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## Comments

# Duty of Farm Tractor Operators to Infant Passengers

A recent Illinois decision raises two interesting questions concerning the nature of the liability of farm tractor operators toward child licensees. The questions raised are (1) the liability as affected by the operator's status as an occupier of land and the child's status as a social guest or licensee; and (2) the applicability of automobile guest statutes to infant passengers on farm tractors. The Illinois case presented the questions upon the following facts. A five-year-old boy was injured on defendant's farm when his foot became wedged between a revolving brake drum and the rear tire of the tractor operated by the defendant. The plaintiff child had been "helping" pick up corn and, at the defendant's direction, was standing on the drawbar behind the tractor seat on the trip home from the field. Judgment for the plaintiff followed a trial court instruction requiring ordinary care by the defendant. The judgment was reversed on appeal in *Krantz v. Nichols*.<sup>1</sup> The appellate court held that as the plaintiff was a licensee on the defendant's land, the defendant's only duty was to refrain from wilful or wanton injury to the child. With the case thus disposed, the reviewing court did not reach the question of the trial court's rejection of the defendant's claim that the guest statute applied. Both questions will be considered here.

## I. OPERATOR'S STATUS AS OCCUPIER OF LAND

It has frequently been stated that an occupier's only duty toward trespassers and licensees is to refrain from wilfully or wantonly injuring them.<sup>2</sup> With regard to the present state of the authorities, however, this broad statement is misleading. Currently, the supposed rule seems to be generally applied only in cases where injury is caused by static defective conditions on land or where the presence of the licensee or trespasser is completely unknown

<sup>1</sup> 11 Ill. App.2d 37, 135 N.E. 2d 816 (1956).

<sup>2</sup> Prosser, Torts 445 (2d ed. 1955). A social guest, such as the plaintiff in the instant case, is classified a licensee. Restatement, Torts § 331, comment a, 3 (1934); Prosser, Torts 447 (2d ed. 1955).

and could not be anticipated.<sup>3</sup> Generally, the only duty regarding defective static conditions is to warn licensees of latent defects known to the occupier and unknown to the licensee.<sup>4</sup> Whether a known trespasser is entitled to a warning of known latent defects is uncertain.<sup>5</sup>

The prevailing modern view requires that an occupier, in carrying on *affirmative* activities, must act with reasonable care toward all persons who may foreseeably be injured by such affirmative conduct.<sup>6</sup> Thus, so long as a licensee's presence is or should be known, the occupier has a duty of reasonable care with respect to such licensee insofar as active operations on the land are concerned.<sup>7</sup> A similar duty of reasonable care in conducting active operations is owed to a known trespasser<sup>8</sup> and even, it seems, to a trespasser whose presence, though actually unknown to the occupier, could reasonably have been anticipated.<sup>9</sup> Of course, if the licensee or trespasser is or should be aware of the risk involved in the operation, or if he acts unreasonably, the occupier will have a valid defense.<sup>10</sup>

However, remnants of the old rule, requiring a finding of wilfulness or wantonness both as to affirmative and static conditions, nevertheless remain, with resulting confusion in the cases. In Illinois, scene of the instant case, this is particularly true. Although there is Illinois authority to the effect that an occupier must conduct his active operations with reasonable care in order

<sup>3</sup> Prosser, Torts 435, 448 (2d ed. 1955).

<sup>4</sup> Restatement, Torts § 340 (1934); Prosser, Torts 449, 450 (2d ed. 1955).

<sup>5</sup> Prosser, Torts 436 (2d ed. 1955). Restatement, Torts § 337 (1934) states that the duty exists if an artificial condition involves risk of death or serious bodily harm.

<sup>6</sup> Restatement, Torts §§ 334, 336, 338, 341 (1934); Prosser, Torts 435-436, 448-449 (2d ed. 1955).

