INTRODUCTORY

IN 1957, a subcommittee of the Committee on Foreign Exchanges of Law Teachers and Students of the American Association of Law Schools recommended a program that was intended to foster international understanding among law students and the legal profession. Part of this program included a proposal that law students of the United States and other nations prepare reciprocal notes on some legal problem of common interest that would serve as a comparative exhibit of the law of the various nations.

The *Journal*'s[1] first contributions to this program were notes on retailer and manufacturer liability for personal injuries from defective products in Germany and the United States, and minority stockholder challenge of majority actions in Italian and American close corporations.

The immediately following notes treat the problem of the motor vehicle owner and operator's liability to persons injured by the negligent operation of the vehicle. The German note was prepared by Eberhard von Olshausen, an eighth-semester law student at the University of Kiel in Germany. The editors express their appreciation to Professor Hans W. Baade of the Duke Law School who edited and translated the German contribution. The American note was prepared by a law student of the Duke Law School.

A hypothetical fact situation has been employed to confine the area of discussion.

—The Editors

TORT LIABILITY FOR NEGLIGENT OPERATION OF A MOTOR VEHICLE IN GERMANY AND THE UNITED STATES

HYPOTHETICAL CASE

A owned an automobile that was used for the usual family purposes. The automobile was registered in *A*'s name and was driven from time to time not only by *A* but also by his wife and *B*, their eighteen-year-old son, all of whom were duly licensed to

[1] 1959 DUKE L.J. 93. See Baade, *Studenten treiben Rechtsvergleichung*, [1959] JURISTENZEITUNG 206.

drive. It was customary for *B* to ask A's permission before using the automobile. *B* was a competent driver and had never been in any kind of an accident or given *A* any reason for doubting his care and prudence.

On this occasion, *B* asked *A*'s permission to use the automobile for an evening's drive with some friends. *A* gave *B* his permission, with the understanding that *B* was to drive the vehicle only around town and not on the super highway. *B* then invited several of his friends, including *X*, to ride with him and proceeded to drive the vehicle on the super highway to a neighboring city. *X* was riding with *B* in the front seat. As a foreign-made automobile passed them, *X* remarked: "I wonder what kind of car that is?" *B*, the driver, looked back toward the car that had passed, momentarily taking his eyes off the road. At that moment the car swerved to the left and hit a car coming from the opposite direction that was being carefully driven by *Y*. Both *X* and *Y* were injured in the accident.

Would *A* and *B* be liable to *X* and *Y*?

LIABILITY UNDER GERMAN LAW*

I

A's LIABILITY TO *Y*

A. *Gefaehrdungshaftung* (Strict Liability) of the Motor Vehicle Holder

Section seven of the Road Traffic Law provides that the holder of a motor vehicle is liable for damages resulting "from the operation" thereof. While the minority view is that whether a motor vehicle is

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The form of citations to German source materials in this article generally follows German usage. For explanation and illustrations, see Kaplan, von Mehren, & Schaefer, *Phases of German Civil Procedure* (pt. 1), 71 HARV. L. REV. 1193 n.†† (1958); SCHLESINGER, COMPARATIVE LAW xxiii (2d ed. 1959). In accordance with prevalent German usage, titles of articles appearing in legal periodicals published monthly or more frequently, as well as the dates of decisions, including those reprinted and cited herein to legal periodicals, are omitted. The following abbreviations are used throughout: Courts: Reichsgericht (German Supreme Court, 1879-1945) [hereinafter cited as RG]; Entscheidungen des Reichsgerichts in Zivilsachen (Decisions of the Supreme Court in Civil Cases) [hereinafter cited as RGZ]; Bundesgerichtshof (Supreme Court of the Federal Republic of Germany) [hereinafter cited as BGH]; Entscheidungen des Bundesgerichtofs in Zivilsachen (Decisions of the Federal Supreme Court in Civil Cases)

in operation has to be determined according to strictly mechanical standards,[1] the Supreme Court and a majority of authors—more correctly, it is submitted—apply a test based upon more practical road traffic criteria.[2] However, since, in the instant case, *A*'s car was in motion, there can be no doubt that *Y*'s injury resulted from its operation within the meaning of the statute. The question remaining is whether *A* was the holder of the vehicle at the time of the accident. The mere fact that the vehicle belonged to him and was registered in his name does not suffice to establish him as the holder, although this does have

[hereinafter cited as BGHZ]; Oberlandesgericht (intermediate court of appeals) [hereinafter cited as OLG] (see Kaplan, von Mehren, & Schaefer, *supra*, (pt. 2), at 1444-54); Landgericht (trial court of general jurisdiction) [hereinafter cited as LG].

Legal Periodicals: Deutsches Autorecht [hereinafter cited as DAR]; Juristische Wochenschrift [hereinafter cited as JW]; Neue Juristische Wochenschrift [hereinafter cited as NJW]; Juristische Rundschau [hereinafter cited as JR]; Monatsschrift fuer Deutsches Recht [hereinafter cited as MDR]; Juristenzeitung [hereinafter cited as JZ]; Recht des Kraftfahrers [hereinafter cited as RdK]; Versicherungsrecht [hereinafter cited as VersR]; Verkehrsrechts-Sammbung [hereinafter cited as VRS] (cited to volume, *e.g.* 1 VRS 1). The abbreviated citation of legal periodicals is followed by the last two digits of the year of publication, which in turn are followed by the page reference. Thus, in accordance with the abbreviated method here used, the German publication cited at note 1, *supra*, would here appear as follows: Baade, JZ 59, 206.

The following treatises are cited by author and page only: BIERMANN, REICHSHAFTPFLICHTGESETZ (1956) [hereinafter cited as BIERMANN]; ENNECCERUS-LEHMANN, RECHT DER SCHULDVERHAELTRISSE (14th ed. 1954) [hereinafter cited as ENNECCERUS-LEHMANN]; FISCHER, GEFAELLIGKEITSFAHRT UND VERTRAGLICHE HAFTUNG (Kieler Abhandlungen 1938) [hereinafter cited as FISCHER]; GEIGEL DER HAFTPFLICHTPROZESS (9th ed. 1957) [hereinafter cited as GEIGEL]; LEONARD, BONSONDERES SCHULDRECHT (1931) [hereinafter cited as LEONARD]; MAURACH, DEUTSCHES STRAFECHT, ALLGEMEINER TEIL (2d ed. 1958) [hereinafter cited as MAURACH]; MUELLER, STRASSENVERKEHRSRECHT (21st ed. 1959) [hereinafter cited as MUELLER]; WELZEL, DEUTSCHES STRAFECHT (5th ed. 1956) [hereinafter cited as WELZEL]; WUSSOW, DAS UNFALLHAFTPFLICHTRECHT (5th ed. 1954) [hereinafter cited as WUSSOW].

Commentaries: Citations are to numbered comments to or before sections of the statute commented upon. In the case of Palandt's commentary, which now is the work of several authors, the name of the author of the comment cited is also given. ERMAN, KOMMENTAR ZUM BGB (1952) [hereinafter cited as ERMAN]; FLOEGEL-HARTUNG, STRASSENVERKEHRSRECHT (12th ed. 1959) [hereinafter cited as FLOEGEL-HARTUNG]; PALANDT, KOMMENTAR ZUM BGB (16th ed. 1957) [hereinafter cited as PALANDT]; REICHSGERICHTSRAETEKOMMENTAR ZUM BGB (10th ed. 1953) [hereinafter cited as RGRK]; STAUDINGER-WERNER, KOMMENTAR ZUM BGB (11th ed. 1959) [hereinafter cited as STAUDINGER-WERNER].

[1] Roth-Stielow, DAR 58, 123.

[2] Constant jurisprudence of the RG and BGH. See, for example, RGZ 126, 334; *id.* 132, 264; RG, JW 32, 784; BGH, MDR 56, 461; BGH, NJW 59, 627 (here probably espousing this view more comprehensively than did the Reichsgericht); BGH, VersR 55, 345; FLOEGEL-HARTUNG § 7, comm. 4; Boehmer, VersR 57, 587; JR 58, 475; JZ 59, 156; ENNECCERUS-LEHMANN 998, expresses no opinion.

a certain evidentiary value.[3] Courts and authors are in full agreement that the holder of a motor vehicle is the person who has the use of the vehicle on his own behalf and, in addition, has full access thereto.[4] The person using the vehicle on his own behalf is the one who derives the benefits from its operation and pays for its upkeep[5]—that is, the person who has the predominant economic interest in the vehicle.[6]

In the present case, it follows that *A* and not his son *B* is the holder, although, at least theoretically, there could be two holders of the same vehicle.[7] *A* has the predominant use of the car; he presumably pays for insurance, maintenance, and fuel; and he has complete power of disposal of the vehicle. This use and control is a continuous relationship[8] that is not terminated by the occasional turning over of the car to *B* for specific trips,[9] a conclusion further buttressed by *B*'s obtaining *A*'s permission to use the vehicle before each trip. The granting of such occasional permission constitutes a special form of control over the vehicle. This follows from section seven, paragraph three of the Road Traffic Law, which established the liability of the *holder* for damage caused by persons to whom the holder has temporarily given the vehicle, a provision which would be self-contradictory if the surrender of the car to others would, without more, result in the loss of the status of holder. It has even been held that the owner of a motor vehicle who had temporarily leased the vehicle in exchange for a fixed sum plus insurance premiums was still the holder thereof, if the lessor did not contribute to the upkeep of the vehicle other than through the purchase of gasoline.[10]

Consequently, a temporary use of the vehicle, such as in the instant case, without the assumption of any maintenance and operation costs

[3] RG, JW 31, 1862.

[4] RGZ 77, 348, 349; *id.* 78, 179; *id.* 87, 137; *id.* 91, 270; *id.* 91, 304; *id.* 93, 222; *id.* 120, 154, 159; *id.* 127, 174; *id.* 170, 182, 184; BGHZ 5, 269; *id.* 13, 351; OLG Frankfurt, 1 VRS 110; OLG Hamm, NJW 55, 1162; ENNECCERUS-LEHMANN 999; FLOEGEL-HARTUNG § 7, comm. 10; LARENZ, SCHULDRECHT, BONSONDERER TEIL 392 (1956); MUELLER 228.

[5] RGZ 91, 269; *id.* 93, 222; FLOEGEL-HARTUNG § 7, comm. 10; LARENZ, SCHULDRECHT, BONSONDERER TEIL 392 (1956).

[6] OLG Hamburg, DJZ 32, No. 430.

[7] RG, JW 34, 2913; BGHZ 13, 351; FLOEGEL-HARTUNG § 7, comm. 18.

[8] LARENZ, SCHULDRECHT, BONSONDERER TEIL 392 (1956); ENNECCERUS-LEHMANN 999.

[9] In the same sense, RGZ 161, 359.

[10] BGH, NJW 52, 581. See also RGZ 141, 400; RG, DAR 37, 82; OLG Cologne, DAR 38, 268; OLG Duesseldorf, DAR 56, 677; OLG Hamm, DAR 56, 113; LG Munich, DAR 56, 188.

can neither destroy *A*'s status as a holder, nor make *B* the holder of the vehicle.

