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to qualify, or he might induce his successor to renounce the office before qualification.

The second distinguishable aspect between the two approaches is that of constitutional and legislative construction. The majority approach interprets literally the hold over provision of a state constitution or statute. It is interpreted as preventing the development of a vacancy, and of requiring the successor to be chosen by the same mode as the incumbent.²³ This prevents a governor whose appointments are subject to legislative confirmation from delaying appointments until the legislature has adjourned.²⁴ On the other hand the minority approach follows the intention of the framers of applicable constitutions and statutes.²⁵ The primary aim of a hold over provision is to insure the presence of a person qualified to perform the duties of the office during the short interval between the expiration of a term and the assumption of duties by the successor.²⁶ If the draftsmen had intended for an incumbent to hold over for another term upon the failure of his successor to qualify, a special provision would have been made.

Although the majority approach has several beneficial aspects, the minority view gives more protection to the integrity of elective offices and is more in accord with the spirit and purpose of the state constitutions or statutes on the subject.

JAY FREDERICK WILKS

LIABILITY OF LAND POSSESSOR TO SOCIAL GUEST

The division of negligence into degrees—slight, ordinary, gross—which was introduced into Anglo-American law in a 1704 bailment case,¹ has never received general judicial approval.² The concept,

²³See *Pitmann v. Ingram*, 184 Ga. 255, 190 S.E. 794 (1937).

²⁴E.g., *Shackelford v. West*, 138 Ga. 164, 74 S.E. 1079 (1912).

²⁵See *Olmstead v. Augustus*, 112 Ky. 365, 65 S.W. 817 (1901).

²⁶*Hood v. Miller*, 144 Okla. 288, 291 Pac. 504 (1930).

¹The doctrine was borrowed from the Roman law by Chief Justice Holt in *Coggs v. Bernard*, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1704). See generally Green, *The Three Degrees of Negligence*, 8 Am. L. Rev. 649 (1874); Elliot, *Degrees of Negligence*, 6 So. Cal. L. Rev. 91 (1933).

²*Steamboat New World v. King*, 57 U.S. (16 How.) 260 (1853); *Denver & R.G.R.R. v. Peterson*, 30 Colo. 77, 69 Pac. 578 (1902); *City of Lanark v. Dougherty*, 153 Ill. 163, 38 N.E. 892 (1894); *Denny v. Chicago, R.I. & P. Ry.*, 150 Iowa 460, 130 N.W. 363 (1911); *Raymond v. Portland R.R.*, 100 Me. 529, 62 Atl. 602 (1905);

however, has survived by statute in special situations.³ Some twenty-nine states, by statute or court decision, apply the doctrine to limit the liability of a motor vehicle operator to a guest.⁴ In these states the guest generally may not recover unless the driver was guilty of acts amounting to gross negligence or wilful misconduct.⁵

Smith v. Allen,⁶ a recent decision from the Court of Appeals for the Fourth Circuit in a diversity action involving Virginia law expanded this doctrine to cover the host's liability to a social guest. Mrs. Smith was visiting her nephew, Mr. Allen, when she received leg injuries as a result of a fall caused by the collapse of a board in a pier which was maintained and controlled by Allen. There was evidence tending to show the board was rotten and that this fact was known or should have been known by Allen. Allen was told by his employee immediately prior to the accident of the defective condition of that part of the pier on which Mrs. Smith was injured. The trial court directed a verdict for the defendant, who had rested without introducing any evidence. The Court of Appeals reversed and remanded, holding that while the plaintiff could recover only upon a showing of gross negligence, there was sufficient evidence to go to the jury on this issue.

Since this was a case of novel impression under Virginia law,⁷ the

Prosser, Torts § 33 (2d ed. 1955). Most writers also have rejected the theory of degrees of negligence. Harper, Law of Torts § 74 (1933); Salmond, Law of Torts § 121 (10th ed. 1945); Elliott, Degrees of Negligence, 6 So. Cal. L. Rev. 91 (1933); Harper, Licensor-Licensee, Tweedledum-Tweedledee, 24 Conn. B. J. 123 (1951);

³These statutes generally apply the doctrine in situations involving bailment, criminal negligence and contributory negligence. See Cal. Civ. Code § 1846 (1931); Neb. Rev. Stat. §§ 25-1151 (1956); N.D. Comp. Laws §§ 7280-7283 (1913); S.D. Comp. Laws § 991 (1929); Wis. Stat. § 340.26 (1953). See note 4 *infra*.

