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WILFUL AND WANTON CONDUCT IN AUTOMOBILE GUEST CASES

By JOHN A. APPLEMAN

There is one major difference between high caliber jurists and those of mediocre ability—a difference which is demonstrated in innumerable situations. It springs out of an incoherence of thought in most cases, while in others it arises out of an inability to express conclusions in a concise and logical manner. This lack of acuteness referred to—this difference between high and low grade jurists—is the ability to properly define and apply legal terms as used in statutes and the ability to separate one type of culpability from another similar to and related to the first type. Sometimes this failure has little practical importance and the legal result may not be thereby affected. In other situations, however, as in that here presented, it is of major seriousness. Failure to observe and recognize proper distinctions upon this question may serve to establish or to deny verdicts. It is precisely because this question is of such paramount importance and because the law is rapidly becoming so muddled in this respect that some logical discussion is essential.

This question is neither moot nor academic. The statutes of Alabama, Arkansas, California, Colorado, Delaware, Illinois, Ohio, Utah and now Indiana apply the term “wilful and wanton”, or a phrasing essential similar, in their guest statutes. Other states make it a partial test, along with some other legal measure of culpability. Such other states include Michigan, Nevada, North Dakota, South Dakota, and Wyoming. Since all of these states are constantly called upon to interpret their own statutes, and because decisions of those states are given judicial cognizance elsewhere in other situations, this question has a very important place in the active law.

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Precisely what does this phrase mean? Are the words "wilful" and "wanton" purely repetitive? It would seem so from the confusion existing in the minds of even some of the most eminent authorities in the field of automobile law. Blashfield has defined wanton misconduct as "the intentional or wanton disregard of the safety of others, as is manifested by conduct which is of such a character as to indicate the autoist's indifference to the consequences of his acts."¹ "Wilful misconduct," the definition reads, "is the intentional doing of something which should not be done, or intentional failure to do something which should be done, in the operation of the automobile, under circumstances tending to disclose the operator's knowledge, express or implied, that an injury to the guest will be a probable result of such conduct."² This is a fairly clear distinction if Blashfield's test is accepted. Berry, on the other hand, gives almost exactly the same definition for wantonness as Blashfield has given for wilful misconduct. "'Wantonness,' as in the operation of an automobile, is the conscious doing of some act or the omission of some duty with knowledge of existing conditions, and conscious that, from the act or omission, injury will likely result to another."³

Here we have two excellent authorities in this field in a dispute of some seriousness. If both are correct then the terms are of similar import—they are repetitive and interchangeable. Either this must be the true situation or one of the above writers has been lax in his definition. It might be well to examine the legal background of these phrases to some extent, although space cannot allow an exhaustive analysis.

In Penal law the expressions "wilful" or "wilfully" implied an intentional act, committed with knowledge of the probable result. It meant more than mere voluntary carelessness. Usually the idea of legal malice or of a wrongful intent was

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² Blashfield, ibid, Section 2322, page 110.
A great many courts have used the term in phases of law other than penal to mean simply "intentional" without including or implying a wrongful intent. The term "wanton" had a different connotation. Its meaning always implied a reprehensible act, but was not as broad as "wilful" in the penal sense—though perhaps broader than some definitions of "wilful." An act might be held wanton without being wilful. The element of a wrongful intent could also be lacking. It was sufficient to constitute wantonness that an act indicate a reckless disregard for consequences, and that an unlawful act be committed without the specific intention of injuring any person thereby.

These definitions were originally carried over into the field of automobile law verbatim. There seems to be no doubt that when legislatures first drafted guest statutes using the expressions wilful or wanton, they had the age-old meaning of these terms in mind. Accordingly, we may say that the terms most commonly used in automobile law may be arranged in the following ascending order of culpability: Negligence, Gross Negligence, Heedlessness, Recklessness, Wanton-

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4a See 68 Corpus Juris 266 et seq; and the hundreds of definitions given therein.

ness, Wilfulness, and Intentional Acts—the latter two of which are nearly identical in import. Negligence and gross negligence were different degrees of one type of culpability entirely separate and distinct from recklessness. Each of those expressions is different in kind from wilful or wanton misconduct. All have one striking similarity—that the party committing the wrongful act has not respected the legal rights of the injured party and has violated the rights of such person. Apart from that they are each separate and distinct types of wrongs, differing in the nature of the act committed and in the intention of the tort-feasor. Blashfield has aptly stated, "The difference is one of kind, not merely of degree."

