Volume 4 | Issue 2 Article 3

1958

# Comments

Various Editors

# COMMENTS

## EVIDENCE—LAY OPINION IN CIVIL CASES—SPEED OF MOTOR VEHICLES.

As more and more automobiles are used on the nation's highways, there is great concern with the problem of keeping to a minimum the fatalities and injuries which arise as a result of the misuse of these motor vehicles. As a result of this awareness, state legislatures are constantly considering better methods of speed detection and apprehension of speeders. However, with each new statute comes close scrutinization by the citizenry and the press, and the courts' dockets are burdened with many cases testing the constitutionality of each statute. The latter is so even though conviction under the statute will result at most in a fine or suspension of driving privileges if several violations of the speed laws are committed by an individual. If the speeding by the individual results in death to another, then, of course, the individual is subject to criminal prosecution. This same unreasonable speeding can cause a secondary consequence, namely, property loss. Millions of dollars for property and personal injury loss are awarded in civil actions each year as a result of traffic accidents caused by speeding. Yet, much less concern is shown over the admissibility of evidence of speed in civil cases than the constitutionality of statutes providing for various types of speed detection methods and devices. The relative amount of concern over the two topics can be seen by a comparison of the number of cases involving the respective topics and the resulting amount of literature on each topic. It is the purpose of this Comment to discuss the admissibility of lay opinions as evidence of speed in civil cases. Primarily, admissibility of this type of evidence in the courts of New Jersey, New York, and Pennsylvana will be discussed. However, where it has been found that the courts in these states have not clearly treated particular points involved in this subject other jurisdictions will be considered so that the reader may become familiar with the various general views on the particular points.

### I.

### BASIC CONSIDERATIONS IN DETERMINING ADMISSIBILITY.

As to when opinions may be rendered in court, the general rule in New Jersey, New York and Pennsylvania, as in other states, is that an

opinion, whether formed by an expert or non-expert, may not be given as to matters that are within the common knowledge of the jury.[1] Testimony to be admissible must be in form of facts from which the trier of fact can form their own conclusions. However, there is a well recognized exception to the above rule, viz., a witness may give an opinion in matters where the facts observed by the witness are such that he can not reproduce or make them plain to the jury so that the latter can form their own opinions.[2] Testimony as to temperature, color, and sound fall into this class of exceptions, as well as does testimony as to speed of objects. The New Jersey, New York, and Pennsylvania courts recognize that non-expert opinion as to the speed of a moving object is admissible notwithstanding that it is actually an estimate, opinion, or conclusion of the witness.[3]

However, before a witness's testimony can be held to be competent and admissible on the question of speed, there are several prerequisites to be met. From a review of the cases, it would appear that the courts use the following three considerations, generally stated, in passing on the admissibility of the lay opinion evidence: (1) the witness must have sufficient ability, usually obtained by experience, in determining speed of like vehicles at relative speeds; (2) the witness must have been able to identify the particular vehicle observed to be the vehicle whose speed is in question and have had a clear observation and opportunity to judge the speed of the vehicle; (3) and the witness must have been in an acceptable position relative to the vehicle to have made a sufficiently accurate estimate of the speed.

Concerning the first consideration above, it would appear that the courts are very liberal as to the minimum amount of ability necessary before a person may testify as to speed,[4] and in effect state that the experience that one acquires in his everyday living in comparing relative

1. Bergen County Traction Co. v. Bliss, 62 N.J.L. 410, 41 Atl. 837 (1898); Moran v. Standard Oil Co., 211 N.Y. 187, 105 N.E. 217 (1914); Fifth Mut. Bldg. Soc'y v. Holt, 184 Pa. 572, 39 Atl. 293 (1898).

2. See Gretowski v. Hall Motor Express, 25 N.J. Super. 192, 95 A.2d 759 (1953); Finn v. Cassidy, 165 N.Y. 584, 59 N.E. 311 (1901); Graham v. Pennsylvania Co., 139 Pa. 149, 21 Atl. 151 (1891).

3. Baus v. Trenton and Mercer County Traction Corp., 102 N.J.L. 1, 131 Atl. 92 (1925), *aff'd*, 102 N.J.L. 712, 134 Atl. 915 (1926) (speed of a trolley car); Roeltgen v. Public Ser. Ry., 2 N.J. Misc. 471 (Sup. Ct. 1924); Marcucci v. Bird, 275 App. Div. 127, 88 N.Y.S.2d 333 (3d Dep't 1949); Dugan v. Arthurs, 230 Pa. 299, 79 Atl. 626 (1911).

4. In *Marcucci v. Bird, supra* note 3 at 129, 88 N.Y.S.2d at 335, the court, when referring to the defendant's non-expert witness who testified as to the speed of the plaintiff's car, stated that "it is well settled that any person of ordinary ability and intelligence having the means or opportunity of observation is competent to testify as to the rate of speed of such a vehicle." In *Dugan v. Arthurs, supra* note 3 at 302, 79 Atl. at 627, the court in summarizing the requirements for the competency of plaintiff's witnesses' testimony as to the speed of the auto stated that "their competency to express an opinion did not require them to possess technical or scientific knowledge. An intelligent person having a knowledge of time and distance is capable of forming an opinion as to speed of a passing railroad train, a street car, or an automobile . . . . His everyday experience gives him sufficient knowledge to form an intelligent judgment on the subject."

speeds of objects is sufficient. It is most difficult to determine what degree of experience the courts would consider as falling below the minimum requirement. The mere fact that the witness never drove a car apparently will not place him below this minimum and make him incompetent,[5] and courts apparently do not require any degree of frequency in the non-driver's riding in a car before he can obtain sufficient ability to give his opinion.[6] Also it would appear that the courts do not feel that experience in judging speed is dependent upon age, since the courts have held that youths eleven years of age[7] are competent to testify as to speed. While it is difficult to determine just what minimum ability in judging speed is required before the witness may give his opinion, it would appear that once the court finds that the witness is competent to form an opinion as to the speed of moving vehicles, any inexperience in this matter goes to the weight of the evidence, not to its admissibility.[8]

Of course, experts can give an opinion as to the speed of an automobile based on observation of it in motion. However, when they do, their testimony is not received under the exception to the general rule against opinion evidence which is made when an expert gives an opinion on matters not within the knowledge of the jury. Rather, the expert's opinion would be admissible under the exception existing in the case of impossibility of reproducing the data, which is the same as was discussed above in the case of non-experts.[9] It is submitted that the labelling of a witness as an expert may very readily cause the jury to give much more weight to his testimony than would be afforded to a non-expert, and yet, the party presenting the alleged expert will only have the burden of showing that his witness meets the low standards of competency of a nonexpert to have the witness's opinion admitted.[10] Therefore, it is suggested that the courts should keep a close watch to see that the party presenting the witness does

5. See Kozemchak v. Garner, 163 Pa. Super. 328, 61 A.2d 375 (1949); Morris v. Emmons, 32 Del. 389 (C.P., Pa. 1942).

6. *Ibid.* In both cases the witnesses testified that they had ridden in cars in the past. In the *Kozemchak* case the witness did state that she had often ridden in them.

7. Senecal v. Drollette, 304 N.Y. 446, 108 N.E.2d 602 (1952) (error not to allow a twelve year old boy to testify as to speed); Marcucci v. Bird, 275 App. Div. 127, 88 N.Y.S.2d 333 (3d Dep't 1949) (prejudicial error not to admit the testimony of a fifteen year old who was employed by a motor sales concern and had considerable experience in the operation of motor vehicles); Connolly v. Bell Tel. Co., 100 Pgh. L.J. 57, 83 Pa. D. & C. 342, (C.P. 1949) (A fourteen year old boy who was eleven at the time he made his observation as to speed and had ridden in automobiles frequently was allowed to testify. The court specifically pointed out that the judge must caution the jury that the weight of the opinion was for them to determine.).

8. See Dugan v. Arthurs, 230 Pa. 299, 79 Atl. 626 (1911).

9. See Annot., 1918A L.R.A. 703.

10. In *Pierontoni v. Barber,* 384 Pa. 56, 119 A.2d 503 (1956), the witness had worked with the chief of police in operating a speed trap from which he claimed to have acquired a keen aptitude in gauging the speed of automobiles over a measured course. The court required only such experience to make an estimate of speed as would be required of a non-expert. It is not hard to visualize how the party presenting such a witness could forcibly convey to the jury that this man was an expert and that the jury would then afford his testimony comparable weight.

not label him to be an expert until such party establishes that he in fact is an expert in determining speed from mere observation of motor vehicles in motion. While it is true that the difference between the classification of "expert" and "non-expert" is a question of degree and not of kind, still it must be appreciated that there is a wide difference in standards in determining an experienced non-expert and an expert and the term *expert* should not be applied loosely.