While section seven, paragraph three of the Road Traffic Law provides that, in cases of so-called *Schwarzfahrt* (deviation), the driver and not the holder is liable for any damage caused by the operation of the vehicle, this will be of no avail to *A* in the instant case. Although it appears possible to regard *B*'s driving the car on the super highway, despite *A*'s specific instruction to the contrary, as a deviation,[11] a short history of the instant statutory provision will show that it does not apply to the hypothetical case. As originally enacted, the statute was interpreted to exclude the liability of the holder only if the vehicle was *put into motion* without the holder's knowledge and consent.[12] The law of July 21, 1923, provided for the exclusion of liability if the vehicle was "*used* without the holder's knowledge and consent," regardless of whether such use followed the authorized or unauthorized putting into motion of the vehicle.[13] Such a use without the holder's knowledge and consent was deviation by the driver from the instructions of the holder in such a way as to exclude the possibility that the holder would have intended to authorize it.[14] However, the statute was again amended in 1939 to render the holder liable whenever he "turns over" the vehicle to the driver, *i.e.*, gives him the real possibility of using it.[15] This was plainly the situation in the hypothetical case.

Section seven, paragraph two of the Road Traffic Law excludes liability where the accident was caused by an "unavoidable event." However, since *B*, the driver of the vehicle, did not observe *every* care and diligence required by the exigencies of the situation, *i.e.*, a degree of care and diligence beyond that which is customary,[16] the accident was not "unavoidable" within the meaning of the statute.

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[11] See RGZ 154, 340. *But see* OLG Duesseldorf, JW 27, 922.

[12] RGZ 77, 1348; RG, DJZ 19, 598.

[13] See MUELLER, § 7, introd. comm. III; RGZ 161, 145, 149. An English translation of portions of the Road Traffic Law as originally enacted can be found in VON MEHREN, THE CIVIL LAW SYSTEM 436-38 (1957). Most subsequent amendments to this statute are recorded in footnotes 20-24 of von Mehren's work.

[14] RGZ 119, 347, 350; *id.* 136, 4, 7; *id.* 161, 145, 149.

[15] See BGHZ 5, 269; FLOEGEL-HARTUNG § 7, comm. 48; LARENZ, SCHULDRECHT, BONSONDERER TEIL 394 (1956). Somewhat narrower but, at any rate, covering the hypothetical case, is MUELLER, § 7, comm. B(I) 62.

[16] RGZ 86, 149, 151; *id.* 92, 38; *id.* 96, 130; *id.* 139, 302; *id.* 159, 312; *id.* 164, 273; BGHZ 20, 259; BGH, DAR 52, 149; NJW 54, 185; 4 VRS 177; 5 *id.* 329, 331; 9 *id.* 105; 10 *id.* 327; VersR 57, 587; Boehmer, DAR 56, 288-89; FLOEGEL-HARTUNG § 7, comms. 25, 33; MUELLER 239.

On the other hand, *A*'s liability under section twelve of the Road Traffic Law is limited to 25,000 Marks. Furthermore, he is not liable for damages for pain and suffering under this statute.[17]

B. Liability in Tort

Liability under the Road Traffic Law does not exclude a more comprehensive liability incurred under another statute.[18] In *A*'s case, this would be liability in tort, or, more specifically, liability for violation of his duty of supervision, as provided by section 832 of the *Civil Code*. As the father of *B*, *A* was legally bound to exercise his power of supervision,[19] and *B* has caused a bodily injury to *Y*. *A*'s liability, therefore, will depend upon whether he is able to establish either that he performed his duty of supervision, or that the accident would have happened even if he had so performed this duty. Proving the latter will be difficult, for the mere possibility that the accident would have happened in any event will not suffice.[20] As regards the first possibility of exculpation, the extent of the duty of supervision depends upon the habits, the age, maturity, and capabilities of the minor and, additionally, upon the capabilities and the economic position of the parent.[21] In this connection, it should be emphasized that a very strict standard will be applied for dangerous activities, such as using firearms or driving motor vehicles.[22] This, however, cannot be extended to mean that the occasional turning over of a motor vehicle to an eighteen-year-old minor will of itself be sufficient to constitute a violation of the parental duty of supervision,[23] for common experience indicates that minors of that age are quite capable of coping with the dangers of road traffic. Otherwise, it would be hard to understand why drivers' licenses can be obtained by minors who have reached the age of eighteen.[24] Furthermore, the parent cannot reasonably be required constantly to accompany and super-

[17] CIVIL CODE § 253 (Chung Hui Wang transl. 1907) [hereinafter cited as BGB].

[18] Road Traffic Law § 16 (1909). See VON MEHREN, *op. cit. supra* note 13, at 438.

[19] BGB §§ 1626, 1631.

[20] BGH, VersR 52, 238, PALANDT-GRAMM, BGB § 832, comm. 6(b); RGRK § 832 BGB, comm. 8.

[21] RG, JW 04, 202; *id.* 05, 21; *id.* 26, 1149; RGZ 52, 69; *id.* 98, 246; OLG Koblenz, VersR 53, 369; OLG Duesseldorf, RdK 55, 123; OLG Munich, VersR 58, 238; LARENZ, SCHULDRECHT, BONSONDERER TEIL 351 (1956); PALANDT-GRAMM BGB § 832, comm. 4; RGRK, BGB § 832, comm. 7.

[22] BGH, VersR 52, 53; VersR 52, 238; PALANDT-GRAMM, BGB § 832, comm. 6(a).

[23] See OLG Dusseldorf, RdK 551 23.

[24] Strassenverkehrszulassungsordnung (Road Traffic Licensing Regulations) § 17 (1957).

vise his minor children.[25] All that can be expected is that the father point out the dangers of road traffic to his son, generally instruct him as to his duties, and caution him to exercise due care. The Supreme Court also requires the father to check on the son's driving habits from time to time without the son's knowledge of such supervision. For, the Supreme Court argues, even a minor who usually drives safely and confidently will, experience has shown, frequently be inclined toward fast and reckless driving.[26]

It would appear that, according to the test evolved by the Supreme Court, *A* would not be held to have violated his duty of supervision. The mere fact that *B* had, up to the time of the accident, given no cause for doubting his care and prudence will not suffice to exculpate his father,[27] as the duty of supervision commences before the parent becomes aware of his ward's lack of care and diligence;[28] the description of *B* as a careful and prudent driver would seem to justify the conclusion that this deportment is the fruit of corresponding supervision and instruction.[29] This conclusion is further strengthened by the fact that it was customary for *B* to request *A*'s permission to use the car, and that *A*, as indicated by his reference to the super highway, used these occasions to caution his son. Consequently, it appears most likely that *A* will be able to exculpate himself by showing that he did exercise due care and diligence in the supervision of his son. *A* will therefore be liable to *Y* only on the limited basis of section seven of the Road Traffic Law, and not on the basis of section 832 of the *Civil Code* as well.

II

B's Liability to *Y*

A. Liability under the Road Traffic Law

B is not liable to *Y* on the basis of section seven of the Road Traffic Law since, as indicated above, he was not the holder of the vehicle. However, he is liable under section eighteen, paragraph one of this law as the operator of the vehicle. While this liability is excluded if the damage is not caused by the fault of the driver, *B* will not be able to sustain the burden of proving that the accident was not caused by his

[25] RG, JW 05, 21; RGZ 50, 60; Enneccerus-Lehmann 953; RGRK, BGB § 832, comm. 7.

[26] BGH, VersR 52, 238; OLG Munich, VersR 58, 238. *Cf.* the parallel holding as regards BGB § 831; RGZ 142, 356, 363; RG, JW 35, 115; *id.* 37, 1956.

[27] BGH, VersR 52, 238; OLG Neustadt, DAR 51, 112.

[28] BGH, VersR 52, 238; RGRK, BGB § 832, comm. 2.

[29] See OLG Duesseldorf, RdK 55, 123.

negligence. Because *B* has reached the age of eighteen, his liability in tort is not limited by statute. However, his liability under section eighteen of the Road Traffic Law is limited as to amount by section twelve and, in view of the negative enumeration of section 253 of the *Civil Code,* he is not liable for damages for pain and suffering under the Road Traffic Law.

B. Liability in Tort

According to sections sixteen and eighteen, paragraph two of the Road Traffic Law, liability thereunder does not preclude a greater liability under another statutory provision. In the instant case, it is clear that *B* has committed a tort against *Y* within the purview of section 823 of the *Civil Code. B* took his eyes off the road only momentarily, but this is, especially on a super highway, plainly negligence as defined by the *Civil Code, i.e.,* the nonobservance of customary care and diligence,[30] which can be expected to cause accidents resulting in damage. The same liability is incurred under section 823, paragraph two of the *Civil Code* in conjunction with either section one of the Road Traffic Regulations[31] or section 230 of the *Penal Code,* both of which are protective statutes within the meaning of section 823. *B*'s liability under section 823 is not limited as to amount, and he is liable in damages for pain and suffering.[32]

C. Mitigation Because of *Betriebsgefahr* (Inherent Danger)

Since *Y* was also driving a motor vehicle at the time of the accident, the question arises whether his recovery from *A* and *B* is reduced because he, too, was operating a dangerous instrumentality. The provision in point is section seventeen of the Road Traffic Law, which is a special rule for the application of the comparative negligence rule formulated in section 254 of the *Civil Code* and which precludes the application of this latter section.[33] Section seventeen of the Road Traffic Law provides, in substance, that if, in a collision of motor vehicles, one of the vehicle holders suffers damages, and the holders are legally liable to each other, the extent of the damages which one or more of them will have to pay is contingent upon the degree to which the damage was caused by the various parties. Section eighteen of the law extends this principle to motor vehicle operators.

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[30] See BGB § 276.

[31] OLG Bamberg, DAR 53, 33.

[32] See BGB § 847.

[33] RG, JW 37, 1312; RG, DAR 38, 270; FLOEGEL-HARTUNG § 17, comm. 2; Rauschert, NJW 54, 704; Stueckrath, JR 52, 154.

If *Y* was only the operator of the vehicle, there would be no mitigation in damages. For the reference in section eighteen to section seventeen indicates that the mitigation rule applies only if the person damaged would, had not he but a third party been injured, be liable to such a third person.[34] Since strict liability exists only as to holders and not as to operators, and since *Y* will easily sustain the burden of proving that he was not negligent, he is not obliged to suffer a reduction in his recovery if he was only the operator, not the holder, of the vehicle.

If *Y* were the holder, however, the result would be different. While the question is still quite controversial, it seems firmly established in the jurisprudence of the Supreme Court,[35] followed by other courts[36] and by several authors,[37] that the recovery of damages in motor vehicle accident cases can be reduced by taking into account the *Betriebsgefahr*, *i.e.*, the typical danger inherent in the vehicle of the victim even in the absence of any fault on his part. While the pre-1945 Supreme Court had permitted such a reduction only as between parties both of whom were without negligence and merely liable to each other on the basis of strict liability,[38] it had permitted an exception to this restrictive rule if there was any negligence, however slight, on the part of the victim, as well as on the part of the principal wrongdoer. The recovery of the former was consequently reduced by (a) his contributory negligence, and (b) his *Betriebsgefahr*.[39] From here it was only a short step to the realization that liability for *Betriebsgefahr* is not an exceptional obligation, but a natural concomitant of the machine age, and that there is little justice in denying a reduction of recovery to the party who, while only slightly negligent, drives a comparatively innocuous vehicle, as against someone who, while technically without fault, is responsible for the operation of a vehicle with substantial inherent danger, such as a multiple-trailer truck.[40]

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[34] This would seem to be quite uncontested. See BGHZ 20, 259; FLOEGEL-HARTUNG § 17, comm. 16. MUELLER § 17, comm. 6(II)(b); *id.* § 7(I), introd. B.

[35] BGHZ 6, 139; *id.* 20, 259; BGH, DAR 53, 94; *id.* 55, 135; *id.* 54, 14; 9 VRS 89, 427.

[36] OLG Stuttgart, NJW 50, 545; OLG Hamburg, VersR 54, 65; OLG Bremen, DAR 52, 57; OLG Duesseldorf, RdK 55, 124; OLG Oldenburg, DAR 53, 96; *id.* 56, 129; LG Aachen, 9 VRS 241.