One of the most acute distinctions ever made was brought out by a Kansas court: "One who is properly charged with recklessness or wantonness is not simply more careless than one who is only guilty of negligence. His conduct must be such as to put him in a class with the wilful doer of wrong. The only respect in which his attitude is less blameworthy than that of the intentional wrongdoer is that, instead of affirmatively wishing to injure another, he is merely willing to do so. The difference is that between him who casts a missile intending that it shall strike another and him who casts it where he has reason to believe it will strike another, being indifferent whether it does so or not."

If this test were applied in many of the automobile cases today, much less confusion would be apparent. Such confusion exists even among some legislators since Vermont, in its guest statute, sets up the test of "wilful negligence." The terms are mutually inconsistent and by their own definitions, are mutually exclusionary. Babbitt continuously employs the same confused terminology as if he does not understand the inconsistency thereof.

The difficulty in properly applying the terms referred to

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6 Blashfield, ibid, Volume 4, Section 2771, page 516.
8 Section 5113, Public Laws of Vermont, 1933 (Act No. 78, 1929).
may have arisen partly from the unconquerable desire of courts to create judicial legislation. Vested with the authority which they possess, it seems impossible for judges to remember that they are supposed to administer the law as it is—not as they believe it should be. If the result obtained from a logical interpretation violates their individual notions of propriety or public policy, the statute is immediately circumvented. While legislatures have been vested by state constitutions with the power to declare what the public policy shall be the courts have, in many instances, usurped this power and the field of automobile law is no exception. The power to interpret is the power to nullify.

The importance of this is apparent when we recall that the guest statutes were passed to accomplish a definite purpose. Litigation arising out of automobile accidents had become so prolific, particularly between host and guest where the former carried liability insurance, that the majority of states felt it desirable to limit the host's liability. Some courts are in accord with the spirit of the statute and to that end do not hesitate to direct a verdict for the host where there is no showing made of the high degree of culpability required by statute. Other courts, regardless of the showing made by plaintiff, are inclined to permit the jury to determine in nearly every case whether such conduct is evident—and will

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9 "If the jury had found, under all the proven facts and circumstances, that the plaintiff was in fact given proper and sufficient warning of the approach of the car, and that he was afforded fair and reasonable opportunity to remove himself from its pathway, but that the plaintiff failed and refused to do so, then, in considering and determining the further question as to whether or not the defendant in operating the car in the manner shown inflicted the alleged injury willfully and intentionally, it was for the jury to consider as one of the elements in the case, and in the light of all the proven facts and circumstances, whether the defendant acted in good faith under what was then and there a reasonable assumption that the plaintiff could and would remove himself from the pathway of danger and thus avoid the injury. If in the light of all the proven facts and circumstances the defendant reasonably could and did rely upon such an assumption, then the element of willfulness would have been eliminated. But, as already stated, if at the time of the alleged injury it had become apparent to the defendant that the plaintiff did not intend to remove himself from the pathway of the approaching car, the remedy of the defendant would not have been to intentionally run the plain-
often sustain a recovery under a wilful and wanton statute where simple negligence is really the only act shown. It is negligent, of course, to drive with defective brakes or lights, or to drive at a fast rate of speed upon a wet pavement—it may be gross negligence to pass a car on a hill or curve. But just when does such conduct evince an utter abandon for the consequences; or, perhaps, indicate a desire to injure the guest or an indifference to the occurrence of such injury? If the statute requires both wilful and wanton action, it would appear that all of these elements must be present. Let us see briefly what some of the courts have done in certain situations presented.

Alabama and Arizona have not yet construed their guest statutes in this respect. California has, perhaps, some of the most interesting results under its guest statute. That court has held that a jury may find wilful and wanton misconduct to exist in the following situations: An attempt to embrace plaintiff against her will and thereby causing her to lose control of the automobile; failure to stop at an arterial high-

tiff down in a manner and with an instrumentality reasonably calculated under the circumstances to cause loss of life or serious bodily injury. Under the evidence in the trial of the case, the question of willfulness, as well as all other questions dealt with in this paragraph, being issues of fact for the jury, it was error to grant a nonsuit as to the individual defendant." Elrod v. Anchor Duck Mills (1935), 50 Ga. App. 531, 179 S. E. 188; Lindsey v. Kindt (1930), 221 Ala. 190, 128 So. 139; Allison Coal & Transfer Co. v. Davis (1930), 221 Ala. 334, 129 So. 9; Smith v. Furness (1933), 117 Conn. 97, 166 A. 759; Elrod v. Anchor Duck Mills (1935), 50 Ga. App. 531, 179 S. E. 188; Layton v. Ogonoski (1930), 256 Ill. App. 461; Sudinski v. Krohn (1928), 242 Mich. 497, 219 N. W. 665; Masters v. Von Lehmden (1930), 36 Ohio App. 414, 173 N. E. 303.