⁴These states are: Alabama, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington and Wyoming. For a comprehensive and detailed analysis as to what is required to impose liability in each of the above states see 27 Ins. Counsel J. 223 (1960).

⁵All of the states enumerated in note 4 *supra* require proof of gross negligence or wilful misconduct or both to enable the guest to recover. 27 Ins. Counsel J. 223 (1960).

⁶297 F.2d 235 (4th Cir. 1961).

⁷Though Virginia has no cases dealing with the liability of a possessor of land to a social guest there are several Virginia cases dealing with the general class of licensees in the form of "tolerated intruders." *Pettyjohn & Sons v. Basham*, 126 Va. 72, 100 S.E. 813 (1919); *Norfolk & W.R.R. v. DeBoard's Adm'r*, 91 Va. 700, 22 S.E. 514 (1895); *Nichols' Adm'r v. Washington, O. & W.R.R.*, 83 Va. 99, 5 S.E. 171 (1887). There are dicta in cases dealing with business invitees which suggests that the social guest might be given the status of an invitee. *Richmond & M. Ry. v. Moore's Adm'r*, 94 Va. 493, 27 S.E. 70 (1897); *Rayless Chain Stores, Inc. v. DeJarnette*, 163 Va. 938, 178 S.E. 34 (1935); see note 9 *infra*.

court looked elsewhere for authority. The court followed the Restatement nomenclature of classifying the social guest, Mrs. Smith, as a gratuitous licensee⁸ rather than an invitee.⁹ However, the court rejected the Restatement rule of the liability of possessors of land to gratuitous licensees which imposes liability on the host where he knows of a dangerous condition and fails to warn the guest or to use reasonable care to make the condition safe.¹⁰ This rule, based primarily on ordinary negligence, was discarded in favor of the gross negligence rule. In reaching this result the court said:

"[W]e cannot overlook the analogy between this situation and that of a guest passenger in the automobile of another."¹¹

The Virginia guest statute, which codifies earlier Virginia decisions,¹² limits the liability to a guest of the owner or operator of a motor vehicle to situations involving gross negligence or wanton and wilful conduct.¹³ Inherent in the Virginia statute and other "guest" statutes and judicial decisions which have adopted this rule is the premise that the recipient of gratuitous hospitality should be allowed to recover from his host only if the host was guilty of something more than ordinary negligence.¹⁴ Thus, since the benefit runs only to the

⁸A gratuitous licensee enters the land with the possessor's consent but not necessarily by his invitation. Only the consent distinguishes him from a trespasser. Restatement, Torts § 341 (1934); Prosser, Torts § 77 (2d ed. 1955).

⁹In order to qualify as an invitee the visitor must offer some potential pecuniary benefit to the host, or, at least, enter the premises under an invitation which expressly or impliedly represents that reasonable care has been exercised to make the premises safe. Restatement, Torts §§ 332, 343, comment a (1934); Prosser, Torts § 78 (2d ed. 1955).

¹⁰The rule provides that "a possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon if, but only if he

(a) knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and

(b) invites or permits them to enter or remain upon the land, without exercising reasonable care (i) to make the condition safe, or (ii) to warn them of the condition and the risk involved therein." Restatement, Torts § 342 (1934).

¹¹297 F.2d at 240.

¹²Jones v. Massie, 158 Va. 121, 163 S.E. 63 (1932); Boggs v. Plybon, 157 Va. 30, 160 S.E. 77 (1931). In 1938 Virginia passed a statute codifying the rule laid down in these decisions. Va. Code Ann. § 8-646.1 (1950). See note 13 *infra*.

¹³The statute stipulates that a guest may recover from the host driver only if injury was caused "from the gross negligence or willful and wanton disregard of the safety of the person or property of the person being so transported on the part of such owner or operator." Va. Code Ann. § 8-646.1 (1950).

¹⁴Aragona v. Parrella, 325 Mass. 583, 91 N.E.2d 778 (1950); Scheibel v. Lipton, 156 Ohio St. 308, 102 N.E.2d 453 (1951); Solterer v. Kiss, 193 Va. 695, 70 S.E.2d 329

guest, the host's duty toward him should be correspondingly less than it would be in the ordinary situation.¹⁵ Also some courts treat the problem as one involving assumption of the risk, pointing out that the guest should occupy a position equal to that of the host's family.¹⁶ It appears that the basic philosophy is simply that one should not be quick to sue a friend for damages.