<sup>7</sup> Yamauchi v. O'Neill, 38 Cal. App.2d 703, 102 P.2d 365 (1940); Olderman v. Bridgeport-City Trust Co., 125 Conn. 177, 4 A.2d 646 (1939); Houston Belt & Terminal Ry. v. O'Leary, 136 S.W. 601 (Tex. Civ. App. 1911); Restatement, Torts § 341 (1934); Prosser, Torts 448 (2d ed. 1955). *Contra*, Duff v. United States, 171 F.2d 846 (4th Cir. 1949). See annot., 49 A.L.R. 773 (1927) and 156 A.L.R. 1221 (1945).

<sup>8</sup> Cole v. New York Central Ry., 150 Ohio St. 175, 80 N.E.2d 854 (1948); Peirce v. Walters, 164 Ill. 560, 45 N.E. 1068 (1897).

<sup>9</sup> Krause v. Watson Bros. Trans. Co., 119 Colo. 73, 200 P.2d 387 (1948); Wiegink v. Harrington, 274 Mich. 409, 264 N.W. 845 (1936).

<sup>10</sup> Shafer v. Tacoma Eastern R. Co., 91 Wash. 164, 157 P. 485 (1916).

to avoid injuring licensees,<sup>11</sup> other Illinois cases involving active operations have adhered to the wilful or wanton standard.<sup>12</sup> On the other hand, a duty to use reasonable care to avoid injury to trespassers actually known to be in a position of peril has been consistently recognized,<sup>13</sup> although sparingly applied.<sup>14</sup>

The Nebraska cases likewise reflect confusion concerning the occupier's duty towards licensees and trespassers. Certain early cases adopt a wilful and wanton standard even in the case of active operations.<sup>15</sup> In two comparatively recent decisions involving occupier liability to licensees for static defective conditions, no distinction was drawn between static conditions and active operations.<sup>16</sup> The occupier's duty to the licensee was said to be satisfied merely by giving notice of known hidden dangers and by refraining from wilful and wanton conduct. In contrast to such cases, however, is a line of authority finding a duty of reasonable care on the part of railroads towards trespassers and licensees whose presence on the tracks either is or should be known.<sup>17</sup>

So far as the principal case is concerned, defendant's moving of the tractor (with plaintiff perched precariously on the drawbar at defendant's direction) is doubtless an active operation which, under the modern view, requires the exercise of ordinary care. Indeed, since plaintiff's presence and exposure to serious injury were known to defendant, the modern cases would require de-

<sup>11</sup> *Moore v. Ohio Oil Co.*, 241 Ill. App. 388 (1926) (stringing of wire across road). See also *Ryan v. Chicago & N.W. Ry.*, 315 Ill. App. 65, 42 N.E.2d 128 (1942) (policeman hit by train while walking near railroad tracks).

<sup>12</sup> *Jones v. Schmidt*, 349 Ill. App. 336, 110 N.E.2d 688 (1953); *Garner v. Burns Mid-Town, Inc.*, 346 Ill. App. 162, 104 N.E.2d 506 (1952) (dictum).

<sup>13</sup> *Peirce v. Walters*, 164 Ill. 560, 45 N.E. 1068 (1897); *Joy v. Chicago, B. & Q. R.R.*, 263 Ill. 465, 105 N.E. 330 (1914) (dictum); *Illinois Central R.R. v. Godfrey*, 71 Ill. 500 (1874) (dictum).

<sup>14</sup> *Illinois Central R. R. v. Eicher*, 202 Ill. 556, 67 N.E. 367 (1903) (wilful and wanton rule applied though plaintiff was seen walking along the tracks, apparently oblivious to oncoming train).

<sup>15</sup> *Shults v. Chicago, B. & Q. R.R.*, 83 Neb. 272, 119 N.W. 263 (1909); *Chesley v. Rocheford & Gould*, 4 Neb. (Unofficial) 768, 96 N.W. 241 (1903).

<sup>16</sup> *Malolepszy v. Central Market*, 142 Neb. 570, 575, 7 N.W.2d 74 (1942); *Haley v. Deer*, 135 Neb. 459, 463, 282 N.W. 389, 392 (1938).