10 "We agree with the conclusions reached by the trial court. That the action of Adkins constituted willful misconduct admits of no doubt. They were intentional and willful. The circumstances were such as to render it probable that an accident would result from interference with plaintiff's control of the car. The speed of the car, the grade, the turn in the road, of which Adkins was aware, all pointed toward danger. Without being able to slacken the speed of the car and to control the steering wheel, it was inevitable that plaintiff would be unable to negotiate the curve, and no reason is advanced why Adkins did not realize the danger, although his intoxication may furnish a reason for his not giving heed to it.

"There was ample proof of an intent and purpose to do the thing that probably would result in injury, and this is sufficient to prove willful mis-
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Way;\(^{11}\) passing cars at high speed knowing there are vehicles approaching from the opposite direction;\(^{12}\) driving at an excessive speed in cases varying from 50 to 55, 60, and 75 miles an hour;\(^{13}\) or inattention to one’s driving.\(^{14}\) On the other hand the same courts have held that verdicts should have been directed for the defendant where a car was driven 60 miles an hour on a rough road with defective equipment;\(^{15}\) or where control of the automobile is lost for some reason;\(^{16}\)

conduct. Walker v. Bacon, 132 Cal. App. 625, 23 P. (2) 520; Manica v. Smith, 138 Cal. App. 695, 33 P. (2) 418. The defendant will be held to have intended the consequences which would naturally result from his deliberate acts. Without the semblance of excuse for his misbehavior, he placed his companion in a position of imminent danger. It is useless for him to contend that he did not thereby court disaster.” Barcroft v. Adkins (1935), 6 Cal. App. (2) 180, 44 P. (2) 379.

\(^{11}\) Browne v. Ferdanez (1934), 140 Cal. App. 689, 36 P. (2) 122.


\(^{14}\) “Viewing the evidence in the light most favorable to the plaintiff, and indulging in every legitimate inference which may be drawn therefrom, the defendant, while driving her car along one of the important thoroughfares of Los Angeles, turned her head in the opposite direction from which the automobile was proceeding and continued said conduct over a distance of over 300 feet, the plaintiff in the meantime protesting. As a result of such conduct, defendant’s automobile collided with a car parked at the right-hand curb. * * * Viewing the evidence in this case under proper instructions as to the law, reasonable men might well have differed in determining whether the defendant was guilty of willful misconduct. We are not holding that the defendant was guilty of willful misconduct; we are holding that the question should have been submitted to the jury. * * * Gross negligence and willful misconduct are so closely akin that the line between them is not always easy to draw, and the distinction arises frequently from the fact that willful misconduct has the additional element of willfulness, which implies an intent or knowledge.” Frank v. Myers (1936), D. C. A. (2), 60 P. (2) 144.

\(^{15}\) Walker v. Bacon (1933), 132 Cal. App. 625, 23 P. (2) 520.

or where a speed of 60 miles an hour upon a curve is shown,\textsuperscript{17} although we have seen above that a speed of 50 miles an hour upon a curve was so held; nor is such conduct shown by attempting to beat another car to an intersection,\textsuperscript{18} nor by falling asleep at the wheel; \textsuperscript{19} or various other causes.\textsuperscript{20} One

\textsuperscript{17} "The facts in the case before us fall distinctly short of showing the doing of an act with a wanton and reckless disregard of possible consequences, and display neither the intention of doing an act which would cause physical injury nor an attitude of mind of indifference to the probable results. It is significant, in considering the apparent danger, that respondent though requesting, when the car was proceeding at a speed of 63 miles an hour, that the driver slow down, made no request or comment when the speed had been reduced to 58 miles an hour until the car approached the curve, at which time he yelled to the driver to 'look out'; an exclamation indicating the need for circumspection because of the curve in the road ahead rather than any disapproval of the speed or manner of driving. The evidence fails to establish willful misconduct, the necessary basis for a recovery of damages by respondent, the guest of the driver." Newman v. Solt (1935), 8 Cal. App. (2) 50, 47 P. (2) 289.

\textsuperscript{18} Squiar v. McLean (1935), 3 Cal. App. (2) 429, 39 P. (2) 437; Meek v. Fowler (1935), 3 Cal. (2) 420, 45 P. (2) 194, see lower court's decision (1934) 35 P. (2) 410.

\textsuperscript{19} Forsman v. Colton (1933), 136 Cal. App. 97, 28 P. (2) 429.