Concerning the second consideration in determining the competency of a witness to render opinion evidence, it would appear that the courts of the various jurisdictions differ as to requirements for observation and detection. It would appear that in New York, if there is in fact *any* observation, the requirement of observation is met and the opportunity of the witness to judge the speed of the auto goes to the weight of the testimony rather than its admissibility.[11] However, in Pennsylvania, it has been held that not only must there be an observation in fact but also the observation must provide the witness with sufficient opportunity to judge the speed.[12] Yet some doubt is created by the case of *Sapsara v. Peoples Cab Co.*[13] in which the court did not seem to consider any minimum time of observation before the testimony was held admissible. From the brief decision it is difficult to determine that the court was trying to effect a change in Pennsylvania law and agree with New York on the question as to whether some minimum amount of observation must be had before the testimony is competent. Such a change is certainly not apparent in the recent case of *Heacox v. Polce*[14] wherein the court held that the plaintiff's testimony was inadmissible because the plaintiff had not observed the defendant's car moving toward him for a sufficient amount of time. It should be noted that the dissenting opinion pointed out that the plaintiff had observed the defendant's car for 900 to 1000 feet before it struck him.

11. See Marcucci v. Bird, 275 App. Div. 127, 88 N.Y.S.2d 333 (3d Dep't 1949). The court gave no consideration to the length of the time of observation necessary to provide an opportunity to judge the speed, but merely held that since plaintiff's witness saw the auto as it approached him, his testimony should be admissible.

12. In *Kotlikoff v. Master,* 345 Pa. 258, 27 A.2d 35 (1942), the testimony of one witness who had observed the defendant's truck from a time when it approached him from 450 feet until the accident occurred 150 feet from him and the testimony of one of the plaintiffs who observed the truck from the time it was about a city block way, were both held admissible. However, in the following cases the respective witnesses' testimony was held inadmissible: Kelly v. Veneziale, 348 Pa. 325, 35 A.2d 67 (1944) (witness observed the defendant's auto for only about 5 or 10 feet before the point of collision); Cardarelli v. Simon, 149 Pa. Super. 364, 27 A.2d 250 (1942) (plaintiff saw the defendant's auto coming at him for only a fraction of a second as he glanced to his right). See Schaffer v. Torrens, 359 Pa. 187, 58 A.2d 439 (1948) (witness observed the travel of the auto from a point 10 feet before striking the pedestrian until 65 to 70 feet afterwards when the auto came to a stop and the court held that the testimony as to speed was admissible).

13. 381 Pa. 241, 113 A.2d 278 (1955). A taxicab driver saw the defendant's truck only from the time it was from 15 to 18 feet away from the point of its collision with his cab and yet the court held his opinion as to its speed was admissible. In a very brief treatment of the point the court stated that the driver only had to have an observation of the vehicular movement in question.

14. 392 Pa. 415, 141 A.2d 229 (1958).

In addition to an adequate observation of the vehicle, there is the requirement of identification of the car observed as the car involved in the collision, where the observation by the witness did not continue until the point of collision. It would appear that the courts are not too strict as to the degree of identification of the car observed and that identification merely to the extent of the color of the car is sufficient.[15] However, it is easily realized that the degree of identification should depend on the distance that the observation ceases from the point of the collision[16] and also the load of traffic over the stretch of roadway where the observation is made.

In examining the third consideration in a court's determination of the witness's competency, the courts appear to be quite liberal and permit the witness to be in almost any position with respect to the motor vehicle so long as an observation did in fact occur. The courts have permitted a lay witness to render his opinion as to speed where the witness was observing the car as it passed in front of him[17] or when the car was proceeding directly towards him.[18] Also, witnesses have been permitted to testify where the car whose speed was in question was being driven ahead of the car in which the witness was riding;[19] or the car in question passed the car in which the witness was riding;[20] or the car in question was being driven behind the car in which the witness was riding.[21] The fact that the car whose speed was in question struck the car in which the witness was riding[22] or struck a party accompanying the witness while walking[23] does not render the lay witness incompetent to render his opinion as to the speed of the car in question. It can be appreciated that some of the above positions would be more advantageous for observation by the witness than other positions and that testimony based on observation from these positions should receive more weight. On a few occasions this factor has been

---

15. In *Miller v. Trans Oil Co.*, 18 N.J. 407, 113 A.2d 777 (1955), the testimony of the witness as to the speed of the auto which passed him was admissible when the extent of the identification of the vehicle was a "black sedan." The court cited *Walsh v. Murray*, 315 Ill. App. 664, 43 N.E.2d 562 (1942), in arriving at this decision, See also *Fitzgerald v. Penn Transit Co.*, 353 Pa. 43, 44 A.2d 288 (1945) where the lack of proper identification was one of several factors considered by the court in holding that the testimony of two witnesses was inadmissible.

16. In the *Miller* case, *supra* note 15, the "black sedan" passed the witness's car three-fourths of a mile from the scene of the subsequent accident.

17. See Senecal v. Drollette, 304 N.Y. 446, 108 N.E.2d 602 (1952); Dugan v. Arthurs, 230 Pa. 299, 79 Atl. 626 (1911).

18. Marcucci v. Bird, 275 App. Div. 127, 88 N.Y.S.2d 333 (3d Dep't 1949). See also 9C BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 6232 n.25 (1954).

19. See Murray v. Jenkins, 36 Erie L.J. 236 (C.P., Pa. 1952).

20. See Miller v. Trans Oil Co., 18 N.J. 407, 113 A.2d 777 (1955).

21. See Griffin v. Ensign, 234 F.2d 307 (3d Cir. 1955).

22. See Kotlikoff v. Master, 345 Pa. 258, 27 A.2d 35 (1942); Kozemchak v. Garner, 163 Pa. Super. 328, 61 A.2d 275 (1948).

23. See Senecal v. Drollette, 304 N.Y. 446, 108 N.E.2d 602 (1952).

taken into consideration by the court in considering whether opinion evidence should be admitted.[24]

Regardless of the length of the observation or the position of observation, the witness must base his estimate or opinion as to the speed of the vehicle solely on this observation and not from facts learned through subsequent observation or information subsequently received.[25] The latter procedure would definitely be an invasion of the realm of the jury, or it would result in the witness holding himself out as an expert without his having met the qualifications to be considered as an expert.

Another consideration that a court may look into in exercising its discretion to determine whether the lay opinion is admissible is the time of day when the observation was made. At night the observer must rely on the light from the headlights or taillights of the car in question for his observation from which to determine the car's speed. It has been held that testimony as to speed based on the observation of a car's headlights is admissible.[26] However, it can be appreciated how difficult it is to observe and judge the speed of a car from approaching, glaring headlights, and this should be considered not only in giving proper weight to the testimony but even as to whether in fact the observation was adequate to render the opinion admissible.[27]

## II.

### FACTOR OF REMOTENESS OF OBSERVATION.

Quite often it will happen that the witness has observed the motor vehicle for an adequate length of time to make a determination as to its speed, but the observation is terminated before the accident involving the motor vehicle occurs. In other words, the period of observation is remote from the point of the accident. Upon examining the cases it can be seen that no definite limit as to the degree of proximity to the point of the accident can be set forth in feet or approximate fraction of miles as a criterion for admissibility of the opinion testimony.[28] From a reference to

24. See *Kozemchak v. Garner,* 163 Pa. Super. 328, 61 A.2d 375 (1948) where the court pointed out that the occupant in the front seat would certainly have a much better opportunity for observation than the witness in the back seat.

25. Wenhold v. O'Dea, 338 Pa. 33, 12 A.2d 115 (1940) (testimony of the witness was properly excluded where the witness did not base his opinion on the observation he had made but rather on information he had received by observation at the scene of the accident a week or two after the accident).

26. Thornbury v. Maley, 242 Iowa 70, 45 N.W.2d 576 (1951).

27. See Heacox v. Police, 392 Pa. 415, 141 A.2d 229 (1956) (one of the factors considered by the court in holding the opinion inadmissible under the facts of the case was the difficulty in determining speed from an approaching headlight); Kozemchak v. Garner, 163 Pa. Super. 328, 61 A.2d 375 (1948) (the court considered the fact that the observation was of approaching headlights in determining that the opinion as to speed was of doubtful value). See also Andrews v. Armour & Co., 119 Conn. 651, 178 Atl. 359 (1935).