[37] LARENZ, SCHULDRECHT, ALLGEMEINER TEIL 125 n.1 (1953); GEIGEL 135; MUELLER 378; PALANDT-DANCKELMANN BGB § 254, comm. 2(a); Gelhaar, DAR 54, 267; Rauschert, NJW 54, 704; Voss, VersR 52, 376.

[38] RGZ 67, 120; *id.* 114, 76; *id.* 129, 59; *id.* 164, 269; RG, JW 37, 2648; *id.* 38, 3052; Deutsches Recht 39, 1079.

[39] RG, JW 37, 2648; 38, 3052. See Boehmer, VersR 57, 347.

[40] BGHZ 20, 259.

Even if *Y*'s *Betriebsgefahr* as a holder is considered by way of mitigation, however, this does not necessarily mean that his recovery will be reduced. For, as indicated above, strict liability based upon the *Betriebsgefahr* borne by the holder of a vehicle exists only for accidents not caused by an unavoidable event. The test for determining whether the event was in fact avoidable is, of course, very strict; and it has been rightly and repeatedly held that faulty driving on the part of the wrongdoer does not necessarily make the accident unavoidable as regards the victim, as he could have foreseen, and properly reacted to, such faulty driving.[41] However, where there is no prior indication of faulty driving at all, the accident caused by a seemingly well-driven car's sudden deviation into oncoming traffic has rightly been held not only by the Supreme Court,[42] but also by several other courts,[43] to be entirely unavoidable as regards the unsuspecting victim on the other side of the road.

It follows that *Y*'s recovery from *A* and *B* will not be reduced by his own *Betriebsgefahr*, regardless of whether or not he is the holder of the vehicle that he was driving.

III

A's Liability to *X*

A is not liable to *X* as the holder of the vehicle because *X* did not pay for his transportation, and neither *A* nor *B* was engaged in the commercial transportation of passengers. Unless both of these conditions are met, section 8(a) of the Road Traffic Law excludes the strict liability of the holder to persons riding in his vehicle. Furthermore, *A* is not liable to *X* in tort, for, as has been pointed out above, he did not violate his duty of parental supervision over *B*, and is not otherwise at fault.

A's liability to *X* could, therefore, be based only upon a contractual relationship in which *B* figures as *A*'s agent and *A* is liable for *B*'s torts under section 278 of the *Civil Code*. Such a contractual relationship, however, does not exist in the instant case. There was neither any understanding between *A* and *X* in connection with the automobile trip undertaken by *B*, nor any indication that *A* had authorized *B* to enter into a gratuitous transportation contract with *X* on behalf of *A*. The

[41] BGH, DAR 52, 149; *id.* 55, 194; 5 VRS 329 RGZ 162, 1, 3; 164, 273, 280; Floegel-Hartung § 7(II), comm. 33.

[42] 10 VRS 172. *Cf.* 10 VRS 327.

[43] OLG Munich, Hoechstrichterliche Rechtsprechung 42, No. 435; LG Duesseldorf, VersR 55, 606; LG Paderborn, VersR 55, 606.

assumption of an implied authorization for the making of such a contract can only be based upon unequivocal evidence.[44]

Even if *B* had been authorized by *A* to take guests with him and had informed *X* of this authorization, and even if *X* had, at least tacitly, declared his acceptance of a gratuitous transportation agreement, this would not suffice to establish a contractual relationship between *A* and *X*. *A*'s action would signify nothing more than his assent as a parent and as the owner of the vehicle to the performance of a gratuitous transportation contract between *B* and *X*, not between himself and *X*. Manifestly, parental authorization or ratification of the contracts of minors does not establish a contractual relationship between the parent and the third party.

IV

B's Liability to *X*

A. Contractual Liability

There is an additional reason for denying the existence of a contractual relationship. Since this is of importance to the relationship between *B* and *X* as well as *A* and *X*, it will be examined here. The legal relationship between the parties is based upon a so-called *Gefaelligkeitsfahrt*, *i.e.*, the gratuitous transportation of another person in a motor vehicle without some benefit to the driver.[45] Such a *Gefaelligkeitsfahrt* is a factual relation which lies outside the scope of legally relevant acts—particularly contracts—and constitutes a gratuitous social relationship rather than a gratuitous contract.[46] A legal relationship, and more particularly a contract, can only be based upon the intention of the parties to establish a legal obligation.[47] Whether such an intention exists depends upon the particular fact situation, especially the nature and

[44] OLG Bamberg, NJW 49, 506; OGH (formerly Supreme Court for the British Zone), 3 VRS 15, 18.

[45] This is the definition of that term by Guelde, Deutsches Recht 39, 1420. See also FLOEGEL-HARTUNG § 8(a), comm. 6.

[46] This is undisputed. RGZ 65, 18; *id.* 65, 315; *id.* 128, 229, 231; *id.* 141, 262; RG, JW 34, 2033; *id.* 35, 1021; *id.* 37, 1490; BGH, DAR 58, 213; OLG Tuebingen, DAR 51, 178; OLG Karlsruhe, Hoechstrichterliche Rechtsprechung 35, 683; OLG Naumburg, RdK 31, 241; OLG Bamberg, NJW 49, 507; OLG Duesseldorf, RdK 50, 76; ENNECCERUS-LEHMANN 1000-01; FLOEGEL-HARTUNG § 8(a), comm. 6; MUELLER 297; PALANDT-DANCKELMANN § 241, introd. 2; *id.* BGB § 254, comm. 6; WUSSOW 458; Goetz & Boehmer, DAR 57, 228-29; Boehmer, JR 57, 338-39; Arndt, JW 29, 898; Carl, JW 37, 1633; Louis, JW 35, 1021; Josef, JW 28, 2310; Guelde, JW 36, 1584; and Deutsches Recht 39, 1420; Koch, JW 31, 3301; Groebe, JW 36, 1581ff. A different definition is seemingly advocated by Volkmann, JW 34, 346-47.

[47] BGHZ 21, 102; OGH 3 VRS 15, 19; ENNECCERUS-LEHMANN 114.

purpose of the relationship, its economic significance, particularly for the person favored, and his discernible interest in the realization of the relationship.[48] According to the test here set out, the assumption of a legal obligation must be denied in the instant case. Whether *B* undertook the pleasure drive which he planned and whether he took his friends with him was of no economic or legal significance for the latter, whose interest in the trip remained purely social.[49] It was manifestly not the intention of the parties to create a right on the part of the guests to transportation in *A's* car by *B* and a corresponding duty of *B* (or *A*) to make reparation in case of nonperformance.

The Supreme Court, however, has recently decided that the absence of a legal duty of performance will not necessarily exclude the legal relevance of a gratuitous obligation.[50] In essence, the Court held that even if there is no obligation to perform, voluntary performance will nevertheless give rise to a legal relationship with concomitant contractual duties of due care and diligence. Thus, the Court created a new type of obligation: a contract without the duty of performance but with the duty of due care and diligence, a subspecies of a "contract giving rise to protective duties towards third persons."[51] Even this new legal concept, however, would not cover the instant case. In the case decided by the Supreme Court, a firm employing a driver had permitted his temporary employment by a transport firm whose driver had suddenly died, and which needed a driver immediately for the fulfillment of a transport contract previously concluded. The Supreme Court placed special emphasis upon the fact that the relationship concerned the economic and business interest of both parties, and that the defendant was to aid the plaintiff in a business emergency. Even a quasi-contractual relationship without the obligation of performance, but with the obligation of due care and diligence in case of performance, the Court held, has to be founded on economic and business considerations. It specifically indi-

[48] RG, Leipziger Zeitschrift 18, 496; *id.* 1923, 275; RGZ 151, 203, 208; BGHZ 21, 102; ERMAN, BGB § 241, 2x introd. comm. 11(b). PALANDT-DANCKELMANN, BGB § 241, 2x introd. comm. 2.

[49] The situation would have been different if *B* had promised to take his friend to the station because his friend was planning an important business trip. To the same effect, see MUELLER 297.

[50] BGHZ 21, 102.

[51] BGH, JZ 60, 124, discussed by Lorenz, JZ 60, 108; GERNHUBER, DRITTWIRKUNGEN IM SCHULDVERHAELTNIS KRAFT LEISTUNGSNAEHE, FESTSCHRIFT FUER ARTHUR NIKISCH 249 (1958); LARENZ, SCHULDRECHT, ALLGEMEINER TEIL 139 (1953).

cated that mere gratuitous acts of kindness in social life rather than in business life would not create such an obligation.[52]

Therefore, it follows that *A* is not liable to *X* at all, and that *B* is not liable to him in contract.

B. Liability in Tort

B is not liable to *X* in tort on the basis of section eighteen of the Road Traffic Law as the operator of the vehicle, as the exception of section 8(a) of the same law for gratuitous and noncommercial riders also applies to the operator's liability.[53] However, *B* has committed a tort resulting in bodily injury to *X*, just as he has committed a similar tort against *Y*. The only question is whether, as against a gratuitous guest and in view of the special fact situation here presented, his liability to *X* is either diminished or excluded.

1. A lesser standard of care toward gratuitous guests?

It is sometimes asserted either that the motor vehicle operator's liability to gratuitous guests is limited to gross negligence, or that the standard of care is *diligentia quam in suis*, that is, the same degree of prudence and care as the operator applies in his own affairs.[54] However, the courts have consistently held,[55] and most authors have maintained,[56] that, in principle, the operator is liable for all negligent acts toward gratuitous guests. The latter, it is submitted, is the preferable view.

The contrary opinion proceeds mainly by analogy from sections 521, 599, and 690 of the *Civil Code*, which limit the donor's, the gratuitous

[52] BGH 21, 102, 107; BGH, VersR 58, 377. To the same effect, see MUELLER 297.

[53] FLOEGEL-HARTUNG § 8(a), comm. 5; LG Freiburg, VersR 58, 439; Arbeitsgericht (Labor Court) Augsburg, VersR 58, 496.

[54] ENNECCERUS-LEHMANN 114; Groebe, JW 36, 1581, 1584; Loehlein, Zeitschrift fuer das gesamte Handels-und Konkursrecht 36, 297, and JR 50, 132; Stienen, Deutsches Recht 40, 426; Beitzke, MDR 58, 678; FISCHER, *passim;* OLG Munich, Leipziger Zeitschrift 17, 1370. Louis, JW 35, 1023; *id.* 36, 425, would exclude liability for gross negligence as well. However, he resorts to political terms rather than legal arguments. The question is left open in RG Leipziger Zeitschrift 18, 496, and RGZ 65, 17. *But see* note 58 *infra.*

[55] RGZ 45, 394; JW 32, 1025; *id.* 34, 2033; *id.* 35, 1021; *id.* 36, 1890; *id.* 39, 482; BGH, VersR 55, 309; *id.* 56, 388; *id.* 56, 589; *id.* 57, 299; *id.* 57, 718; *id.* 58, 309; *id.* 58, 377; OGH 3 VRS 15; OLG Kiel, Hoechstrichterliche Rechtsprechung 38, No. 1590; OLG Tuebingen, DAR 51, 178; 52, 6; OLG Bamberg, DAR 53, 33; OLG Munich, VersR 58, 459; OLG Stuttgart, VersR 58, 473.

