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Treadmill to Confusion--Ohio's Guest Statute

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NOTES

Treadmill to Confusion — Ohio's Guest Statute

"We know not what we do when we speak words" — Shelly, Rosalind and Helen, Line 1108.

Cardozo once stated that one of the greatest causes for uncertainty in the law was the attempted distinction between cases where the facts presented no distinction in legal principles applicable.¹ The validity of the eminent jurist's assertion is borne out by an analysis of automobile guest law today. An examination of the various guest cases, so called, reveals a hodge-podge of anomalies, contradictions and misnomers. One Ohio judge voiced the sentiments of many when he remarked:

It is a day devoutly to be wished for when the courts of last resort will give us definitions which are understandable to the ordinary mind.²

This article will trace the background of Ohio's Guest Statute,³ survey the leading decisions, and offer suggestions in an attempt to clarify

¹ CARDOZO, *THE GROWTH OF LAW* 3 (1924)

² *Lockshin v. Greenberg*, 25 Ohio L. Abs. 284, 287 (Ct. App. 1937).

³ OHIO REV. CODE § 4515.02.

Ohio's atmosphere of thought. The following analysis will be limited to the conduct and state of mind of the host driver. Misconduct on the part of the guest which might preclude his recovery will not be discussed, nor will the question of who is considered a guest under the statute.⁵ Before considering the problems involved, however, certain facts should be offered as a poignant reminder of the tragedy of our highways.

More Americans have been killed in automobile accidents since Pearl Harbor than were killed in World War II.⁶ Every 13 minutes an American loses his life in an automobile accident; one is injured every 23 seconds.⁷ Such results are appalling. The courts and the legislatures have a duty to protect the public from the maniacs of the highway. Severe penalties should be meted out to guilty offenders and innocent victims of such catastrophes should be afforded the opportunity of adequate legal redress.

COMMON LAW LIABILITY OF THE DRIVER

The principal analogy at the common law was to a person entering on the land of another by permission. The owner of the land owed the licensee a duty to exercise reasonable care under the circumstances.⁸ This is in conformity with the traditional concept that whenever one acts, even though it be gratuitously, he owes a duty to use due care toward those whom his actions might affect. Thus the vast majority of common law

⁴The possible defenses of contributory negligence, imputed negligence and assumption of the risk will not be considered in this article. See 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE, Part I, pp. 514-610, 656-705, 706-724 (Perm. ed. 1946).

⁵For a discussion of who is considered a guest under Ohio's Guest Statute, see 6 OHIO JUR. 2d, *Automobiles* § 221 (1954).

⁶OHIO STATE BAR ASSOCIATION, ACCIDENT INFORMATION PAMPHLET (1956).

⁷NATIONAL SAFETY COUNCIL, ACCIDENT FACTS (1956) The pamphlet also reveals the following information. There were 62 million motor vehicles on the roads in 1955, being operated by 75 million licensed drivers. 38,300 Americans lost their lives in automobile accidents in 1955, while 1,350,000 were injured. About 3 out of every 10 drivers in fatal accidents were violating the speed laws. In 22 out of 100 fatal accidents the driver had been drinking. In one of four accidents, the weather was rainy, snowy or foggy. Of the 38,300 fatalities, 9,400 occurred in urban areas. A breakdown of how the people were killed: pedestrian accidents, 8,200; collisions between motor vehicles, 13,000; automobiles overturning, running off the highway, 13,500; collisions with a railroad train, 1,400; collisions with bicycles, 480; collisions with fixed objects, 1,600; other collisions, 120. Of the total fatalities, 21,400 occurred at night. In urban areas, over half the victims were pedestrians, while in rural areas, the victims were mostly occupants of the motor vehicle. The state of Ohio had 2,074 motor vehicle deaths in 1955. Property damages across the nation from motor vehicle accidents totalled one billion, seven hundred million dollars.

⁸PROSSER, TORTS § 77 (2d ed. 1955)

courts required a motorist, who had voluntarily undertaken to carry another gratuitously, to exercise the ordinary care of a reasonably prudent man in the management and operation of his automobile.

