COMMENT

THE OHIO GUEST STATUTE

As the use of automobiles became almost universal, the proverbial ingratitude of the dog that bites the hand that feeds him, found a counterpart in the many cases that arose, where generous drivers, having offered rides to guests, later found themselves defendants in cases that often turned upon close questions of negligence. Undoubtedly the Legislature[s], in adopting [the guest statutes] reflected a certain natural feeling as to the injustice of such a situation.[1]

INTRODUCTION

The Ohio General Assembly in 1933 enacted the Ohio Guest Statute, section 4515.02 of the Ohio Revised Code (section 6309-6 G.C.), in response to a general feeling of animosity toward "hitch-hikers" and other guests bringing personal injury actions against the "good Samaritan" motorist. It was also hoped that such legislation would prevent fraud and collusion feared to be inherent in "guest suits." The statute itself reads as follows:

> The owner, operator or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, resulting from the operation of said motor vehicle, while such guest is being transported without payment therefor in or upon said motor vehicle, unless such injuries or death are caused by the wilful or wanton misconduct of such operator, owner, or person responsible for the operation of said motor vehicle.[2]

After a quarter-century of existence, the Ohio Guest Statute has been characterized as a "treadmill of confusion."[3] Such characterization justifies the present Ohio courts' position as to their interpretation of "guest" and "wilful or wanton" within the statute. However, the question remains as to whether this confusion is solely attributable to incongruous judicial interpretation or is a consequence of the equivocal nature of any guest legislation.

HISTORICAL DEVELOPMENT OF GUEST LEGISLATION IN THE UNITED STATES

1. *General*

At common law an occupant of an automobile was normally permitted to recover for injuries proximately caused by the driver's negli-

[1] Crawford v. Foster, 110 Cal. App. 81, 293 Pac. 841, 843 (1930).

[2] Section 4515.02, Ohio Rev. Code (1953).

[3] For an excellent discussion of the Ohio Guest Statute and especially the courts' interpretation of wilful or wanton misconduct, see Comment "Treadmill to Confusion—Ohio Guest Statute," 8 W. Res. L. Rev. 170 (1957).

gent conduct, although in Massachusetts, New Jersey and Pennsylvania the driver's duty to his occupants was partially limited without the benefit of a statute.[4] Most states analyzed the automobile host-guest relationship as being similar to the host-guest relationship of real property, namely that of licensor-licensee. Thus the host was not legally obligated to inspect the automobile in order to guarantee its safety, but his only duty was not to increase existing hazards or be responsible for new ones once the journey began. In 1927 Connecticut passed the first automobile guest statute,[5] a statute which ten years later was repealed due to "unfavorable results."[6] The rapid technological developments in the auto industry meant increased consumption which, due to a proportionate increase in the number of accidents, led to the enactment of guest legislation in other states, until today twenty-seven states have automobile guest statutes. Any attempt to crystallize these statutes is impossible due to the variety of provisions and resulting interpretation. As the Ohio Supreme Court has properly concluded:

> Because of the great variety of terms, used in guest statutes of the several states of the United States, relating to the quality or degree of tortious conduct of an automobile host driver necessary to create liability against him in favor of his guest, and because of the careless use of language in court opinions and legal literature describing these terms, great confusion has arisen in the matter of applying them to specific uses.[7]

However, it can be readily seen that the purpose of all guest statutes is twofold: (1) to protect against fraud and collusion, and (2) to protect the motorist (or owner) against liability for injuries to his occupants, unless he is compensated for the transportation in an amount substantially commensurate with the cost of the transportation—in other words to preclude recovery by those who really have no moral right to recover. Owing to these "commendable" purposes, only one guest statute has even been held to be unconstitutional.[8]

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[4] For appropriate citations from these three states concerning this point, see 27 Mich. L. Rev. 458 (1929); 7 Notre Dame Lawyer 87 (1932); 6 Notre Dame Lawyer 300 (1931); 74 University of Pa. L. Rev. 86 (1925).

[5] Conn. Gen. Stat. § 1628 (1930).

[6] Conn. Gen. Stat. § 340(E) (Supp. 1939).

[7] Tighe v. Diamond, 149 Ohio St. 520, 524, 80 N.E.2d 122, 126 (1948).

[8] The Kentucky Guest Statute was held to be unconstitutional in Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347 (1932). The court held that such legislation violated Art. 54 of the Kentucky Constitution which reads in part, "The general assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to the person or property." The Ohio Guest Statute was held not to violate the due process clause of the Constitution in Smith v. Williams, 51 Ohio App. 464, 1 N.E.2d 643 (1935).

2. Analysis of the Statutory Standards of Other States

Following is a listing of the states which have enacted guest statutes and a summary of the degree of care required of the owner or operator toward his guest.