28. *Admissible:* Baus v. Trenton & Mercer County Traction Corp., 102 N.J.L. 1, 131 Atl. 92 (1925), *aff'd,* 102 N.J.L. 712, 134 Atl. 915 (1926) (three and one half blocks away in the city); Clay v. Monington, 266 App. Div. 695, 40 N.Y.S.2d

the limited number of cases that devote any discussion to this point of remoteness it is difficult to determine which of three rules[29] on this question is followed by New Jersey, New York and Pennsylvania. It is difficult to arrive at a conclusion as to whether they follow the rule requiring evidence of continuity of speed of the vehicle from the point where the observation terminated up to the point of the accident, or whether they follow the rule that presence of corroborating evidence as to speed is sufficient to permit admission of the opinion based on remote observation, or whether they follow the broad rule that the remoteness be not too great so that an inference may arise that the speed did continue up until the point of collision. From the case of *Miller v. Trans Oil,*[30] it would appear that in New Jersey no additional evidence of speed nor continuity of speed to the point of the impact is required before opinion testimony formed from a remote observation is admissible. In the case of *Owen v. Gruntz,*[31] the Appellate Division of the Supreme Court of New York held that testimony as to speed based on an observation made at 600 yards was admissible in view of the other corroborating evidence as to speed. However, it need not be shown by eyewitness testimony that the speed was continuous from point of observation to the point of the accident. It is even more difficult from the Pennsylvania decisions to obtain a substantial hint as to what rule the courts will follow. In *Murray v. Jenkins*[32] the trial court attempted to establish the rule that if the remoteness of observation exceeds 200 to 300 feet, which range courts have spoken of as the scene of the accident, the testimony should not be admissible unless there is evidence of the continuity of the speed from the point of observation to the point of collision. The common pleas court admitted that it had no Pennsylvania authority for such a rule and merely cited cases from those few states which have required this evidence of continuity. Furthermore, upon examining other Pennsylvania decisions it can be

108 (3d Dep't 1943) (700 feet); Owen v. Grunz, 216 App. Div. 19, 214 N.Y. Supp. 543 (4th Dep't 1926) (800 yards in a city where there were surrounding circumstances to support the opinion but no direct evidence that the speed continued was necessary for competency); Pierontoni v. Barber, 384 Pa. 56, 119 A.2d 503 (1956) (750 feet along a highway); Rooney v. Maczko, 315 Pa. 113, 172 Atl. 151 (1934) (150 or 200 feet along a road); Yourkavitch v. Dallessandro, 34 Birks L.J. 285 (C.P., Pa. 1942) (one and one-half city blocks and court held that the distance was such that the speed at the two places could be fairly considered as a single transaction); Poff v. Martin, 42 Lanc. L.R. 387 (C.P., Pa. 1930) (1500 feet along a highway).

*Inadmissible:* Kelly v. Veneziale, 348 Pa. 325, 35 A.2d 67 (1944) (597 feet along a city street); McCauliff v. Griffith, 110 Pa. Super. 522, 168 Atl. 536 (1933) (1,400 feet along a highway).

29. See Annot., 46 A.L.R.2d 9 (1956).

30. 33 N.J. Super. 53, 109 A.2d 427 (1954), *aff'd,* 18 N.J. 407, 113 A.2d 777 (1955) (⅓ mile). See also Baus v. Trenton & Mercer County Traction Corp., 102 N.J.L. 1, 131 Atl. 92 (1925), *aff'd,* 102 N.J.L. 712, 134 Atl. 915 (1926). The court went so far in this case as to state that the testimony based on a remote observation placed a burden on the other party to show proof that the car stopped between the point of observation and the point of the accident which was a distance of three and one-half city blocks.

31. 216 App. Div. 19, 214 N.Y. Supp. 543 (4th Dep't 1926).

32. 36 Erie L.J. 236 (C.P., Pa. 1952).

seen that such a rule apparently was not applied in several cases where the particular degree of remoteness was over 200 or 300 feet.[33] However, if there is additional evidence of continuity of the observed speed to the point of impact, opinion testimony can be admitted even though the remote observation was made at a point of great distance from the accident, whereas in the absence of such evidence of continuity, it would be a reasonable exercise of the court's discretion to refuse the admission of opinion as to the speed of the vehicle.[34]

It is submitted that perhaps the determining factor for admissibility should be the causal connection or the contact between the speed of the motor vehicle at the time of the observation and the subsequent unobserved accident,[35] rather than any limits of distance or time. It is suggested that this test for admissibility would be a reasonable one since it would take into consideration the reality that the possibility of change of speed between the point of observation and the point of the accident will be determined by the particular circumstances under which the accident occurred. For example, it is very likely that a motor vehicle whose speed on a turnpike is observed at several thousand feet from the point of collision would continue this speed up to the point of collision, whereas a car traveling in a city over merely several hundred feet would quite likely have cause to slow down due to traffic signals, intersections, jay-walkers or slow moving traffic. Yet, apparently only a few courts have made any effort to consider all the particular facts of the situation surrounding the collision when exercising their discretion as to the admissibility of an opinion based on an observation at a remote point.[36] It is submitted that, at least, the jury should be instructed that these considerations as to the degree of remoteness affect the weight of the testimony.

Naturally, there will have to be an identification of the car observed during the remote observation as the one involved in the subsequent accident and whose speed is in question before the opinion testimony will be admissible.[37]

## III.

### TERMS AND EXPRESSIONS USED IN THE OPINION TESTIMONY.

Once a court has exercised its discretion and finds that the opinion as to speed by the non-expert should be admitted, the problem as to what descriptive terms and expressions may be used by the witness in rendering his opinion before the court is encountered. While the courts have ad-

33. See note 28 *supra.*

34. See Finnerty v. Darby, 391 Pa. 300, 138 A.2d 117 (1958) (opinion formed from an observation one half mile away from the point of the accident was admissible where there was direct testimony of the continuity of the speed after the observation).

35. See Bryant v. Brown, 278 Mich. 686, 271 N.W. 566 (1937). See also 9C BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 6235 (1954).

36. See Finnerty v. Darby, 391 Pa. 138 A.2d 117 (1958).

37. See note 15 *supra.*

mitted exact numerical estimates as to the rate of speed of the vehicle in question,[38] the courts have recognized the practicality of not requiring absolute accuracy in the estimate of rate of speed by the non-expert[39] and have permitted numerical approximations or numerical ranges of speed when the non-expert is giving his estimate as to speed.[40]

Another method of description which could be used by a witness in giving his estimate as to the speed of the vehicle is the use of such terms as *fast, slow* and the like. It would appear that both the New Jersey[41] and New York[42] courts would admit testimony in such terms. However, Pennsylvania has long refused to admit testimony in which the witness used these terms because such terms are vague,[43] and as was pointed out by the Supreme Court of Pennsylvania in the case of *Warruna v. Dick*,[44] one may call a thing fast which another man would call slow. But it would seem that the deficiencies which the Pennsylvania courts cite as a reason for not admitting opinion evidence expressed in these terms could easily be removed by either the court asking the witness what he meant by his use of these terms[45] or by further direct examination or cross-examination.[46] Permitting the witness to use these terms would probably facilitate the submission of more competent testimony than would the requirement that the witness put his opinion into a rate-form of testimony at a time quite subsequent to the time of observation when the witness probably never gave much, if any, thought to the speed in definite terms of rate when he observed the motor vehicle in motion.

As the final consideration of the use of these terms it is interesting to note that the courts will not permit the witness to compare the speed of two cars and state his comparison,[47] since such a comparison is a conclusion which is within the function of the jury. However, in a particular situation where the witness is going in one direction and the car in question is going in the same direction, it would appear that the New Jersey

38. Schaffer v. Torrens, 359 Pa. 187, 58 A.2d 439 (1948) (45 miles per hour).

39. See discussion in: Finnerty v. Darby, 391 Pa. 300, 138 A.2d 117 (1958); Dugan v. Arthurs, 230 Pa. 299, 79 Atl. 626 (1911).

40. Finnerty v. Darby, 391 Pa. 300, 138 A.2d 117 (1958) (between 35 to 55 miles per hour); Kotlikoff v. Master, 345 Pa. 258, 27 A.2d 35 (1942) (45 to 50 miles per hour); Dugan v. Arthurs, 230 Pa. 299, 79 Atl. 626 (1911) (about 50 miles per hour).

41. See Baus v. Trenton & Mercer County Traction Corp., 102 N.J.L. 1, 131 Atl. 92 (1925), *aff'd*, 102 N.J.L. 712, 134 Atl. 915 (1926).

42. Hansell v. Galvani, 286 App. Div. 1019, 144 N.Y.S.2d 852 (2d Dep't 1955) *appeal denied* 309 N.Y. 1035, 132 N.E.2d 498 (1956); Marcucci v. Bird, 275 App. Div. 127, 88 N.Y.S.2d 333 (3d Dep't 1949).

43. Layman v. Gearhart, 389 Pa. 187, 132 A.2d 228 (1957) (very fast or very rapidly).

44. 261 Pa. 602, 104 Atl. 749 (1918). See also Tolomeo v. Harmony Short Line Motor Transp. Co., 349 Pa. 420, 37 A.2d 511 (1944).

45. See King v. Keller, 90 Pa. Super. 596 (1927).

46. See Davis v. Smitherman, 209 Ala. 244, 96 So. 208 (1923); Schultz v. Starr, 180 Iowa 1319, 164 N.W. 163 (1917).

47. Saeger v. Foster, 185 Iowa 32, 169 N.W. 681 (1918).

courts, in view of the case of *Miller v. Trans Oil Co.*,[48] would permit somewhat of a comparison in that the witness is permitted to state at what speed he was traveling and then state that the car in question was traveling "faster."