A few jurisdictions at common law proceeded upon a supposed analogy to the gratuitous bailment of chattels and held that the driver was liable to the guest only for gross or aggravated negligence.⁹ Such courts required a person who invited another to ride *gratis* to use only slight diligence to avoid injury to that person. The majority of the courts at common law, however, correctly reasoned that there is a clear distinction between the care required of a bailee of chattels, and that of the driver of an automobile to whom the passenger has entrusted his life. It is indisputable that society has a far greater interest in the protection of the life and well-being of its citizens than in the protection of property.

In Ohio, the guest at common law could recover for the ordinary negligence of the driver.¹⁰ Some courts, however, absolved the driver from ordinary care if the guest himself requested the ride, holding that the guest was a mere volunteer and the driver only owed him the duty to refrain from willfully, wantonly or intentionally injuring him.¹¹

BEGINNINGS OF GUEST LEGISLATION

At the turn of the twentieth century the automobile was a rarity. It was viewed with superstition, distrust and bewilderment. However, with characteristic American initiative, rapid technological strides were taken, and soon more people were donning their driving goggles and taking to the highways. As the "horseless carriages" became more common, the amount of litigation involving automobiles correspondingly increased. By the middle of the 1920's, a veritable avalanche of automobile cases descended upon the courts, many of which involved the host driver and the guest. Large judgments were being rendered against the host, and the feeling that he was being made to pay too high a price for his good samaritanism was evidenced. Automobile insurance had lessened the guest's dislike of suing the host driver. The insurance companies maintained that as a result of such insurance, fraud and collusion were being indulged in by the parties.

In 1927, the first of the automobile guest statutes was passed in Connecticut.¹² The common law duty of the driver was swept away and recovery was limited to his gross negligence. Before examining the various guest statutes, it should be noted that Connecticut, the pioneer guest leg-

⁹ *Ibid.*

¹⁰ 4 OHIO JUR., *Automobiles* § 33 (1929).

¹¹ 29 OHIO JUR., *Negligence* § 50 (1933).

¹² CONN. GEN. STAT. § 1628 (1930).

isolation state, found the results of its statute unfavorable. Many serious injuries went uncompensated;¹³ and Connecticut finally repealed its guest statute in 1937¹⁴

GUEST LEGISLATION TODAY

In more than half of the states, automobile guest statutes are now in effect.¹⁵ A compilation reveals many variations in wording, often resulting in ambiguity and contradictions. Some statutes link the words "intentional" and "accident," thus creating the paradox of an intended, unintentional occurrence.¹⁶ Several states have defined negligence as being synonymous with willful or wanton misconduct,¹⁷ but others have said that the terms are incompatible since negligence differs in kind, not degree, from a willful or wanton act.¹⁸ One court stated that negligence and willfulness are as unmixable as oil and water.¹⁹ Some of the statutes are worded to permit recovery for gross negligence,²⁰ while others provide specifically for recovery when the driver is intoxicated at the time of the accident.²¹ A few state legislatures have used the phrase

¹³ See Allen, *Why Do Courts Coddle Automobile Indemnity Companies?* 61 AM. L. REV. 77 (1927).

¹⁴ CONN. GEN. STAT. § 540 (E) (Supp. 1939).

¹⁵ A total of 27 states now have automobile guest statutes. They are, Alabama, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington and Wyoming. The particular citation for each of the above states will be given when the state is mentioned in the article.

¹⁶ IDAHO CODE ANN. § 49-1001 (1947); N. M. STAT. ANN. § 64-24-1 (1953); ORE. REV. STAT. § 30.110 (1953); S. C. CODE § 46-801 (1952); TEXAS REV. CIVIL STAT. art. 6701(b) (1948); WASH. REV. CODE § 46.08.080 (1951)

¹⁷ ARK. STAT. § 75-913 (1947); COLO. REV. STATS. ANN. § 13-9-1 (1953); FLA. STAT. § 320.58 (1955); KAN. GEN. STAT. ANN. § 8-122(b) (1949); NEV. COMP. LAWS § 4439 (Supp. 1941); N. D. REV. CODE § 39-1502 (1943); VT. STAT. § 10,223 (1947); VA. CODE OF 1950 § 8-646.1; WYO. COMP. STAT. § 60-1201 (1946).

¹⁸ *Gallegher v. Davis*, 37 Del. 380, 183 Atl. 620 (1936); *Perkins v. Roberts*, 272 Mich. 545, 262 N.W. 305 (1935).

¹⁹ *Kelly v. Malott*, 135 Fed. 74 (7th Cir. 1905).