<sup>17</sup> *Krummack v. Missouri P. Ry.*, 98 Neb. 773, 154 N.W. 541 (1915); *Omaha & R. V. Ry. v. Wright*, 47 Neb. 886, 66 N.W. 842 (1896); *Chicago, B. & Q. R.R. v. Wymore*, 40 Neb. 645, 58 N.W. 1120 (1894); *Chicago, B. & Q. R.R. v. Grablin*, 38 Neb. 90, 56 N.W. 796 (1893) (engineer has duty to public to exercise careful and vigilant lookout for persons on the track).

defendant to act with ordinary care in such an operation even if plaintiff had been a trespasser. In fact, plaintiff was a licensee.

Aside from running afoul of the prevailing view concerning the occupier's duty to licensees in conducting active operations, the *Krantz* case also seems erroneous from the standpoint of the attractive nuisance doctrine. Generally speaking, an occupier has the duty under this doctrine of protecting child trespassers against injury from defective structures or dangerous agencies upon his land, provided the expense and inconvenience incurred in such protection is slight as compared with the danger involved to the children. This duty arises whenever it is foreseeable that children too young to appreciate the risk will come on the premises and be injured.<sup>18</sup>

*Krantz* not only fulfills the requirements for the application of the attractive nuisance doctrine but goes considerably beyond them. The prospect of a tractor ride (and also perhaps of helping defendant with his corn gathering) just as surely operated as an "attraction" to plaintiff *Krantz* as did the floating plank in a pit of deep water to the child plaintiff involved in a famous early decision.<sup>19</sup> Again, plaintiff *Krantz* was too young to appreciate the risk of the ride, or at least a jury might so find. And it would have cost defendant nothing to have exercised reasonable care for plaintiff's safety. Certainly no inconvenience to defendant was

<sup>18</sup> *Kahn v. James Burton Co.*, 5 Ill.2d 614, 126 N.E.2d 836 (1955); *Ramirez v. Chicago B. & Q. R.R.*, 116 Neb. 740, 219 N.W. 1 (1928); Restatement, Torts § 339 (1934). In the early, more restricted view the object causing the injury must have lured the child onto the land. *United Zinc & Chemical Co. v. Britt*, 258 U.S. 268 (1921); *McDermott v. Burke*, 256 Ill. 401, 100 N.E. 168 (1912). Under the modern view, the basis of liability is simply the foreseeability of harm to a child. Attractiveness is not even a necessary element, but is significant in determining whether the trespass should be anticipated. *Kahn v. James Burton Co.*, 5 Ill.2d 614, 126 N.E.2d 836 (1955); *Beaston v. James Julian, Inc.*, 120 A.2d 317 (Super. Ct. Del. 1956); *Ramirez v. Chicago, B. & Q. R.R.*, 116 Neb. 740, 219 N.W. 1 (1928) (occupier on notice of frequent presence of child trespassers held liable when one of them fell into open man hole).

<sup>19</sup> *City of Pekin v. McMahon*, 154 Ill. 141, 39 N.E. 484 (1895). However, the "attractive nuisance" doctrine has been held not to cover vehicles in use. *Schlatter v. City of Peoria*, 309 Ill. App. 636, 33 N.E.2d 730 (1941) (garbage truck); *Purcell v. Degenhardt*, 202 Ill. App. 611 (1916) (street roller). These cases seem to hold only that the "attractiveness" of an operating, useful vehicle is not sufficient to establish the necessary foreseeability of danger to children, in the absence of additional knowledge by the operator which would put him on notice that children are endangered. Therefore, they are of no value as precedents in the instant case, where the presence of the plaintiff was actually known.

involved. Furthermore, plaintiff's presence was known to defendant. Indeed, defendant had expressly invited plaintiff to come upon the land and then had directed him to stand on the tractor drawbar where he was injured. Surely a known child licensee expressly directed to meddle with the "attraction" should be in no worse position vis-a-vis the occupier than a child trespasser whose presence could only "reasonably have been anticipated."<sup>20</sup> Yet this seems to be precisely what the Illinois Appellate Court has held.

