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RIGHTS AND LIABILITIES OF GRATUITOUS AUTOMOBILE PASSENGERS

WILLIAM W. HAMILTON

WITH the advent of the automobile came also an enlargement of a doctrine which had previously received little attention in the deliberations of our courts of last resort. Often the law has been criticized for a failure to keep pace with the many changes in the world's economic and social structure. Certainly such criticism is not appropriate when applied to the rights and liabilities of gratuitous automobile passengers. One need only refer to opinions being rendered each day by the highest tribunals of both state and nation to be convinced of this.

The foundation of the doctrine was laid before the advent of the automobile but only to a minor degree. The reason is obvious—the danger was not so great in vehicles prior to automobiles and even for some time after the advent of automobiles the doctrine was not enlarged to a very great extent. An early opinion by the Court of Appeals of Georgia clearly corroborates this fact, where it remarks:

It is insisted in the argument that automobiles are to be classed with ferocious animals, and that the law relating to the duty of the owners of such animals is to be applied. It is not the ferocity of the automobile that is to be feared, but the

1 Member of the Illinois Bar; associated with the Chicago Board of Underwriters.
ferocity of those who drive them. Until human agency interferes, they are usually harmless. While by reason of the rate of pay allotted to the judges of this state, few, if any, have ever owned one of these machines, yet some of them have occasionally ridden in them, thereby acquiring some knowledge of them; and we have, therefore, found out that there are times when these machines not only lack ferocity, but assume such an indisposition to go that it taxes the limit of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evil-disposed mules, and the like.\(^2\)

Therefore, in an automobile we have an instrumentality which, when operated by a reckless or incompetent person, becomes inherently dangerous. The power, control, and speed of automobiles are new factors which tempt a reckless driver to undertake hazardous risks. On the other hand, they afford elements of safety and convenience to a careful one. The law contributes to the rational enjoyment of the automobile, to the safety of its occupants, and to the welfare of the traveling public, when it holds the driver to a positive duty and the occupants to a standard of ordinary care. In commenting upon the changing conditions, the Federal Court said:

An automobile driver has the opportunity, if the situation is one of uncertainty to settle that uncertainty on the side of safety, with less inconvenience, no danger, and more surely than the driver of a horse. Such being the case, the law, both from the standpoint of his own safety and the menace his machine is to the safety of others, should, in meeting these new conditions, rigidly hold the automobile driver to such reasonable care and caution as go to his own safety and that of the traveling public. If the law demands such care, and those crossing railroads, etc., take such care and not chance their protection, the possibilities of automobile accidents will be minimized.\(^3\)

Notwithstanding the automobile has, in some jurisdictions, won judicial encomium and is shielded as being a

\(^2\) Lewis v. Amorous, 3 Ga. App. 50.

harmless instrumentality, the fact remains that its toll of life and limb far exceeds that of any other human agency. An automobile moving at an ordinary rate of speed requires the constant attention of the driver, and oftentimes that of the occupants, if it is not to become a menace to the safety of its occupants, as well as pedestrians. The locomotive engineer and passengers may contemplate the landscape with comparative assurance that the train will not run into a ditch, but the driver of an automobile may take but momentary glances at his surroundings if he would keep his car upon the highway and preserve the security of its occupants. The dangers incident to the inattention of the driver of an automobile are very great. Inattention to driving for a fraction of a second may plunge the car into a ditch and bring death or serious injuries to its occupants. Where such grave hazards exist, the standard of care measuring the liability of the driver and the occupants should not be treated too lightly.

If we consider the appalling number of automobile fatalities and accidents since the prevalence of automobiles on our thoroughfares and highways with their attending tragedies, the subject is of human interest; and if we consider the element of driving from the back seat—the bane of all persons at the steering wheel—as a factor, the subject certainly becomes of interest when modelling our dispositions; but if we analyze the many legal consequences giving rise to different doctrines enunciated by the courts, the subject approaches profound importance, both to the lawyer and the layman.

The tragedies arising from the facts of each case and the legal significance of the doctrines enunciated therein are so interwoven that we may treat them together. We shall dismiss the factor of driving from the back seat with the candid admission that although it is irritating, disturbing, and annoying, it is—in a majority of cases—conducive to the better welfare and safety of all the parties concerned. Interference by the passenger or guest where the vehicle is about to be placed in a position
of danger may, at times, prove to be gross imprudence and so disconcert the driver as to cause the disastrous result which such interference was designed to avoid.

Many are the problems which arise from the facts in decided cases. In some instances the court will apparently fail to take into consideration any of these many problems which the ordinary layman deems of paramount importance, but upon a close observation they will be found to possess no real legal significance.

Whether a passenger exercises the care required of him depends on the facts of the particular case and particularly his position in the automobile, his opportunity of seeing the impending accident, and the obviousness of the danger. Besides these elements, does the fact that the occupant is riding with one whom he knows to have undergone several minor accidents, but who in his experience has always been a careful driver and observant of the rights of others, preclude him from a recovery? Or, suppose a guest is riding with one who has been in several actionable accidents, but on every ride has shown himself to be a careful driver, is the guest guilty of contributory negligence with knowledge of these facts when injury results? Should the guest's own ability or knowledge as a driver, the question of whether he rides often as a guest, or his aptitude at judging distances and speed while in a moving vehicle, enter as a factor? Should the occupant's mental or physical condition be considered in determining his actions as those of a reasonably prudent person under the circumstances?

Some courts have confronted and answered these questions logically, simply, and directly. Others have answered them in an indirect, bewildering, and confusing manner.

Fearing that some of the state tribunals have not remedied many evils existing in actions by guests against their host, legislatures in some jurisdictions have passed statutes on this subject. The states which have such statutes are California, Connecticut, Delaware, Illinois, Indiana, Iowa, Kentucky, Michigan, Oregon, South Caro-
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While the enactment of these "guest laws," as they are commonly known, will not bar the institution of inherently honest suits, they will act to deter the filing of meritless claims. Moreover, cases involving members and relatives of families, where the driver is insured, present a golden opportunity for collusion so difficult to prove. Courts generally recognize such obvious defects, as was so well stated in the case of Truso v. Ehnert:4

Counsel for defendant may be right in his attitude that the numerous cases now arising wherein a guest in an automobile, frequently closely related to the driver sues him for damages because of his alleged negligence but more because of his insurance, call for some new law. It may be that as a practical matter the most important fact in the case is that the defendant is insured. But the need for new law is a matter for the legislatures. The courts can only apply existing law adapting it to new situations as they arise. So we cannot absolve the driver of an automobile from the old duty of due care for the protection of those who entrust their safety to his management of his automobile. The mere circumstance of family ties or the relation of guest and host do not put a case beyond the operation of that duty.