²⁰ FLA. STAT. § 320.59 (1953); KAN. GEN. STAT. § 8-122(b) (1949); MICH. COMP. LAWS § 9.2101 (1948); MONT. REV. CODE ANN. tit. 32, § 1113 (1947); N. D. REV. CODE tit. 39, § 1502 (1943); ORE. REV. STAT. § 30.110 (1953); VT. STATS. REV. § 10,223 (1947); VA. CODE OF 1950 § 8-646.1; WYO. COMP. STAT. § 60-1201 (1945).

²¹ CAL. VEHICLE CODE ANN. § 403 (Deering 1948); IDAHO CODE § 49-1001 (1947); IOWA CODE § 321.494 (1954); NEB. REV. STAT. c. 39, § 740 (1943); NEV. COMP. LAWS 1929 SUPP. § 4439 (1941); N. D. REV. CODE tit. 39, § 1502 (1943); ORE. REV. STAT. § 30.110 (1953); UTAH CODE ANN. § 41-9-1 (1953).

"reckless disregard of the rights of others,"²² or "willful misconduct,"²³ to define the conduct necessary for recovery.

A number of states list the "willful *and* wanton" misconduct of the driver as a basis for recovery,²⁴ while the Alabama,²⁵ Delaware,²⁶ Indiana²⁷ and Ohio²⁸ legislatures have provided for "willful *or* wanton misconduct." In those states employing the terms "willful" and "wanton" it is exceedingly difficult to distinguish between the two since they are often used synonymously. The situation is best summed up by the words of the Ohio Supreme Court in the case of *Tighe v. Diamond*,²⁹ in which the court stated:

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 cases. This confusion makes difficult the task of giving the proper interpretation and meaning to the term applicable to the guest statute in force in the jurisdiction of the trial forum. (Emphasis added.)³⁰

The road ahead for guest legislation is unpredictable. Transportation modes and methods are ever-advancing. Guest legislation, foreseeably, will encompass hitherto undeveloped means of conveyance. Even today, guest law is rapidly evolving. Air travel has become increasingly popular, and many Americans now own their own aircraft. Consequently, certain states, of which one is Ohio, have adopted aircraft guest statutes,³¹ with many more expected to follow.

²² IDAHO CODE ANN. § 49-1001 (1947); IOWA CODE § 321.494 (1954); MONT. REV. CODE ANN. tit. 32, § 1113 (1949); N. M. STAT. ANN. c. 64, art. 24 § 1 (1953); ORE. REV. STAT. § 30.110 (1953); S. C. CODE § 46-801 (1952); TEXAS REV. CIVIL STAT. art 6701 (b) (1948).

²³ CAL. VEHICLE CODE ANN. § 403 (Deering 1948); NEV. COMP. LAWS § 4439 (1941); N. D. REV. CODE § 39-1502 (1943); UTAH CODE ANN. § 41-9-1 (1953).

²⁴ ARK. STAT. ANN. § 75-913 (1947); COLO. REV. STAT. ANN. § 13-9-1 (1953); FLA. STAT. § 320.59 (1955); ILL. REV. STAT. c. 95½, § 58(a) (1955); MICH. COMP. LAWS § 9.2101 (1948); S.D. CODE § 44.0362 (1939); VA. CODE ANN. § 8-646.1 (1950); WYO. COMP. STAT. ANN. § 60-1201 (1945).

²⁵ ALA. CODE ANN. tit. 36, § 95 (1940).

²⁶ DEL. CODE ANN. tit. 21, § 6101 (1953)

²⁷ IND. ANN. STAT. § 47-1021 (1949).

²⁸ OHIO REV. CODE § 4515.02.

²⁹ 149 Ohio St. 520, 80 N.E.2d 122 (1948)

³⁰ *Id.* at 522, 80 N.E.2d at 126.

³¹ Those states now having air guest statutes are Arkansas, ARK. STAT. ANN. § 75-913 (1947); Indiana, IND. ANN. STAT. § 14-924 (1949); Ohio, OHIO REV. CODE § 4561.151; Oregon, ORE. REV. STAT. § 30.120 (1953); South Carolina, S. C. CODE § 2.21 (1952).