\textsuperscript{20} "Applying these rules to the case before us, and conceding that this driver must have known that driving on a wet road might possibly result in injury, it seems clear that the evidence does not justify the belief that he increased his speed with the knowledge or belief or expectation that any serious injury was probable. He had driven a car for six years and this particular car for one year, had driven it in the rain without its skidding, and without doubt he believed he could do this again. If he may be said to have disregarded the possible consequences of his act, such disregard was due to carelessness rather than to wantonness and recklessness, and was undoubtedly based upon his belief that no injury was probable. While he may be said to have been reckless in the sense of being careless, that is only negligence and is not within the statute. But the intentional doing of an act with a wanton and reckless disregard of its possible consequences implies the doing of such an act either with the intent that harm shall result therefrom or in the attitude of mind of not caring if it does result in injury. No such intent and no such attitude of mind on the part of this appellant here appears." Howard v. Howard (1933), 132 Cal. App. 124, 22 P. (2) 279; Horning v. Gerlack (1934), 139 Cal. App. 470, 34 P. (2) 504; Moyer v. Dresch (1935), 2 Cal. App. (2) 655, 38 P. (2) 849; Halter v. Malone (1935), 11 Cal. App. (2) 79, 53 P. (2) 374; Bartlett v. Jackson (1936), 13 Cal. App. (2) 435, 56 P. (2) 1298; Horn v. Volks (1936), 13 Cal. App. (2) 582, 57 P. (2) 175; Medberry v. Olcovich (1936), Cal. App., 59 P. (2) 551.
case has gone far enough to deny a recovery where defendant intentionally ignored a "slow" sign and collided with an approaching car while racing upon the highway under very foggy conditions.\textsuperscript{21}

Colorado has found a driver who was so engrossed with love-making that he drove at a high rate of speed into a busy thoroughfare guilty of willful and wanton misconduct.\textsuperscript{22} Delaware has not had a serious opportunity to really consider this phase of its statute. Illinois, however, represents the cream of all inconsistency. Most cases seem to be left to the jury for decision of this technical legal issue. The test made is as to whether or not there was a gross omission to exercise care. This failure to exercise care, which to most students of law is simple negligence or, at most, gross negligence, is thereupon made the test of liability.\textsuperscript{23} One Illinois Appellate

\textsuperscript{21}McLeod v. Dutton (1936), 13 Cal. App. (2) 545, 57 P. (2) 189.

\textsuperscript{22}There is evidence in this record that, at the time of the accident, defendant and a girl companion were in the front seat of the car and plaintiff and her escort in the back seat; that Schlesinger was driving forty to forty-five miles per hour on one of the principle streets of Denver; that the time was between 11:00 and 11:30 p.m.; that he was driving with one hand, had his right arm about his companion, and was in the act of kissing her "just a split second before the crash"; that he had been repeatedly warned by his passengers of the danger incurred by reason of his conduct; that he paid no heed, "just laughed"; and that after the accident he requested two of his companions to say nothing about the fact that he was driving with one hand.

"The conduct of defendant was certainly conscious, and it must be held that the possible consequences were considered and weighed by him, at least so far as one in his evident frame of mind could consider and weigh. If in that particular his mental processes were blurred, due to his love-making, which was probably the fact, he must be held to the same responsibility as one who voluntarily becomes intoxicated. We think it clear, from the evidence above mentioned, that defendant was so intent upon what was doing that when it became a question of ceasing or endangering the party he was 'wholly indifferent' to the 'probable injurious effect or consequences'.” Schlesinger v. Miller (1935), 97 Colo. 583, 52 P. (2) 402. See the cases of Millington v. Hiedloff (1935), 96 Colo. 581, 45 P. (2) 937; Foster v. Redding (1935), 97 Colo. 4, 45 P. (2) 940.

Court, however, has challenged this test and repudiated it repeatedly—requiring a proof of actual wilful and wanton misconduct.24

Michigan, on the other hand, takes a very rigid interpretation of the expressions used, and has only permitted a recovery in a very few instances. These involved situations where the defendant drove at a high rate of speed knowing of a defect in a tire,25 or where he drove at an excessive rate of speed through a thick cloud of dust,26 or at an excessive speed on a wet highway,27 or had gone to sleep at the wheel.28 In every one of these cases, however, it appeared that the guests had protested and asked to be let out of the car, but the driver had merely increased his speed and refused to let them disembark. There was also evidence of a highly dangerous situation known to the defendant. Michigan has, however, refused to allow a recovery in situations where the defendant raced a train to the crossing, drove at high rates of speed, gone to sleep without apparent warning, and done other acts which, under the Illinois rule, would guarantee a verdict for the plaintiff.29