Enunciations of this character have undoubtedly prompted the aforementioned states to enact legislation in partial attempt to remedy this defect.

California now has a statute,5 effective August 14, 1929, which provides that any person who as a guest accepts a ride in a vehicle on the public highways of the state of California, or the estate, legal representatives, or parents of such guest shall have no cause of action against the driver or owner of the vehicle except when injury or death proximately results from the intoxication, wilful misconduct, or gross negligence of the owner. Prior to the enactment of this statute, California followed the majority rule of ordinary care.6

4 177 Minn. 249.
5 Statutes of 1929, p. 1580.
6 Perry v. McLaughlin, (Cal.) 297 Pac. 554.
A statute was enacted in Connecticut which provides in effect that a guest shall have no cause of action for damages against the owner or operator for injury, death, or loss in case of accident "unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness, or his reckless disregard of the rights of others." The statute has been construed as constitutional by the Supreme Court of Connecticut, as well as by the Supreme Court of the United States.

Delaware passed a similar statute on April 1, 1929; Indiana, a statute made effective May 21, 1929; and in 1927, Iowa enacted a statute effective March 31, 1930. Michigan also has a statute passed in 1929, which reads as follows: "That no person transported by the owner of a motor vehicle as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or loss in case of accident unless such accident shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or operator of such motor vehicle, and unless such gross negligence or wilful misconduct contributed to the injury, death, or loss for which the action is brought."

In 1927 a statute was passed in Oregon denying a guest any recovery against the driver or owner for injuries received while riding in an automobile on the public highways of the state of Oregon. This statute was declared unconstitutional by the Supreme Court of Oregon. That court, on a motion for rehearing, differentiated the statute of Oregon from that of Connecticut as passed on in the case of Silver v. Silver, on the

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7 Public Acts of 1927, Ch. 308.
9 Silver v. Silver, 280 U. S. 117.
10 36 Del. Laws, Ch. 270, p. 795.
11 Code of Iowa, 1927, sec. 5026-b-1.
13 Stewart v. Houk, 127 Or. 589.
14 108 Conn. 371.
ground that the Connecticut act endeavored to readjust the duty, whereas the Oregon act abolished the remedy.

Pursuant to this, the Oregon legislature passed an act which is similar to that of Connecticut and reads:

No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against certain owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the intentional act of said owner or operator, or caused by his gross negligence or intoxication, or his recklessness as regards the rights of others.15

A statute was enacted and made effective on March 7, 1930, in South Carolina, which provides a similar restriction on such causes of action. The statute in Vermont16 makes like provision.

After defeating a measure similar to the foregoing measures on March 31, 1931, the Illinois legislature, on July 2, 1931, approved the following act:

No person riding in a motor vehicle as a guest, without payment for such ride, nor his personal representative in the event of the death of such guest, shall have a cause of action for damages against the driver or operator of such motor vehicle or its owner or his employee or agent for injury, death or loss, in case of accident, unless such accident shall have been caused by the wilful and wanton misconduct of the driver or operator of such motor vehicle or its owner or his employee or agent and unless such wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought.17

Although it has no statute on the subject, Massachusetts is the leading jurisdiction on the minority rule that the owner of an automobile is liable to his guest for gross negligence only.18 However, this rules does not apply

16 Act of 1929, No. 78.
17 Cahill's Ill. Rev. St. 1931, Ch. 95a, par. 43.
in case of death, as the "death statute" allows the deceased's representative to recover where only "ordinary negligence" is shown. Georgia follows the minority ruling in requiring negligence of the owner or operator to be shown as gross negligence. Washington also follows the minority view. In Nebraska, under a statute, the doctrine of comparative negligence is applied, and the negligence of the guest should, therefore, be a matter to be considered only by way of mitigation of damages.

English courts seem to hold in accordance with the majority of jurisdictions in this country. Baron Parke in *Lygo v. Newbold*, held that one who undertakes to provide for the conveyance of another, even though he does so gratuitously is bound to exercise due and reasonable care. The same result was reached in the case of *Harris v. Perry & Co.* The Canadian courts have adopted the same view.

While statutes are the only solution for the problem, there is a question of whether the statutes that have been passed provide an adequate remedy. The jury must still decide what constitutes recklessness or conduct indicating a wanton disregard of the rights of the guest, measuring such conduct by the test of what approximates ordinary care. Although the term "ordinary care" is very wide in its application and at times may become confusing to the juries, yet in jurisdictions where the degrees of negligence are recognized, is it not logical to assume that the jury will finally apply the standard of ordinary care, and perhaps term the lack of it "gross negligence" under the circumstances, thus producing the same result but possibly in a different manner?

These guest cases have again led the courts to consider whether there are various degrees of negligence. It has

20 Eastman v. Silva, (Wash.) 287 Pac. 656.
21 Compiled Statutes 1922, sec. 8832.
22 9 Exch. 302.
always been the writer’s steadfast opinion that there are no degrees of negligence and that the standard of care always remains the same, but that a greater effort in various circumstances must be exerted to attain that standard of care. Lord Cranworth in Wilson v. Brett,\textsuperscript{25} declares: “There is no difference between negligence and gross negligence; it is the same thing with the addition of a vituperative epithet.” The United States Supreme Court in Steamboat New World v. King,\textsuperscript{26} has characterized as impracticable any degrees of negligence; and Judge Townes in his work on Torts says, “It seems preferable to me to say that the standard of care does not change.”

Perhaps it would be wise to establish definitely as a basis for our subsequent discussion the well-settled rules as regards some of the doctrines which are an inherent factor in the study of this subject.

Contributory negligence is such negligence on the plaintiff’s part as helped to produce the injury complained of, or, in other words, it is his failure to exercise that ordinary care and diligence which would be expected of a reasonably prudent person under like circumstances to avoid injury to himself. Contributory negligence, being a defense to be pleaded and proved, is generally a question of fact, but when the established facts and circumstances permit only one possible conclusion to be drawn by a reasonably prudent man, it becomes a matter of law for the court’s determination.