State	Degree of Care
1. Alabama, Ala. Code tit. 36, § 95 (1940)	Wilful or wanton misconduct.
2. Arkansas, Ark. Stat. §§ 75-913, (1947)	Wilful and wanton operation in disregard of the rights of others.
3. California (Vehicle § 17158) (1959)	Intoxication; wilful misconduct.
4. Colorado, Colo. Rev. Stat. Ann. § 13-9-1 (1953)	Intentional; intoxication; wilful and wanton disregard of the rights of others.
5. Delaware, Del. Code Ann. tit. 21, § 6101 (1953)	Intentional accident; willful or wanton disregard of the rights of others.
6. Florida, Fla. Stat. § 320.59 (1955)	Gross negligence; wilful and wanton misconduct.
7. Idaho, Idaho Code Ann. § 49-1001 (1953)	Intentional; intoxication; reckless disregard of the rights of others.
8. Illinois, Ill. Rev. Stat. ch 95-½, § 9-201 (1957)	Wilful and wanton misconduct.
9. Indiana, Ind. Ann. Stat. § 47-1021 (1929).	Wanton or wilful misconduct.
10. Iowa, Iowa Code § 321.494 (1958)	Under influence of intoxicating liquor; reckless operation.
11. Kansas, Kan. Gen. Stat. Ann. § 8-122(b) (1949)	Gross and wanton negligence.
12. Michigan, Mich. Comp. Laws § 256.29 (1948)	Gross negligence; wilful and wanton misconduct.
13. Montana, Mont. Rev. Code Ann. §§ 32-1113 to 32-1116 (1931)	Grossly negligent; reckless operation.
14. Nebraska, Neb. Rev. Stat. § 39-740 (1943)	Infiuence of intoxicating liquor; gross negligence.
15. Nevada, Nev. Rev. Stat. § 39-740 (1931).	Intoxication; wilful misconduct; gross negligence.
16. New Mexico, N. M. Stat. Ann. § 64-24-1,2 (1953)	Intentional accident; heedlessness; reckless disregard of the rights of others.
17. North Dakota, N. D. Rev. Code § 39-1503 (1943)	Intoxication; wilful misconduct or gross negligence.
18. Ohio, Ohio Rev. Code § 4515.02 (1953)	Wilful or wanton misconduct.
19. Oregon, Ore. Rev. Stat. § 30.110 (1953)	Intentional accident; intoxication; reckless disregard of the rights of others.

20. South Carolina, S. C. Code § 46-801 (1952)	Intentional accident; reckless disregard of the rights of others; heedlessness.
21. South Dakota, S. D. Code § 44-.0362 (1939)	Wilful and wanton misconduct.
22. Texas, Tex. Rev. Civ. Stat. art. 6701-b (1948)	Intentional accident; reckless disregard of the rights of others.
23. Utah, Utah Code Ann. §§ 41-9-1, 41-9-2 (1953)	Intoxication; wilful misconduct.
24. Vermont, Vt. Stat. Ann. tit. 23, § 1491 (1959)	Gross negligence; wilful negligence of the operator.
25. Virginia, Va. Code Ann. § 8-6461 (1950)	Gross negligence; wilful and wanton disregard of the safety of the person.
26. Washington, Wash. Rev. Code § 46-08.080 (1937)	Intentional accident; gross negligence; intoxication.
27. Wyoming, Wyo. Comp. Stat. Ann. § 60-1201 (1945)	Gross negligence; wilful and wanton misconduct.[9]

Thus, it appears that only Alabama and Indiana have statutes exactly like that of Ohio in reference to the degree of care which an owner or operator of a motor vehicle must exhibit to his guest. However, the statutes of Arkansas, Illinois and South Dakota are sufficiently similar to classify them in the same general category as the three mentioned above. It is interesting to note that ten of the twenty-seven states have provisions allowing recovery for injuries sustained due to the operator's intoxication. As shall be seen later, Ohio, as well as the other states which have the wilful-wanton standard, tenaciously holds that intoxication does not in itself constitute wilful or wanton misconduct.

Who is a Guest Within the Meaning of the Statute?

In order for an injured occupant of an automobile to recover damages resulting from the owner's or operator's negligence, he must be a passenger rather than a guest within the meaning of the statute. A guest, according to the Restatement of Torts, is:

> one whom the owner or possessor of a motor car or other vehicle invites or permits to ride with him as a gratuity, that is, without any financial return except slight benefits it is customary to extend as part of the ordinary courtesies of the road.[10]

The Ohio Supreme Court interpreted the words "without payment therefor" in the statute to mean that a guest is one:

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[9] An extremely helpful table of the states that have guest legislation and a resumé of the courts' of each state's interpretation as to key words within the statute is listed in 27 Ins. Counsel Journal 223 (1960).

[10] 2 Restatement of Torts, § 490, at 1272 (1934).

> who is invited, either directly or by implication, to enjoy the hospitality of the driver of a motor vehicle, who accepts such hospitality and takes a ride either for his own pleasure or on his business without making any return or conferring any benefit upon the driver of the motor vehicle other than the mere pleasure of his company.[11]

Unfortunately, application of any such definition is much more difficult than its formulation.