29 "As the road nears the railroad crossing, there is a gradual incline over a distance of 20 rods, the ultimate rise being about three feet with an abrupt drop beyond the crossing. Ten or twelve feet beyond the tracks, and in the direction the car was proceeding, there is a decided curve to the right, with wooden guard rails and posts on the left side of the road. There is no warning sign indicating the curve. As defendant approached the crossing and for some distance prior to reaching it, he was driving at the rate of 62 miles per hour. Decedent's brother warned defendant to slow up for the railroad tracks, and defendant replied, 'I sure can handle it.' When the car struck
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Nevada and North Dakota have not yet given a construction to the definition of wilful and wanton misconduct under their guest acts. Ohio refused to consider that fast driving, either in the face of blinding lights, or upon emerging from a fog bank could constitute such conduct.\textsuperscript{30} It also held that attempting to beat another car through an intersection was not such an act, nor was the act of driving a car with a defective door out of which a guest is precipitated.\textsuperscript{31} However, the track, it left the road, it 'leaped right up,' and defendant could not make the turn, though he tried to. The car struck the guard rails and posts, knocked out several of them, and finally turned and dropped down the embankment, a distance of some fifteen feet. Decedent died from his injuries within a few hours. Defendant was also badly hurt.

"At the trial, the judge stated that he was out of sympathy with what he termed an utterly harsh construction of the guest passenger act (Comp. Laws 1921, Sec. 4648) and that, while he could follow the law, he did not intend to be carried away and reserved a right to find a little balm in this case. The jury only found a very little balm and awarded plaintiff the sum of $650. Defendant, by proper motion, asked for direction of verdict and judgment non abstante. The motions should have been granted. There was no showing of wanton and willful misconduct. Excessive speed is not sufficient unless accompanied by wanton or willful misconduct. We have expressed our views in recent cases so frequently that repetition is unnecessary."


\textsuperscript{30} McCoy v. Faulkenberg (1935), 53 Ohio App. 98, 4 N. E. (2) 281; Fischer v. Faflik (1936), 52 Ohio App. 69, 3 N. E. (2) 62.

\textsuperscript{31} Oliver v. Holcomb, May 19, 1936, Ohio Ct. of Appeals, Commerce Clearing House Reports, Current Decisions, Requisition No. 158652; Vecchio v. Vecchio (1936), 131 Ohio Sup. 59, 1 N. E. (2d) 624.
passing a car on an icy street and swerving violently to the right after so passing has been held wilful and wanton misconduct.\footnote{Adamisiah v. Krupski, May 19, 1936, Ohio Ct. of Appeals, Commerce Clearing House Reports, Current Decisions, Requisition No. 158653.}

South Dakota has refused to allow a recovery, as does Michigan, under the “gross negligence” test of the statute—stating that it is substantially synonymous with wilful and wanton misconduct. This seems to require a very high degree of proof, much higher than the legislators would seem to have intended.\footnote{Melby v. Anderson (1936), — South Dakota —, 266 N. W. 135. See also the Minnesota case of Thorsuess v. Woltman (1936), — Minnesota —, 269 N. W. 637.} Wyoming has not yet interpreted its act upon any of these questions.

Perhaps the author is a little harsh in his criticism of the results reached by the various courts. There is no doubt that it is extremely difficult to apply a test of this nature in an absolutely arbitrary manner, discarding human prejudices and bias. But in the results reached, there is not a great deal of consistency obtained. California has denied a recovery to a guest where the car was driven 60 miles an hour upon a curve and permitted a recovery where a speed of 50 or of 55 miles an hour was demonstrated. Michigan has permitted a recovery where the operator drove fairly fast through a dust cloud and denied a recovery where he drove in front of an approaching train. Illinois applies entirely different rules in the different Appellate Court Districts—and the fortunes of the defendant must vary with the composition of that particular court. Under these circumstances we can only plead that the court look to the statute first—give a common sense interpretation to the language thereof, accepting the common legal interpretation of the words contained therein, and then apply that test as logically as possible to each factual situation as it arises. And above all, particularly in Illinois, the court should first be certain that the necessary intent on the part of the operator is clearly shown before the case is submitted to a jury. If the court believes that the result is too harsh, it is substituting its opinion of public policy for
that of the legislature. That is unpardonable. If the public policy of the legislature is not one commended by justice, the members thereof and the general public will be able to rectify this error, but they have no such control over the court.

Abating further discussion of the conduct of the operator of an automobile, let us look at the conduct of the guest. Under ordinary circumstances where simple negligence of the party defendant is alleged, the doctrines of contributory negligence and of assumption of risk are much employed to defeat a recovery by a guest. Can these same doctrines be applied in cases arising under wilful and wanton allegations in guest cases?