Anticipation of negligence in another is not a duty which the law imposes. Neither can one be held guilty of contributory negligence solely because he did not anticipate a neglect of duty which others owed him. A person in great peril, where immediate action is necessary to avoid it, is not required to exercise all the presence of mind and carefulness which are justly required of a careful and prudent person under ordinary circumstances. His failure to employ the best course or action

\textsuperscript{25} 11 Mees. & W. 113.
\textsuperscript{26} 16 How. 469.
to avoid the impending peril is not contributory neglig-
genence as a matter of law, although as a matter of sub-
sequent mathematical calculation it can be shown that
the other alternative would have taken him out of dan-
ger. Thus, while one placed suddenly in peril will not
be required to exercise the same amount of care as is
required of a person who has ample opportunity for full
exercise of his judgment and reasoning faculties, the
same degree of care, that is, "reasonable care," is
required.

Error of judgment is not necessarily negligence. The
correct test is: Did the party act as a reasonably prudent
person would have acted under similar circumstances?
The care required has been declared to be as follows:
That degree of care which people of ordinary prudent habits—
people in general—could be reasonably expected to exercise
under the circumstances of a given case . . . that degree of
care and prudence and good sense which men who possess those
qualities in an average or ordinary degree exercise under similar
circumstances.27

No certain and unbending rule as to what constitutes
negligence can be established for all possible contin-
gencies and what may be prudent under some circum-
stances and at some times may be negligent under other
circumstances and at other times. The standard, which
is an elastic one, is that of a prudent man—what such
a man would do and would foresee under such circum-
stances as those under consideration.

It may be stated, then, that the ingredients of con-
tributory negligence do not differ in any respect from
those of primary negligence. They are, after all, like
those of primary negligence—relative and not absolute—
and, being relative, are dependent on the peculiar circum-
stances of each particular case. The Oregon Supreme
Court very lucidly says:
Negligence may be grounded in action or refusal to act, in
speaking or failing to speak, all with reference to duty in the

27 Hoff v. Los Angeles-Pacific Co., 158 Cal. 596.
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premises. We can easily conceive of cases where a clamor of
direction by the guests would confuse a driver or chauffeur and
increase the danger in a manner amounting to contributory
negligence of the passenger. In others, the duty to utter warn-
ing might be imperative. In some instances it would be rank
folly to wrest the reins or the wheel from the one in charge of
the vehicle. In others, it might be highly necessary to do that
very thing. The court cannot lay down a mathematical precept
as a rule of law enjoining in detail what should be said or done
or omitted in every juncture of danger. It is plain, however,
that an invited guest is not to be supine and inert as mere
freight. Accepting the hospitality of his friend does not excuse
him from the duty of acting for his own safety as a reasonably
prudent person would under like circumstances and conditions.
Whether he does so or not must be decided by the twelve who
declare the facts embodied in the verdict.28

The case of Thorogood v. Bryan,29 decided in 1849, is a
well known English case which gave rise to the doctrine
of imputed negligence. There a passenger in a public
vehicle was held chargeable with any negligence of its
managers which contributed to his injury, notwithstanding
the fact that he had no control over the driver. This
rule was the law in England for many years, but it has
now been overruled30 and is not recognized in this
country.

It is noticeable, however, that in jurisdictions which
have decided guest cases apparently on this doctrine,
where the finding of facts are against the plaintiff, the
holding is in reality not based upon any theory of the
imputation of negligence. The omission or negligent act
is that of the plaintiff under the circumstances and is
not imputed from the acts or omissions of another. The
view established by the overwhelming weight of authority
in this country is that the negligence of the driver of a
motor vehicle is not imputed to a passenger who has no

28 White v. Portland Gas & Coke Co., 84 Or. 643.
29 8 C. B. 115.
control over his operation of the machine. Michigan is the only state in which the negligence of the driver of a vehicle is imputed to the passenger riding therein.

It is, of course, elementary law that the driver of an automobile is not an insurer and that in order for the plaintiff to recover for injuries sustained, he must show negligence by the driver in and about the handling of the automobile which was a proximate cause of the injuries. If the injury is occasioned through the concurrent negligence of the driver and a third person, they may be liable as joint tort-feasors. It was stated in the case of Ballinger v. Thomas:

One who is riding in an automobile, the driver of which is not his agent or servant, and not under his control and who is


33 195 N. C. 517.
injured by the joint or combined negligence of a third person and the driver, may recover of either or both, upon proper allegations, for the injuries thus inflicted through such concurring negligence, is fully established by our own decisions and the great weight of authority elsewhere.

What then is the duty which the driver owes to the passenger? It must be borne in mind that there is a clear distinction between the driver's liability to another motorist and his liability to the guest. What might constitute negligence on the part of the driver as between him and another motorist with whom he collides does not necessarily constitute negligence between the driver and one occupying his car as guest. The two situations are entirely different as far as legal responsibility is concerned, and not depending altogether upon the same facts or the same rules of law. The rule as to the duty of the driver to passenger has been stated by the Indiana Appellate Court as follows:

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

This opinion was quoted and adopted in the Arkansas case of Black v. Goldweber.

As a practical proposition, those who ride as guests are not required to use many precautions to avoid injuries from defects in the highways or from defects in the conveyance. Though the negligence of the driver is not imputed to the passenger, still he must exercise reasonable care under the circumstances despite the fact that he may be intoxicated or is not driving the car;  

35 172 Ark. 862.
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and the rule is more strict concerning accidents at railroad crossings. Thus, in Carnegie v. Great Northern Railway Company, the court says:

The negligence of a driver of a vehicle is not imputed to a mere passenger riding therein. Nevertheless, a passenger is required to exercise a proper degree of care for his own safety, and any negligence on his part that contributes to his injury is fatal to his right of recovery. He is obliged to exercise such care as a reasonably prudent person would, when riding with another under similar circumstances. A person of ordinary prudence riding with another upon his invitation will naturally put a certain trust in his judgment, and will rely in some measure on the assumption that he will use care to avoid the ordinary dangers of the road. In order conclusively to charge a mere passenger with contributory negligence in failing to see the approaching train, something more than ability to see and a failure to look must be shown. His failure to look is evidence to be considered on the question of his negligence but it is not conclusive against him. In general, the primary duty of caring for the safety of the vehicle and its passengers rests upon the driver, and a mere gratuitous passenger should not be found guilty of contributory negligence as a matter of law, unless he in some way actually participates in the negligence of the driver, or is aware either that the driver is incompetent or careless, or unmindful of some danger known to or apparent to the passenger, or that the driver is not taking proper precautions in approaching a place of danger, and being so aware fails to warn or admonish the driver, or to take proper steps to preserve his own safety.