OHIO'S GUEST STATUTE

For a guest to recover for his injuries in Ohio, it must be shown that the willful or wanton misconduct of the driver caused the injury.³² This statute, held constitutional,³³ extinguishes the common law liability of the driver. Therefore it must be strictly construed against the host and liberally construed in favor of the guest. The statute has remained unchanged since its passage in 1933, although much criticism has been leveled against it.

In a discussion of willful and wanton misconduct under Ohio's guest statute, it should be remembered that willfulness and wantonness are distinct from mere negligence. However, while acting negligently, one may also commit a willful or wanton tort which is compensable under the Ohio statute.³⁴ Many Ohio courts, in attempting to label the driver's misconduct, have ignored this sound legal maxim.

Although the Ohio decisions seemingly defy classification, an attempt will be made to group the results of the principal Ohio cases concerning "willful or wanton" misconduct. Several early courts used the phrase "wanton negligence,"³⁵ but the Supreme Court of Ohio in *Universal Concrete Pipe Co. v. Bassett*,³⁶ held that there was no such thing as willful negligence or wanton negligence.

A requirement of an actual knowledge of the probability of harm to the guest has been required by some Ohio courts.³⁷ Others, however, have decided that if from the facts, the driver should have known of the great danger,³⁸ or if it was glaringly apparent,³⁹ he is guilty of willful or wan-

³² The Ohio Guest Statute, OHIO REV. CODE § 4515.02 reads:

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, unless such guest is being transported without payment therefor in or upon said motor vehicle, unless such injuries or death are caused by the *willful or wanton misconduct* of such operator, owner or person responsible for the operation of said motor vehicle. (Emphasis added).

³³ *Smith v. Williams*, 51 Ohio App. 464, 1 N.E.2d 643 (1935).

³⁴ *Birmelin v. Gist*, 162 Ohio St. 98, 120 N.E.2d 711 (1954).

³⁵ *Denzer v. Terpstra*, 129 Ohio St. 1, 193 N.E. 647 (1934); *Reserve Trucking Co. v. Fairchild*, 128 Ohio St. 519, 191 N.E. 745 (1934); *Higbee Co. v. Jackson*, 101 Ohio St. 75, 128 N.E. 61 (1920); *Wiley v. Green Cab Co.*, 41 Ohio App. 88, 179 N.E. 419 (1931).

³⁶ 130 Ohio St. 567, 200 N.E. 843 (1936).

³⁷ *Vecchio v. Vecchio*, 131 Ohio St. 59, 1 N.E.2d 624 (1936); *Reserve Trucking Co. v. Fairchild*, 128 Ohio St. 519, 191 N.E. 745 (1934); *Haacke v. Lease*, 35 Ohio L. Abs. 381, 41 N.E.2d 590 (Ct. App. 1941).

³⁸ *Gill v. Arthur*, 69 Ohio App. 386, 43 N.E.2d 894 (1941); *Patterson v. Garrison*, 24 Ohio L. Abs. 226 (Ct. App. 1937); *Adamusiak v. Krupski*, 22 Ohio L. Abs. 360 (Ct. App. 1936).

³⁹ *Miesmer v. Dillin*, 69 Ohio App. 197, 43 N.E.2d 305 (1941).

ton misconduct. As a basis for recovery, plaintiffs have attempted to show that the driver's excessive speed caused the accident, but the Ohio Supreme Court in *Akers v. Sturn*,⁴⁰ held that wantonness could never be predicated on excessive speed alone. The court added, however, that when the concomitant facts showed an unusually dangerous situation, excessive speed plus a knowledge of such peril and a knowing disregard of another's safety amounted to wantonness.

Although the words "willful or wanton misconduct," as used in the statute are grammatically in the disjunctive, in practice, Ohio courts tended to commingle the two terms.⁴¹ However, the Ohio Supreme Court in *Tighe v. Diamond*⁴² attempted to distinguish willfulness from wantonness.