## IV.

### OPINION BASED ON SOUND.

Having discussed the admissibility of an opinion as to speed of a motor vehicle based on the witness's observation, we now turn to the question of the admissibility of an opinion as to speed of a vehicle based solely on the witness hearing the sound of the motor while the vehicle is traveling and the witness making no observation of the vehicle whatsoever. It would appear that in both New York and Pennsylvania an opinion as to speed expressed in a numerical rate will not be admissible if it is based solely on the witness having heard the sound made by the motor vehicle.[49] However, the Appellate Division of the Supreme Court of New York pointed out in *Parsons v. Syracuse B. & N.Y. Ry. Co.*[50] that non-expert witnesses were qualified to testify as to whether the train was going fast or slow, notwithstanding that the witnesses' opinions were based solely on the sound made by the train. It would appear that such a distinction as to terms used in the opinion, *i.e.*, "fast" or "slow" rather than a numerical rate, would not be made in Pennsylvania since the case of *Laubach v. Colley*,[51] not only did not permit the witness to give an opinion as to the numerical rate of speed but also pointed out that even if the witness had stated that the car's speed was "excessive," it would not be admissible. But the reason given by the Pennsylvania court for not admitting such testimony is the same general reason that has been given in Pennsylvania cases for refusing to admit opinions expressed in the terms *fast* and *slow, i.e.*, what one person may consider excessive or fast, another party may consider otherwise.[52]

It appears reasonable that a non-expert should not be permitted to attempt to submit an opinion as to a numerical rate of speed, or even an opinion expressed in terms of fast or slow, for a vehicle which he did

48. 18 N.J. 407, 113 A.2d 777 (1955) (witness was permitted to give his opinion as to speed in the words: "Well, I was traveling about 45, and this car passed me at quite a bit faster. . . .").

49. Parsons v. Syracuse, B. & N.Y. Ry., 133 App. Div. 461, 117 N.Y. Supp. 1058 (3d Dep't 1909) *rev'd on other grounds* 205 N.Y. 226, 98 N.E. 331 (1912); Laubach v. Colley, 283 Pa. 366, 129 Atl. 88 (1924). For the law in other jurisdictions see 9C BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 6322 (1954).

50. 133 App. Div. 461, 117 N.Y. Supp. 1058 (3d Dep't 1909) *rev'd on other grounds* 205 N.Y. 226, 98 N.E. 331 (1912) (the witnesses had lived for over 20 years near the railroad tracks over which the train whose speed was in question was traveling).

51. 283 Pa. 366, 129 Atl. 88 (1924) (the witness had been an automobile mechanic and the particular auto whose speed was in question had a distinctive sound which differed from other machines in the community).

52. See note 44 *supra*.

not observe. This will appear to be especially true when one recalls how different motors have different degrees of noise level. This noise level would be the only basis for determining speed. It can be easily realized that one car going 60 miles an hour may make less noise than another car going 30 miles an hour, depending on such factors as the age of the car, the motor design, or the mechanical adjustment of the motor or even a defective muffler. Hence it is submitted that a witness, even an expert witness, could not form an effective opinion as to speed solely on hearing the noise made by the motor vehicle unless the witness had been experienced with the particular car to which his testimony relates and the varying degrees of noise level that particular car produces at different speeds.[53]

## V.

## CONCLUSION.

From the above discussion, it can be seen that there are many considerations confronting a court when it is exercising its discretion in deciding whether to admit non-expert opinion testimony as to speed. It is true that this question as to admissibility rests with the discretion of the court, but this discretion should have limits. However, it is certainly difficult to conclusively determine these limits from the state of the law in New Jersey, New York, and Pennsylvania since the appellate courts quite often appear to be reluctant when reviewing the particular cases to set down any standards or limits as to the exercise of this discretion. The courts have a tendency to either render a flat statement as to whether the opinion is or is not admissible or merely to generalize in attempting to support their decisions. This is especially true when the courts treat such questions as the minimum ability to judge speed which is necessary before a witness can be held to be competent to testify and whether the opinion based on a remote observation should be admissible. This reluctance to set minimum standards or limits has resulted in a tendency of the courts, in the absence of a well defined standard or limit, to be overly liberal in admitting opinion testimony of even eleven year olds and non-drivers who have admittedly merely ridden in automobiles. This liberality has progressed to such a point that it is removing much of the discretion from the judge in the trial as to his refusing to admit opinion testimony. This is seen in the *Senecal* case[54] wherein the trial judge was reversed when he exercised his discretion and found that a twelve-year-old boy was too young to testify. The court's holding in effect goes even further than the

53. It is difficult for the writer to realize how even an expert could be found to meet such qualifications. However, see *Salvgne v. Lacock,* 76 Pgh. L.J. 181 (C.P., Pa. 1924), where opinion testimony based solely on the sound of the motor was admissible, and the expert determined the speed by the staccato of the motor of a motorcycle. It is submitted that such a method would not be adaptable to six and eight cylinder internal combustion motors.

54. Senecal v. Drollette, 304 N.Y. 446, 108 N.E. 2d 602 (1952).

proposed Model Code of Evidence,[55] which is most liberal on the question of admissibility but still provides that opinion evidence may be rejected at the judge's discretion if he finds that it is of such slight significance that it is of very little probative value. When such low qualifications as to the ability to judge speed are tolerated as is the situation in the past cases, one can not help but wonder if in fact the courts should even put up a pretense of determining the competency of witnesses and rather just admit anyone's testimony. Yet, it is submitted that the judicial capacity in the trial should not be removed in this manner and all factors of competency be left to the jury to consider in giving proper weight to the opinion evidence. Definite standards should be set up whether they be along lines of requiring at least a minimum age for finding competency, or holding drivers competent but non-drivers incompetent, or at least requiring a greater standard of experience in judging the speed of motor vehicles than merely having ridden in an automobile. The judging of the speed of a body in motion is no easy task, and the courts should recognize this.

We can only hope that the reluctance on the part of the courts of these states to lay down definite standards will be overcome with a subsequent volume of cases that may eventually appear on these considerations. One begins to wonder, however, whether there is reasonable expectancy that many cases on these considerations will appear in the future because of the few number of times in the past that the treatment of these considerations was raised on appeal. It is difficult to realize why this question of admissibility of non-expert opinion testimony should not be raised more frequently before our appellate courts since the speed, and its reasonableness, of a defendant's motor vehicle will be important considerations in many instances, if not the controlling ones, in determining the defendant's negligence and consequently his liability for any ensuing personal injury or property loss.

*Robert L. Brabson*

## NEGLIGENCE—LAND OCCUPIERS' LIABILITY FOR INJURIES TO LAWFUL ENTRANTS—TREND TOWARD REASONABLE CARE IN ALL INSTANCES.

For almost a century, the affirmative obligations owed by an occupier of land toward persons entering upon his premises have been imposed according to the status of the visitor. The entrants are categorized as trespassers, licensees, or invitees and to each class, the occupier owes a respective duty of care. For almost as long a period, dissatisfaction with the system has been expressed. As a result of the advocacy of reform,

55. See MODEL CODE OF EVIDENCE rule 303, comment (1942).

the law of occupiers' liability is now experiencing a change from a mechanical jurisprudence, exercised through rigid categories to the abolition of the common law distinctions and a requirement of a reasonable care in all instances. It is the purpose of this Comment to describe the development of the categories; to briefly summarize the common law rules as developed; to analyze the dissatisfaction in the system which stimulates the present trend; and lastly to present the methods by which the goals of the movement are being accomplished. As the present trend principally affects only those lawful entrants upon the land, it is not within the scope of this Comment to discuss the law regarding trespassers except incidentally. Although the abolition of this class is also a goal to be achieved in the trend, the most significant steps taken thus far are in respect to the lawful visitors, the licensee and the invitee.

## I.

## DEVELOPMENT OF THE DISTINCTIONS.

At early common law, the landowner was considered to be sovereign over his land and could use that land in any manner which pleased him.[1] The sanctity of land ownership was based on its economic importance and the social desirability of its free use and exploitation.[2] Nevertheless, by the middle of the nineteenth century, there appeared a need to impose certain liabilities on the landowner. The need arose as a working solution of a conflict between social values, *i.e.*, the sanctity of landed property as opposed to the physical safety of the community[3] and, to a limited extent, in recognition of the general principle of the beginning law of negligence, *i.e.*, a man should be responsible for damage which he ought reasonably to have forseen.[4] However, a recourse to elaborate legal distinctions in order to avoid prejudices of the jury[5] and the overzealous desire to safeguard the right of ownership, prevented the rules of negligence from being applied to any great extent and as a result the special rules sprang up.