## II. APPLICABILITY OF THE GUEST STATUTE

As previously noted, the Appellate Court found it unnecessary to pass upon the trial court's ruling that the Illinois guest statute was inapplicable. The Illinois statute allows recovery against the host only where his conduct has been wilful or wanton.<sup>21</sup>

At common law, the duty of a motor vehicle operator to persons in or upon his vehicle is generally comparable to that of an occupier of realty to persons on his land.<sup>22</sup> Thus no affirmative duty is owed to a trespasser unless his presence upon the vehicle actually becomes known.<sup>23</sup> At that time a duty of reasonable care to refrain from injuring through affirmative action arises.<sup>24</sup> The common law duty owed to the vehicle guest (licensee) is to warn him of known latent defects<sup>25</sup> and, according to most courts, to use ordinary care in operating the vehicle.<sup>26</sup> The obligation to disclose known latent defects to licensee-guests in automobiles is

<sup>20</sup> Other courts have so held. *Atlantic Ice and Coal Co. v. Harris*, 45 Ga. App. 419, 165 S.E. 134 (1932) (workmen had duty of reasonable care to boy riding on conveyor belt); *Rosenberg v. Durfree*, 87 Cal. 545, 26 Pac. 793 (1891) (farmer allowed eight year old child to ride on horse drawn water pumping device); *Carroll v. Freeman*, 23 Ont. 283 (Q.B. 1892) (farmer allowed eight year old child to ride on horse drawn mower).

<sup>21</sup> *Smith-Hurd Ann. Stat. Ch. 95½, § 58a* (1950).

<sup>22</sup> *Prosser, Torts* 451 (2d ed. 1955).

<sup>23</sup> *Schlatter v. City of Peoria*, 309 Ill. App. 636, 33 N.E.2d 730 (1941); *Stefan v. New Process Laundry*, 323 Pa. 373, 185 A. 734 (1936); *Meade v. Purity Bakeries Corp.*, 115 N.J. Law 471, 180 A. 856 (1935).

<sup>24</sup> *Byers v. Gunn*, 81 So.2d 723 (Fla. 1955); *Fernandez v. Consolidated Fisheries*, 98 Cal. App.2d 91, 219 P.2d 73 (1950); *Birmingham Ice & Cold Storage Co. v. Alley*, 247 Ala. 503, 25 So.2d 37 (1946).

<sup>25</sup> *Otto v. Sellnow*, 233 Minn. 215, 46 N.W.2d 641 (1951); *Prokey v. Hamm*, 91 N.H. 513, 23 A.2d 327 (1941); *Petteys v. Leith*, 62 S.D. 149, 252 N.W. 18 (1933); *Boggs v. Plybon*, 157 Va. 30, 160 S.E. 77 (1931).

<sup>26</sup> *Moran v. Moran*, 124 Neb. 379, 246 N.W. 711 (1933); *Warput v. Reading Coal Co.*, 250 Ill. App. 450 (1928); see 52 *Colum. L. Rev.* 543 (1952).

thus the same as is applied to licensees with respect to static defective conditions on land.<sup>27</sup> Similarly, the host's duty of driving with due care is comparable to the occupier's modern obligation of due care to licensees in the conduct of his active operations.<sup>28</sup> However, a few jurisdictions, while requiring no duty of reasonable care to licensees in the case of active operations on land nevertheless inconsistently require the automobile host to exercise reasonable care in driving.<sup>29</sup>

The automobile guest statutes, of course, have materially altered the host's common law duty towards his guests. So far as driving is concerned, the host under the various statutes now need only refrain from gross negligence, or reckless, wilful and wanton conduct. The guest assumes the risks of ordinarily negligent driving.<sup>30</sup>

The effect of the guest statutes upon the host's common law duty to warn his guests of known latent defects is not clear. While some courts have held that the failure to warn of known defects is not such recklessness or wilfulness as to incur liability under the statutes,<sup>31</sup> others, including an Illinois appellate court, find liability much the same as at common law.<sup>32</sup>

The Nebraska Supreme Court has stated that the Nebraska guest statute, allowing recovery by the guest upon a showing of gross negligence, might be satisfied by the host's failure to warn

<sup>27</sup> See note 5 supra.