In some areas the law seems clear. For instance, the return or payment need not come from the occupant himself,[12] nor is money needed to constitute payment.[13] Also, an actual business benefit does not have to materialize, the only necessity being the existence of the possibility of a business benefit at the start of the journey. Furthermore, a presumption of a guest relationship arises when the occupant and driver are part of the same family.[14]

Payment for Transportation

In *Duncan* v. *Hutchinson*,[15] the Ohio Supreme Court attempted to prescribe certain tests to determine when one actually "pays for his transportation" and thus takes himself out of the operation of the guest statute. The court concluded that payment is present: (1) when the automobile host has a financial or business interest in the time or service of the occupant, and the purpose of the transportation is to take the occupant to or from his place of employment; (2) when the occupant is making the trip to assist the automobile host in arriving at the latter's destination or to perform some service for the latter's benefit; (3) when a substantial or tangible benefit is conferred upon the automobile host; (4) when the automobile host and occupant embark upon a joint adventure or enterprise in which both are equally interested, and the adventure or enterprise is of such moment and character as to indicate that payment is the motivating influence in

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[11] Dorn v. Village of North Olmstead, 133 Ohio St. 375, 380, 14 N.E.2d 11, 14 (1938). This definition was adopted by the trial court and approved by the Supreme Court.

[12] Sprenger v. Braker, 71 Ohio App. 349, 49 N.E.2d 958 (1942) (transferring members to lodge meeting in expectation lodge would pay for all); May v. Szwed, 68 Ohio App. 459, 39 N.E.2d 630 (1941) (mother of plaintiff received transportation for daughter as partial compensation for employment with the defendant).

[13] Pheiffer v. Penn. Ry. Co., 60 Ohio L. Abs. 24 (1941); 168 F.2d 558. Hallgren v. Wilson, 18 Ohio L. Abs. 652 (Ct. App. 1935) (part of compensation being to furnish transportation to and from streetcar on day off).

[14] Hasbrook v. Wingate, 152 Ohio St. 50, 87 N.E.2d 87 (1949) (Court emphasizes that family relationship extremely important factor in establishing guest status.) *But see* Henlin v. Wilson, 111 Ohio App. 516 (1961).

[15] Duncan v. Hutchinson, 139 Ohio St. 185, 39 N.E.2d 140 (1942).

providing for the transportation; and, (5) when the person is an involuntary occupant of the automobile.

The application of the first criterion is most readily visualized in *Angel v. Constable*,[16] where the court held that there was payment when the plaintiff was being driven home for dinner by the defendant-employer, with the understanding that the plaintiff-employee would return to work after eating. The court reasoned that a more efficient performance by the employee for a longer length of time constitutes payment. The second and third standards are exemplified in *Dorn v. Village of North Olmstead*,[17] where it was held that one riding in the defendant's automobile for the sole purpose of pointing out a location to the latter, was a passenger rather than a guest. The most recent pronouncement in this area by the supreme court came in *Burrow v. Porterfield*,[18] where the court decided that:

> the head of a children's division of a church who was riding in his pastor's motor vehicle, at the pastor's request, in order to attend a church conference dealing with business matters important to such children's division, was [not a guest as a matter of law in such motor vehicle] . . . .[19]

The court reasoned that the knowledge gathered at the conference by the plaintiff would indirectly benefit the pastor in such a manner as to constitute "payment therefor."

The exact amount of benefit that has to be conferred upon the owner or operator in order to make one a paying passenger is somewhat clouded due to the court of appeals decision in *Sabo v. Mayn*.[20] There the defendant, an unlicensed driver, requested the plaintiff, a licensed driver, to accompany him on a joy ride, so that the defendant would not violate the requirements of his driving permit. The court refused to allow the plaintiff to recover for his injuries sustained in the ensuing accident due to defendant's negligence, holding in effect that the plaintiff was a guest despite the fact that his only purpose in accompanying the defendant was to legally allow the latter to drive.

The fourth category of payment set out in the *Duncan* case has been one of considerable controversy, since it is usually within the confines of the words "joint adventure or enterprise" that the share-the-expense problem arises. At first blush, it might appear that one's sharing the expenses of an automobile trip constitutes payment therefor and thus should remove the occupant from the guest statute. How-

16 Angel v. Constauble, 40 Ohio L. Abs. 1, 57 N.E.2d 86 (Ct. App. 1943).

17 Dorn v. Village of North Olmstead, *supra* note 11.

18 171 Ohio St. 28, 168 N.E.2d 137 (1960).