In order to fully understand the cause for discontent with the system developed under the pressures enumerated above and how the reform movement is being fulfilled, it will be necessary to consider the problem

1. BOHLEN, STUDIES IN LAW OF TORTS 46 (1926).
2. See James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 144 (1954).
3. See Marsh, *The History and Comparative Law of Invitee, Licensees and Trespassers*, 69 L.Q. REV. 182 (1953).
4. *Ibid.*
5. It was necessary for judges to narrow down questions to be submitted to the jury by constructing different legal categories of visitors to whom the landowner owed different duties. Marsh, *supra* note 3 at 186. See also Toomey v. London and Brighton Ry., 3 C.B. (T.S.) 146, 140 Eng. Rep. 694, 696 (C.P. 1857) (the judge ruled as a matter of law that there was no evidence to go to the jury, saying, "every person who has any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result.").

in two respects. (1) Who is to be included within the categories of invitee and licensee? (2) What is the duty of care owed to the respective categories?

## II.

## WHO IS AN INVITEE OR LICENSEE?

The controversy over what qualifications entitle an entrant to be classified as an invitee rather than a licensee is one patent reason for the discontent concerning the law of occupiers' liability particularly in the United States.

Perhaps the first case relevant to this issue is *Parnaby v. Lancaster Canal Co.*[6] which holds in effect that a landowner owes a duty of reasonable care to certain persons. The exact basis of the decision has been a subject of dispute as to what were the qualifications of the entrant which elevated him to a position of being owed a duty of reasonable care. The plaintiff in the case had paid tolls and was also a member of the public to which the canal was opened. Legal authors have seized upon one or the other of these factors as a basis of the decision, some finding that the economic benefit in the form of tolls gave the plaintiff his protection,[7] while others hold the fact that the canal was thrown open to the public was the theory behind recovery.[8] This is illustrative of the existing conflict. Throughout the development of the law in this area, courts have supported two entirely separate tests for determining who is an invitee, one is labeled the economic benefit test, the other the invitation test.[9]

The economic benefit test proceeds on the assumption that affirmative obligations are imposed on people only in return for some consideration or benefit, actual or potential.[10] The invitation theory, on the other hand, imposes the duty on the occupier upon an implied representation of safety, *i.e.*, a holding out of the premises as suitable for the purpose for which the visitor came.[11] An invitee is thus one who comes for the purpose for which the premises are held open regardless of whether he brings with him any potential or actual benefit. Whenever the premises are thrown open to the public, there seems to be such an implied representation.[12]

6. 11 Ad. & E. 223, 113 Eng. Rep. 400 (Ex. 1839).

7. Bohlen, *The Basis of Affirmative Obligations in the Law of Torts*, 53 U. PA. L. REV. 209 (1905); Marsh, *supra* note 3.

8. Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942).

9. PROSSER, TORTS § 78 (2d ed. 1955); James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 612 (1954).

10. See City of Boca Raton v. Mattef, 91 So. 2d 644 (Fla. 1956); Cowart v. Meeks, 131 Tex. 36, 111 S.W.2d 1105 (1938). See also James, *supra* note 9 at 612.

11. See Guilford v. Yale University, 128 Conn. 449, 23 A.2d 917 (1942); Sulhoff v. Everett, 235 Iowa 396, 16 N.W.2d 737 (1944); Sweeny v. Old Colony & Newport R. R. Co., 10 Allen 368 (Mass. 1865); Taneian v. Meghrigian, 15 N.J. 267, 104 A.2d 689 (1954).

12. The invitation test has been applied particularly when premises were prepared for the public or a segment of it. See LaSell v. Tri-States Theatre, 233 Iowa 929, 11 N.W.2d 36 (1943) and cases cited note 11 *supra*.

But there must be something to indicate the offering to the public and the assurance that the premises are provided and intended for public use and not merely that the public will be tolerated.[13] Of course, when premises are not open to the public, the individual may still be entitled to protection if he enters under circumstances which give him reasonable assurance that care has been taken to make the place safe for his reception.[14] Visits for the performance of contracts and for other economic advantage to the occupier are usually made upon such implied assurance.[15] Consequently, economic benefit is still an important consideration under the invitation theory although, contrary to the benefit test, it is not controlling. Pecuniary advantage is but one factor to be considered in determining whether there was an invitation with an implied representation of safety.[16]

Some of the early English cases seem to support the economic benefit theory,[17] while others apparently are founded upon the invitation principle.[18] However, prior to the abolition of the categories in England,[19] it was settled that an invitee was one whose entry on the occupiers' land was in some measure for the material benefit of the occupier.[20]

The earliest American decisions in which entrants were held to be invitees are based solely upon an invitation with an implied representation of safety.[21] The first decision in which the idea of business or pecuniary benefit was a controlling factor was *Plummer v. Dill*,[22] decided in 1892. As a result, other courts began to insist on some benefit or interest accru-

13. Prosser, *supra* note 8 at 586.

14. *Id.* at 602.

15. See Indermaur v. Dames, L.R. 1 C.P. 274 (1866) (originated the rule that independent contractors and their servants are invitees.) Also, as to those entering in the performance of a contract, see Strong v. Chronicle Publishing Co., 34 Cal. App. 2d 335, 93 P.2d 649 (1939) (delivery of goods purchased); as to those conferring economic benefit, see Fishang v. Eyermann Contracting Co., 333 Mo. 874, 63 S.W.2d 30 (1933) (paying for privilege to dump refuse).

Those entering in performance of their public duties are usually held to be invitees. See Finnegan v. Fall River Gas Works, 159 Mass. 311, 34 N.E. 523 (1893) (city water meter reader); Paubel v. Hitz, 339 Mo. 274, 96 S.W.2d 369 (1936) (postman). However, firemen and policemen are generally recognized as only bare licensees. See text at note 77 *infra*.

16. Other considerations of equal importance are the character of the building, the use to which it is put, customs of the community, and the conduct of the parties in the past. Prosser *supra* note 8 at 589.

17. See Indermaur v. Dames, L.R. 1 C.P. 274 (1866); Chapman v. Rothwell, El. Bl. & El. 168, 120 Eng. Rep. 471 (Q.B. 1858); Southcote v. Stanley, 1 H. & N. 247, 156 Eng. Rep. 1195 (Ex. 1856).

18. See Corby v. Hill, 4 C.B. (N.S.) 556, 140 Eng. Rep. 1209 (C.P. 1858).

19. See text at note 93 *infra*.

20. See Weigall v. Westminster Hospital, 52 T.L.R. 301 (1936).

21. Davis v. Central Congregation Soc'y, 129 Mass. 367 (1880); Sweeny v. Old Colony & Newport R.R. Co., 10 Allen 368 (Mass. 1865); Swords v. Edgar, 59 N.Y. 28 (1874).

22. 156 Mass. 426, 31 N.E. 128 (1892). Prosser credits Robert Campbell in his early treatise on negligence as having originated the notion that benefit to the occupier is necessary to require an affirmative duty of care in return. See Prosser, *supra* note 8 at 583.

ing to the occupiers[23] and the American Law Institute chose this test in the *Restatement*.[24] However, there are parallel decisions which are based on the invitation theory.[25]

The advocates of the invitation test stress four major advantages of their theory: (1) It accounts more satisfactorily for many of the actual decisions holding the plaintiff to be an invitee;[26] (2) it accounts more satisfactorily for many decisions holding the plaintiff is not an invitee in that it is much easier to find an absence of an invitation;[27] (3) the doctrine of "scope of invitation," which is recognized even as a supplemental rule to the economic benefit test,[28] is generally worked out in terms of invitation, *i.e.*, arrangement of the premises so as to give an appearance that they are included in the area of invitation;[29] (4) it serves better the principles of negligence.[30]

The concept of the licensee was an offshoot of the invitee concept. To a great degree, licensee became the category for those, lawfully on the land, who were unfortunately not able to meet the requirements of an invitee.[31] He was the entrant who did not furnish a pecuniary benefit or who was not invited under an implied assurance of safety. The early case of *Southcote v. Stanley*[32] relegated the social guest to the status of a mere licensee and this distinction has survived to this date[33] notwithstanding the effect of the present trend.[34]

23. See, *e.g.*, Benson v. Baltimore Traction Co., 77 Md. 535, 26 Atl. 773 (1893); Fleckenstein v. Great A. & P. Tea Co., 61 N.J.L. 145, 102 Atl. 700 (1917); Hupfer v. Nat'l Distilling Co., 114 Wis. 279, 90 N.W. 191 (1902).

24. RESTATEMENT, TORTS § 332 (1934): "A business visitor is a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them." It is significant to note that Professor Bohlen was the reporter for this section.

25. St. Louis, I.M. & S.R. Co. v. Dooley, 77 Ark. 561, 92 S.W. 789 (1906); Howe v. Ohmart, 7 Ind. App. 32, 33 N.E. 466 (1893); Phillips v. Library Co. of Burlington, 55 N.J.L. 307, 27 Atl. 478 (1893).

26. James, *supra* note 9 at 614.

27. Usually, it is a more reasonable explanation that the premises are not provided for a certain purpose rather than that there is a lack of business interest, especially in the light of the decisions based on quite tenuous economic benefit such as good will and advertising. See Dye v. Rule, 138 Kan. 808, 28 P.2d 758 (1934) (on property to loaf); Baird v. Goldberg, 283 Ky. 558, 142 S.W.2d 120 (1940) (taking shortcut across property). See also James, *supra* note 9 at 618; Prosser, *supra* note 8 at 596.