[56] PALANDT-GRAMM, BGB § 823, introd. 3(b); FLOEGEL-HARTUNG § 8(a), comm. 6; MUELLER 298; Boehmer, JR 57, 338-39; Guelde, JW 36, 1584 and Deutsches Recht, 39, 1420. LARENZ, SCHULDRECHT, ALLGEMEINER TEIL 163 (1953), left the question undecided, but adopted to the dominant trend in *Schuldrecht Bonsonderer Teil.*

bailor's, and the gratuitous bailee's responsibility for negligence to gross negligence or *diligentia quam in suis.*[57] One difference between these legal relationships and the present fact situation is that, in the former, there is a legal obligation to be performed; the limitation of the munificent person's liability might justly be regarded as a kind of equivalent for his obligation to act without economic benefit to himself.[58] This would justify a lesser standard of care for gratuitous transportation contracts as distinguished from gratuitous transportation relationships—that is, unenforceable social "promises." However, even this restrictive view of a limited standard of care in gratuitous transportation cases would seem to overlook the fact that violation of the legal obligations of the gratuitous lender, bailee, and donor, be it through nonperformance, "positive violation of contract,"[59] promise of a thing impossible to perform, or otherwise, will in practically all cases result in mere property damage as distinguished from personal injuries. Conversely, accidents caused through the operator's negligence in the course of gratuitous transportation will result primarily in personal injuries. The rules established by the *Civil Code* for property damage need not necessarily be applicable by analogy to personal injury cases.

That such an analogy is not permissible is convincingly demonstrated by the fact that both the gratuitous agent and, in principle, the *negotiorum gestor*[60] are liable for all their acts of negligence although they are acting gratuitously. It would seem clear that, as the *Civil Code* lays down a lesser standard of care for gratuitous conferrals of property benefits, but applies the ordinary standard of negligence to gratuitious conferrals of personal services, the analogy, if any, therefore will have to be drawn to the latter and not to the former.[61] The oft-mentioned "gift" of gasoline and "loan" of the car[62] would appear to be substantially outweighed by the importance of the personal services of the

[57] This argument is advanced especially by Loehlein, Stienen, and Enneccerus-Lehmann, *supra* note 54, and Zimmermann, JW 28, 1717. This view is combated by Maier, Deutsches Recht 39, 1417, 1419.

[58] Therefore, Boehmer, JR 57, 338, and OLG Naumburg, RdK 31, 241 would apply a lesser standard of care only in the case of gratuitious transportation *contracts.* This would also seem to have been the view of the Supreme Court in RGZ 65, 17, and Leipziger Zeitschrift 18, 496.

[59] As to "positive violations of contracts," see Comment, 1959 DUKE L.J. 94, 96.

[60] Sections 662, 276; *arg. e. contrario* BGB § 680; see PALANDT-GRAMM, BGB § 662, comm. 4(a).

[61] OGH 3, VRS 15, 19.

[62] Relied upon by OLG Munich, Keipziger Zeitschrift 17, 1370; OLG Naumburg, RdK 31, 242; Zimmermann, JW 28, 1717.

driver. This is all the more so in the present case, where the operator has neither purchased the gasoline nor owns the car.

It is further argued, by Zimmermann[63] and now especially by Beitzke,[64] that it would be unjust and contrary to the intention of the parties to burden the driver who is transporting a passenger gratuitously with a greater degree of care and diligence than he would have to practice if he were driving alone. But, while a person driving alone endangers mainly himself, a person who accepts riders is charged with the duty to look out for others as well: He will therefore have to exercise customary care and prudence.[65] If the driver does not desire to assume this responsibility, he must expressly repudiate it. That it is not unreasonable to saddle the driver of a car with the ordinary degree of care and prudence toward his gratuitous guests, is further illustrated by the obvious fact that, as against all third parties, he has to exercise the same degree of care and prudence.

If Professor Beitzke argues that the guest is well-aware of the inherent dangers in motor traffic and accordingly assumes a corresponding risk, he would seem to overlook the fact that the legislature has recognized the validity of this argument only for purposes of the absolute liability of the motor vehicle holder.[66] This principle does not lend itself to analogy, as negligence in road traffic is not a normal danger that the guest will have to take into consideration.[67] It appears quite permissible, on the contrary, to rebut Professor Beitzke's view by arguing *e contrario* from section 8(a) of the Road Traffic Laws.

A further argument advanced by Professor Beitzke is that while, in the case of an accident involving third parties, the wrongdoer invades the *Rechtssphaere* ("realm") of such third parties, the gratuitous guest by his own acts has voluntarily placed himself in the "realm" of the driver and will therefore have to take the latter's care and prudence as he finds it.[68] This line of reasoning would appear to be quite dangerous, as unsettling well-established rules of liability in a number of typical fact situations, as where a person enters the house of another. It is well-settled that all property owners who, for whatever reason, permit

[63] JW 28, 1717.

[64] MDR 58, 678.

[65] This is properly emphasized by Boehmer, VersR 58, 662, and Guelde, JW 36, 1584-85, and Deutsches Recht 39, 1420-21.

[66] Road Traffic Law § 8(a) (1909).

[67] Boehmer, MDR 58, 896; OLG Naumburg, RdK 31, 241.

[68] *Supra* note 64.

the use of their property by the public are fully responsible for the safety of passage.[69]

Finally, it is occasionally argued that the responsibility of motor vehicle operators to gratuitous guests should be decreased because both are in the same "community of danger." This line of reasoning need not be discarded *a limine* in view of its rather obvious ideological roots in the all-too-recent past, for the community of interest or of danger is a legal principle of quite reputable lineage.[70] Even a bowdlerized view of the arguments advanced by Maier,[71] however, clearly indicates that they are out of place in the instant case. The law has recognized the community of danger in two instances: where, as in the law of average, all persons within the community are threatened by a common danger from without,[72] and secondly, where, as in a civil law (non-business partnership), all partners are endangered by all other partners.[73] In the gratuitous driver case, however, there is no "community" other than a *societas leonina:* the danger flows solely from one of the persons concerned.[74]

2. Limitation of liability by tacit agreement

In full agreement with the decisions of courts and with the predominant view, we have arrived at the conclusion that, in principle, the driver of a motor vehicle is liable for all negligent acts toward even a gratuitous guest. Liability for slight negligence can be excluded by contract, however, and such a contract can be tacitly concluded.[75] In the instant case, however, this possibility can be readily excluded. Since *X* was a minor and was limited in his capacity to make onerous contracts, he could not have concluded such an agreement without the approval of his legal representatives, that is, both his parents.[76] In view of the absence of such approval, there can be no contract for the exclusion of liability for slight negligence.

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[69] RGZ 54, 55; 121, 404; RG, JW 31, 3446; LARENZ, SCHULDRECHT, BONSONDERER TEIL 342 (1956); ERMAN, BGB § 823, comms. 8(d), 9; PALANDT-GRAMM, BGB § 823, comm. 8; RGRK BGB § 823, comm. 6.

[70] WUEST, DIE INTERESSENGEMEINSCHAFT, EIN ORDNUNGSPRINZIP DES PRIVATRECHTS (1958); Pleyer, JZ 59, 167-68.

[71] Maier, Deutsches Recht 39, 1417.

[72] COMMERCIAL CODE § 700 *et seq.* For the case of causation of the common danger by a person concerned, see *id.* § 702.

[73] BGB § 708.

[74] To the same effect, Guelde, Deutsches Recht, 39, 1420-21.

[75] See RGZ 67, 431; BGH 8, VRS 7; OLG Cologne, DAR 39, 62.

[76] BGH, VersR 58, 377; Supreme Constitutional Court, JZ 59, 528.

3. Assumption of risk

As originally conceived, assumption of risk was a subspecies of contributory negligence which, in accordance with section 254, resulted in a reduction of the principal wrongdoer's responsibility, especially if the principal wrongdoer was, as in the case of the holder of animals, subject to strict liability. Thus, the Supreme Court developed the rule that he who, in the absence of contract, knowingly and without professional, moral, or legal obligation, that is, voluntarily, subjects himself to an avoidable danger, such as boarding a horse-drawn vehicle, must bear part of the damage resulting therefrom.[77] Since, however, contributory negligence under section 254 does not require positive knowledge of a danger but only negligent lack of knowledge thereof,[78] the next logical step was to exclude responsibility completely if the principal wrongdoer was strictly liable and the victim's contribution to the accident was particularly substantial.[79] This completed the emancipation of the assumption-of-risk rule from the comparative negligence rule.[80] Although assumption of risk was at first limited to cases of strict liability,[81] it was later extended by a landmark decision of the Supreme Court in 1933 to negligence cases as well.[82] The Court expressly espoused Flad's definition, generally followed since then by the former and the present Supreme Court as well as inferior tribunals,[83] and concurred in by authors generally,[84] that assumption of risk in motor vehicle accident cases is "the consent of the guest rider, within the scope permissible, to the possibility of bodily injury to himself, which consent excludes, within its proper scope, the illegality of the injury and consequently also the liability of the driver."[85]

Thus, in guest-rider cases, assumption of risk is based upon a unilateral declaration of the guest rider that is formally valid only if re-

[77] RG, JW 06, 349; *id.* 11, 28.

[78] BGH 9 VRS 172.

[79] RG, JW 12, 857.

[80] See Wangemann, NJW 55, 85.

[81] RGZ 130, 168. This restrictive view is still maintained by LARENZ, SCHULDRECHT, ALLGEMEINER TEIL 125 (1953). *Contra*, Beitzke, MDR 58, 679.

[82] RGZ 141, 262.

[83] RG, JW 37, 1633; BGHZ 2, 159, 162; BGH, NJW 52, 1410; OLG Hamm, 1 VRS 177; 2 VRS 195; 3 VRS 325; OLG Freiburg, VersR 51, 206; OLG Oldenburg, 4 VRS 4; OLG Tuebingen, RdK 53, 68; 55, 30; OLG Cologne, MDR 54, 481; OLG Bamberg, NJW 49, 506; OLG Nuernberg, VersR 58, 632; OLG Munich, VersR 58, 239.

[84] PALANDT-DANCKELMANN, BGB § 254, comm. 6; FLOEGEL-HARTUNG § 8(a), comm. 7; MUELLER 298; ENNECCERUS-LEHMANN 72; Groebe, JW 36, 1581; Goetz von Boehmer DAR 57, 228-29.

[85] Flad, Recht 19, col. 13.

ceived by the operator of the vehicle. It follows that, inasmuch as the declaration is equated to ordinary legal declarations, a minor will not, for the reason stated above, be able to assume risks without the consent of his guardian. This result has been extensively criticized by legal commentators who rightly point out the incongruity between issuing a driver's license to an eighteen-year-old minor and thereby certifying that he is cognizant of the dangers of road traffic (such as, drunken driving) and able to avoid them himself, while at the same time maintaining that the same minor is, as a matter of law, unable to recognize the same dangers inherent in some other person's driving and to act in accordance with such knowledge.[86] A further reason against the applicability of the civil-law declaration test of the assumption of risk is that, as has been pointed out, the doctrine of assumption of risk was developed as a subspecies of contributory negligence, and there has never been any doubt that the minor's capacity to be contributorily negligent in accordance with section 254 of the *Civil Code* is not equated to his capacity to contract, but to his capacity in torts, so that an eighteen-year-old minor has full capacity to be contributorily negligent.[87] Finally, it is here suggested that a fruitful analogy can be drawn to criminal law, where it is well-established that the capacity of a minor to consent to an otherwise illegal act is not governed by his capacity to contract, but by his natural ability to foresee the consequences of his acts.[88]

Some opponents of the predominant view, which assimilates the capacity to assume risks by declaration to the capacity to contract, tend to avoid the harsh results of this theory by resorting to section 242 of the *Civil Code*, which has gradually resulted in imposing a general requirement of fair dealing in the law of obligations. They argue that a person who by his own conduct has knowingly placed himself in a position of danger is thereby estopped from claiming afterwards that

[86] Wangemann, NJW 55, 185 and MDR 56, 590-91; Boehmer, VersR 57, 205-06; MDR 58, 77; JZ 59, 17; Bemmann, VersR 58, 583; Geigel 171 and JZ 51, 590-91; OLG Oldenburg, DAR 56, 296; Brockmann, Note JW 33, 2389.