The steps that the passenger must take in the exercise of ordinary care will vary with the circumstances, and in few cases, if in any, are they the same that the law exacts of the driver.

37 128 Minn. 14.

A guest riding in an automobile has a right to rely upon the proper discharge of the driver's duty to him, and he is not obliged to anticipate negligence on the part of the driver. This reliance, however, is not absolute. A guest riding on the front seat of an automobile is not excused from all responsibility, but he may rely upon the driver's watchfulness more or less according to circumstances, without forfeiting his right of recovery against one by whose negligence he is injured. 39

In the case of Terwilliger v. Long Island Railroad Co., 40 an action was brought by the wife of a decedent to recover damages for her husband's death as a result of alleged negligence by the defendant in operating one of its trains. At the time of the accident the plaintiff's husband was a guest in an automobile owned and driven by a Mr. Welsh. The defense was the contributory negligence of the plaintiff's intestate. In affirming judgment for the plaintiff the court says:

He [plaintiff's intestate] was a passenger—a guest, in a car operated by a friend, and while he could not close his eyes to an obvious or well known danger, he was not called upon to exercise any active diligence to guard against a danger which was not known to him or which was not likely to befall one situated as he was in the car. He had a right to assume that Mr. Welsh, his friend, would exercise reasonable care in the circumstances of the operation of his car; and unless he was aware of the railroad crossing, and had reason to apprehend that Mr. Welsh would run his car into a position of danger, the jury might properly find that he was in the exercise of that reasonable degree of care which an ordinarily prudent


40 136 N. Y. Supp. 733.
person would exercise under like circumstances, by merely sitting still and talking to a fellow passenger. . . . Of course, if the passenger was familiar with a known danger, if he was better informed of the circumstances than the driver, it might be his duty to watch and point out the danger, but here the car was being driven on flat land, in broad daylight, and at an angle with the track, which had been crossed some distance back, and which was to be crossed again at grade.

The Supreme Court of New Hampshire, by a late decision, in the case of *Hoen v. Haines*, 4 holds, in effect, that the question of whether a guest, under the circumstances, had a right to assume the driver would operate the car in an efficient manner should go to the jury along with the other facts. In this case, the plaintiff was riding as a guest in an automobile which was approaching a bridge in the process of repair, as a result of which, part of the road had been closed, thus allowing traffic to proceed one way at a time. The defendant's car, in attempting to proceed against the one way traffic, collided with the car in which the plaintiff was riding, thereby causing the latter injuries. The court charged the jury that if the plaintiff had not kept a reasonable lookout ahead she could not recover. A verdict was returned in favor of the defendant and the plaintiff alleged exceptions to this charge. The Supreme Court in granting a new trial to the plaintiff, remarked:

The charge nowhere contains an explanation of what would legally constitute a reasonable lookout ahead. . . . The jury were not told that the precautions that the plaintiff was bound to take for her own safety were much less than those demanded of the driver, and that she was not called upon to utter any warning of approaching danger unless she knew, or ought to have known that the driver was unaware of it. Neither were they instructed that, in the absence of any indication to the contrary, the plaintiff was entitled to assume that the driver would not enter the sphere of . . . peril ahead or fail to be duly observant of approaching cars.

41 (N. H.) 154 Atl. 129.
Thus, the New Hampshire Court agrees substantially with that of New York.

In *Stemler v. Cady*, the defendant’s car was zigzagging and on the left side of road. On seeing this, the driver of the truck in which plaintiff was riding as guest turned to the left to avoid a collision; but defendant’s car turned to the right at the same time, thus causing the accident. The court refused to instruct that if plaintiff’s driver was negligent and his negligence contributed to the accident, the plaintiff could not recover; that if the plaintiff surrendered all care to the driver of truck, she could not recover and was bound by his negligence. The Supreme Court, holding that there was no error in refusing to give such instruction, says:

It could be found from the evidence that the plaintiff was looking ahead, saw the defendant’s automobile approaching on the wrong side of the road, and the collision occurred so suddenly that she had no time or opportunity to escape. So far as the operation of the machine was concerned she necessarily relied largely upon the experienced driver of the car. And she had no reason to anticipate the sudden change of direction taken by one or both automobiles which resulted in the collision.

The case of *Churchill v. Texas & Pacific Railway Co.* is somewhat analogous to *Stemler v. Cady*, in that the plaintiffs in both cases were forced to act quickly in an unforeseen, dangerous position. Here the plaintiff sued for the death of his father who was riding on the front seat of a car owned and driven by one Hayslip. In affirming judgment for the plaintiff the following portions of the opinion become of interest:

Granting that driver was negligent in approaching crossing without slackening his speed and attempting to beat the train across it would not defeat the plaintiff’s right to recover for the death of his father unless the circumstances were such that the deceased could be charged with negligence of his

42 246 Mass. 384.
43 151 La. 726.
own. Plaintiff's intestate, not having charge of the operation of the machine, was not required to keep a lookout for danger, but could rely upon a discharge of this duty by the driver who was responsible for its operation; and it not appearing that the deceased saw the approaching train until almost the instant of the collision, and, having shouted the warning as soon as it was discovered, we do not find that he was guilty of negligence.

It is believed, however, that this case is not altogether sound and that the Louisiana Supreme Court renounced the principle of this case in Williams v. Lenfant,44 where the following is stated:

Under the doctrine of many cases to which we have referred, Williams [the guest] was not justified in remaining silent and relying upon his assumption that the driver saw the other car and appreciated the danger. The failure of Williams to exercise the slightest care prevents his recovery.