28. See RESTATEMENT, TORTS § 343, comment b (1934).

29. It seems the customer is conferring potential economic benefit on the occupier even though she is looking for merchandise behind the counter. See MacDonough v. F. W. Woolworth Co., 91 N.J.L. 677, 103 Atl. 74 (1918) (in such a situation, customer held beyond scope of invitation). See James, *supra* note 9 at 619.

30. James, *supra* note 9 at 620.

31. Marsh, *supra* note 3 at 193.

32. 1 H.&N. 247, 156 Eng. Rep. 1195 (Ex. 1856).

33. Sanders v. Brown, 73 Ariz. 116, 238 P.2d 941 (1951); Atkinson v. Ives, 127 Colo. 243, 255 P.2d 749 (1953); Laube v. Stevenson, 137 Conn. 369, 78 A.2d 693 (1951); Comeau v. Comeau, 285 Mass. 578, 189 N.E. 588 (1934); Vogel v. Eckert, 22 N.J. Super. 220, 91 A.2d 633 (1952).

34. See text at note 71 and following.

A licensee was usually thought of as one who, for his own purposes only, had the occupiers' bare permission to enter the land.[35] The importance of the class was at first minimal, as early cases held that there was no duty owed a licensee.[36] However, several exceptions developed which elevated the entrant above the trespasser.[37]

In the United States, the economic benefit theory, supported principally by the Restatement, and the invitation theory, sanctioned by a majority of the courts,[38] stand on somewhat equal footing as the basic tests for imposing affirmative duties upon the occupier of land. The state of the law, however, is one of confusion caused not only by inconsistent opinions among different jurisdictions but in many instances within a single jurisdiction.[39] It is from this state of the law that the present trend works to require a common duty of care owing to all lawful visitors.

## III.

## WHAT IS THE DUTY OF CARE OWED AN INVITEE AND LICENSEE?

The leading case on the duty of care owed the invitee, *Indermaur v. Dames*,[40] laid down the rule that the occupier must "use reasonable care to prevent damage from unusual danger which he knows or ought to know." [41] Although there are some early decisions which apply liability only for injuries resulting from traps and pitfalls,[42] most jurisdictions have accepted the *Indermaur* case, and the usual statement of the rule today is that the occupier owes an affirmative obligation to exercise reasonable care to keep the premises reasonably safe in preparation for the entrance

---

35. Sweeny v. Old Colony & Newport R. R. Co., 10 Allen 368 (Mass. 1865); James, *supra* note 9 at 605. *But see* RESTATEMENT, TORTS § 330 (1934) where licensee includes any person who comes upon the land with the consent of the possessor, including invitees.

36. See Sweeny v. Old Colony & Newport R. R. Co., *supra* note 35.

37. See text at notes 58 and 59 *infra*.

38. See PROSSER, TORTS § 78 (2d ed. 1955).

39. It is significant to note that the most oft cited cases for both doctrines are from the same jurisdiction, Sweeny v. Old Colony & Newport R. R. Co., 10 Allen 368 (Mass. 1865) (invitation theory) and Plummer v. Dill, 156 Mass. 426, 31 N.E. 128 (1892) (economic benefit theory). For the unsettled state of the law in Alabama, see Comment, 10 ALA. L. REV. 804 (1958). See also Note, 44 VA. L. REV. 804 (1958).

The law in Pennsylvania appears well settled. Down through its most recent case on the subject, the jurisdiction follows quite closely the Restatement view and thus can be classified as an economic benefit state. See Kopp v. R.S. Noonan, Inc., 385 Pa. 460, 123 A.2d 429 (1956).

40. L.R. 1 C.P. 274 (1866).

41. *Id.* at 287.

42. See Montgomery & Eufaula R.R. Co. v. Thompson, 77 Ala. 448 (1884).

of the invitee.[43] This includes not only warning the invitee of dangers which are known to the occupier,[44] but also the occupier owes a duty to inspect his premises to discover dangerous conditions.[45] It is generally held that he need not remedy such conditions, but that a mere warning is sufficient.[46] Of course, there will be no liability for injury resulting from conditions from which no unreasonable risk was to be anticipated[47] or for those the occupier could not have discovered with reasonable care.[48] In addition, the occupier must use reasonable care toward the invitee in the exercise of his active operations.[49]

The occupier may be relieved from liability for an injury resulting from a dangerous condition on his premises by the application of any one of three doctrines — contributory negligence, assumption of the risk by the invitee or violation of the scope of invitation. The invitee must exercise reasonable care for his own safety, and if his own negligence is the proximate cause of his injury there is no recovery.[50] Likewise, the occupier is not liable to an invitee for injuries sustained from dangers that were obvious or as well known to the invitee as to the occupier.[51] The "area of invitation" is that portion of the premises which the possessor gives the invitee reason to believe that his presence is permitted or desired because of its connection with the purpose of the invitation.[52] When the invitee goes beyond the scope of this area, he will lose the status of an invitee and be relegated to

43. Kittrell v. Alabama Power Co., 258 Ala. 381, 63 So. 2d 363 (1953); Boucher v. American Bridge Co., 95 Cal. App. 2d 659, 213 P.2d 537 (1950); Messner v. Webb's City, 62 So. 2d 66 (Fla. 1952); LaSell v. Tri-States Theatre, 233 Iowa 929, 11 N.W.2d 36 (1943); Emery v. Midwest Amusement & Realty Co., 125 Neb. 54, 248 N.W. 804 (1933); Bohn v. Hudson & Manhattan R.R. Co., 16 N.J. 180, 108 A.2d 5 (1954); Hess v. Sun Ray Drug Co., 387 Pa. 199, 127 A.2d 699 (1956).

44. Johnson v. DelaGuerra Properties, 28 Cal. 2d 394, 170 P.2d 5 (1946); Straight v. B. F. Goodrich Co., 354 Pa. 391, 47 A.2d 605 (1946).

45. Dickey v. Hochschild, Kohn & Co., 157 Md. 448, 146 Atl. 282 (1929); Durning v. Hyman, 286 Pa. 376, 133 Atl. 568 (1926); Kallum v. Wheeler, 129 Tex. 74, 101 S.W.2d 225 (1937).

46. Burk v. Walsh, 118 Iowa 397, 92 N.W. 65 (1902); RESTATEMENT, TORTS § 343(c)(iii) (1934). This view is strongly criticized in James, *supra* note 9 at 627-30.

47. See, *e.g.*, Home Public Market v. Newrock, 111 Colo. 428, 142 P.2d 272 (1943) (swinging doors); Greenfield v. Freedman, 328 Mass. 272, 103 N.E.2d 242 (1952) (leaves on sidewalk); Sheridan v. Great A. & P. Tea Co., 353 Pa. 11, 44 A.2d 280 (1945) (double entrance doors).

48. Dowing v. Jordan Marsh Co., 234 Mass. 159, 125 N.E. 207 (1919); Schnatterer v. Bamberger, 81 N.J.L. 558, 79 Atl. 324 (1911).

49. A. L. Dodd Trucking Service v. Ramey, 302 Ky. 116, 194 S.W.2d 84 (1946); St. Louis-San Francisco R. R. Co. v. Williams, 176 Okla. 465, 56 P.2d 815 (1936).

50. Indermaur v. Dames, L.R. 1 C.P. 274 (1866) is an early recognition of this rule. The necessity for a proximate causal relationship is the majority rule, but Pennsylvania has repudiated this requirement and has held that if the plaintiff's negligence contributes in any degree whatsoever to the resulting injury he is barred from recovery. See Crane v. Neal, 389 Pa. 329, 132 A.2d 675 (1957); 3 VILL. L. REV. 235 (1958).

51. Lamson & Sessions Bolt Co. v. McCarty, 234 Ala. 60, 173 So. 388 (1937); Kopp. v. R. S. Noonan, Inc., 385 Pa. 460, 123 A.2d 429 (1956); Illinois Cent. R. Co. v. Nichols, 173 Tenn. 602, 118 S.W.2d 213 (1938).

52. RESTATEMENT, TORTS § 343, comment b (1934).

that of a trespasser[53] or a licensee[54] depending on the circumstances of the case.[55]

As has been noted,[56] early cases held that the landowner owed no affirmative duty to make the land safe for a licensee. This is still recognized as the general rule.[57] However, there are two exceptions which are now widely accepted: (1) There is an obligation to use reasonable care in conducting active operations towards a licensee whose presence on the land is known or should reasonably be known to the occupier;[58] and (2) the occupier must disclose to the licensee concealed dangerous conditions on the premises of which he has knowledge.[59]

So while the qualifications of those who will be included within the categories of invitee or licensee is a subject of dispute, the law as to the duty of care owed each respective class is generally settled. This is important to note so as to fully appreciate the methods used, especially in the United States, to require a duty of reasonable care in all circumstances.