Courts are just as prone to utter these two expressions in the same breath as they are to use the terms "wilful" and "negligence" together. Yet they are entirely dissimilar. Speaking casually, one may say that a person is negligent to assume a certain risk—but negligence is not necessarily contributory negligence. Contributory negligence properly means that a plaintiff is barred from recovery if his negligence concurred proximately in causing the accident. Courts applying the doctrine to guest cases have used it more sweepingly and have held that it may be found where the negligence of the guest contributes proximately to cause his own injury. By such statement, a loophole is left for permitting a plaintiff’s verdict even where the guest may have been in the exercise of due care at the moment of the accident if he were negligent in embarking in the vehicle. By so stating, the courts are, in reality, invading the field of assumption of risk.

A person entering an automobile as a guest assumes all known or apparent dangers—those occurring from known defective parts of an automobile, incompetence, inexperience, or recklessness of the driver, physical incapacity of such driver, and the like. If he later discovers such incompetence

or some other hazardous condition after the ride has started — e. g., the driver becomes intoxicated — he assumes any danger resulting from such condition if he does not leave the automobile at the first reasonable opportunity.\textsuperscript{35} But if the guest fails in some positive duty, such as failing to keep a proper lookout or failing to warn the driver of imminent dangers then he is definitely guilty of negligence contributing to his own injury and to the accident in general.\textsuperscript{36} Several jurisdictions, Illinois in particular, bar a recovery under any


situation illustrated, but refuse to term it assumption of risk—using the broader and less accurate term, contributory negligence, to apply to all of the above situations.\(^37\)

In guest cases where the statute requires a proof of wilful and wanton misconduct, it would appear as a general proposition that contributory negligence of the plaintiff will not bar his recovery.\(^38\) This is generally assumed to be true, but

\(^{37}\) Reed v. Zellers (1933), 273 Ill. App. 18.

it has not been tested out in a sufficient number of cases in the jurisdictions studied herein to permit an accurate generalization. No doubt this rule will be usually upheld as the general tendency of courts is to permit a recovery where gross negligence or recklessness is alleged, not involving as high a degree of culpability on the part of defendant as that herein discussed, even though contributory negligence is admitted. Since these doctrines are so generally accepted in phases of law other than guest cases they should certainly find a sound application in the interpretation of statutes such as we have considered. Our first proposition becomes, therefore, that simple negligence of the plaintiff will not bar a recovery if the host is guilty of wilful and wanton misconduct.

Will the doctrine of assumption of risk work any different result? That will depend entirely upon whether or not the risk assumed is the act or conduct upon which the liability of the host rests. If the liability of the host is predicated upon acts which arose purely out of customary recklessness—and the guest knew of such habitual recklessness—logically there could be no recovery. If the liability is predicated upon the act of driving with a defective tire resulting in a blowout, and the guest knows of this condition, he could not recover. Or if in any other situation the injury is a direct result of some act charged as wilful and wanton which the guest, as a reasonable person should have foreseen, there can be no recovery if the guest knowingly consents to incur that danger. Whether a recover will be permitted must depend upon the relationship between the risk assumed and the cause of the accident.

However, it must not be assumed by the reader that under

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40 See cases cited in notes 34 and 35.
no circumstances will conduct of the plaintiff serve to bar a recovery except in the above instances. This would be absurd. To carry the question to a logical absurdity suppose that the guest is the owner of the car or the employer of the driver and orders the driver to do the act which is later charged as wilful and wanton. Clearly the guest could not recover. Now assume that the guest alleges that the host drove in a wilful and wanton manner because he was intoxicated, but the guest himself caused, or assisted in causing, the driver to become intoxicated. No court would, under those circumstances, permit the guest to recover.

Those cases are, undoubtedly, extreme. But starting with situations of that nature the courts have applied the reasoning there involved and brought it down to apply to situations of much lesser culpability. If the guest had sat by without protest while the acts committed were performed, or if the conduct complained of was so flagrantly dangerous that any reasonable person would have vociferously protested and the guest failed to do so, the courts have been inclined to say that he has assisted and encouraged the host by his silence and was equally at fault with the driver.\textsuperscript{41} This, of course, means that the court is thereby finding the guest guilty of wilful and wanton misconduct as a matter of law.