<sup>28</sup> See note 7 supra.

<sup>29</sup> As previously noted, the duty of reasonable care to licensees on land in the case of affirmative activities is not applied in Illinois (see note 11 supra) and has a somewhat questionable status in Nebraska (see notes 15, 16 and 17 supra). However, at common law both Illinois and Nebraska required the host to drive with reasonable care (see note 26 supra).

<sup>30</sup> Neb. Rev. Stat. § 39-740 (Reissue 1952) requires a finding of "gross negligence"; Smith-Hurd Ann. Stat. Ch. 95½, § 58a (1950) (Illinois) and Burns Indiana Stat. 47-1021 (1952 replacement volume) require "wilful or wanton misconduct"; Iowa Code Annot. § 321.494 (1946) requires "recklessness". About one half of the states have enacted guest statutes. Prosser, Torts 451 (2d ed. 1955).

<sup>31</sup> Rhoads v. Studley, 15 Cal. App.2d 726, 59 P.2d 1082 (1936); Gifford v. Dice, 269 Mich. 293, 257 N.W. 830 (1934); Stanbery v. Johnson, 218 Iowa 160, 254 N.W. 303 (1934).

<sup>32</sup> Dyreson v. Sharp, 333 Ill. App. 198, 76 N.E.2d 809 (1947) (allegation that defendant knew of defect and failed to warn passenger held sufficient under statute requiring "wilful or wanton misconduct"); accord, Jones v. Jones, 57 Ga. App. 349, 195 S.E. 311 (1938) (gross negligence statute); Vecchio v. Vecchio, 131 Ohio St. 59, 1 N.E.2d 624 (1936).

of latent defects known to be dangerous.<sup>33</sup> The cases containing such language, however, were actually resolved in favor of the host either on the ground that the evidence was insufficient to establish a causal relation between the allegedly known defect and the injury, or that the host appreciated that the defect was dangerous. In so ruling, the court in two of the three cases<sup>34</sup> involved relied heavily on the circumstance that defendant was himself willing to ride in the car.

*Krantz* involved a situation closely analogous to those just mentioned. Defendant was aware that the five-year-old plaintiff was dangerously perched on the drawbar but took no steps for his protection and apparently failed even to warn him of the danger. From plaintiff's standpoint, the danger was obviously "latent." Thus recovery would seem justified under the Illinois cases even if the guest statute were held to be applicable.<sup>35</sup> It is, however, doubtful whether the guest statute is even applicable to the present situation. Several questions appear to be involved.

First, is it significant that the accident took place on private property? Only two cases have been found bearing upon the question and both held the statute to be applicable. One case involved an accident on a private road leading from a hunting lodge,<sup>36</sup> the other a collision on a "semi-public" road on a federal air base.<sup>37</sup> The Ohio Supreme Court, in dealing with the latter case, expressly pointed out that the primary purpose of the guest statutes was to prevent collusion and that such purpose was applicable regardless of the place of the accident. Precedents drawn from state criminal statutes relating to motor vehicles were held to be irrelevant. While neither of the two cases in question touches upon the applicability of the statute to an accident on private property other than a road, the "prevention of collusion" rationale<sup>38</sup> upon which each rests would clearly seem to apply.

Second, is the extreme peril of plaintiff's location on the draw-

<sup>33</sup> *Cronin v. Swett*, 157 Neb. 662, 61 N.W.2d 219 (1953); *Paxton v. Nichols*, 157 Neb. 152, 59 N.W.2d 184 (1953); *In re Estate of O'Byrne*, 133 Neb. 750, 277 N.W. 74 (1938).

<sup>34</sup> *Cronin v. Swett*, 157 Neb. 662, 61 N.W.2d 219 (1953); *Paxton v. Nichols*, 157 Neb. 152, 59 N.W.2d 184 (1953).