19 Burrow v. Porterfield, *supra* note 18 at 28, 168 N.E.2d at 437.

20 103 Ohio App. 113, 144 N.E.2d 248 (1956).

ever, in the absence of a contract for payment, the Ohio courts refuse to give this connotation to expense sharing in itself, and require a business motive for the trip in addition to the sharing of the expenses.[21]

To sidestep the "harshness" of this test in some circumstances, the Ohio Supreme Court in at least one instance seemed to relax the requirements of a business trip. In *Lisner v. Faust*[22] the court held that a child is a paying passenger and not a guest when he is being transported from his home to his school in an automobile driven by one of a group of parents who have entered into a definite mutual agreement to participate in a car pool for the purpose of transporting their children to and from school. The reciprocal arrangement constituted a benefit of a business-like nature and thus made the child a paying passenger, even though the purpose of the trip was not business as such. In *Lisner*, it appears that the court correctly looked to the nature of the benefit conferred rather than the nature of the trip. Judicial imposition of a business purpose into this standard is unfortunate since often it is most difficult to ascertain the nature of a particular trip to determine if it is social or business in character. Factors such as the relationship between the occupant and motorist, nature or object of the trip, and nature of the arrangement for payment must all be carefully weighed in making this determination.[23]

The fifth test is a rather obvious one in that the court in *Duncan* correctly reasoned that there can be no "involuntary guest." However, some sixteen years later, the same Ohio Supreme Court concluded in *Lombardo v. DeShance*[24] that "it is our conclusion that one may become and be a guest in an automobile within the meaning of the Ohio Guest Statute although he may be mentally incapable of accepting an invitation to ride in that automobile."[25] In the *Lombardo* case, the plaintiff, while intoxicated, was taken for a ride by the defendant without the plaintiff's knowledge or consent. In reversing the lower court, the supreme court held the plaintiff to be a guest, apparently in-

[21] Jancar v. Knopie, 171 Ohio St. 165, 168 N.E.2d 407 (1960). (Defendant and wife were going on motor trip and asked plaintiff and his wife to accompany them on share expenses basis. Directed verdict for defendant upheld); Miller v. Fairley, 141 Ohio St. 327, 48 N.E.2d 217 (1943) (paying share of expenses on business trip (job) is enough to make one a passenger); Ackerman v. Steiner, 44 Ohio L. Abs. 600, 59 N.E.2d 950. (Ct. App. 1944) (sharing expenses in going to bowling tournament not enough to remove one from being guest); Voelkl v. Latin, 58 Ohio App. 245, 16 N.E.2d 519 (1938) (share expense arrangment to go to party not enough); Ernest v. Bellville, 53 Ohio App. 110, 4 N.E.2d 286 (1936) (share expense to go on fishing trip not enough).

[22] 168 Ohio St. 346, 155 N.E.2d 59 (1958).

[23] For a complete listing of these factors, see Miller v. Fairley, *supra* note 21 at 337, 48 N.E.2d at 222.

[24] 167 Ohio St. 431, 149 N.E.2d 914 (1958).

[25] Lombardo v. DeShance, *supra* note 24 at 436, 149 N.E.2d at 908.

corporating the business-social test into the area of the involuntary guest. By its very meaning, guest implies consent to an invitation and it seems only reasonable to infer that such consent should be a prerequisite.

In summary, one is able to categorically list from the judicial decisions, three factors, each of which helps to classify an occupant of an automobile either as a guest or as a passenger: (1) the first is to classify one as a guest or a passenger by examining the initial purpose of the ride, that is, whether it has a business or social aspect; (2) the second is to determine if there is an actual payment for the transportation, understood by the parties to be such rather than a mere expression of social amenities. Thus an actual contract between the parties specifying that the rider is to pay for the transportation is payment and makes one a passenger. (3) Finally, one can look at the business benefit rendered to the occupant by the trip compared to that enjoyed by the owner or driver. If an occupant confers a substantial benefit upon the owner or operator, he will probably be a passenger rather than a guest.

Termination of Guest Relationship

As mentioned above, the fifth criterion used in determining whether an occupant of an automobile is a guest is whether or not he is voluntarily riding in the automobile. Presumably, one who is in an automobile against his wishes is not a guest since the host-guest relationship contemplates an acceptance of an invitation. Thus, it seems to follow that one who begins a journey as a guest ceases to be such once he demands to be let out of the automobile and the operator refuses. Quite surprisingly, however, most states including Ohio (at least until recently) hold that the host-guest relationship once established is not terminable.[26] There appears to be no sound legal basis to justify such a rule as all the usual requisites for a guest are missing. The Ohio Supreme Court in *Redis v. Lynch*[27] recently indicated a possible departure from the conventional rule. There the plaintiff, a sixteen-year-old girl, was offered a ride by the defendant to her house. The defendant permitted one whom he knew to be an unlicensed driver to operate the automobile. The driver, with the defendant's consent and against the protests of the plaintiff, drove toward plaintiff's house on a much longer route than that normally used. After the defendant had encouraged the operator to "drive faster" and the automobile reached a speed of 90 m.p.h., an accident resulted and the plaintiff was seriously injured. The lower court sustained the defendant's demurrer but the

[26] For Ohio's position here see 5 Cleve-Mar. L. Rev. 101 (1956).