[87] BGB § 828; RGZ 54, 404; *id.* 59, 221; *id.* 68, 423; *id.* 108, 89; *id.* 156, 202; OGH, NJW 50, 905; OLG Schleswig, Schleswig-Holsteinische Anzeigen 57, 97; OLG Duesseldorf, RDK 55, 123; OLG Nuernberg, VersR 58, 633; FLOEGEL-HARTUNG § 9, comm. 9; PALANDT-DANCKELMANN, BGB § 254, comm. 2(a); RGRK, BGB § 254, comm. 1(c); STAUDINGER-WERNER BGB § 254, comm. 30; ENNECCERUS-LEHMANN 73; LARENZ, SCHULDRECHT, ALLGEMEINER TEIL 124 (1953).

[88] Entscheidungen des Reichsgerichts in Strafsachen (Decisions of the Supreme Court in Penal Cases) 41, 394; 77, 17, 20 [hereinafter cited as RGSt]; Entscheidungen des Bundesgerichtshofs in Strafsachen 4, 88 [hereinafter cited as BGHSt]; MAURACH 267; WELZEL 79.

he lacked the necessary capacity to act.[89] This line of argument would appear to be fairly conclusive, as it is well-established that the doctrines of estoppel and abuse of rights operate against minors as well. It is generally conceded, however, that resort to general clauses such as section 242 should be avoided wherever the particular problem can be solved by resorting to more specialized legal rules. In the instant case, it is submitted that the analogy to consent in penal cases, and the test of natural understanding there developed, affords a better solution. First, such an analogy would further cement the necessary congruence between civil and criminal law;[90] and second, it would afford a test that, while not automatic, is nevertheless not difficult to apply and is recognized, in principle, by the *Civil Code* in section 828, which provides that persons between seven and eighteen years of age are not liable for their torts if, at the time the acts were committed, they lacked the ability to recognize that their acts would entail legal responsibility.

There are, however, substantial arguments against the test here suggested. For one thing, it is well-settled in civil as well as in penal law that even a person with full legal capacity cannot consent to an injury to himself that is *contra bonos mores*. This especially includes "consent" even to accidental homicide.[91] On the other hand, it has been repeatedly held that the doctrine of assumption of risk is applicable to wrongful death cases.[92] Thus, it would appear that the consent theory will lead to incorrect results at least in this relatively important group of cases. It is submitted, however, that such is not the case. While one cannot legally consent to the specific act that leads to his own accidental death, a person might very well consent to a pattern of conduct that might, by some yet unforeseeable turn of events, result in such an accidental death. If, as section 276 of the *Civil Code* provides, consent to the negligence of another is possible, the standard for such negligence clearly cannot be determined by the eventual and largely fortui-

[89] This view was apparently first expressed by Geigel, JZ 51, 590-91. See also GEIGEL 171; OLG Oldenburg, DAR 56, 296; Boehmer, VersR 57, 205-06; JR 57, 338; MDR 58, 77-78; JZ 59, 57; Bemmann, VersR 58, 583; Wangemann, NJW 55, 85, 87 and, with qualifications, MDR 56, 385. The Supreme Court acknowledged that there are "weighty reasons" for this opinion, but left the question open. BGH, VersR 58, 377.

[90] See MAURACH 238; WELZEL 44.

[91] RGSt 2, 442; RG, JW 25, 2250; BGHSt 4, 88, 93; 7, 117; Supreme Court of Bavaria, NJW 57, 1245; RGZ 66, 307; MAURACH 265, 437-38.

[92] RG, JW 34, 346; OGH 3 VRS 15; OLG Hamm, VersR 54, 129; 55, 172; OLG Oldenburg, DAR 56, 296.

tous outcome in each individual case, but rather has to be determined by some objective standard.[93]

Another objection to the theory here set forth is that it seems to fail in strict liability cases. As one critic has pointed out, one cannot consent to the "negligence" of an animal.[94] Obviously, the "negligence" of the animal is not the reason for the strict liability imposed upon its owner. The problem is that, as the law permits persons to engage in certain inherently dangerous activities such as operating a railroad or a motor vehicle or keeping an animal, the carrying on of these dangerous activities of recognized social utility is lawful as such and therefore not subject to assumption of risk by "consent" to a tort.[95] However, a conceptual distinction might well be drawn between the creation and establishment of a source of danger of recognized social utility that is legal, and individual manifestations of such danger which, when causing damage to third parties, create obligations in tort.[96] Although such torts are not caused by negligence, it nevertheless seems quite clear that a person might assume risks by consenting in advance not to the general operation of the source of danger, but to the specific acts and events which, while not negligent, nevertheless impose strict liability on the person responsible for the instrumentality or animal.

The result, then, is that *X* was capable of assuming the risk of the automobile trip by consenting, either expressly or by implication, to the dangers resulting therefrom. In the instant case, however, there has been no such assumption of risk. The mere fact that *X* accepted transportation as a gratuitous guest is insufficient to constitute implied consent to risks, for this would merely be a different version of the tacit agreement theory rejected above.[97] Similarly, the relation of friendship between *B* and *X* will be insufficient to support, as a matter of law, the latter's assumption of risks.[98] There is surprisingly full uanimity in judicial opinion and learned comment[99] to the effect that a tacit assump-

[93] Bemmann, VersR 58, 583; WEIZEL 80; Kammergericht (Supreme Court of West Berlin), JR 54, 429.

[94] Bemmann, VersR 58, 583.

[95] LARENZ, SCHULDRECHT, BONSONDERER TEIL 384-85 (1956); MAURACH 434-35.

[96] *Cf.* MAURACH 434 *et seq.* *But see* BGHZ 24, 21 (*en banc*).

[97] FLOEGEL-HARTUNG § 8(a), comm. 11.

[98] RG, JW 36, 3382; Goetz von Boehmer, DAR 57, 228-29; *contra,* OLG Schleswig, DAR 53, 32, reversed by BGH 7 VRS 6.

[99] RGZ 128, 129, 232; *id.* 145, 395; *id.* 141, 262; RG, DAR 38, 80; *id.* 41, 1067; BGHZ 2, 159, 161; *id.* 22, 110; BGH, VersR 53, 85; *id.* 53, 475; *id.* 54, 561; *id.* 55, 116; *id.* 55, 309; *id.* 55, 355; *id.* 57, 791; *id.* 58, 309; *id.* 58, 377; OGH, NJW 50, 143; DAR 51, 25; 3 VRS 15; OLG Tuebingen, DAR 52, 6; OLG Hamm, 3 VRS 325;

tion of risk can only be predicated upon the knowledge of the consenting person of particular facts increasing the danger of the voyage. Neither the fact that *X* was only eighteen years old and therefore had possessed a driver's license for only a short period,[100] nor his venturing out on a well-traveled super highway,[101] will be sufficient for this purpose. It might have been different, however, if the roads had been icy or otherwise unusually dangerous.

Finally, *X*'s exclamation cannot be regarded as an assumption of risk.[102] This would be an entirely artificial construction of a spontaneous exclamation obviously made without opportunity to weigh the dangers inherent in the situation.

4. Contributory negligence

X should have realized, however, on due reflection, that his exclamation calling the driver's attention to a passing vehicle was likely to distract the latter's attention from the road and cause an accident. Therefore, *X* was contributorily negligent, and his recovery will have to be diminished, in accordance with section 254 of the *Civil Code,* by the degree of his contribution to the accident, in this instance probably twenty-five per cent. That, however, is a question of fact.

V

SUMMARY

1. *A* is not liable to *X* and is liable to *Y* only on the basis of section seven of the Road Traffic Law.

2. *B* is fully liable to *Y* on the basis of section eighteen of the Road Traffic Law, as well as section 823, paragraph one, and paragraph two, in conjunction with section 230 of the *Penal Code* or section one of the Road Traffic Regulations.

3. *B* is liable to *X* on the basis of section 823, first paragraph, and second paragraph, in conjunction with section 230 of the *Penal Code* or section one of the Road Traffic Regulations, but the extent of his liability to *X* is subject to diminution by the degree of the latter's contributory negligence in accordance with section 254 of the *Civil Code.*

OLG Karlsruhe, MDR 56, 550; OLG Oldenburg, DAR 56, 296; OLG Duesseldorf, VersR 57, 343; OLG Hamburg, VersR 57, 344; OLG Munich, VersR 58, 239; OLG Stuttgart, VersR 58, 473; FLOEGEL-HARTUNG § 8(a), comm. 7; *id.* § 9, comm. 15; MUELLER 298; STAUDINGER-WERNER BGB § 254, comm. 27; Boehmer, VersR 57, 205; Goetz von Boehmer, DAR 57, 229; Groebe, JW 36, 1583; WUSSOW 528. BIERMANN, DAS REICHSHAFTUNGSGESETZ 109 (1956), would appear to be self-contradictory.

[100] FLOEGEL-HARTUNG § 8(a), comm. 8.

[101] *Cf.* BGH, VersR 56, 388.

[102] So held by OLG Munich, VersR 58, 459, for a similar reason.

LIABILITY IN THE UNITED STATES

I

LIABILITY OF *B*

According to the majority common-law doctrine, Driver *B*, having voluntarily and without compensation undertaken to transport Passenger *X* as a social guest, is required to exercise the care of a reasonably prudent man in the management and operation of the automobile. He is not, however, bound to exercise the highest practicable degree of care, as in the case of a common carrier. Nor is he held to the stringent liability of an insurer.[1] In order to recover damages for his injuries, Passenger *X* would have the burden of proving that Driver *B* was negligent and that his negligence was a proximate cause of his injuries.[2] In the hypothetical case, Driver *B* would probably be found negligent in permitting his attention to be distracted[3] and in swerving to the left side of the highway.[4] Moreover, the requisite causal connection between *B*'s negligence and *X*'s injury is clearly present.

Even assuming that Driver *B* were negligent, Passenger *X* would be barred from recovery if he were contributorily negligent in asking the question that momentarily distracted *B*.[5] Generally, a guest who

[1] 4 BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 2311 (1946). See generally, White, *The Liability of an Automobile Driver to a Nonpaying Passenger*, 20 VA. L. REV. 326 (1934).

[2] Brown-Miller Co. v. Howell, 224 Miss. 136, 79 So. 2d 818 (1955); Lane v. Bryan, 246 N.C. 108, 97 S.E.2d 411 (1957).

[3] The distraction of the driver's attention from the operation of his automobile strongly implies negligence. See Davison v. Davison, 92 N.H. 245, 29 A.2d 131 (1942); Hoey v. Solt, 236 S.W.2d 244 (Tex. Ct. App. 1951); Boward v. Leftwich, 197 Va. 227, 89 S.E.2d 32 (1955); Elkey v. Elkey, 234 Wis. 149, 290 N.W. 627 (1940). See also the cases cited in notes 12 & 31, *infra*, and cases collected in Annot., 120 A.L.R. 1513 (1939). See Barret, *Mechanics of Control and Lookout in Automobile Law*, 14 TUL. L. REV. 493 (1940).

[4] Most states have statutes that provide that a motorist must keep to the right and give an approaching motorist at least one-half of the highway. See Burtchell v. Willey, 147 Me. 339, 87 A.2d 658 (1952) (violation of statute prima facie evidence of negligence); Wallace v. Longest, 226 N.C. 161, 37 S.E.2d 112 (1946) (violation of statute negligence per se).