At first blush, the rationale appears equitable and just; but, is the host's hospitality worth absolving him from liability in all cases where he merely negligently injures the guest? Moreover, favors are returned so that the host may be in the process of returning a favor when the guest is injured. Is it fair, in any event, to classify the social guest invited partly for business purposes with the social guest invited for friendship only? It is hard to conceive of a situation in which the host does not receive or expect to receive some benefit from the presence of the guest, be it only his desire to accommodate a friend. In any event if the hospitality received by the injured guest is completely gratuitous such hospitality is unlikely to be of such magnitude as to justify excusing the host from all wrongdoing short of gross negligence. It is to some extent true that the social companion should not be quick to sue a good friend. But, in most cases in which suit is brought, the host will have insurance in which case the proceeding loses much of its adversary character and the basic reason for the gross negligence rule fails.¹⁷

This problem is further compounded by the difficulty experienced by the courts in applying and defining the standard of gross negligence.¹⁸ At the root of this problem is the difficulty of formulating an objective standard by which the jury can determine, as a matter of fact, whether or not a defendant has been grossly negligent. Many courts,¹⁹ including Virginia,²⁰ maintain that there is a difference in

(1952); *Roanoke Ry. & Elec. Co. v. Whitner*, 173 Va. 253, 3 S.E.2d 169 (1939); *Ferguson v. Virginia Tractor Co.*, 170 Va. 486, 197 S.E. 438 (1938).

¹⁵*Massaletti v. Fitzroy*, 228 Mass. 487, 118 N.E. 168 (1917); *Jones v. Massie*, 158 Va. 121, 163 S.E. 63 (1932); *Boggs v. Plybon*, 157 Va. 30, 160 S.E. 77 (1931). See note 14 *supra*.

¹⁶*Comeau v. Comeau*, 285 Mass. 578, 189 N.E. 588 (1934); *Cosgrave v. Molstrom*, 127 N.J.L. 505, 23 A.2d 288 (1941).

¹⁷See note 27 *infra*.

¹⁸*Chicago, R.I. & P. Ry. v. Hamler*, 215 Ill. 525, 74 N.E. 705 (1905); *John v. Northern Pac. Ry.*, 42 Mont. 18, 111 Pac. 632 (1910); *McAdoo v. Richmond & D.R.R.*, 105 N.C. 140, 11 S.E. 316, (1890); *Universal Concrete Pipe Co. v. Bassett*, 130 Ohio St. 567, 200 N.E. 483 (1936); *Ketchmark v. Lindauer*, 198 Va. 42, 92 S.E.2d 286 (1956); *Prosser, Torts* § 33 (2d ed. 1955); *Elliott, Degrees of Negligence*, 6 So. Cal. L. Rev. 91 (1933).

¹⁹*Willite v. Webb*, 253 Ala. 606, 46 So. 2d 414 (1950); *Bedwell v. De Bolt*, 221 Ind. 600, 50 N.E.2d 875 (1943); *Titus v. Lonergan*, 322 Mich. 112, 33 N.W.2d

kind between acts which are grossly negligent and those which are wilful and wanton. But the nature of this difference is not easily ascertainable and at least one writer has concluded that Virginia courts in particular have failed to grasp this distinction.²¹ The only agreement the courts have reached in the area is that gross negligence is something greater than ordinary negligence,²² which does little to dispel the aura of confusion surrounding the term. Nonetheless, the fact that the definition and application of the term "gross negligence" have been extremely difficult both for the courts and the juries is hardly to be doubted.²³ This is not to imply that standards of ordinary negligence are entirely certain and definite. But the additional division of an already indefinite standard can only result in increased confusion among courts and juries.

On the other hand, the Restatement rule,²⁴ has the merit of being relatively clear and precise. This rule, by virtue of its clarity and precision, is not likely to result in confusion in the minds of the jury, while an instruction on gross negligence, accompanied by a nebulous and uncertain standard, is likely to have the opposite result. For example, in the instant case, the jury could readily find that Allen knew or should have known of the condition and failed to warn Mrs. Smith. Under the Restatement rule this would settle the liability. However, under a gross negligence instruction, the jury would then have to decide if knowledge of the condition and failure to warn the guest amounted to gross negligence as defined by the court.

The Restatement theory of liability is substantially the standard of reasonable care in specific terms, though in all cases it exonerates the host from the duty of inspection. Since state courts are not bound by federal precedent dealing with state law, it would seem that it would be preferable for the Virginia court, when confronted

685 (1948); *Ressmeyer v. Jones*, 210 Minn. 423, 298 N.W. 709 (1941); *Sorrell v. White*, 103 Vt. 277, 153 Atl. 359 (1931).