[27] 169 Ohio St. 305, 159 N.E.2d 597 (1959).

supreme court reversed holding that a jury question was raised as to whether the plaintiff had remained a guest for the entire trip.[28]

WILFUL OR WANTON MISCONDUCT

Polonius: "What do you hear, my Lord?"
Hamlet: "Words, words, words."[29]

The Ohio Guest Statute provides that in order for a guest to recover damages for the negligent operation of an automobile, it is necessary that his injuries be proximately caused by the wilful or wanton misconduct of the host.[30] Unfortunately, after some twenty-seven years of application, the Ohio courts are far from unanimity in defining wilful or wanton, although they do agree that they differ from mere negligence,[31] and it is error to charge that they are the same.[32]

Since wilful misconduct connotes intentional wrongdoing, its application to specific fact situations has not been difficult.

> "Wilful misconduct" on the part of the motorist within the meaning of the Ohio Guest Statute . . . is either the doing of an act with specific intent to injure his passenger or, with full knowledge of existing conditions, the intentional execution of a wrongful course of conduct which he knows should not be carried out or the intentional failure to do something which he knows should be done in connection with the operation of his automobile, under circumstances tending to disclose that the motorist knows or should know that an injury to his guest will be the probable result of such conduct.[33]

Thus, as evidenced by the pronouncement of the supreme court above, wilful misconduct may be either actual or constructive—the former anchored on an actual intent to injure, while the latter is predicated on an intentional act or refusal to act coupled with an absolute indifference to the safety of others as evidenced by knowledge of the existing danger—a constructive intent to injure.[34]

Wanton misconduct, on the other hand, means that the actor's conduct is of "an unreasonable character, in disregard of a risk known

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[28] The court also intimated that a jury question was presented as to whether the defendant's conduct amounted to wilful or wanton misconduct.

[29] Hamlet, Act II, scene 2.

[30] § 4515.02 Ohio Rev. Code (1933).

[31] Akers v. Stirn, 136 Ohio St. 245, 25 N.E.2d 286 (1940); Universal Concrete Pipe Co. v. Bassett, 130 Ohio St. 567, 200 N.E. 843 (1936). Still some early courts used the term wilful or wanton negligence. See Higbee Co. v. Jackson, 101 Ohio St. 75, 128 N.E. 61 (1920).

[32] Reserve Trucking Co. v. Fairchild, 128 Ohio St. 519, 191 N.E. 745 (1934).

[33] Tighe v. Diamond, 149 Ohio St. 520, 122, 80 N.E.2d 122 (1948).

[34] For a very worthwhile discussion of wilful or wanton misconduct, see 6 Ohio Jur. 2d "Automobiles" § 226 (1954).

to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow."[35] The Ohio Supreme Court defined wantonness in *Universal Concrete Pipe Co. v. Bassett*,[36] a non-guest case, as follows:

> wanton misconduct is such conduct as manifests a disposition to perversity, and it must be under such surrounding circumstances and existing conditions that the party doing the act or failing to act must be conscious, from his knowledge of such surrounding circumstances and existing conditions, that his conduct will in all probability result in injury. . . . Wantonness is a synonym for what is popularly known as cussedness and cussedness is a disposition to perversity.[37]

The continued application of this definition by the Ohio courts has led to unjustifiable results. Certainly, the popular notion of "cussedness" and "disposition to perversity" invoke a spirit of ill-will or wickedness which borders very closely to wilful misconduct. Perhaps it is true that the subtle legal distinction between wilful and wanton is so slight as not to merit distinction. However, the two terms should not be confused to the extent that they foreshadow liability for injuries resulting from conduct short of that designed to ensue in intentional injury.

In *Haacke v. Lease*,[38] the motorist turned to observe a group of buildings and continued driving for a quarter mile without watching the highway. The court could find no wantonness in his conduct, saying there was no actual knowledge of a great probability of harm. Judge Hornbeck, in a strong dissent, asserted that a person should be charged with knowledge of the natural and probable consequences of his acts, stating: "If such acts, under all the circumstances, do not constitute wanton misconduct, I can conceive of no conduct that could be so characterized."[39] Other courts have acquiesced in the requirement of actual knowledge,[40] while at least one court correctly agreed with the reasoning of Judge Hornbeck.[41]

In *Hellerin v. Dixon*,[42] the supreme court reversed the lower courts and allowed no recovery where the plaintiff-occupant was killed as the defendant-motorist drove his twelve-year-old automobile "as fast as he could"[43] uphill in a rainstorm on a slippery pavement. The court

35 Prosser, Torts, § 33 at 151 (1955).

36 Universal Concrete Pipe Co. v. Bassett, *supra* note 31.

37 Universal Concrete Pipe Co. v. Bassett, *supra* note 31 at 843-45.

38 35 Ohio L. Abs. 381, 41 N.E.2d 590 (Ct. App. 1941).

39 *Id.* at 392.