[5] See James, *Contributory Negligence*, 62 YALE L.J. 691, 705 (1953), who says: "In an atmosphere where the importance of fault itself is waning, contributory negligence will be bound to meet with rapidly mounting disfavor. . . . [C]ontributory negligence is well on its way to becoming a dead letter, except as juries illicitly apply it to diminish a plaintiff's recovery." See also, Mechem, *The Contributory Negligence of Automobile Passengers*, 78 U. PA. L. REV. 736 (1930); Note, 11 W. RES. L. REV. 109 (1959). The fact that a joint enterprise exists between a driver and his passenger will not prevent the passenger's recovering damages from the driver for injuries resulting from the

engages the driver in conversation or who asks him some question is not, as a matter of law, contributorily negligent if the driver abandons his observation of the road for the purpose of answering the question. However, where the conversation is of an engrossing nature and is likely to distract the driver, the guest by initiating or participating in such a conversation might be contributorily negligent.[6] There is virtual uniformity in holding that the burden of pleading and proving contributory negligence is upon the defendant,[7] although a few jurisdictions hold that the plaintiff must prove that he was not negligent.[8] Because Passenger *X*'s question was of a type that might foreseeably distract *B*, it is probable that a jury would find *X* contributorily negligent and would render a verdict in favor of *B*.[9]

Another common-law view renders the driver liable to his invited social guest only for injuries resulting from the former's gross negligence. This rule was first set forth in the leading case of *Massaletti v. Fitzroy*,[10] in which the court analogized the driver-guest relationship to a gratuitous bailment. The doctrine gained very limited acceptance, however; and among those states that have no guest statutes, it is in effect today only in Massachusetts and Georgia.[11] Whether Passenger

driver's negligence. If a joint enterprise is established between driver and passenger, however, the negligence of the driver is imputed to the passenger, thus preventing the passenger's recovering from a third person for injuries resulting from the concurring negligence of the driver and the third person. Under the supposed facts, Driver *B* and Passenger *X* were not engaged in a joint enterprise since both of the following requisites did not exist: (1) a mutual interest in the objectives of the ride, and (2) a mutual right of control over the operation of the vehicle. 5A AM. JUR. *Automobiles* §§ 826–28 (1956).

[6] 4 BLASHFIELD, *op. cit. supra* note 1, § 2431.

[7] King v. Brindley, 255 Ala. 425, 51 So. 2d 870 (1951); Welch v. Moothart, 89 So. 2d 485 (Fla. 1956).

[8] Jacobson v. Aldrich, 246 Iowa 1160, 68 N.W.2d 733 (1955); Irish v. Clark, 149 Me. 152, 99 A.2d 290 (1953).

[9] State v. Brandau, 176 Md. 584, 6 A.2d 233 (1939) (directed verdict for defendant affirmed since the question of guest was asked under such circumstances as would naturally tend suddenly to distract the attention of the driver at a time when imminent danger was present); Campbell v. Campbell, 316 Pa. 331, 175 Atl. 407 (1934) (jury found guest contributorily negligent in distracting motorist by discussing papers with him relating to the driver's admission to college). *Cf.* Sweeney v. New Orleans Pub. Serv., 184 So. 740 (La. Ct. App. 1938); Kirby v. Keating, 271 Mass. 390, 171 N.E. 671 (1930) (jury found that guest who asked driver the time was not contributorily negligent when driver ran off road while looking at his watch).

[10] 228 Mass. 487, 118 N.E. 168 (1917).

[11] Cobb v. Coleman, 94 Ga. App. 86, 93 S.E.2d 801 (1956); Marshall v. August, 155 N.E.2d 800 (Mass. 1959).

X could make out a prima facie case of gross negligence would depend upon such elements as the length of time that *B*'s attention was distracted, the speed of the automobile, and the existence of any imminent danger at the time of the distraction.[12] Since *B* was only momentarily distracted, he probably would not be grossly negligent as a matter of law. However, if it were established that *B* was guilty of gross negligence, *X* would be barred from recovery if he were contributorily negligent.[13]

The common-law liability of a driver to his guest has been superseded in twenty-seven states by guest statutes, which provide that the driver is liable to his guest only for an extreme departure from ordinary care.[14] These statutes, which are not uniform in their terminology, limit the liability of the driver to one or a combination of the following types of misconduct: gross negligence, heedless and reckless misconduct, wanton or willful misconduct, intentional infliction of harm, and intoxication.[15] The impetus for the enactment of these statutes was the feeling that it was unjust to permit one who is a recipient of the driver's hospitality, and who confers no tangible benefit upon the driver, to recover damages for his ordinary negligence.[16] It was also felt that such statutes were necessary to prevent insurance companies from being defrauded in collusive suits between guest and host.[17]

Guest statutes generally have been sustained against the challenge that they violate the due process clause.[18] However, those statutes attempting to relieve a driver from all liability to his guest, whatever

[12] Chastain v. Lawton, 87 Ga. App. 35, 73 S.E.2d 38 (1952) (motorist who looked to rear for 3 to 5 seconds while traveling at 30 to 35 miles per hour on heavily traveled thoroughfare held grossly negligent); Dinardi v. Herook, 328 Mass. 572, 105 N.E.2d 197 (1952); Roy v. Roy, 101 N.H. 88, 133 A.2d 492 (1957).

[13] Oast v. Mopper, 58 Ga. App. 506, 199 S.E. 249 (1938); Oppenheim v. Barkin, 262 Mass. 281, 159 N.E. 628 (1928).

[14] A few of these are: CAL. VEHICLE CODE 17158 (1959); COLO. REV. STAT. ANN. § 13-9-1 (1953); FLA. STAT. ANN. § 320.59 (1958); OHIO REV. CODE ANN. § 4515.02 (Baldwin 1953); TEX. REV. CIV. STAT. art. 6701b (1960).

[15] See generally, 2 HARPER & JAMES, TORTS 950-62 (1956); Weber, *Guest Statutes*, 11 U. CINC. L. REV. 24 (1937); Notes, 54 NW. U.L. REV. 263 (1959); 34 IND. L.J. 338 (1959); 8 W. RES. L. REV. 170 (1957).

[16] See Crawford v. Foster, 110 Cal. App. 81, 293 Pac. 841, 843 (1930). See also, Sullivan v. Davis, 263 Ala. 685, 83 So. 2d 434 (1955).

[17] Naphtali v. Lafazan, 7 Misc. 2d 1057, 165 N.Y.S.2d 395 (1957); Kitchens v. Duffield, 149 Ohio St. 500, 79 N.E.2d 906 (1948).

[18] See Silver v. Silver, 280 U.S. 117, 123 (1929); Pickett v. Matthews, 238 Ala. 542, 192 So. 261 (1939); Gallegher v. Davis, 37 Del. 380, 183 Atl. 620 (1936).

the degree of negligence,[19] or to hold the driver liable only for intentional[20] injuries have been held unconstitutional.

Because an occupant of a motor vehicle is a guest if he rides for his own pleasure or on his own business and confers no benefits upon his host other than the pleasure of his company,[21] Passenger *X*, in a guest-statute jurisdiction, would be governed in his claim against Driver *B* by the terms of the statute. Judicial attempts to define the ambit of liability under these statutes have been characterized by disagreement and confusion. Gross negligence is defined by some courts as but a greater degree of negligence than ordinary negligence.[22] Another view holds that the difference is one of kind, gross negligence being synonymous with wanton and willful misconduct.[23] Some courts have equated heedless or reckless misconduct with gross negligence,[24] while others have given it the same meaning as wanton or willful misconduct.[25] Willful misconduct, although it has been held to be synonymous with gross negligence,[26] usually requires a positive intention to inflict harm.[27] Wanton misconduct is variously said to be something less than willful injury,[28] to be synonymous with willful misconduct,[29] and to signify an even higher degree of culpability than willful action.[30]

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[19] Coleman v. Rhodes, 35 Del. 120, 159 Atl. 649 (1932); Stewart v. Houk, 127 Ore. 589, 271 Pac. 998 (1928).

[20] Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347 (1932). *Cf.* Shea v. Olson, 185 Wash. 143, 53 P.2d 615 (1936).

[21] Illustrative cases holding the occupant a guest are: Kroiss v. Butler, 129 Cal. App. 2d 550, 277 P.2d 873 (1954); Sabo v. Marn, 103 Ohio App. 113, 144 N.E.2d 248 (1956). Cases holding that the occupant was not a guest are: Martinez v. Southern Pac. Ry., 45 Cal. 2d 244, 288 P.2d 868 (1955); Milkovich v. Bune, 371 Pa. 15, 89 A.2d 320 (1952). See 2 HARPER & JAMES, TORTS 958-62 (1956); Note, 27 VA. L. REV. 559 (1941).

[22] Conway v. O'Brien, 312 U.S. 492 (1941); Olson v. Shellington, 167 Neb. 564, 94 N.W.2d 20 (1959).

[23] Hamilton v. Peoples, 38 Tenn. App. 385, 274 S.W.2d 630 (1954); Froh v. Hein, 76 N.D. 701, 39 N.W.2d 11 (1949). See Note, 4 U. FLA. L. REV. 79 (1951); Note, 33 ORE. L. REV. 216 (1954).

[24] Rogers v. Blake, 150 Tex. 373, 240 S.W.2d 1001 (1951).

[25] Harlow v. Van Dusen, 137 Cal. App. 2d 547, 290 P.2d 911 (1955); Fowler v. Franklin, 58 N.M. 254, 270 P.2d 389 (1954).

[26] Carraway v. Revell, 112 So. 2d 71 (Fla. 1959).

[27] De Loss v. Lewis, 78 Cal. App. 2d 223, 177 P.2d 589 (1947); Usselton v. Carvey, 169 Ohio St. 142, 158 N.E.2d 190 (1956). See Appleman, *Wilful and Wanton Conduct in Automobile Guest Cases*, 13 IND. L.J. 131 (1937); Green, *Illinois Negligence Law, Wilful and Wanton Negligence*, 39 ILL. L. REV. 197 (1945).

[28] Long v. Foley, 180 Kan. 83, 299 P.2d 63 (1956).

[29] Eikenberry v. Neher, 126 Ind. App. 571, 134 N.E.2d 710 (1956).

[30] Pettingell v. Moede, 129 Colo. 484, 271 P.2d 1038 (1954).

Whatever judicial interpretation is given the degree of negligence required under the guest statute, all courts agree that momentary inattention will not nullify the driver's statutory protection.[31] But, if Driver *B*'s attention were diverted for a substantial length of time, he might be liable for *X*'s injuries.[32]

If *B*'s conduct were regarded as gross negligence, a majority of the courts would hold that the passenger's contributory negligence would bar recovery.[33] If, however, *B* would be liable only for recklessness, or willful and wanton misconduct, contributory negligence would not bar recovery[34] unless it involved recklessness, or willful and wanton misconduct.[35]

These statutes have been severely criticized for failing to prevent collusion between driver and passenger, for placing an economic burden upon the community that provides gratuitous medical care for indigent guests, and for relieving the negligent driver of the moral obligation to care for his injured guest.[36] Such statutes, being in derogation of the common law, are strictly construed against the host and liberally in favor of the guest.[37] In an effort to avoid the harshness of the

[31] The distraction of the driver did not render him liable to his guest in the following cases: Davis v. Klaiber, 229 F.2d 883 (6th Cir. 1956) (leaning over to light cigar); Desch v. Reeves, 163 F. Supp. 213 (M.D.N.C. 1958) (looking to the side at a truck); Winn v. Ferguson, 132 Cal. App. 2d 539, 282 P.2d 515 (1955) (diverting attention to child climbing about in automobile); Bashor v. Bashor, 103 Colo. 232, 85 P.2d 732 (1938) (manipulating radio dial); Sayre v. Malcom, 139 Kan. 378, 31 P.2d 8 (1934) (driving with eyes off road for 75 feet). For cases in guest statute jurisdictions predicated upon the defendant's automobile being on the wrong side of the road see Annot., 136 A.L.R. 1256 (1942).