## IV.

## THE TREND.

As a result of dissatisfaction with the common-law system, there have been many advocates of the abolition of the "needless refinements and profitless distinctions."[60] The basic criticism is that the law on this topic is only a sub-head of the general doctrine of negligence and as such should be controlled by this doctrine rather than by special rules of its own.[61] This seems to be a well-founded criticism so far as lawful entrants are concerned. However, it may be reasonable to have special rules relating to trespassers and this appears to be recognized in the trend toward abolition of the categories. Of course, some proponents would want this distinction also eliminated in favor of requiring a duty of reasonable care in

53. Fullerton v. Conan, 87 Cal. App. 2d 354, 197 P.2d 59 (1948); Parsons v. Drake, 347 Pa. 247, 32 A.2d (1943); Hayward v. Downing, 112 Utah 508, 189 P.2d 442 (1948).

54. Wilson v. Goodrich, 218 Iowa 462, 252 N.W. 142 (1934); Lerman Bros. v. Lewis, 277 Ky. 334, 126 S.W.2d 461 (1939); Napier v. First Congregational Church, 157 Ore. 110, 70 P.2d 43 (1937).

55. For a discussion of what circumstances will determine the new status of an invitee exceeding the area of invitation, see RESTATEMENT, TORTS § 343, comment b (1934).

56. See text at note 36 *supra*.

57. See Hayes v. New Britain Gas Light Co., 121 Conn. 356, 185 Atl. 170 (1936); James, *supra* note 9 at 606.

58. Oettinger v. Stewart, 24 Cal. 2d 133, 148 P.2d 19 (1944); RESTATEMENT, TORTS § 341 (1934).

59. Laube v. Stevenson, 137 Conn. 469, 78 A.2d 693 (1951); RESTATEMENT, TORTS § 342 (1934).

60. SALMOND, TORTS 549 (11th ed. 1953).

61. *Ibid.* See also James, *supra* note 2 at 144.

all circumstances.[62] This, to be sure, is a more consistent approach and no doubt is the ultimate goal of the present movement.[63]

There are other causes of discontent resulting from the common law system: (1) injustices caused by too rigid an adherence to the conventional categories;[64] and (2) the confusion, often within the same jurisdiction, as to the qualifications with respect to the various categories.[65] While not a criticism of the old law, the general availablity of insurance is worth mentioning as a factor in the extension of the landowners' liability.[66]

Naturally, the trend towards requiring reasonable care has not gone unchallenged. There are those who strongly advocate the retention of the old system. It has been said that the distinctions "correspond to real differences in the nature of the user of property and in the reasonable claims to protection of those who are permitted such use." [67] As a defense to the abolition of such distinctions, it was stated that "a legal system must, in the nature of things, create and impose its own comparatively rigid categories on the phenomena which its seeks to control, and the seemingly arbitrary operation of them in borderline cases is the price one has to pay for some degree of legal certainty and for the exclusion of bias in the judicial process." [68]

The abolition of the common-law distinctions is being accomplished in two ways. In the United States, it is being achieved through judicial decision by way of broadening the category of the invitee so as to almost eliminate the status of licensee. In England, it has been accomplished by an act of Parliament titled the Occupiers' Liability Act.

## A.
## United States

There are three principle ways in which the case law has extended the category of the invitee. First, there has been a trend to include within the class two types of lawful visitors who previously had been almost unanimously held to be licensees. The social guest, who since 1856[69] has been relegated to the category of a licensee,[70] has been recognized as an

62. Professor James appears to advocate this position in James, *supra* note 2.

63. Recognition of different duties owed the constant trespasser and the development of the attractive nuisance doctrine reflect the influence of the general rules of negligence on the law with respect to the trespassers.

64. This reason (citing the case of Fairman v. Perpetual Investment Building Society, [1923] A. C. 74) was put forth in the Law Reform Committee's Recommendation leading to the Occupiers' Liability Act (1957). See Bowett, *Law Reform and Occupiers' Liability*, 19 MODERN L. REV. 172 (1956).

65. See text at note 39 *supra*.

66. See James, *supra* note 9 at 612.

67. Coleshill v. Manchester Corp. [1928] 1 K. B. 776, 791.

68. Payne, *Occupiers' Liability Act*, 21 MODERN L. REV. 359, 373 (1958).

69. Southcote v. Stanley, 1 H.&N. 247, 156 Eng. Rep. 1195 (Ex. 1856).

70. See note 33 *supra*.

invitee in certain instances.[71] The holdings categorizing the guest as a licensee have been founded on lack of pecuniary benefit[72] as well as absence of an implied representation that the premises were prepared for his visit, the guest taking them only as the occupier himself uses them.[73] However, the courts have attempted to extend each theory by including the social guest within the category of invitee. Under the economic benefit test, courts have searched to find economic advantage in incidental assistance given by the guest.[74] Under the invitation theory, it has been advanced that "the social guest has reasons to believe that his host will either make conditions safe or at least warn of hidden dangers." [75] The attempt to require reasonable care in the occupier's relation with the social guest is a noticeable element of the trend away from the old categories.

The second group of lawful visitors who have traditionally been labeled as licensees and who are now being brought into the class of invitees are firemen and policemen. These officers enter not by consent or invitation but under a license of law.[76] Consequently, it is difficult to flatly categorize them as either invitees or licensees in the ordinary sense. However, courts have almost uniformly required of the occupier, with respect to these entrants, the duties generally applied toward licensees.[77] It has been suggested that the duty to make all the premises reasonably safe for them would be a severe burden on the occupier considering the unpredictability

71. Goldstein v. Healy, 187 Cal. 206, 201 Pac. 462 (1921) (guest of hotel patron as to hotelkeeper); Dickerson v. Connecticut Co., 98 Conn. 87, 118 Atl. 518 (1922) (guest in private automobile); Taneian v. Meghrigian, 15 N.J. 267, 104 A.2d 689 (1954) (guest of landlord living on premises concerning maintenance of common ways); Gleason v. Boehm, 58 N.J.L. 475, 34 Atl. 886 (1896) (guest of tenant as to landlord concerning maintenance of common ways). See also Laube v. Stevenson, 137 Conn. 469, 78 A.2d 693, 697 (1951) where, although holding the social guest a licensee, two of five judges dissented, expressing a desire to eliminate this "anomaly which . . . cannot be sustained in logic."

*Compare* Scheibel v. Lipton, 156 Ohio St. 308, 102 N.E.2d 453, 462 (1951) in which the court refused to relegate the social guest to a licensee but did not go so far as to classify him an invitee, saying, ". . . the difficulty of forcing social guests into any one of the three molds commonly recognized, . . . is solved by ceasing such effort and merely considering and discussing social guests as social guests and by referring to the one owing the duty and obligation to the guest as the host." While this is not as radical as a complete change over, it is consistent with the trend.

72. Sanders v. Brown, 73 Ariz. 116, 238 P.2d 941 (1951); Atkinson v. Ives, 127 Colo. 243, 255 P.2d 749 (1953).

73. Comeau v. Comeau, 285 Mass. 578, 189 N.E. 588 (1934); See PROSSER, TORTS § 77 (2d ed. 1955).

74. See McCulloch v. Horton, 102 Mont. 135, 56 P.2d 1344 (1936) (opening garage door for host).

75. McCleary, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land*, 1 Mo. L. REV. 45, 58 (1936). See also Taneian v. Meghrigian, 15 N.J. 267, 104 A.2d 689 (1954).

76. Smith v. Twin State Gas & Elec. Co., 83 N.H. 439, 144 Atl. 57 (1928); Meiers v. Fred Koch Brewery, 229 N.Y. 10, 127 N.E. 491 (1920).

77. See, *e.g.*, Pincock v. McCoy, 48 Idaho 227, 281 Pac. 371 (1929) (policeman); Aldworth v. F. W. Woolworth Co., 295 Mass. 344, 3 N.E.2d 1008 (1936) (fireman); Brennan v. Keene, 237 Mass. 556, 130 N.E. 82 (1921) (policeman); Hamilton v. Minneapolis Desk Mfg. Co., 78 Minn. 3, 80 N.W. 693 (1899) (fireman).

of the time and place of their visits.[78] However, the answer to this argument is that the duty of reasonable care would not require a severe burden of extensive preparation, but only reasonable precautions against foreseeably unreasonable danger.[79] In somewhat of a compromise position between these points, some courts require the occupier to use care to keep those parts of the premises which they have prepared for invitees reasonably safe for these officers as well as for invitees.[80] Although this is not the ultimate goal, it is a movement in conformity with the trend. In certain other specific situations, courts have found these parties to be invitees, usually where they come upon the premises not under the license of law but as volunteers, there being no duty to respond. Thus, a fireman called from a neighboring municipality[81] and a policeman attempting to relight a street lamp[82] were held to be invitees. In addition, the occupier may be required to use reasonable care to ascertain whether his premises have not been arranged in violation of a statute under which a fireman or a policeman may sue.[83]

The second method by which the category of the invitee has been broadened in America, is the stretching of the economic benefit test to the breaking point. Many cases have been decided on such tenuous economic advantage, as advertising and good will, that almost everyone who enters upon the premises could logically be included. As a consequence, many of the prior cases adhering rigidly to the theory are, in effect, overruled.