²⁰*Ketchemark v. Lindauer*, 198 Va. 42, 92 S.E.2d 286 (1956).

²¹*Light*, Annual Survey of Virginia Law, 42 Va. L. Rev. 1197 (1956).

²²*Steambolt New World v. King*, 570 U.S. (16 How.) 260 (1853); *Dickerson v. Connecticut Co.*, 98 Conn. 87, 118 Atl. 518 (1922); *Thompson v. Ashba*, 122 Ind. App. 58, 102 N.E.2d 519 (1951); *Nadeau v. Fogg*, 145 Me. 10, 70 A.2d 730 (1950); *McLean v. Triboro Coach Co.*, 302 N.Y. 49, 96 N.E.2d 83 (1950). See also *Prosser*, Torts § 33 (2d ed. 1955).

²³This fact has led the legal writers to condemn almost unanimously the doctrine of degrees of care. *Eldridge*, Modern Tort Problems § 10 (1941); *Harper & James*, Law of Torts § 16.13 (1956); *Pollock*, Torts 353 (14th ed. 1939); *Prosser*, Torts § 33 (2d ed. 1955); *Salmond*, Torts § 121 (10th ed. 1945).

²⁴See note 10 *supra*.

with a case similar to *Smith v. Allen*, to adopt the Restatement rule on both practical and theoretical grounds. Though the gross negligence rule is firmly entrenched in Virginia law concerning guests in automobiles, the similarity between social guests in automobiles and those on land is not so striking as to demand a uniform rule. Many statutes, in fact, have different theories of liability to cover the two situations.²⁵ Moreover, consistency is not all important where the extension of a rule of law would tend to be unjust and impractical. Though Virginia has never passed on a case involving the problem presented in *Smith v. Allen*, such cases are appearing in the United States courts with increased frequency,²⁶ perhaps due to the spread of liability insurance to cover such situations.²⁷ If the present trend holds true the likelihood is that in the future Virginia courts also will be called upon to deal with this problem with frequency.

There has been an undercurrent of dissatisfaction with the rigid and arbitrary classifications concerning the social guest.²⁸ A recent New Jersey case set up reasonable care as the duty owed by the host to his guest.²⁹ Yet, essentially the social guest is still the invitee who is not an invitee,³⁰ even though such "business visitors" may offer no shade of pecuniary benefit to the host.³¹ Perhaps the only way to do justice

²⁵For example Delaware, Florida, Ohio and Washington have "guest" statutes requiring the automobile guest to prove gross negligence or willful and wanton misconduct in order to impose liability on the host. Del. Code Ann. tit. 21, § 6101 (1953); Fla. Stat. § 320.59 (1956); Ohio Rev. Code § 4515.02 (Baldwin 1961); Wash. Rev. Code § 46.08.080 (1957). These same states have held that a possessor of land must use reasonable care to warn against or remove defects which he knows are likely to cause harm to his social guests. *Maier v. Voss*, 46 Del. 418, 84 A.2d 527 (1951); *Goldberg v. Strauss*, 55 Fla. 254, 45 So. 2d 883 (1950); *Scheibel v. Lipton*, 156 Ohio St. 308, 102 N.E.2d 453 (1951); *McNamara v. Hall*, 38 Wash. 2d 864, 233 P.2d 852 (1951).

²⁶Compare the great number of recent cases in Annot., 25 A.L.R.2d 598 (1952), with the earlier lack of authority in annotations 12 A.L.R. 987 (1921), 92 A.L.R. 1005 (1934).

²⁷Professor Harper suggests that their increased frequency is due to the spread of liability insurance. Harper & James, *Law of Torts* § 27.1 (1956). The great number of cases in Annot., 25 A.L.R.2d 598 (1952) between members of the same family suggests that these suits are not truly adversary.

²⁸*Laube v. Stevenson*, a Discussion, 25 Conn. B.J. 123 (1951); *McCleary*, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land*, 1 Mo. L. Rev. 45 (1936).

²⁹*Cohen v. Kaminetsky*, 36 N.J. 276, 176 A.2d 483 (1961).

³⁰The term "invitee" seems to indicate that a social guest would fall squarely into this category. For a discussion of this anomaly see Prosser, *Business Visitors and Invitees*, 26 Minn. L. Rev. 573 (1942).

³¹Those classified by the courts as invitees include many groups of visitors who do not confer discernible benefits upon the host. *Guilford v. Yale Univ.*, 128 Conn. 449, 23 A.2d 917 (1942); *Bunnell v. Waterbury Hospital*, 103 Conn. 520,