[32] Farrey v. Bettendorf, 96 So. 2d 889 (Fla. 1957); Gustason v. Vernon, 165 Neb. 745, 87 N.W.2d 395 (1958).

[33] Carter v. Carter, 63 So. 2d 192 (Fla. 1953); Koster v. Matson, 139 Kan. 124, 30 P.2d 107 (1934).

[34] Loomis v. Church, 76 Idaho 87, 277 P.2d 561 (1954); Bohnsack v. Driftmier, 243 Iowa 383, 52 N.W.2d 79 (1952). *Contra*, Schiller v. Rice, 151 Tex. 116, 246 S.W.2d 607 (1952).

[35] Laux v. Kummer, 342 Ill. App. 448, 96 N.E.2d 828 (1951); Pierce v. Clemens, 113 Ind. App. 65, 46 N.E.2d 836 (1943).

[36] Note, 27 GEO. L.J. 624, 628-29 (1939). White, *supra* note 1, at 333, 335, points out: "The charge of perjury and collusion between the driver and passenger is a matter peculiarly for the criminal courts. It furnishes no sound reason for altering the substantive rights and duties of the driver and passenger. . . . [I]t is doubtful that the responsibility for these legislative monstrosities can entirely be escaped by either the courts or bar." For a biting criticism, see Tipton, *Florida's Automobile Guest Statute*, 11 U. FLA. L. REV. 287, 299 (1958).

[37] Green v. Jones, 136 Colo. 512, 319 P.2d 1083 (1957); Clinger v. Duncan, 166 Ohio St. 216, 141 N.E.2d 156 (1957).

statutes, some courts have tended to narrow the group of passengers to whom the guest statutes apply or to find the degree of negligence necessary to render the driver liable to be scarcely greater than that of ordinary negligence.[38]

Since Driver *B* was undoubtedly negligent in allowing his attention to be distracted[39] and in swerving to the left side of the highway,[40] he would be liable to Driver *Y*, with whom he collided, since his negligence was a proximate cause of *Y*'s injuries. Obviously, *Y* was not contributorily negligent since a motorist traveling in a lawful manner on the right side of the road may assume that one approaching from the opposite direction will control his vehicle and will not suddenly turn and cross his path.[41]

II

Liability of *A*

According to the common law, an automobile owner[42] is not liable to third parties for injuries caused by the operator of the vehicle merely because of a parent-child[43] or bailor-bailee[44] relationship. However, a parent who permits his child to use an automobile might be liable for injuries caused by the child's negligent operation of the vehicle under one of the following theories: (1) entrustment of the vehicle to an incompetent or reckless driver; (2) the doctrine of *respondeat superior;* (3) the family-purpose doctrine; (4) statutory liability; or (5) the dangerous instrumentality doctrine.

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[38] See Note, 13 WASH. & LEE L. REV. 84, 91 (1956); Note, 54 NW. U.L. REV. 263 (1959); Note, 5 KAN. L. REV. 722 (1957).

[39] See note 3 *supra.*

[40] See note 4 *supra.*

[41] Globe Cereal Mills v. Scrivener, 240 F.2d 330 (10th Cir. 1956); Peeples v. Dobson, 99 So. 2d 161 (La. Ct. App. 1957); Lucas v. White, 248 N.C. 38, 102 S.E.2d 387 (1958).

[42] In the hypothetical fact situation, *A*'s ownership of the automobile is stated. However, the fact that the automobile was registered in *A*'s name would establish a presumption in some jurisdictions that he was the owner. See Annot., 103 A.L.R. 138 (1936).

[43] Bonner v. Surman, 215 Ark. 301, 220 S.W.2d 431 (1949); Hartough v. Brint, 101 Ohio App. 350, 140 N.E.2d 34 (1955). In Louisiana, however, "the father, or after his decease, the mother, are responsible for the damage occasioned by their minor or unemancipated children, residing with them. . . ." LA. CIV. CODE ANN. art. 2318 (Dart 1945). See Honeycutt v. Carver, 25 So. 2d 99 (La. Ct. App. 1946).

[44] Graham v. Shilling, 133 Colo. 5, 291 P.2d 396 (1955); Dean v. Ketter, 328 Ill. App. 206, 65 N.E.2d 572 (1946).

A. Entrustment

According to the entrustment doctrine, recovery by Passenger *X* or Driver *Y* from Owner *A* would be dependent upon establishing that *A* was personally negligent in entrusting his automobile to one whom he knew, or should have known, was an incompetent or reckless driver, and that the alleged incompetence or recklessness was a proximate cause of the injury.[45] In a guest-statute jurisdiction, *X* might also have to establish that *B* was guilty of the statutory degree of negligence.[46] If these elements were established, the fact that the accident occurred at a place where *B* had been forbidden to drive would not relieve *A* from liability because, under the entrustment doctrine, "the responsibility of the owner will follow the continued operation of the vehicle even though such operation is beyond the scope of permission."[47] This doctrine is predicated upon the owner's original act of entrusting the automobile to an incompetent, this being a negligent act in the causal sequence.

Since, under the supposed facts, *B* previously neither had been in an automobile accident nor had given *A* any reason to doubt his care and prudence, *A* was not personally negligent in entrusting his automobile to *B*. Therefore, *A* would not be liable under the entrustment doctrine to either Passenger *X* or Driver *Y*.

B. Respondeat Superior

The doctrine of *respondeat superior* might, however, render Owner *A* vicariously liable if he occupied a master-servant relationship with *B* at the time of the accident. This would also necessitate finding that *B* was acting within the scope of his employment.[48] While the mere rela-

[45] F.B. Walker & Sons v. Rose, 223 Miss. 494, 78 So. 2d 592 (1955); Saunders v. Prue, 235 Mo. App. 1245, 151 S.W.2d 478 (1941). See Annot., 168 A.L.R. 1364 (1947). See generally, Note, 4 DRAKE L. REV. 98 (1955).

[46] Ortman v. Smith, 198 F.2d 123 (8th Cir. 1952); Benton v. Sloss, 38 Cal. 2d 399, 240 P.2d 575 (1952), 21 U. CINC. L. REV. 93 (1952). *Contra*, Williams v. Husted, 54 N.E.2d 165 (Ohio Ct. App. 1943).

[47] Gulla v. Straus, 154 Ohio St. 193, 200, 93 N.E.2d 662, 666 (1950). See also, Krausnick v. Haegg Roofing Co., 236 Iowa 985, 20 N.W.2d 432 (1945).

[48] See generally, 2 HARPER & JAMES, TORTS 1374-92 (1956); MECHEM, AGENCY, 237-45, 256-65 (4th ed. 1952). In the following cases the court found an agency relationship between parent and child: Catanzaro v. McKay, 277 S.W.2d 566 (Mo. 1955) (son running errand for father); Irvine v. Killen, 109 Pa. Super. 34, 165 Atl. 528 (1933) (mother receiving wages of son who drove her automobile to work); Cotterly v. Muirhead, 244 S.W.2d 920 (Tex. Civ. App. 1951) (son driving himself and his sister to school); Kichefsky v. Wiatrzykowski, 191 Wis. 319, 210, N.W. 679 (1926) (father sending son to buy a new hat). Compare cases in note 51 *infra*, in which no agency relationship existed between parent and child.

tionship of parent and child does not establish an agency relationship,[49] in some jurisdictions the fact that *A* owned the automobile would raise a rebuttable presumption that *B* was driving the automobile as *A*'s agent and that *B* was acting within the scope of his agency.[50] Should such a presumption of agency arise, it could easily be overcome because *B* was engaged in a trip solely for his own purpose and pleasure and obviously was not an agent acting within the scope of his employment.[51]

C. The Family Purpose Doctrine

The difficulty in holding the parent liable under the orthodox concept of agency for the injuries inflicted by the negligent operation of his automobile by a financially irresponsible minor often left an uncompensated victim. The parent thus escaped liability even though he could have controlled the use of the automobile, was more able to pay the damages than was the minor, and could have insured the risk. Judicial dissatisfaction with parental immunity prompted approximately one-half of the states to adopt the family purpose or family car doctrine. This doctrine, an extension of the rules of the master-servant relationship, is based on the theory that the head of the family, by furnishing an automobile for the pleasure and convenience of his family, makes the pleasure of the family his business. Therefore, when a member of the family drives the automobile for his own pleasure, he is engaged in the business of the head of the household and is acting as a servant, thus making the head of the household liable for the torts resulting from the operation of the vehicle.[52]

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[49] Hartough v. Brint, 101 Ohio App. 350, 140 N.E.2d 34 (1955); Fielding v. Dickinson, 204 Okla. 372, 230 P.2d 466 (1951).

[50] MECHEM, AGENCY, 328-330 (4th ed. 1952). Wigmore advocates such a presumption because of "the relative facility of proof as between the parties, the ordinary habits of owners of vehicles, and the wisdom of placing the risk of not obtaining evidence upon the person who owns a valuable and dangerous apparatus and therefore should take special precaution against its misuse by irresponsible persons." 9 WIGMORE, EVIDENCE 400 (3d ed. 1940). See Comment, 2 BAYLOR L. REV. 432 (1950); Note, 4 VAND. L. REV. 151 (1950).

[51] "A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." RESTATEMENT (SECOND), AGENCY § 220(1). In the following cases no agency relationship was found between parent and child: Bonner v. Surman, 215 Ark. 301, 220 S.W.2d 431 (1949) (son using mother's automobile to deliver papers); Schuth v. Kuntz, 346 Ill. App. 334, 105 N.E.2d 523 (1952) (son taking sister and grandmother to church); Haskey v. Williams, 360 Pa. 78, 60 A.2d 32 (1948) (daughter on way to college to obtain her clothes); Ebner v. Gandy, 138 Tex. 295, 158 S.W.2d 989 (1942) (son driving with mother to football game).

[52] 2 HARPER & JAMES, TORTS 1419-20 (1956). Some of the pioneer cases setting

To recover under the family purpose doctrine, the aggrieved party must establish (1) that the head of the household had a property interest in the automobile; (2) that the automobile was provided for family use; (3) that a familial relationship existed between the operator and the head of household; (4) that the operator had permission to use the automobile; and (5) that at the time of the accident the automobile was being operated for one of the permissive uses for which it was intended.[53] In the hypothetical case, Passenger *X* or Driver *Y* could easily satisfy these requirements by establishing that *A*'s automobile was frequently used by his wife and son, *B*, and that *A* had given *B* permission to use the vehicle on the night of the accident.

Whether the fact that Driver *B* was driving on the super highway, where *A* had forbidden him to drive, would relieve *A* from liability under the family-purpose doctrine would probably be decided on the same principles as a servant's deviation from the scope of his employment. Courts generally have held that the head of the family is not relieved from liability if a member of his family does not obey in detail his instructions as to the time, place, and manner of driving.[54] In a few jurisdictions, however, liability is not imposed where there is a substantial departure from the consent or instructions given as to the use of the vehicle.[55] It would seem that, in the hypothetical case, *B*'s deviation, although a substantial departure from *A*'s instructions, should not prevent *A*'s being held liable. Otherwise, "the purposes of this doctrine would be destroyed entirely if a father could relieve himself of responsibility by specific instructions known only to himself and his son."[56]

The family purpose doctrine has been aptly described as "an illegitimate child of the law . . . accepted only out of social necessity and

forth this doctrine are: Benton v. Regeser, 20 Ariz. 273, 179 Pac. 966 (1919); Hutchins v. Haffner, 63 Colo. 365, 167 Pac. 966 (1917); Griffin v. Russel, 144 Ga. 275, 87 S.E. 10 (1916); King v. Smythe, 140 Tenn. 217, 204 S.W. 296 (1918). See cases collected in Annot., 132 A.L.R. 981 (1941). See generally, Lattin, *Vicarious Liability and the Family Automobile*, 26 MICH. L. REV. 846 (1928); McCall, *The Family Automobile*, 8 N.C.L. REV. 256 (1930).