40 Vecchio v. Vecchio, 131 Ohio St. 59, 1 N.E.2d 624 (1936).

41 Patterson v. Garrison, 24 Ohio L. Abs. 226 (Ct. App. 1937).

42 152 Ohio St. 40, 86 N.E.2d 777 (1949).

43 *Id.* at 45, 86 N.E.2d at 780.

concluded that there was no "disposition to perversity" since there was only a chance that injury would result, there being a wide gap between chance and probability.[44] One of the most recent opinions rendered by the supreme court is *Birmelin v. Gist*[45] where testimony was presented to the effect that the motorist, while speeding, changed his speed and swerved from one side of the road to the other in a manner so as to prevent a truck that was following him from passing. All of the occupants of the automobile were killed in the resulting accident, but the court was unable to find wanton misconduct since no evidence was presented that the driver realized that his conduct would in all probability result in injury—the court refused to "guess what had happened." No wonder lower courts are prone to tag wantonness as the legal equivalent of wilfulness.[46]

VIOLATION OF STATUTE

Another vulnerable area of the Ohio courts is the frequent pronouncement that violation of a statute by a motorist is not enough in itself to constitute wilful or wanton misconduct. Thus, excessive speed,[47] bad judgment, and the like are not enough to show a disposition to perversity.[48] Fortunately, wantonness can be found where a statute is violated coupled with "unusually dangerous surroundings showing a knowing disregard of another's safety."[49] However, wantonness could not be found where:

> a driver of a car, who upon approaching an intersection of two state highways at a rate of speed between 55 and 60 m.p.h., observed a car to his right approaching the intersection, then proceeds to look at the baggage on his running board to see if it is secure and then at his wristwatch for the purpose of checking the correctness of his speedometer, fails to notice a traffic light at the intersection or

[44] But see Judge Zimmerman's dissent where he says, "Based upon the described conduct of the driver, which in our opinion showed a reckless disregard of consequences and the rights of others, the jury was justified in finding the existence of the elements comprising wanton misconduct. . . ." *Id.* at 48, 86 N.E.2d at 78.

[45] 162 Ohio St. 98, 120 N.E.2d 711 (1954).

[46] See Headnote 3 of McCoy v. Faulkenberg, 53 Ohio App. 98, 4 N.E.2d 281 (1935) "The character of an act as wilful or wanton must be determined by whether the misconduct is a wilful disregard of the just rights or safety of others . . . or a wantonness that is the legal equivalent of wilfulness." In the *McCoy* case, an intoxicated motorist returning from a party was found not guilty of wilful or wanton misconduct when he drove his automobile 45 m.p.h. on a city street turning in and out of traffic, striking a pole, which killed a passenger.

[47] Kennard v. Palmer, 143 Ohio St. 1, 53 N.E.2d 908 (1944).

[48] For another case where violation of a safety statute did not amount to wilful or wanton misconduct, see Thomas v. Williams, 54 Ohio L. Abs. 94, 86 N.E.2d 801 (1948).

[49] Kennard v. Palmer, *supra* note 47 at 4, 53 N.E.2d at 908.

> make any observation of the highway on which he is traveling, and, when his attention is called to the car approaching on the intersecting road, accelerates his car in such a manner as to pass in front of such approaching car and becomes involved in a collision with it, is, as a matter of law, not guilty of wilful or wanton misconduct so as to be liable in damages for the death of a guest passenger in his automobile.[50]

Although violation of one statute may not amount to wantonness, a series of negligent acts such as those mentioned above add up to something more than mere negligence—indeed, they amount to wantonness. In interpreting wantonness, Ohio courts seem to have placed too much emphasis on the requirement of an intentional ill will to cause injury rather than on an examination of the facts of each case and a determination of the degree of risk involved in that particular conduct by the motorist. Certainly, wantonness should be found where a series of negligent acts augment the degree of risk to the extent illustrated by the above set of facts. In short, wanton misconduct should also be found where there is no intent to injure.

Finally, the most recent decision by the Ohio Supreme Court indicates that the court will be "hard put" to find wanton misconduct. In *Tonti v. Paglia*,[51] the court sustained the defendant's demurrer to a petition in which it was alleged that the defendant permitted her minor son, whom she knew to be a reckless driver, to operate her automobile and as a result of the minor's negligence, the plaintiff was injured. In adhering to "rigid precedent," the court concluded that the "entrustment of the motor vehicle to such [an] incompetent person does not, in itself, constitute wilful or wanton misconduct."[52]

In effect, then, Ohio courts have adjudicated wantonness out of the Guest Statute. Whether the Ohio legislature intended that wilful and wanton be used in the disjunctive by the inclusion of "or" is more than an academic question, but need not concern us here. Actual wilful misconduct has been applied to acts initiated by an intent to injure. Wantonness in effect has been given the same meaning due to the "disposition to perversity" cliché followed so religiously by the courts. More important, in so construing the terms, courts have failed to classify, either as wilful or wanton, conduct which takes place in light of such a great risk that even a "reasonably negligent" person would not act in a similar manner. Surely one who acts in light of such a measurable risk ought to be held to the sound legal maxim that a person is presumed to have intended the natural consequences of his voluntary acts.