As the cases hold that a guest to some extent may rely upon the ability and experience of the driver in the immediate operation of the car, so they also hold that the guest cannot relinquish all care, or relieve himself from the exercise of all precaution for his own safety. One of the leading decisions on this subject, that of the Alabama Supreme Court in McDermott v. Sibert,45 rendered in 1928, has undoubtedly provoked severe criticism from those parties who are prone to sleep while traveling over the highways at night. Here the plaintiff, suing by next friend, was riding in defendant's car with another friend. The defendant had been on this road more than once and was familiar with the car and its operation. The road was paved, straight, and level for quite a distance and the lights on the car were burning brightly. In passing a car ahead of them, they ran into a large loose rock, which caused the car to swerve to the left. In attempting to turn it back into the paved road, the front axle struck another rock, hidden from view by

44 15 La. App. 515.
45 218 Ala. 670.
weeds, which upset the roadster. The plaintiff was asleep and knew nothing of the accident until he regained consciousness. The plaintiff’s suit rests upon alleged negligent operation of the car to which defendant pleaded the general issue and contributory negligence on the plaintiff’s part. These two issues, submitted to the jury, resulted in a verdict for the defendant, and from judgment the plaintiff appealed. The Supreme Court affirmed the judgment for defendant, saying in part:

It is the generally recognized rule that a person riding in an automobile driven by another, even though not chargeable with the driver’s negligence, is not absolved from all personal care for his own safety but is under the duty of exercising reasonable or ordinary care to avoid injury; that is, such care as an ordinarily prudent person would exercise under like circumstances. . . . The authorities are also to the effect that a passenger cannot negligently abandon the exercise of his own faculties and trust entirely and absolutely to the care and vigilance of the driver and then escape the exercise of due care when the occasion arises. Moreover, the plaintiff in the instant case, sitting on the extreme right with the top fastened down, abandoned himself to sound sleep, though so exposed to danger from being thrown from the car, and in such relaxed condition, the jury may find, had prevented any effort on his part to exercise care for his own safety, and the more serious injury to the plaintiff as compared to the lesser injuries to his companions, tends to illustrate the peril of such exposure.

The case was one peculiarly within the province of the jury, and we find no occasion to disturb the action of the Court in denying plaintiff’s motion for a new trial.

Similar decisions are to be found in Burton v. Pryor, Dedman v. Dedman, and Leclair v. Boudreau.

This rule does not place an absolute liability upon the guest if he fails to maintain a continual lookout, but it

46 (Mo. App.) 198 S. W. 1117.
47 155 Tenn. 241.
48 101 Vt. 270.
does not relieve him from all responsibility to exercise care for his own safety more or less according to the situations involved in each particular case. One's responsibility as a guest in the rear seat of an automobile or other vehicle is less than as a guest in the front seat, regarding which the Supreme Court of Connecticut has said:

The guest on the rear seat of the automobile owes a very limited degree of care. He is not expected to direct the driver nor to keep a lookout. Dangers or threatened dangers known to him he must warn the driver of, and for his failure to do so be chargeable with having proximately contributed to the accident, unless a reasonable person under all the circumstances would not have given the warning.

While the law requires a guest in an automobile to exercise ordinary care and prudence for his own safety, and does not permit him to entrust his safety absolutely to the driver, regardless of impending danger or apparent lack of ordinary caution on the part of the driver, it does not require him to use the same vigilance as is required of the driver, nor does it put him under the same obligations as the driver in looking for dangers. Whether he is contributorily negligent for not maintaining a lookout varies with the facts. The Connecticut Supreme Court in the leading case of Clarke v. Connecticut Company, says:

A gratuitous passenger in no matter what vehicle is not expected, ordinarily, to give advice or direction as to its control and management. To do so might be harmful rather than helpful. But his presence in the vehicle may so obstruct the driver's view of a car or other approaching vehicle, or other


51 83 Conn. 219.
circumstances of the situation may be such as to make it his duty to look out for threatened or possible dangers and to warn the driver of such after their discovery. This might be necessary for the passenger’s as well as the driver’s safety. On the other hand the character of the vehicle in which he is a passenger may be such or his location in it may be such that to look or listen for approaching cars or other dangers would be unnecessary and useless. For such a passenger to engage in conversation with fellow passengers and entirely neglect to look out for dangers or to observe the manner in which the vehicle is being operated might be the conduct of a reasonably prudent person. It cannot be said, therefore, that in every case and all the time it is the duty of a gratuitous passenger to use his senses or to look and listen in order to discover approaching vehicles or other dangers, or that his failure to do so would be a failure to exercise due care. But while this is so, the law fixes no different standard of duty for him than for the driver. Each is bound to use reasonable care. What conduct on the passenger’s part is necessary to comply with this duty must, depend upon all the circumstances, one of which is that he is merely a passenger having no control over the management of the vehicle in which he is being transported. Manifestly the conduct which reasonable care requires of such a passenger will not ordinarily, if in any case, be the same as that which it would require of the driver. While the standard of duties is the same the conduct required to fulfill that duty is different because their circumstances are different. Whether reasonable care has been exercised in either case is a question of fact for the jury.

In the case of Toney v. Herman Hale Lumber Company the jury returned a verdict for the defendant and found that while the driver had used ordinary care the plaintiff, a guest in the driver’s car, was guilty of contributory negligence. The Supreme Court refused to disturb the verdict, since the jury had found that failure of the plaintiff to keep a lookout was contributory negligence which was the proximate cause of the injury. A

\(^{52}\) (Texas) 36 S. W. (2d) 234.
RIGHTS OF GRATUITOUS PASSENGERS

case in which a similar decision was rendered is that of *Schweig v. Wells.*

The case of *Simrell v. Eschenbach* is an action by the plaintiffs, husband and wife, to recover for injuries sustained due to negligence of the defendants. Although the husband, who was driving, was also negligent since the lights on his car did not meet the statutory requirements, the lower court rendered judgments for both plaintiffs. The defendant appealed on the grounds of plaintiffs' contributory negligence. The judgment for the wife was affirmed but reversed as to husband because of his contributory negligence. The court says:

While the husband's negligence would not defeat the wife's action, yet her own negligence would. As an occupant of the car she was bound to exercise reasonable care for her own safety, but the record discloses nothing as a matter of law which proves the contrary. So far as appears, the doctor [husband] was in general a careful driver, and she did not know that the defendant's truck or any other obstruction or danger lurked by the way. Hence there was no reason why she should be alert. . . . A passenger is only required to act in the presence of some threatened danger. As she took no part in the driving and knew of no danger, the fact that she was dozing when the crash came did not necessarily convict her of negligence.

It must be noted that the holding in this case is directly contra to the decision reached in *McDermott v. Siebert*, previously discussed, in which the facts were similar.