The history of this doctrine is very interesting. If we disregard the confusion of language found in a Minnesota case, the following statement is helpful: "The same basic reason which causes contributory negligence to prevent a recovery in an action sounding in ordinary negligence also prevents a recovery by one who is guilty of wilful and wanton negligence. Such negligence is just as efficient to offset the defendant's negligence of the same character as contributory negligence offsets ordinary negligence. There can be no more comparative wantonness than there can be comparative negligence. When both parties are guilty of such negligence

neither can be selected as that which is the proximate cause and hence the law must leave both where it finds them.\textsuperscript{42}

That statement, although mixing the words "wilful" and "negligence" sound very logical. As a matter of fact it is not strictly accurate. The proximate cause of the accident may be clearly the misconduct of the driver—such as in racing a train to a crossing—where the conduct of the guest cannot, in any way be considered a proximate cause of the accident. Yet under those circumstances the guest also may be charged with wilful and wanton misconduct so as to prevent a recovery.\textsuperscript{42} Is there not some broader theory, including a situation of this nature, upon which such denials of recovery can be logically based?

The writer submits that from the old common law there has been evolved such a doctrine. The courts originally used the theory "\textit{In pari delicti potior est conditio defendentis}" to apply to situations tainted with fraud, usury, or other actions where a criminal or quasi-criminal type of conduct on the part of plaintiff is apparent.\textsuperscript{43} It, therefore, denied

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\textsuperscript{43} Willgeroth v. Maddox (1935), 281 Ill. App. 480.

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recoveries by one person against another if both were in pari-delicto. Out of this has emerged another doctrine. If a person wilfully placed himself upon a railroad track in an attempt to commit suicide and was killed by a train, certainly it would not be contended that his next-of kin could recover for wrongful death. If, in any situation, the conduct of a plaintiff is as culpable as that of defendant there can be no recovery. 45 This has had particular application in railroad cases where the plaintiff has placed himself in a situation of danger but charges wilful and wanton conduct on the part


The foregoing cases do not hold that the plaintiff must in every case be equally culpable with the defendant. If permitting a recovery would violate public policy or encourage violations of law, there can be no recovery even if the guilt of defendant is greater than that of plaintiff.

45 “There is yet another element necessary to be borne in mind and submitted to the jury along with the wantonness of the defendant, and that is the wantonness of the plaintiff; for, if the plaintiff is also wanton, his must logically and fairly offset the defendant's wantonness as effectually as his contributory negligence offsets the defendant's negligence. In other words, if the case is not one of negligence, but one of wantonness, then the wantonness of both parties must be taken into account.” Holwerson v. St. Louis & S. Ry. Co. (1900), 157 Mo. 216, 57 S. W. 770. See also: Berz Co. v. People's Gas, Light & Coke Co. (1918), 209 Ill. App. 304; Willgeroth v. Maddox (1935), 281 Ill. App. 480; Scruggs v. B. & O. R. R. Co. (1936), 287 Ill. App. 310; Ohio & Miss. Ry. Co. v. Eaves (1866), 42 Ill 288; Harris v. Hatfield (1874), 71 Ill. 498; Louisville & Nashville Ry. Co. v. McCoy (1883), 81 Ky. 403; Heland v. City of Lowell (1862), 85 Mass. 407; Redson v. Mich. Cent. R. Co. (1899), 120 Mich. 671, 79 N. W. 939; Hinkle v. Minn. A. & C. R. Co. (1925), 162 Minn. 112, 202 N. W. 340; Moore v. Lindell Ry. Co. (1903), 176 Mo. 528, 75 S. W. 672; Kinnie v. Town of Morristown (1918), 184 App. Div. 408, 172 N. Y. S. 21; Slicker v. Seccombe (1931), 42 Ohio App. 357, 182 N. E. 131; Spillers v. Griffin (1913), 109 S. C. 78, 95 S. E. 133; Osteen v. Atlantic Coast Line R. Co. (1923), 119 S. C. 438, 112 S. E. 352.
of the railroad company employees. Just as logical application to situations where a guest rides in an automobile knowing that, under the circumstances, he accepts a known risk or to situations where the guest is as culpable as the host.

Just how does this rule apply where the guest brings a suit against the host? Suppose the guest has charged as wilful and wanton misconduct that the host has driven in front of an approaching train, and the evidence shows that the guest saw the train and neither protested against proceeding further or took any active steps for his own safety. There has been a holding in this type of case as follows: "From the evidence in this case we are of the opinion that Maddox and Willgeroth were guilty of negligence or wilful and wanton conduct to the same degree, as they both had equal opportunity to observe the approaching train." And

