: for reversal, nine; for dismissal, four; for a new trial, four; Robinson, J., not voting on the directions to be given. It is no wonder that respondent's counsel seemed a trifle plaintive in his petition for rehearing, which was denied.

68 This is not strictly true, though it is difficult to characterize either of the two attempts as real "knocks." In Davis v. Browne, note 15, supra, as what must have been a really desperate expedient, defendant suggested joint adventure as the basis for im-
a "joint undertaking of a business nature" in automobile litigation in
the state, nor is one more likely in the future, and the requirement of
"proving a contract which by its terms specifically provides for the
right of control" in the nonbusiness venture represents a well-nigh
insuperable obstacle to the proponent. Hereafter, joint adventure can
only be the product of clean-cut agreement in advance, and assuming
a party whose members are legally sophisticated enough to know of
the Poutre rule, it is highly unlikely they would make such an agree-
ment to avoid the Scylla of the Guest Statute in view of the risk of
being wrecked on the Charybdis of imputed negligence. Unless the
court changes its mind, or people arranging for social expeditions by
automobile cease doing so in their usual way, or witnesses are much
better or at least differently coached than heretofore, it seems clear
that joint adventure is no longer a factor of any importance in auto-
mobile cases.

Nor is that result to be deplored, so far as the Guest Statute is con-
cerned. Whether or not we think that statute selfish in origin, unsound
in theory, or harsh in operation, these matters are for legislative de-
termination, and so long as it is on the books it should not be stultified
by first bringing in as an escape from it a concept totally foreign in
field and purpose and then watering that concept down in its applica-
tion to social expeditions until the statute had ceased, as in the Pence
case, to have much of any meaning at all.

III

Whether the Guest Statute achieves its purpose of minimizing the
danger of collusive suits in which host and guest, theoretical adver-
saries, cooperate to fleece the host's insurance carrier, is difficult to
judge. In a sense the test is purely negative: how many claims were
not made, how many actions were not brought, because of the statute?
Relevant data would be hard to come by, and admittedly an appraisal
based simply on the number of what might be called intramural suits
appealed to the Supreme Court is far from conclusive. Yet it may be

puting negligence; not a single fact supported it. The other case was Finn v. Drtila,
note 29, supra, equally barren of support unless the court chose to ignore the cases of
the last twenty years and return to that hazy time before the Rosenstrom decision. It
had never occurred to the writer until now that the use of Shepard's citator was not
universal.

67 Data from Casualty Insurers would not be particularly significant, except as a
sampling device; in 1947, the latest year on which figures are available, only 30% of
the cars registered in Washington were covered for public liability. The new financial
responsibility act may up the proportion, and the consequent effect of the Guest Statute,
16 N. W. Agency BUL. No. 4, p. 7 (Mar., 1949).
suggestive of the fact that the statute has had some damping effect; in the nearly sixteen years it has been operative, only twenty-seven cases involving it have come down, an insignificant number in comparison to the mass of automobile litigation in that same period. A counter-vailing factor may be found in the nearly uniform lack of success by appellants. In the last ten years, corresponding roughly to the period in which the rules have been somewhat stabilized by a pair of landmark cases, sixteen appeals were taken from judgments involving the statute, joint adventure, or both. Only two judgments were reversed. One dealt solely with imputed negligence, and the verdict was obviously not supported by the evidence. The other reversal represents one of those rare occasions on which previous cases are overruled and the application of a doctrine radically changed.

One further matter should be mentioned, enabling this discussion to end on a distinctly cheerful note. In these sixteen cases, the writer is convinced that the court reached the right result in fourteen of them. That is not to say that the court has not sometimes achieved the right result for the wrong reason, but surely, if there be anything to that Yalensian brand of pragmatism called Functionalism, may we not sit back and relax, happy in the thought that one way or another everything will come out all right?