Since the case of *Goehmann v. National Biscuit Company,* decided in April, 1931, has elicited editorial comment from several Chicago newspapers, it also warrants our consideration. Here, the plaintiffs were riding as guests in an automobile on a Wisconsin state highway. At the intersection of this and another state road the car in which the plaintiffs were riding was struck by one of the defendant's trucks. At the intersection the car

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53 (Mo.) 26 S. W. (2d) 851.
54 303 Pa. 156.
55 (Wis.) 235 N. W. 792.
had stopped, and both driver and the occupants had looked down the highway. Perceiving the defendant's truck, they estimated its distance away as 150 feet, which would have given their car ample time to cross. They were mistaken in their estimate of the truck's distance away and a collision occurred. In the lower court, judgment was given for the defendant, based substantially on the ground that the plaintiffs should have protested to the driver of their car in some manner. The Wisconsin Supreme Court reversed the decision, holding as follows:

The plaintiffs were not negligent in failing to warn Immel [the driver] of the approaching car because he was aware of its approach. They are not negligent in failing to protest against an effort to cross ahead of the truck, because the court says that could easily have been done if he [the driver] had speeded up his car to fifteen miles per hour, which is apparent from the physical facts. The negligence of Immel consisted in the manner in which he managed his car for the moment. We do not consider that the law casts upon the occupants of a car any duty with reference to the manner in which it is momentarily managed by the driver. Not only does it not cast any duty upon them in such respect, but it should not recognize any prerogatives on their part. Driving from the back seat should not be encouraged when it comes to the details of car management in emergencies. The practice is not indulged in by considerate persons, and, if it were, the harm would exceed the good. The momentary management of the car should be left to the driver. . . . Continual suggestions are but confusing and irritating and we think it better that it be definitely understood that neither duty devolves upon, nor prerogatives belong to, the occupants of a car to participate in the immediate management and control. They have a duty to maintain a lookout, a duty to warn, and a duty to protest against excessive speed and reckless driving. These however, are all apart from the immediate management of the car, especially in emergencies.

An analysis of the foregoing decision reveals that it contains no unorthodox principles of any nature. The
court seemingly goes out of its way to condemn, in no uncertain terms, "back-seat driving," and yet reaches the final conclusion that a guest must maintain a lookout, must warn, and must protest.

We have previously commented upon the fact that the rule is stricter at railroad crossings, the reason being that here is an exceedingly dangerous place and one which should be approached with the utmost care and caution, for if one is struck violently, death usually ensues immediately. The automobile has the better opportunity to avoid a possible accident; and, with a certain amount of precaution, safety may be insured.

In Bradley v. Missouri Pacific Railroad Company the court held that plaintiff's intestate riding in an automobile with another, who was driving, when struck and killed at a railroad crossing with which he was familiar, was under the same duty as the driver to look and listen for approaching trains, and while the negligence of the driver was not imputable to him he himself was chargeable with contributory negligence, when, by looking, he could have seen the train in time to have avoided the accident. This decision is in line with all Federal holdings for they are among the jurisdictions which hold that one who fails to look and listen for approaching trains is guilty of contributory negligence as a matter of law, and especially is this true of one riding on the front seat with the same view as that of the driver. Cases of particular importance are Brommer v. Pennsylvania Railroad Company and Stephenson's Administratrix v. Sharp's Executors.

56 288 Fed. 484.
58 179 Fed. 577.
59 222 Ky. 496.
Where a passenger attempts to advise the driver that he may proceed in safety or assumes the duty of looking out for dangers, he may not recover if an accident occurs because of his failure to do such. Decisions regarding such cases are given in Smellie v. Southern Pacific Company and Morningstar v. Northeast Pennsylvania Railroad Company.

A person, riding as a guest, who assumes a dangerous position, such as sitting on the floor of the truck with feet hanging over the side or with feet on the running board, cannot recover for injuries sustained while riding thus. In a Missouri case the court said:

The law is well settled that, where a person voluntarily assumes a position of imminent peril and danger where there is at hand and accessible to him a place of safety, and by reason of haven taken the dangerous position he is injured, he cannot recover against another, who is also negligent, because such person’s negligence in taking the dangerous position is one of the direct and proximate causes of the injuries and contributes thereto.

If a passenger sees that a driver is guilty of negligence in the operation of the machine or is oblivious of some danger apparent to the passenger, he must, in the exercise of reasonable care, give some warning to the driver in an effort to avoid the imminent peril. This
point of view is expressed in the case of *Schlosstein v. Bernstein*.

The Alabama Supreme Court, in the case of *Birmingham Railway Light and Power Company v. Barranco,* held:

There is no duty on such guest to anticipate that the independent driver of the vehicle in which such guest is riding will enter the sphere of danger or peril ahead, or will omit to exercise commensurate care to sense the approach or probable approach of other agencies of transportation with reference to which the ordinarily prudent driver should in due observance of his duty govern the movement of the vehicle he controls. Where, however, such guest knows of the danger or peril into which or toward which the vehicle is being driven, or the circumstances of the realized speed of the vehicle and known location and its surroundings ahead are such as to suggest, to a reasonably prudent person likewise situated, the probability that a sphere of danger or peril may be created thereby, or may be entered in the course of the vehicle’s movement, it is the duty of such guest to warn the driver in the premises and to protest [against] a continuance of a movement so actually or probably fraught with danger or peril to such occupant of the vehicle. In other words, the duty imposed upon such person, whatever his seat in the vehicle, is created by either known dangers or perils that the attendant circumstances reasonably suggest or foreshadow. The duty is therefore not original with respect to the operation of the vehicle, but resultant, and that only from known and appreciated circumstances capable of bringing it into effect. Otherwise the law would be held to sanction this irrational result: such person would be allowed to close his senses to known dangers or to perils reasonably suggested by the attendant circumstances indicated, in blind reliance upon the unaided care of another independent of such per-


65 293 Pa. 245.

66 203 Ala. 639.
son's control though that other is without assuming the consequences of the omission of such ordinary care as the attendant circumstances or known perils create.