[53] Lattin, *supra* note 52, at 861.

[54] Evans v. Caldwell, 184 Ga. 203, 190 S.E. 582 (1937); First-City Bank & Trust Co. v. Doggett, 316 S.W.2d 225 (Ky. 1958), 48 KY. L.J. 169 (1959) in which the author contends that in Kentucky, consent as a prerequisite to liability under the family purpose doctrine has virtually been eliminated; Jones v. Cook, 96 W. Va. 60, 123 S.E. 407 (1924). See also, Comment, 22 TENN. L. REV. 535, 541-42 (1952).

[55] Costanzo v. Sturgill, 145 Conn. 92, 139 A.2d 51 (1958); Vaughn v. Booker, 217 N.C. 479, 8 S.E.2d 603 (1940).

[56] Turner v. Hall's Adm'x, 252 S.W.2d 30, 32, (Ky. 1952).

then rationalized by means of legal fictions."[57] It has been rejected by many courts that feel the principles of the master-servant relationship cannot be extended to hold that a member of the family using the car for pleasure, the purpose intended by the head of the household, becomes the agent of the head of the household.[58] Although one must admit that the principles of agency have been distorted, "the practical administration of justice between the parties is more the duty of the court than the preservation of some esoteric theory concerning the law of principal and agent."[59] To impose liability on the parent, who in many instances is covered by an omnibus clause in his liability insurance policy, justifiably achieves a desirable social result.[60]

D. Statutory Liability

At least seven jurisdictions[61] have statutes that extend the doctrine of *respondeat superior* by making the vehicle owner liable for injuries caused by the negligent operation of his vehicle on the highway by one to whom he has given either express or implied permission to drive.[62] In effect, these statutes make one who uses an automobile with the owner's consent the agent of the owner and dispense with the common-law requirement of actual agency as a condition of the owner's liability. The purpose of these consent statutes is to protect innocent third parties and to prevent an owner's escaping liability on the ground

[57] Note, 38 KY. L.J. 156 (1949).

[58] Trice v. Bridgewater, 125 Tex. 75, 81 S.W.2d 63 (1935); Hackley v. Robey, 170 Va. 55, 195 S.E. 689 (1938); Van Blaricom v. Dodgson, 220 N.Y. 111, 115 N.E. 443 (1917).

[59] King v. Smythe, 140 Tenn. 217, 222, 204 S.W. 296, 298 (1918). Prosser says, "It probably is to be regarded as the adoption of a fiction, and as merely a partial and inadequate step in the direction of an ultimate rule which will hold the owner of the car liable in all cases for the negligence of the driver to whom he entrusts it." PROSSER, TORTS 371 (2d ed. 1955).

[60] Although several jurisdictions which once accepted the family purpose doctrine now reject it, there appears to be no definite trend toward either general acceptance or rejection of this doctrine. See Sare v. Stetz, 67 Wyo. 55, 214 P.2d 486 (1950), in which the doctrine was rejected. See also Burns v. Main, 87 F. Supp. 705 (D. Alaska 1950), in which the doctrine was accepted.

[61] CAL. VEHICLE CODE § 17150 (1959); D.C. CODE ANN. § 40-403 (1951); IOWA CODE ANN. § 321.493 (Supp. 1959); MICH. COMP. LAWS § 257.401 (Supp. 1956); MINN. STAT. ANN. § 170.54 (1946); N.Y. VEHICLE & TRAFFIC LAWS § 59; R.I. GEN. LAWS ANN. § 31-31-3 (1956).

[62] See generally, Brodsky, *Motor Vehicle Owners' Statutory Vicarious Liability in Rhode Island*, 19 B.U.L. REV. 448 (1939); Note, 21 MINN. L. REV. 823 (1937). For a survey of European legislation, see Deak, *Liability and Compensation for Automobile Accidents*, 21 MINN. L. REV. 123 (1937). Cases are collected in Annot., 135 A.L.R. 481 (1941).

that his automobile was being used without his consent or not on the owner's business.[63]

These statutes have been upheld as a valid exercise of the state police power.[64] However, a statute that imposed liability upon the owner even though his automobile was taken without his consent or knowledge has been held to violate due process.[65] Since these statutes are in derogation of the common law, they are usually strictly construed.[66] However, a few courts have held that they should be liberally construed in order to carry out their purpose.[67]

Under these consent statutes, it is almost invariably held that the owner is not liable if the operation of the automobile at the time of the accident was not, as to place, within the terms of the consent.[68] Thus, Owner *A* would not be liable under the consent statutes to Passenger *X* or Driver *Y* because *A* had specifically instructed Driver *B* not to drive on the super highway.

In several jurisdictions, the scope of liability under the consent statutes is limited by guest statutes under which the owner is liable to the driver's guest only if the driver is guilty of the type of misconduct set forth in the guest statute.[69] Thus, if the court applied the consent

[63] Burgess v. Cahill, 26 Cal. 2d 320, 158 P.2d 393 (1945); Parker v. Telesco, 111 N.Y.S.2d 481 (1952).

[64] Young v. Masci, 289 U.S. 253 (1933); Mauica v. Smith, 138 Cal. App. 695, 33 P.2d 418 (1934). In Stapleton v. Independent Brewing Co., 198 Mich. 170, 175, 164 N.W. 520, 521 (1917), the court said: "The owner of an automobile is supposed to know, and should know, about the qualifications of the persons he allows to use his car, to drive his automobile, and if he has doubts of the competency or carefulness of the driver he should refuse to give his consent to the use by him of the machine. The statute is within the police power of the states."

[65] Daugherty v. Thomas, 174 Mich. 371, 140 N.W. 615 (1913).

[66] Miller v. Berman, 55 Cal. App. 2d 569, 131 P.2d 18 (1942); Geib v. Slater, 320 Mich. 316, 31 N.W.2d 65 (1948).

[67] Bayless v. Mull, 50 Cal. App. 2d 66, 122 P.2d 608 (1942); Frye v. Anderson, 248 Minn. 478, 80 N.W.2d 593 (1957).

[68] Henrietta v. Evans, 10 Cal. 2d 526, 75 P.2d 1051 (1938); Rowland v. Spalti, 196 Iowa 208, 194 N.W. 90 (1923); Kieszkowski v. Odlewany, 280 Mich. 388, 273 N.W. 741 (1937), 24 MINN. L. REV. 271 (1940). See cases collected in Annot., 159 A.L.R. 1309, 1323 (1945). See Note, 26 MARQ. L. REV. 39 (1941). For the position of the California courts when the bailee violates the owner's instructions see Note, 7 STAN. L. REV. 507, 517-28 (1955).

[69] CAL. VEHICLE CODE §§ 17150, 17158 (1959). In California, however, willful misconduct is imputed to the owner only if there is an actual agency relationship between owner and driver. See Benton v. Sloss, 38 Cal. 2d 399, 240 P.2d 575 (1952); IOWA CODE ANN. §§ 321.493, 321.494 (1949); White v. Center, 218 Iowa 1027, 254 N.W. 90 (1934). MICH. COMP. LAWS § 257.401 (Supp. 1956), interpreted in Peyton v. Delany, 348 Mich. 238, 83 N.W.2d 204 (1957).

statute despite the deviation from *A*'s instructions as to place of operation, *A* would be liable to Passenger *X* only if *B* were guilty of the degree of negligence required under the guest statute.

The fact that *B* was eighteen years of age would be of great significance in some jurisdictions in determining *A*'s liability. There are statutes to the effect that a minor under eighteen years of age who applies for an operator's license must have his parent sign his application.[70] The parent thereby becomes liable for the licensee's negligence or willful misconduct in the operation of the vehicle until the minor attains the prescribed age.[71] There are also statutes to the effect that the owner of an automobile who permits a minor under a prescribed age to operate the vehicle shall be jointly and severally liable with the minor for the latter's negligence.[72] Neither type of statute could be invoked against *A* since *B* was eighteen and thus beyond the prescribed age.

E. The Dangerous Instrumentality Doctrine

Florida has applied the so-called dangerous instrumentality doctrine to automobiles. This doctrine provides that when an owner authorizes and permits another to use his automobile, he is liable for injuries to third persons caused by its negligent operation.[73] Under this doctrine, the fact that *B* deviated from *A*'s instructions would not absolve *A* of liability since in Florida "knowledge and consent of the owner of the

[70] See, *e.g.*, ARK. STAT. ANN. § 75-315 (1957); DEL. CODE ANN. tit. 21, § 6105 (1953); OHIO REV. CODE ANN. § 4507.07 (Page 1954); WIS. STAT. § 343.15 (1957). See cases collected in Annot., 26 A.L.R.2d 1320 (1952). It has been held that the adult who signs the application for the license is liable to the minor's guest only if the minor is guilty of the degree of negligence set forth in the guest statute. See McHugh v. Brown, 50 Del. 154, 125 A.2d 583 (1956); Tighe v. Diamond, 149 Ohio St. 520, 80 N.E.2d 122 (1948).

[71] Carter v. Graves, 230 Miss. 463, 93 So. 2d 177 (1957); Garret v. Lyden, 161 Ohio St. 385, 119 N.E.2d 289 (1954).

[72] See, *e.g.*, ARIZ. REV. STAT. ANN. § 28-417 (1956); DEL. CODE ANN. tit. 21, § 6106 (Supp. 1958); KAN. GEN. STAT. ANN. § 8-222 (1949). It has been held that the guest statute is not applicable to this situation and that the owner is liable for the ordinary negligence of the minor. See Bisoni v. Carlson, 171 Kan. 631, 237 P.2d 404 (1951), 1 U. KAN. L. REV. 368 (1953).

[73] Leonard v. Susco Car Rental System of Fla., 103 So. 2d 243 (Fla. 1958); Lynch v. Walker, 159 Fla. 188, 31 So. 2d 268 (1947); Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920). This doctrine has now been recognized by legislative enactment, FLA. STAT. ANN. § 51.12 (Supp. 1959). See Note, 5 U. FLA. L. REV. 412 (1952).

use of an automobile on the highway by another imposes liability for the negligent operation of it, no matter where the driver goes."[74]

A would not be liable to Passenger *X*, however, unless *B* were guilty of gross negligence or willful and wanton misconduct as set forth in the Florida guest statute.[75] The principal factor in determining whether *B* was grossly negligent would be the length of time that he was distracted as "a momentary diversion . . . would not constitute gross negligence but if such diversion from the way ahead is for a substantial length of time, such conduct would demonstrate an obvious lack of slight care which would bring it within the area of negligence defined as gross."[76] Since *B* was only momentarily distracted, Owner *A* would not be liable to *X* under the dangerous instrumentality doctrine. He would, however, be liable to *Y*.

[74] Cropper v. U.S., 81 F. Supp. 81, 82 (N.D.Fla. 1948). See also, Boggs v. Butler, 129 Fla. 324, 176 So. 174 (1937).

[75] Koger v. Hollahan, 144 Fla. 779, 198 So. 685 (1940).

[76] Farrey v. Bettendorf, 96 So. 2d 889, 895 (Fla. 1957).