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[50] Headnote of Murphy v. Snyder, 63 Ohio App. 423, 27 N.E.2d 152 (1937).

[51] 171 Ohio St. 520, 172 N.E.2d 618 (1961).

[52] *Id.* at 523, 172 N.E.2d at 620.

It is imperative that if wilful and wanton are to be merged, courts must recognize that continuance of misconduct after knowledge (actual or constructive) of the danger involved often amounts to a reckless disregard for the safety of others, and therefore is certainly wilful or wanton. Regardless of the labels attached to different kinds of conduct, and regardless of whether wantonness is the legal equivalent of wilfulness, "all the circumstances presumably known to the driver should be considered; his physical condition, the weather, highway conditions, traffic, the speed of his vehicle and all facts which indicate that the danger was glaringly apparent."[53] These factors along with the mental attitude of the driver (either subjective or objective) before and at the time of the accident must be the guidelines in the determination of wilful or wanton misconduct. A case by case adjudication would seem to be much preferable to the apparently stereotype "cussedness" test existing today.

SOLUTION—JUDICIAL RE-EXAMINATION OR REPEAL OF THE GUEST STATUTE

Despite controversial judicial interpretation and application of the Guest Statute, the question remains as to the merits of any legislation which changes the common law liability of a motorist to his guest. This question has become especially relevant as a result of recent attempts to repeal the Ohio Guest Statute.[54]

Those who advocate the necessity of a guest statute claim such protection is needed for the "good Samaritan" motorist who extends his kindness by means of giving a "lift" to a neighbor or a weary traveler. They argue that it would be a gross imposition to expose such a motorist to liability for his mere negligence as this would be a prime example of the proverbial ingratitude of "the dog that bites the hand that feeds him." Furthermore, it is argued that the repeal of the guest statute means collusion, perjury and fraud. Since many guests are

53 8 W. Res. L. Rev. 170 (1957).

54 In 1949, a bill was introduced in the Ohio General Assembly, H. B. 546, to amend the guest statute so as to subject motorists to liability for injuries resulting from their negligence except as to those plaintiffs of first degree of kinship to the motorist. Such an amendment, it was hoped, would allow recovery in the normal case but still prevent collusive suits. In the 102d and 103d General Assembly in 1947 and 1959 respectively, H.B.'s 748 and 147 were introduced, the purpose of which was to completely repeal the Guest Statute. Although both bills were recommended for passage by the Judiciary Committee, both failed to receive the required number of votes for passage. A great deal of appreciation is extended to Mr. Robert Bayley of Clark County who introduced H.B. 157 for taking time to give his views on the subject of the repeal of the Guest Statute. Some of the arguments advanced in this paper for the repeal of the Guest Statute coincide with the views of Mr. Bayley, given to this writer in an interview on April 19, 1960.

family members or friends of the insured driver, the incentive for fraud and the difficulties in combating the same become self-evident—husband will sue wife, brother will sue sister, etc. Also, it is felt that many claims, entirely without merit, would be made against motorists and subject them or their insurance companies to "blackmail" by facing them with the alternative of the cost of a "nuisance" settlement or the expense of a carefully prepared trial. Such guest claims as these, it is argued, would place an unwarranted burden upon the insuring public in the form of higher automobile insurance rates, as the cost of automobile liability insurance is directly proportional to the total amount of claims paid by the companies.

Finally, it should be remembered that a "Medical Payments Coverage" currently can be purchased as part of an automobile insurance policy which, in effect, protects a guest by payment of all reasonable medical expenses incurred within one year after the accident.

Arguments for the repeal of the existing Ohio Guest Statute are greater numerically and also more sound economically, sociologically, and legally. To return to the common law rule would only mean that the driver has the same duty of care to those within his automobile as to those whom he meets on the street. The Ohio Guest Statute in effect makes an occupant a trespasser when he actually is a social invitee.

Since speed and the violation of other safety statutes are probably the greatest causes of automobile accidents,[55] it follows that these types of misconduct which are negligent, but never wilful or wanton in themselves say the courts, are the greatest causes of injuries and deaths to the passengers. Yet the Ohio Guest Statute tells the driver, the one person who can do the most to prevent injuries to his passengers, that as to pedestrians and persons in other automobiles, he must conduct himself reasonably; however, as to the "trespassing" guest, he can be as unreasonable as he pleases just so long as he is not guilty of wilful or wanton misconduct. Moreover, if the injured guest is a wage earner, we are really shifting the burden of the driver's negligence to the guests' dependents, and this often shifts the burden from an *admittedly* negligent driver. No wonder it is vehemently argued that guest statutes do not reflect people's sentiments but rather are creatures of the insurance companies.