<sup>35</sup> *Dyreson v. Hughes*, 33 Ill. App. 198, 76 N.E.2d 809 (1947).

<sup>36</sup> *Fishback v. Yale*, 85 So.2d 142 (Fla. 1955).

<sup>37</sup> *Kitchens v. Duffield*, 149 Ohio St. 500, 79 N.E.2d 906 (1948).

<sup>38</sup> This is a widely accepted view in guest statute jurisdictions. See *Taylor v. Taug*, 17 Wash.2d 533, 136 P.2d 176 (1943); *Ward v. George*, 195 Ark. 216, 112 S.W.2d 30 (1937); *Naudzius v. Lahr*, 253 Mich. 216, 234 N.W. 581 (1931).

bar of importance? Reasoning that the guest statute was only intended to reduce the host's common law duty of reasonable care in cases where the guest was exposed to the "ordinary risks of the perils of traffic," the Ohio Court of Appeals held that a scoutmaster driving a car pulling a loaded trailer designed solely for carrying property could not invoke the guest statute against a twelve-year-old plaintiff whom he permitted to ride on the trailer.<sup>39</sup> *Krantz*, of course, would be covered by such a ruling. The Michigan court, however, has ruled that a rider of a toboggan being pulled behind an automobile was covered by the statute notwithstanding the extreme peril involved.<sup>40</sup>

Third, is a farm tractor a motor vehicle within the meaning of the statute? The Illinois Guest Statute is a section of that state's "Motor Vehicle Act." The term "motor vehicle", as defined for the entire act, clearly includes tractors.<sup>41</sup>

Nebraska's Guest Statute, however, fails to define the term "motor vehicle." While "The Rules of the Road" portion of the statutes contains a definition of the term broad enough to include a farm tractor, the definition is expressly limited to that portion of the statutes. In view of this express limitation and because of the nature of the guest statute, the definition in question would appear to be of limited value.<sup>42</sup>

As a guest statute's primary purpose is to prevent host-guest collusion at the expense of an insurance company, the prevalence of insurance coverage of farm tractor accidents should be of importance in determining whether such accidents are included. Liability coverage of farm tractors is significantly less than coverage of automobiles, as indicated by a survey conducted in Indiana in 1951.<sup>43</sup> The survey disclosed that 18 per cent of the interviewed farmers carried insurance covering accidents of this type, as opposed to 90 and 97 per cent liability coverage on trucks and passenger automobiles respectively. Prior to 1948 few farmers carried any tractor liability insurance at all.<sup>44</sup> As the Nebraska

<sup>39</sup> *Vest v. Kramer*, 111 N.E.2d 696 (Court of Appeals, 1951), *aff'd*, 158 Ohio St. 78, 107 N.E.2d 105 (1952).

<sup>40</sup> *Langford v. Rogers*, 278 Mich. 310, 270 N.W. 692 (1936).

<sup>41</sup> *Smith-Hurd*, Ill. Ann. Stat. ch. 95½, § 1 (1950).

<sup>42</sup> Neb. Rev. Stat. § 39-741 (Reissue 1952).

<sup>43</sup> Ind. Agr. Exp. Sta. Bul. 609, Sept. 1954.

<sup>44</sup> *Meyer*, Can Your Farm Afford an Accident, Country Gentleman, Nov. 1953, p. 67. The type of policy by which this coverage is obtained, farmers' comprehensive personal liability, originated in 1948. *Rush*, Increase in Farm Liability Risks and Availability of Insurance, Agr. Finance Rev., Nov. 1952.

Guest Statute was enacted in 1931,<sup>45</sup> it seems very unlikely that the legislature even considered the problem of collusive law suits arising out of farm tractor accidents. As the statute offers no sure guidance, it should be interpreted as excluding such accidents.