This decision, with its lucid reasoning, it is believed, represents the weight of authority. A recent utterance of the Illinois Supreme Court presents practically the same reasoning. 67

It thus seems well settled that the guest must warn of dangers in accordance with the situation; but "such suggestions should be reasonably made and should, of course, not take the form of what is commonly known as 'back seat driving,' and should not be more insistent or vociferous than is warranted by the occasion and by the certainty of the existence of danger." 68

One who enters an automobile as a guest takes such car in its existing condition except as to latent defects only within the knowledge of the owner or driver. 69 In the case of Waters v. Markham, 70 the plaintiff's intestate was killed by the car's overturning when a tire blew out. The tires had gone twelve thousand miles and the evidence indicated that they were defective. The court, in considering the condition of the car, said:

An automobile host may be held liable for injuries to his guest, caused by a defective condition of his automobile, if he knew of such defect and realized, or should have realized, that it involved an unreasonable risk to his guest; if the defect was so concealed or hidden as not to be reasonably obvious or patent to the guest; if the defect and risk involved were in fact unknown to the guest; and, if the host failed to warn the guest of the defective condition and the risk involved. This rule seems to be eminently fair and just and fully to state the grounds for which the liability of a host for injuries to his guest resulting from a defective condition of an automobile, may properly be predicated.

67 Dee v. City of Peru, 343 Ill. 36.
70 (Wis.) 235 N. W. 797.
On the other hand, the courts are strong in holding that a guest who accepts an invitation to ride when aware of the car's defective condition from which injury results, is guilty of contributory negligence.\textsuperscript{71} There is little confusion or conflict in the holdings on this subject. The plaintiff cannot recover for injuries caused by defects of which he has knowledge, but he may recover where there are latent defects of which the driver or owner knows, but of which he fails to warn the guest.

One who enters a car as guest assumes the risk incident to the known incompetency, reckless habits, inexperience, and proficiency of the driver.\textsuperscript{72} In \textit{Sommerfield v. Flury et al.},\textsuperscript{73} the Wisconsin court held:

The duty devolving upon the driver of a car is said to be not to increase the danger or add a new one. Obviously the danger which he is under obligation not to increase is the danger which may be anticipated upon entering the car. One so entering the car . . . assumes the dangers incident to the known incompetency or inexperience of the driver. He also assumes the dangers incident to the known habits of the driver. He is also bound by his acquiescence in the speed maintained or other respects in which the car is handled.

On the other hand, it has been held that the known incompetency and inexperience of the driver are merely facts to be considered in determining whether the guest was guilty of contributory negligence.\textsuperscript{74}

In \textit{Marks v. Dorkin},\textsuperscript{75} it was said:

There can be no contributory negligence or assumption of risk arising on the part of an invited guest from the mere knowledge that the driver on former occasions has so driven


\textsuperscript{72} Sommerfield v. Flury, 198 Wis. 42; Kelly v. Gagnon, (Neb.) 236 N. W. 160; Poneitowcki v. Harres, 200 Wis. 504; Thomas v. Steppert, 200 Wis. 388.

\textsuperscript{73} 198 Wis. 42.

\textsuperscript{74} Wiley v. Young, 178 Cal. 681; Kalamian v. Kalamian, (Conn.) 139 Atl. 635.

\textsuperscript{75} 105 Conn. 521.
his automobile as to indicate that he is likely to drive recklessly. . . . Contributory negligence or assumption of risk in relation to the negligent driving of a car cannot arise until it is disclosed to, or ought to have been known to, the guest that the driver is driving negligently; in other words, a guest, merely because he believes or fears from past experience that the driver of a car may drive negligently, does not assume the risk of any such negligence or fail to use due care by accepting an invitation to ride.

It is hardly thought that this case represents the best view nor the weight of authority as found in the case of *Sommerfield* v. *Flury*.

The fact that a guest rides with one under a physical disability does not establish as a matter of law his contributory negligence, unless the guest knew that the driver’s disability would hinder his proper management of the car and endanger the safety of himself and the occupants.\(^7\)

If a guest rides in a car knowing that the driver is intoxicated and injury results from the driver’s failure to manage and operate the car as a reasonably prudent person because of such intoxication, the guest cannot recover. This rule applies even though the driver has become intoxicated after the commencement of the ride.\(^7\)

Of course, if the intoxication is not known to the guest and there are no facts or conditions from which he might know of it, the rule should not apply.\(^8\)

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\(^7\) *Krause v. Rarity*, (Cal. App.) 283 Pac. 886 and 285 Pac. 879, affirmed by the Supreme Court in 293 Pac. 62; *Gaffney v. City of Dixon*, 157 Ill. App. 589.


In *Winston's Administrator v. City of Henderson*, a leading case both on speeding and intoxication, plaintiff's intestate, Winston, was killed while a guest in an automobile. Both Winston and the driver were intoxicated. In the defendant city, the car overturned in striking a ditch which the plaintiff alleges was in a defective condition, known to the defendant. In holding that there could be no recovery by the plaintiff, the court is definite in denunciation of conduct such as appeared in this case:

When two or more persons voluntarily drive or ride an automobile upon a public highway at a dangerously high rate of speed merely for the purpose of enjoying the exhilarating and pleasurable sensations incident to the swirl and dash of rapid transit, they may properly be said to be engaged in joy-riding. Such joyriders not only assume the risks of danger attendant upon the sudden and violent movements of the car, but also such as arise from the inability of the driver, when traveling at a high rate of speed, to make short, quick stops to avoid collisions, or defects in the street, or direct the car at bends and curves in the road so as to keep in the traveled way.

One about to enter a car should exercise reasonable care to see that the driver in charge is an experienced, reasonably safe, and sober person, and if he fails to do this and injury results to him from a defect in the street to which the negligence, want of skill, or care on the part of the driver contributed, such negligence is chargeable to him.

Even while prosecuting a journey, if the driver becomes intoxicated so as to lose control of the vehicle, or is reckless, and this is known to the passenger, ordinary care requires the passenger to call upon the driver to stop and to allow him to alight or turn the management of the vehicle over to another capable of properly directing it, and if the passenger fails to exercise such care and is injured as a result of the negligence or recklessness of the driver and a third person, he may not have recourse of such third person, this being denied him because of his own negligence rather than upon the ground that the negligence of the driver is imputed to him.