In the *Tighe* case, the driver, despite the guest's protests, sped 60 miles per hour along a road he knew well, and passed over a hump in the road at a high rate of speed "to give the guest a thrill." He lost control of the car and it overturned three times, resulting in serious injuries to the guest. The Supreme Court of Ohio affirmed the jury's finding of willful misconduct, stating that the defendant may not have actually intended the consequences, but because of his knowledge of the circumstances, the court imputed a constructive intention as to the consequences. Thus the *Tighe* court differentiated wantonness from willfulness by stating that in wantonness, the driver need not have intended the consequences, while intent, actual or constructive, must be found in willfulness. It is submitted that such is really not a differentiation, since in wantonness, though the driver may not have actually intended the consequences, if an avoidance of the catastrophe was within his power, and his misconduct continued, a sound legal maxim to be applied is that a person is presumed to have intended the natural consequences of his voluntary acts.⁴³

In an early Ohio appellate case,⁴⁴ the court held that a driver who turned to observe a group of buildings situated a distance from the highway, and continued driving without watching the highway for three city

⁴⁰ 136 Ohio St. 245, 25 N.E.2d 286 (1940).

⁴¹ *Payne v. Vance*, 103 Ohio St. 59, 133 N.E. 85 (1921); *Higbee Co. v. Jackson*, 101 Ohio St. 75, 128 N.E. 61 (1920); *Shulz v. Fible*, 71 Ohio App. 353, 48 N.E.2d 899 (1943); *McCoy v. Faulkenberg*, 53 Ohio App. 98, 4 N.E.2d 281 (1935).

⁴² 149 Ohio St. 520, 80 N.E.2d 122 (1948).

⁴³ In another "thrill ride" case, the court in *Martins v. Kueter*, 65 S.D. 384, 274 N.W. 497 (1937), held that the defendant's actions indicated a state of mind approaching deliberate and intentional misconduct which he must have realized would result in injury to the plaintiff. Similarly, in *Fuller v. Chambers*, 142 Adv. Cal. App. 427, 298 P.2d 125 (1956), it was held that a motorist who knowingly flirts with danger and takes a chance of killing or injuring himself or his guest is guilty of willful misconduct.

⁴⁴ *Haacke v. Lease*, 35 Ohio L. Abs. 381, 41 N.E.2d 590 (Ct. App. 1941).

blocks, was not guilty of wanton misconduct under the guest statute. The court held that the driver was merely negligent in not keeping his eyes on the road, since he was not actually conscious of the probability of the crash that resulted. In a vigorous dissent, Judge Hornbeck maintained that the driver was chargeable with the natural and probable result of his deliberate act, stating in part:

his *continued* conscious failure to resume such attention to the wheel, as the slightest concern for the welfare of his passenger would prompt, compels the inference that he was utterly indifferent to and heedless of the safety of his passengers. (Emphasis added).⁴⁵

In *Hellerin v. Dixon*,⁴⁶ the defendant drove his car uphill for at least 300 feet at 40 miles per hour in a heavy rainstorm. The pavement was wet and slippery, and the windshield wipers stopped working as he sped uphill. Thus he was unable to see the road ahead. The driver stated in court that he was going uphill as fast as the car would go. The right wheels left the paved portion of the road and went onto the berm of the highway, and the car crashed into the headwall of a culvert with great force, demolishing the automobile, causing its hood to be thrown some 20 feet, and fatally injuring the guest. The Ohio Supreme Court reversed a judgment for the plaintiff, stating that there was only a chance, not a probability that injury to the plaintiff would result. The court was unable to find an entire absence of care or indifference to the consequences by the defendant, holding that he had no timely knowledge of the danger.

An Alabama court⁴⁷ was confronted with a similar situation and had to decide whether, under its guest statute,⁴⁸ the defendant was guilty of willful or wanton misconduct. The defendant drove his car at 60 miles per hour along a slippery road on a rainy night with knowledge that a smooth tread was on the left rear wheel and that the steering wheel was loose. The car skidded off the road and turned over. The Alabama Supreme Court affirmed the jury's finding of wanton misconduct.

In the recent Ohio case of *Birmelin v. Gist*,⁴⁹ the evidence disclosed that the defendant, in an obvious attempt to prevent a truck from passing his automobile, would slow down and speed up as he travelled along the highway. At times the car would veer to the left side of the highway, once clear to the left side berm. The defendant, after travelling in the right lane for a time veered to the left and collided head-on with an oncoming truck, causing the death of all four occupants. The Ohio Supreme

⁴⁵ *Haacke v. Lease*, 35 Ohio L. Abs. 381, 392 (Ct. App. 1941).

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

⁴⁷ *Dean v. Adams*, 249 Ala. 319, 30 So.2d 903 (1947).

⁴⁸ ALA. CODE ANN. tit. 36, § 95 (1940)

⁴⁹ 162 Ohio St. 98, 120 N.E.2d 711 (1954).