46 "Plaintiff saw this train coming. He was just in the act of hitching onto a log. Instead of immediately removing his horses, which, it is evident, he had then ample time to do, and taking them out of danger, he ordered the log rolled up onto the car, and, before he could then get his horses removed, both the horses and his partner, Wentworth, in charge of them, were killed. Had injury resulted to the train, or to the trainmen, it might just as well have been charged that he (the plaintiff) was guilty of intentional wrong, as to charge that the engineer was guilty of it. It would then be gross negligence against gross negligence, willful conduct against willful misconduct, and intent against intent; and in such case the law leaves both parties where they have placed themselves and gives recovery to neither." Redson v. Michigan Cent. R. Co. (1899), 120 Mich. 671, 79 N. W. 939. Also see Ohio & Miss. Ry. Co. v. Eaves, supra; Scruggs v. B. & O. Ry. Co., supra; L. & N. Ry. Co. v. McCoy, supra; Hinkle v. Minn. A. & C. R. Co., supra; Moore v. Lindell Ry. Co., supra.

47 "We are almost constrained to feel under the circumstances that, if the defendant was guilty of willful and wanton conduct, the plaintiff's wife and the driver of the Ford car were likewise as equally reprehensible and that the rule stated in Hinkle v. Minn., A. & C. R. Ry. Co., 162 Minn. 112, 202 N. W. 340, 41 A. L. R. 1377 would be applicable, that is, that where each is guilty of willful and wanton conduct there can be no recovery, for in the case at bar the plaintiff's wife well knew that her sister was going to turn right at the intersection." Slicker v. Seccombe (1931), 42 Ohio App. 357, 182 N. E. 131. See also Willgeroth v. Maddox (1935), 281 Ill. App. 480; Ward v. Hall (1936), 283 Ill. App. 651, Commerce Clearing House Reports, Current Decisions-Negligence, Requisition No. 151985; Scruggs v. B. & O. Ry. Co. (1956), 287 Ill. App. 310.
the same is true if the plaintiff charges that the defendant was guilty of such conduct by placing a fatigued person at the wheel who goes to sleep and wrecks the car; where the evidence showed that both parties had equal knowledge of the driver's condition. One court held: "Furthermore, appellee was at all times in the same position to have knowledge of the condition of Miss Scandroli as was appellant. Appellee made no objections to anything that was done or anything that happened on this trip. She acquiesced and made no protest at any time to the driving of Miss Scandroli or the manner in which she was handling the car. * * * If appellant was guilty of wilful and wanton conduct on this occasion, so was appellee, and there can be no recovery."\(^{49}\)

These few cases serve to indicate the general line of authority upon this question. If the conduct of the guest is similar in nature to that of the host, he has no reason to complain of the conduct of the latter. We have seen that the courts have held the following acts to constitute wilful and wanton conduct: Driving at a high rate of speed with a boot in the tire, failure to stop at an arterial highway, driving at excessive speeds, driving at high rates of speed when visibility was poor, attempting to pass other vehicles when the view was obstructed, and certain other acts. If the evidence showed clearly that the guest was aware of the nature of the acts at the time they were committed certainly it should be evident that his conduct is as reprehensible as that of the host. He joins with the host in testing manifest dangers, and is placing, not only himself, but members of the general public in great hazard and danger.

All of us would admit, the author is certain, that one's conduct is gravely at fault, morally, if he permitted a friend to shoot an innocent bystander when such act could be easily prevented. It is, also unpardonable if that person should permit a friend to hurl a large stone or other deadly weapon


at another where he could easily prevent it. It is equally a matter of common blame where one, as a guest, permits his host to hurl an instrument of great force and violence, an automobile, about the highways in a manner that could be classed as wilful and wanton. If the guest assents and acquiesces in such conduct, certainly all rules of equity and justice must combine in denying a recovery to him. Unless such guest can show that his conduct was free from fault under the circumstances, the guest statutes are designed to prohibit his recovery and this purpose must be recognized and enforced by the courts.

The writer, frankly, is not in entire accord with the spirit of such guest statutes as those herein discussed. It seems extremely harsh to deny a recovery where the conduct of a driver is grossly negligent or even reckless, where such conduct is not necessarily wilful and wanton. If the courts properly applied the theories of assumption of risk and contributory negligence it would seem that even the common law rule of ordinary negligence would seem a more desirable test of liability. But regardless of personal prejudice, we must realize that the legislatures have acted. It is the duty of the courts to interpret such statutes in their present form—not in the way the courts feel they should read. If such statutes are too harsh, or are otherwise unworkable, they can be changed by a new statute in short order. The duty of the court not to meddle with legislation or to foist an unwarranted interpretation upon statutes is a sacred task, one sworn to be properly fulfilled. If the judicial bodies fail in this regard, they will rapidly lose respect in the eyes of legislatures, attorneys, and the public in general.