79 179 Ky. 220.
This rule seems to be too well settled to warrant further citation or consideration. The authorities were aptly summarized in Schwartz v. Johnson.80

When a guest rides in an automobile and permits the driver to run at a reckless or fast speed, or encourages such speed, he may properly be charged with contributory negligence.81 One of the most interesting as well as one of the leading cases on this subject is that of Dale v. Jaeger.82 The court said in part:

Here was a car admittedly plunging through the night on straight stretches at a rate of forty-seven to sixty miles per hour, the curtains down, and the disturbed atmosphere assuredly rushing like an incipient tornado by the speeders’ ears. . . . With a lighted speedometer directly facing him, acquainted with cars both as passenger and driver, with the car lights covering the road fifty or seventy-five feet ahead, with the swish of gravel and roar of the air, can it be said that any human being in possession of his five senses may be heard to say that at this abandoned rate of speed he possessed his soul in sweet oblivion and “didn’t notice anything out of the way, the way it was riding?” For the man in the street, the reasonably prudent citizen whose legislative representatives have unequivocally banned such wanton driving on the public highways, plaintiff’s plea will fall on deaf ears. If plaintiff did not know, he should have known, and in law he is fixed with knowledge that was being flashed to him on every side.83

Even a protest may be insufficient, if it is not heeded and the passenger takes no further steps for his safety;

80 152 Tenn. 586.
82 44 Ida. 576.
83 See also State v. Phillinger, 142 Md. 365.
as was stated in *Sheehan v. Coffey.* Then again, the law fixes no specified rate of speed at which the guest must protest against such excessive speed as to be held guilty of contributory negligence. Furthermore, the reckless driving must have continued long enough to have afforded the guest a reasonable opportunity to protest against it; and, where the guest makes a reasonable protest against the speed but an accident occurs before he has an opportunity to take further steps for his safety, he is not guilty of contributory negligence as a matter of law. Such a situation, however, presents a question for the jury to determine—that is, whether his actions were those of an ordinarily prudent person under the circumstances. The amount or sufficiency of the protest must also be determined by the jury in view of the actions of reasonable persons, as stated in *Krause v. Hall.*

No case has been found, however, which attempts to define the amount of protestation necessary to relieve the guest of contributory negligence as a matter of law. When it is considered that the guest has no control over the automobile and that it is not within his power to coerce the driver, it is apparent that all the guest may do is to indicate to the host his or her displeasure with reference to the manner in which the car is being driven.

As has been noted, the liability of the guest is predicated upon the knowledge that the car is being driven at an excessive speed. It then follows that a guest who is ignorant of the speed of the automobile cannot be held to the same responsibility as one having full knowledge of such facts.

84 200 N. Y. Supp. 55.
86 *Gordon v. Opalecky,* 152 Md. 536.
87 *Rappaport v. Roberts,* (Mo. App.) 203 S. W. 676; *Masten v. Cousins,* 216 Ill. App. 268.
89 195 Wis. 565.
Where the occupant who is aware of such facts as the excessive speed and reckless driving does not leave the machine when an adequate opportunity arises, but unreasonably remains in the machine, or at least does not insist upon leaving, he may be chargeable with negligence. Obviously, a failure to leave cannot be construed as negligence in all circumstances. It might be gross folly in some instances to attempt to leave; and, in others, it might be highly proper. At any event, the occupant’s failure to leave is a question of fact depending upon the variable circumstances.

Occasions will arise where the passenger’s best recourse under the circumstances would have been to jump, thus avoiding the impending accident, but his failure to follow the best recourse is not contributory negligence as a matter of law, for while acting in such an emergency the law does not hold him to the same care as a person acting under ordinary circumstances. On the other hand, suppose he observes the car approaching an impending peril or danger, and in an effort to avoid it, leaves the vehicle and thus injures himself. Although it may be proved subsequently that if he had remained with the machine such injury would not have occurred, he is not guilty of contributory negligence in choosing the wrong alternative in such an emergency.

After an analysis of the foregoing cases is it possible to arrive at a sane conclusion as to the rights and liabilities of gratuitous automobile passengers?

It is the incontrovertible general rule that such passengers must at all times exercise ordinary care—the care which people in general, of ordinarily prudent
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Habits—would exercise under like circumstances and conditions. Whether his conduct is commensurate with this standard of care is, in a majority of cases, a question of fact for the jury.

The test of a passenger’s negligence is his action or want of action in the face of manifest danger, danger known to him, or danger which it was his duty, as well as the driver’s, to observe. When dangers which are either reasonably manifest or known to a passenger confront the driver of a vehicle, and the passenger has an adequate and proper opportunity to control or influence the situation for safety but sits by without warning or protest and permits himself to be carelessly driven to his injury, this is negligence which will bar his recovery. This duty is applied more strictly at inherently dangerous places such as railway crossings. The passenger is not obliged, even when the danger of an accident suddenly becomes imminent, to displace the driver or seize the operating levers, for to do so would be more harmful than helpful. Warnings, so obnoxious to the majority of drivers, should be reasonably made and in accordance with the attendant circumstances and certainty of danger. In such cases, the vigilance required of a passenger on the rear seat is less than that required of a passenger on the front seat.

To a certain degree, the passenger may rely upon the driver’s ability to manage properly the car in a safe manner. The law, however, will not allow a blind reliance upon the driver when approaching a place of danger or when the circumstances would indicate a dangerous predicament, for he must exercise ordinary care, and look out for himself in such situations.

A passenger who places himself in a dangerous position in the car although a safe place is accessible or assumes to advise the driver of manifest dangers, but fails to so do, is guilty of contributory negligence, thus banning a recovery for injuries received where his negligence concurred in making the accident possible.
A passenger who knows that the driver is under the influence of liquor or should, in the exercise of reasonable care, know it—either at the commencement of, or during, the ride—is guilty of contributory negligence if he fails to take measures to protect himself. If he knows the driver is intoxicated before he enters the car, he is presumed to have acquiesced in the driver's subsequent reckless conduct, occasioned by such intoxication.

A guest accepts the existing conditions of the car in which he rides. If he knows of any defects therein, or should have known of them, and injury results therefrom, he may not recover. Latent defects must be disclosed to the passenger in order to bar recovery.

A passenger who knows the driver is operating the automobile in an unsafe manner or driving at an excessively dangerous speed must protest against such driving. In failing to do so, he will be held to have acquiesced and to have taken the risk of the danger which befell him. Whether the number or manner of protests are sufficient must vary with each case. Where the protests are unavailing, he must quit the car if that may be done with safety or at least order it to be stopped that he may alight.

If it were possible to acquaint passenger, owner, and operator with the doctrines which we have set forth, the automobile accidents in this country would be materially diminished. The law has certainly contributed to the rational enjoyment of the automobile without making any fast, arbitrary, or unbending rules. In treating the rights and liabilities of gratuitous automobile passengers, the law has kept pace with, and adapted itself to, the rapidly changing conditions.