Court, without dissent, reversed the jury's verdict for the plaintiff, stating such acts did not constitute willful or wanton misconduct. The court added that though much criticism had been levelled against Ohio's guest statute because many honest claims were being prohibited, it was for the legislature to alter the situation.

It is contended that a proper and practical interpretation of the terms of the statute would do much to alleviate the growing public distrust of the guest statute. In an analogous fact situation to that of the *Birmelin* case, a California court,⁵⁰ with a willful misconduct proviso in its guest statute,⁵¹ held that a defendant who drove 60 miles per hour on a misty night and attempted to pass vehicles in the presence of a danger signal was guilty of willful misconduct. The evidence disclosed that the defendant had been drinking, knew the road well and drove 180 feet straight into a concrete abutment.

A new element was added to the definition of wanton misconduct in *Universal Concrete Pipe Co. v. Bassett*,⁵² a non-guest case. The defendant's truck driver had lost his way and parked on the highway, seeking directions at a nearby farmhouse. The plaintiff's automobile collided with the parked truck, and to avoid the defense of contributory negligence, the plaintiff alleged that the defendant was guilty of wanton misconduct. The court, holding for the defendant, criticized the unwarranted usage of the charge of wanton misconduct, and then followed with a definition of wantonness that has since plagued Ohio's judicial house. The court stated:

Wantonness is a synonym for what is popularly known as "cussedness" and cussedness is a disposition to perversity.⁵³

This unique definition of wantonness has since reared its troublesome head in other Ohio guest cases. Several Ohio courts have expressly followed the *Bassett* rule on "disposition to perversity,"⁵⁴ while some have held that wantonness is *not* synonymous with cussedness,⁵⁵ and others said that a disposition to perversity alone is not wanton misconduct.⁵⁶ A

⁵⁰ *Hallman v. Richards*, 123 Cal. App.2d 274, 266 P.2d 812 (1954).

⁵¹ CAL. VEHICLE CODE ANN. § 403 (Deering 1948).

⁵² 130 Ohio St. 567, 200 N.E. 843 (1946).

⁵³ *Id.* at 573, 200 N.E. at 845.

⁵⁴ *Kennard v. Palmer*, 143 Ohio St. 1, 53 N.E.2d 652 (1944); *Jenkins v. Sharp*, 140 Ohio St. 80, 42 N.E.2d 755 (1942); *Melville v. Greyhound Corp.*, 94 Ohio App. 258, 115 N.E.2d 42 (1953); *Ulrich v. Massie*, 89 Ohio App. 362, 102 N.E.2d 274 (1951); *Hottel v. Read*, 66 Ohio App. 323, 33 N.E.2d 1011 (1940); *Murphy v. Snyder*, 63 Ohio App. 423, 27 N.E.2d 152 (1939); *Fischer v. Faflik*, 52 Ohio App. 69, 3 N.E.2d 62 (1936).

⁵⁵ *Johnson v. Gernon*, 91 Ohio App. 529, 107 N.E.2d 377 (1947); *Major v. Liggett*, 72 Ohio App. 71, 50 N.E.2d 795 (1942).

⁵⁶ *Clark v. Hiatt*, 73 Ohio L. Abs. 116 (Ct. App. 1955); *Miljak v. Boyle*, 93 Ohio App. 169, 112 N.E.2d 340 (1952).

number of courts decided that if the disposition to perversity ceased at any time prior to the accident, the defendant was absolved,⁵⁷ but the court in *Kennard v. Palmer*⁵⁸ held that while a disposition to perversity is an element of wanton misconduct, it need not continue up to the time of the accident.

The great confusion following the *Basset* court's dropping of the "cussedness" bombshell is apparent. No other state applies such a test. It is interesting to note that in the case of *Weaver v. Mark*,⁵⁹ a federal court, in applying Ohio's guest statute, ignored the "cussedness" element. In that case, the federal circuit court overruled a district court's sustaining of the defendant's demurrer where the plaintiff alleged that the defendant drove 80 miles per hour around a turn in the road where he knew that such was highly dangerous to the plaintiff; that the defendant drove at a high rate of speed over the guest's protests; that the defendant, when warned of a train crossing ahead declared that if the train didn't get out of his way, he'd go right through it; and that the defendant was under the influence of alcohol, and failed to keep a lookout or to do anything to avoid the accident. The circuit court held that a good cause of action was stated under Ohio's guest statute. This is one of the few Ohio guest decisions cited with favor in other jurisdictions.