There are numerous instances when the theory has been strained,[84] but perhaps the most illustrative examples are the "companion" cases, whereby one apparently an invitee enters the premises with another person. Such persons would be those accompanying customers into stores and

78. See Shypulski v. Waldorf Paper Products Co., 232 Minn. 394, 45 N.W.2d 549 (1951).

79. James, *supra* note 9 at 635.

80. Learoyd v. Godfrey, 138 Mass. 315 (1885) (policeman on walk); Meiers v. Fred Koch Brewery, 229 N.Y. 10, 127 N.E. 491 (1920) (fireman on driveway); RESTATEMENT, TORTS § 345 (1934). See Ryan v. Chicago & N.W.R. Co., 315 Ill. App. 65, 42 N.E.2d 128 (1942) where the court held that a policeman on the railroad's right of way where he had pursued a prisoner was neither a trespasser nor a mere licensee but nevertheless applied only the duty to use reasonable care in the carrying on of active operations which is owed all licensees.

81. Clinkscales v. Mundkoski, 183 Okla. 12, 79 P.2d 562 (1938); Buckeye Cotton Oil Co. v. Campagna, 146 Tenn. 389, 242 S.W. 646 (1922).

82. San Angelo Water, Light & Power Co. v. Anderson, 244 S.W. 571 (Tex. Civ. App. 1922). See St. Louis-San Francisco Ry. Co. v. Williams, 176 Okla. 465, 56 P.2d 815 (1936) (policeman was held an invitee). The defendant had requested police to inspect its freight cars nightly and although the plaintiff's presence was in reply to an express invitation, it appears he was under a duty to respond. Hence, the case seems to be contra to the weight of authority. It may be the cornerstone of a complete change in the law as to these entrants.

83. Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312, 56 Pac. 358 (1899) (statute prohibited storing of explosive powder beyond certain quantity).

84. Professors Prosser and James question the economic benefit accruing to the occupier from one entering the premises merely to use a toilet or telephone or from some public officers such as a tax or customs collector. See James, *supra* note 9 at 617, 634; Prosser, *supra* note 8 at 590, 609.

those welcoming the arriving or speeding the parting guest on the premises of the carrier. These companions are generally held to be invitees, but courts which seek an economic benefit as the key to classification have strained to find it in these situations. As to friends on a carrier's premises, results have been based on the possibility that the friend may render assistance[85] or the conclusion that the passenger pays for the privilege of bringing his friends.[86] As to children and friends who accompany a customer into a place of business, economic benefit is found in the possibility that the friend may offer advice or assistance,[87] or may be induced to buy himself,[88] or that the parent would not be able to come without the child.[89] It is apparent that the courts feel these persons should be given the protection of an invitee but to sustain such a holding on the basis of the economic benefit test is obviously labored and the reasoning is questionable. The application of the invitation theory would be the better solution as it is clear that these persons are included within the purpose for which the premises are held open.[90]

The stretching of the economic benefit test may often be based on inadequate though ingenious reasoning, but it is illustrative of the trend to broaden the category of the invitee. This is the result of the stubborness of some courts in sticking by the test and their refusal to adopt the more inclusive invitation theory. However, other courts have made the change so as to achieve the necessary result in a more sound manner.

Thus, we come to the third and final method of extending the status of the invitee, the change over to the invitation theory. Although this is patently the best approach, at least from the point of view of immediate remedies, it is not satisfactory in effect. Many courts apparently do not realize the inconsistency between the two theories and the need to adhere to one or the other. As has been noted, often both theories thrive side by side in the same jurisdiction. What may appear as a shift for the better in one case may be subsequently "overruled" by a later decision fraught with words such as "mutual benefit" or "pecuniary advantage." Hence, the shift may only be a temporary one so as to afford the plaintiff in the instant case the protection owed an invitee. It is difficult to find a case expressly repudiating a prior decision based on the economic benefit theory.

85. Fournier v. New York, N.H. & H.R. Co., 286 Mass. 7, 189 N.E. 574 (1934); Hamilton v. Texas & Pac. R. Co., 64 Tex. 251 (1885).

86. McCann v. Anchor Line, 79 F.2d 338 (2d Cir. 1935); Atchison, T. & S.F.R. Co. v. Cogswell, 23 Okla. 194, 99 Pac. 923 (1909).

87. Kennedy v. Phillips, 319 Mo. 573, 5 S.W.2d 33 (1928).

88. *Ibid.*

89. Anderson v. Cooper, 104 S.E.2d 90 (Ga. 1958); Grogan v. O'Keefe's Inc., 267 Mass. 189, 166 N.E. 721 (1929).

90. See Howlett v. O'Keefe's Inc., 256 Mass. 544, 152 N.E. 895 (1926); Powell v. Great Lakes Transit Corp., 152 Minn. 90, 188 N.W. 61 (1922); Miller v. George B. Peck Dry Goods Co., 104 Mo. App. 609, 78 S.W. 682 (1904); Atchison, T. & S. F. Ry. v. Cogswell, 23 Okla. 181, 99 Pac. 923 (1909); Himstreet v. Chicago & N.W. R. Co., 167 Wis. 71, 166 N.W. 665 (1918).

Most courts either distinguish the prior case on other grounds[91] or ignore the inconsistency.[92]

Legally, it would seem to be the lesser of two evils for a state to stay with the economic benefit test and stretch the same to the breaking point rather than oscillate between the two theories. The next best solution would be a complete and permanent adoption of the invitation theory. The most satisfactory remedy to the problem is, of course, for a state to legislate a requirement of reasonable care in all circumstances.

## B.
## England

England has nearly attained the ultimate in the trend. By act of Parliament it has imposed upon the occupier the same duty, described as the "common duty of care," toward all his lawful visitors.[93] The act in effect abolishes the common-law distinction between invitees, licensees and contractual visitors and makes no change in the law governing liability to trespasses, but the broad considerations on which the common-law distinctions were founded may still be relevant to the question whether the common duty of care has been discharged in a particular case.[94]

The act defines the common duty of care as a duty to use reasonable care to see that the visitor will be reasonably safe in using the premises for the purposes for which he was invited or permitted to be there.[95] The occupier may extend or disclaim his liability by agreement and he is expressly provided with the defense of assumption of risk.[96] Although the defense of contributory negligence is not expressly included, it probably was intended to apply.[97]

The act has not met with unanimous approval. Although granting some reform was necessary as to occupiers' liability, all do not agree this method was the best way of dealing with the subject.[98] Nevertheless, "the modern tendency . . . is away from rigid categories in favour of a broad flexible principle, and the Occupiers' Liability Act is in tune with this tendency." [99]

91. See First Nat'l Bank of Birmingham v. Lowery, 263 Ala. 36, 81 So. 2d 284 (1955) which seems to be based on the invitation theory. The court merely distinguishes a previous case based solely on lack of pecuniary benefit.

92. See Richmond Bridge Corp. v. Priddy, 167 Va. 114, 187 S.E. 518 (1936). In apparently applying the invitation test, the court ignores previous decisions based on common interest or mutual advantage.

93. The Occupiers' Liability Act, 1957, 5 & 6 ELIZ. 2, c. 31 § 1(2).

94. See Payne, *supra* note 68 at 360.

95. The Occupiers' Liability Act, 1957, 5 & 6 ELIZ. 2, c. 31 § 2(2).

96. *Id.* § 2(1), (5).

97. Payne, *supra* note 68 at 367. He submits that the omission in the act to expressly provide for the defense is sure to be seized upon by counsel as significant. Technically, contributory negligence is not the proper term for such has been abolished as a complete defense by statute in England, and a system of damage apportionment sometimes called comparative negligence instituted. Law Reform Act, 1945, 8 & 9 GEO. 6, c. 28.

98. See Payne, *supra* note 68; Note, 19 MODERN L. REV. 532 (1956).

99. Payne, *supra* note 68 at 363.

## V.

## CONCLUSION

The law of negligence is gradually working its way into a most important area which for decades has doled out liability not through the test of "reasonably foreseeable harm" but through rigid categories ascertained by the qualifications of the injured party. Of course, there are valid arguments for the retention of this system. However, the fairness and success of the principles of negligence in determining liability overshadow these objections. Because the circumstances by which the plaintiff is on the land will be considered in determining what is the care reasonably owed him in a particular case, the results under the negligence principle will on the most part be the same as under the old system. However, this will not necessarily be true in all cases. It is the different result in these borderline cases and the desirability of a uniform test of tort liability that makes the change an important one. Besides outright legislation dealing with the subject as England has attempted, the most sound method for accomplishing the result is through the application by the courts of the invitation test which is more inclusive as to persons protected by the rules of negligence. At the present time, the state of the law in the United States is rather unsettled as the trend toward the abolition of a mechanical jurisprudence and the substitution of a duty of reasonable care in all instances takes hold.

*Donald G. Jewitt*