Fourth, is a five year old child a "guest" within the meaning of the statutes? The answer to this question, perhaps the most important of those to be considered, depends first of all upon whether the child passenger must *accept* the operator's hospitality and, if so, whether he is legally capable of accepting. The statutes of some states, including Nebraska, specifically provide that a person must accept a ride in order to become a guest,<sup>46</sup> while the statutes of other jurisdictions, including Illinois, though not specifically so providing, have judicially been construed to contain such a requirement.<sup>47</sup> Acceptance jurisdictions almost uniformly consider the infancy of the passenger in determining whether an effective acceptance has been made.<sup>48</sup> The cited cases concern children of "tender years" and squarely hold that such children are not guests. The rationale of these cases is that a passenger, in order to become a guest, must at least be capable of understanding the ordinary risks of motor vehicle travel. The courts, in the cases under discussion, have taken the view, consistent with that taken in cases involving child licensees and trespassers on land, that age is a crucial consideration in determining whether the passenger has the capacity to understand the nature of the risk.

The rationale of the leading cases holding that a child of tender years may be a guest is simply that acceptance is not necessary for guest status and that the court should not engage in judicial legislation.<sup>49</sup> Such decisions have been criticized for their reliance on

<sup>45</sup> Neb. Laws ch. 105 § 1 (1931).

<sup>46</sup> Neb. Rev. Stat. § 39-740 (Reissue 1952); 66 West's Ann. Cal. Codes § 403 (1956).

<sup>47</sup> *Kudrna v. Adamski*, 188 Ore. 396, 216 P.2d 262 (1950); *Fuller v. Thrun*, 109 Ind. App. 407, 31 N.E.2d 670 (1941); *Dorn v. Village of North Olmstead*, 133 Ohio St. 375, 14 N.E.2d 11 (1938); *Langford v. Rogers*, 278 Mich. 310, 270 N. W. 692 (1936); see *Miller v. Miller*, 395 Ill. 273, 69 N.E.2d 878 (1946).

<sup>48</sup> *Sargent v. Selvar*, 46 Wash.2d 271, 280 P.2d 683 (1955); *Kudrna v. Adamski*, 188 Ore. 396, 216 P.2d 262 (1950); *Fuller v. Thrun*, 109 Ind. App. 407, 31 N.E.2d 670 (1941); *Rocha v. Hulen*, 6 Cal. App.2d 245, 44 P.2d 478 (1935). A possible exception is *Langford v. Rogers*, 278 Mich. 310, 270 N.W. 692 (1936) in which a child was held to be a guest. However, it seems likely that the point of whether a small child can accept was not fully considered, as the opinion does not mention the age of the child.

<sup>49</sup> *In re Wright's Estate*, 170 Kan. 600, 228 P.2d 911 (1951); *Morgan v. Anderson*, 149 Kan. 814, 89 P.2d 866 (1939).

largely inapplicable authority and as involving an unwarranted extension of the assumption of risk doctrine.<sup>50</sup> In any event, such decisions would seem to be of little persuasive force in jurisdictions where, by the terms of the statute or by prior judicial construction, an acceptance on the part of the passenger is a prerequisite to the guest status.

Particularly in our consideration of questions three and four, the decision of the trial court in the instant case that the guest statute was not available as a defense seems correct.

### III. CONCLUSION

In summary, the technical status upon land or motor vehicles of a child too young to appreciate the risks involved should be irrelevant in fixing a defendant's standard of care. The test should properly be whether injury to a small, uncomprehending child is foreseeable, and if so, whether the ordinarily careful defendant could have prevented the injury. Open recognition of such a test would do much to eliminate the chances of a result, as in *Krantz*, out of touch with the practical realities of the situation. A man carrying a small child upon farm machinery should have a positive and enforceable duty to protect that child from injury.

*Duane L. Nelson, '58*

<sup>50</sup> As pointed out in 52 Colum. L. Rev. 543 (1952), the cases cited are distinguishable either as involving older children (e.g., *Shiels v. Audette*, 119 Conn. 75, 174 Atl. 323 (1934) (child of 13)) or are from jurisdictions having no guest statute (e.g., *Eisenhut v. Eisenhut*, 212 Wis. 467, 250 N.W. 441 (1933); *Balian v. Ogassian*, 277 Mass. 525, 179 N.E. 232 (1931)).