CUSSEDNESS — TOOL OR MONKEY WRENCH?

From the foregoing analysis, it is evident that Ohio guest decisions are often at opposite poles. One court remarked:

Wanton misconduct has been the subject of much dissertation by the courts of this state since the enactment of the guest statute and there has been a marked failure of unanimity in the pronouncements of the Supreme Court as well as of the lower courts in defining and applying the term to the facts in the respective case.⁶⁰

It appears that our lower courts are still "devoutly wishing for the day" when the courts of last resort will supply them with a practical test for submitting the questions of willful or wanton misconduct to the jury. When a trial judge attempts to apply the holding of the *Bassett* case concerning "cussedness" or "disposition to perversity," he is beset with difficulties. The Supreme Court has never expressly defined what is meant

⁵⁷ *Ulrich v. Massie*, 89 Ohio App. 362, 102 N.E.2d 274 (1951); *Hottel v. Read*, 66 Ohio App. 323, 33 N.E.2d 1011 (1940); *Murphy v. Snyder*, 63 Ohio App. 423, 27 N.E.2d 152 (1939); *Fischer v. Faflik*, 52 Ohio App. 69, 3 N.E.2d 62 (1936).

⁵⁸ 143 Ohio St. 1, 53 N.E.2d 652 (1944). See also *Thomas v. Foody*, 54 Ohio App. 423, 7 N.E.2d 820 (1936).

⁵⁹ 112 F.2d 917 (6th Cir. 1940).

⁶⁰ *Angel v. Constable*, 57 N.E.2d 86 (Ohio App. 1943).

by perversity as a determinate of wantonness, and Ohio courts are split as to the feasibility of attempting to apply such a term.

A psychiatric definition of perversity affords little enlightenment, since in psychiatry, perversity means practices (usually of a sexual nature), that deviate from the accepted standards of the community.⁶¹ Perhaps the most practical approach would be a reference to the dictionary. An Ohio appellate court took heed to such suggestion when it stated that it was proper for the trial court to use the word "perversity" as defined in the Oxford Dictionary. The court stated:

we can find no objection to trial courts going to the well recognized sources of authority for *terms too vague for ordinary understanding*, and in the instant case we can find no objection to the general charge of the court in relation to perversity. We can readily agree that in the absence of some definition by the trial court the jury would have *no idea* what perversity means and this is without any disrespect to the jury. (Emphasis added.)⁶²

Interestingly, another trial judge did resort to Webster's Dictionary, and his comments on "cussedness," "wantonness" and "perversity" after a thorough research, highlight the problem. The judge concluded, in discussing the *Bassett* court's definition of wantonness under the guest statute:

The foregoing analysis of the terms found in the court's definition of wanton misconduct *carries us completely around the circle and brings us out where we started*. That is to say, if wantonness is synonymous with cussedness, and if cussedness is a disposition to willful perversity, and if perversity is the state of being perverse, that is willful, then we have not clarified the atmosphere of thought, nor have we clearly defined the *boundaries* between conduct that is wanton on one hand, and willful on the other. (Emphasis added.)⁶³

THE LABEL'S THE THING

The definitions offered as boundaries by the courts have proved unworkable. Rather than serving as landmarks for correct judicial application to the just claims of the guest. In their zealous efforts to group and pigeon-hole the guest cases under a convenient label, the courts have seemingly been oblivious to the unsavory social results ensuing. The automobile guest area today is permeated by the nebulous fog of a tyranny of labels. Confusion can be avoided by a judicial abstinence from sweeping generalizations and *over-definition* of the terms "willful or wanton misconduct."

Instead of blind allegiance to labels, courts should consider the par-

⁶¹ HINSIE AND SHATZKY, PSYCHIATRIC DICTIONARY 413 (1940)

⁶² Lockshin v. Greenberg, 25 Ohio L. Abs. 284, 287 (Cr. App. 1937).

⁶³ Pringle v. Durivage, 23 Ohio L. Abs. 134 (C.P. 1937)

ticular facts of each case. If the risk taken by the driver was so great that no driver would have undertaken it without knowing that disaster would probably result, such should be the gravamen of willful or wanton misconduct.