That the repeal of the Guest Statute would raise insurance rates is at the most mere speculation. Besides, Ohio's insurance rates already reflect the risk of the insured driver negligently injuring his passenger,

[55] Bureau of Motor Vehicle Data received from Columbus Division of the Bureau of Motor Vehicles.

because any Ohio driver would be so liable in any of the states which do not have guest legislation (Kentucky, Pennsylvania, and West Virginia included). Moreover, a study has indicated that there is no consistency in rates when comparing those states which have guest legislation and those states which do not.[56] Those who argue that no guest statute will lead to collusive suits designed to defraud insurance companies are perhaps on more secure ground. However, those who so argue fail to recognize that such suits can be avoided by prompt and thorough investigations of accidents by responsible authorities and insurance companies. Acknowledging the fact that there remains a risk of fraud in every law suit, judicial machinery is today designed to combat such fraud. The repeal of the guest statute would still mean that the plaintiff must show first that he was in fact injured; second, that the driver's negligent conduct was the proximate cause of the injury; and third that he, the passenger, was not contributorily negligent in bringing about the injury nor did he assume the risk of his driver's negligent conduct. Moreover, collusive suits are even a possibility today under the Ohio Guest Statute if the driver is willing to falsely admit to misconduct which even the Ohio courts will recognize as being wilful or wanton. Besides, should honest claims ever be denied so as to prevent possible fraudulent recoveries?

The most serious concern with the Ohio Guest Statute today stems from the often harsh, inhuman and cruel results of cases litigated under the statute. Admittedly, much of the blame for these results can be directly placed on the Ohio courts' fusion of wilful and wanton. In addition to the "unjust" decisions already enumerated, one need only examine *Bailey v. Huff*[57] to see the undesirable situation guests find themselves in today. In this case, the driver admitted driving while intoxicated. After the defendant narrowly missed colliding with a truck, the plaintiff requested that the defendant let him drive and upon refusal, in vain asked to be let out of the automobile. The defendant, while turning left, collided with an oncoming automobile. The defendant's motion for a directed verdict was sustained by the Franklin County Common Pleas Court. Decisions such as this lead to an "uneasy" situation—perhaps even more so than allowing a hitchhiker to recover from a good samaritan motorist for the latter's "ordinary negligence." Whether the Legislature should take cognizance of such decisions as *Bailey* and act accordingly remains to be answered,

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[56] This study was conducted by Robert Bayley of Clark County and the results given to this writer in my interview with Mr. Bayley on April 19, 1960.

[57] 78 Ohio L. Abs. 183, 152 N.E.2d 162 (C.P. 1953); *aff'd*, 152 N.E.2d 166 (1957).

and the answer will depend upon one's personal convictions about guest legislation.

Finally, the Guest Statute means that if X and his Siamese cat are riding in my automobile, and both are killed by Z's negligence (for instance, driving 90 m.p.h. through a stop sign), X's estate can recover for the value of the cat since the Guest Statute does not apply to property. Moreover, Z could be sentenced to manslaughter for X's death. But X's wife and children could recover nothing for X's injuries or death. Should not our society be more interested in the preservation of life and limb than in the protection of property?

CONCLUSION

The present status of guest legislation in Ohio is undesirable both for the guest and for the public. Thirty years of judicial interpretation have resulted in much dissatisfaction. Moreover, the dissatisfaction has led to a serious examination of the merits of a guest statute in our present day society, and this examination has illuminated the undesirable characteristics inherent in such legislation. The fact that passengers constituted 43.2% of all injuries and 31.7% of all deaths in Ohio for 1959[58] is perhaps reason enough in itself to suggest there is no longer any sound basis for guest legislation today as there was in the "hitchhiker era" of the early 1930's. Even assuming that percentages for 1930 and 1960 remained constant, the increase in total accidents should concern us. It is most imperative that the increased automobile injury and death toll accelerated by the increased use of the automobile be checked by some method. Any incentive, no matter how small, which would decrease the appalling highway slaughter of today should be advanced.

Four possible remedies appear to be open: (1) a judicial change in the interpretation of wilful or wanton; (2) legislative change in the degree of care owed a guest, such as a change from wanton misconduct to gross negligence which might be more susceptible to a "better" judicial interpretation; (3) a legislative pronouncement as to the meaning of wilful or wanton; and (4) repeal of the guest statute entirely. Since the courts appear to be bound in this area by stare decisis and self created legal dogma, we must look to the legislature for relief. Oddly enough, the door is wide open for the Ohio Supreme Court has recognized that, "however the guest statute was not of judicial origin, it is a legislative enactment and as long as it exists, courts must abide by its terms and be governed by its provisions."[59]

It is fully recognized that guest legislation is desirable for the

[58] *Supra* note 53.

[59] Birmelin v. Gist, *supra* note 42 at 108.

encouragement of social amenities, and the elimination of fraudulent suits. But it is time to re-examine our society and determine whether such values override the urgent need to "discourage" in whatever manner possible the highway death toll. In short it is time to determine whether the Ohio Guest Statute is one of those principles that has served its day and has no place in modern day society.

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