Some courts have attempted to differentiate willful misconduct from wanton misconduct. The sorry results were clearly shown by the sad tale of the court that went "round the circle and back where it started." Most jurisdictions treat the phrase "willful or wanton misconduct" as merely rhetorical, describing a particular mode of conduct. Practically, the courts will seldom be confronted with the necessity of distinguishing the terms. When such a rare instance does arise,⁶⁴ the following suggestions are offered in the hope of clarifying Ohio's atmosphere of thought.

The difference between wanton and willful misconduct, it is submitted, should be predicated upon the driver's knowledge, actual or constructive, of the perilous situation before him and, thereafter, an indifference to the consequences. Willful misconduct should be based upon the driver's actual, subjective knowledge and intent while the test for wantonness should be an objective one. Thus, subjective intent need not be proven, such boundaries have imposed an almost insurmountable barrier to be proven if, from the objective facts, the conduct would be considered reckless.

The nebulous phrase, "disposition to perversity," foisted upon the unsuspecting Ohio courts in the *Bassett* case, has proved unworkable. If "cussedness" has any application in guest cases, it should be only as one of several possible determinates of the driver's state of mind. The irritation and resentment of the driver, evidenced by his words and actions, and his subsequent continuance of the perilous course of conduct, in spite of the expostulations of his guest, would indicate the necessary subjective awareness. And if such was followed by a continued persistency in the misconduct, and an indifference to the consequences, the requirements of willfulness would then be met.

Wanton misconduct, on the other hand, should be based upon a con-

⁶⁴In *Tighe v. Diamond*, 149 Ohio St. 520, 80 N.E.2d 122 (1948), the court was forced to distinguish "willfulness" from "wantonness" because of the procedural problem involved. The host driver was a minor, and under Ohio's Minor Automobile Operators Responsibility Statute, OHIO REV. CODE § 4507.07, any *negligence or willful misconduct* of a minor under 18 years of age was imputed to the person signing the minor's application for a license. Such person was jointly and severally liable with the minor for damages. In the *Tighe* case, the minor and his father who signed the application were joined as co-defendants. Since proving the minor driver's mere negligence would not satisfy the requirements of the guest statute, and since establishing wanton misconduct alone could not create liability against the father under the minor's responsibility statute, the plaintiff had to prove the *willful* misconduct of the minor driver.

structive realization of the danger involved. Though the driver did not actually know of the peril, such would have been obvious to reasonable men. If the driver, being constructively aware of the peril, persists in his misconduct, such action amounts to a reckless disregard for the safety of his guest. Since the test is objective, a driver of reckless temperament could not escape liability by denying realization of the danger involved, since he should have realized the danger created by his misconduct.

Such a test for wantonness would be a more practical one than that promulgated by the *Tighe* court. The jury, with proper instructions, would more easily grasp the meaning of "reckless driving," a term commonly understood by all to mean conduct in which only a fool would engage.

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 indicating that the danger was glaringly apparent. Recklessness would not be determined by the driver's subjective state of mind, rather by his acts and omissions. Driving while intoxicated, like the violation of the speed statutes, is not of itself wanton misconduct, but if the driver should have realized that grave consequences would naturally result from his foolhardy actions, and such consequences did result, he has committed a wanton wrong.

CONCLUSION

Accident records indicate the increasing tragedy of the highways. Despite such terrible slaughter, many Ohio courts have indirectly cloaked the driver with immunity from the just claims of his guest. The possibility of collusion in guest cases, more often than not a mere figment of the insurance companies' imagination, should not eradicate the basic right of every citizen to an adequate legal redress for his injuries. It is submitted that by an application of the proposals previously set forth, a satisfactory result might be reached. The driver should not be liable for the ordinary mishaps of the highway, but by an application of the foregoing boundaries, such would not occur. The floodgates would not be opened.

Finally, that lexicographical merry-go-round, "cussedness," should be limited in application. It has proven of little value to the courts and has unduly burdened the plaintiff.

Admittedly, the good samaritan should not be the scapegoat of automobile guest litigation. But neither should the innocent victims of the slaughter of the highways be ignored by the courts, as was, in the parable, the injured man by the "priests and Levites who, seeing him, passed by."⁶⁵

JAMES F. O'DAY

⁶⁵ NEW TESTAMENT (Douay Version), Luke 10:30-37.