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The Indiana Guest Statute

THE INDIANA GUEST STATUTE

In recent years automobile tort law has been affected by the enactment and impact of the so-called guest statutes. These statutes define the duty owed by the owner or operator of an automobile to one in the vehicle whose legal status is that of a guest. A guest who is injured in an automobile mishap in a state which has not adopted such a statute may proceed against his host within the framework of a common law negligence action.[1] However, a guest who is injured in one of the twenty-seven states which have enacted guest statutes[2] must allege and prove much more than ordinary negligence in order to recover for his personal bodily injuries.[3]

Despite a divergent variety of standards expressed in the guest statutes of the different states,[4] there is more harmony than disparity among the state courts as to both the method of approach and the ultimate results under such statutes.[5] The Indiana guest statute and the interpretation it receives by the Indiana courts are typical of the statutes and court

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jured while conferring with fellow employee about bowling league organized by employer).

1. 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE pt. 1 § 2311 (perm. ed. 1946).

2. Alabama, Arkansas, California, Colorado, Delaware, Florida, Idaho, Indiana, Illinois, Iowa, Kansas, Michigan, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington and Wyoming.

3. 4 BLASHFIELD, *op. cit. supra* note 1, § 2313.

4. The standards of conduct required for liability are variously described as intentional, willful, wanton, grossly negligent, reckless, and heedless.

5. See PROSSER, THE LAW OF TORTS § 77, at 452 (2d ed. 1955); Note, 35 MICH. L. REV. 804 (1937).

decisions in other jurisdictions.[6] Under the present Indiana statute the owner or operator of a motor vehicle is not liable for the ". . . injuries to or death of a guest, while being transported without payment therefor . . . unless such injuries or death are caused by the wanton or wilful misconduct of such operator or owner . . . ."[7] The purpose of this note is to inspect the doctrines developed by those cases involving the guest statute that have been decided by the Indiana courts.

Prior to adoption of the first Indiana guest statute in 1929,[8] the duties an automobile owner or operator owed to a guest riding in his vehicle in this state were delineated by the doctrines of common law negligence.[9] Contrary to the approach utilized in some other jurisdictions also without guest statutes, the Indiana courts did not analyze the duties an automobile owner or operator owes to his guest by drawing upon the analogous doctrines which determine the tort duties an occupier of real estate owes toward a person on his property through a classification of the latter's status as a trespasser, licensee or an invitee.[10] Indiana, as well as most other states, adheres to the traditional common law position that there are no variations of nor degrees in negligence.[11] Thus, prior to adoption of the guest statute, it was impossible for the Indiana courts to assess the liability of an automobile host to his guest by imposing such liability only when his conduct could be categorized as "grossly negligent." A few states that have not enacted guest statutes, but that recognize various degrees of negligence, have arrived at practically the same results in their case law as have other states under the guest statutes.[12]

A number of reasons have been suggested for legislatures having adopted the guest statutes. Blashfield, in his noted treatise on *Automobile Law,* says of such statutes that, "They were designed to relieve the harshness of the common-law rule which requires the exercise of ordi-

6. *Compare* Brown v. Saucerman, 145 N.E.2d 898 (Ind. 1957), *with* Fink v. Dasier, 273 Mich. 416, 263 N.W. 412 (1935).

7. IND. ANN. STAT. § 47-1021 (Burns 1952).

8. IND. REV. STAT. c. 201, § 1 (1929).

9. Munson v. Rupker, 96 Ind. App. 15, 148 N.E. 169 (1925).

10. "A trespasser and licensee going upon a tract of land—an inert, immovable body—takes it as he finds it, with knowledge that the owner cannot and will not by any act of his start it in motion and hurl it through space in a manner that may mean death to him who enters thereon. He who enters an automobile to take a ride with the owner also takes the automobile and the driver as he finds them. But, when the owner of the automobile starts it in motion, he, as it were, takes the life of his guest into his keeping. . . . The law exacts of one who puts a force in motion that he shall control it with skill and care in proportion to the danger created. This rule applies to a guest at sufferance as well as to a guest by invitation." *Id.* at 30, 148 N.E. at 173-74.

11. Union Traction Co. v. Berry, 188 Ind. 514, 121 N.E. 655 (1919); PROSSER, THE LAW OF TORTS § 33, at 149 (2d ed. 1955).

12. See, *e.g.,* Flynn v. Hurley, 332 Mass. 182, 124 N.E.2d 810 (1955).

nary care even to a recipient of the driver's kindness and hospitality."[13] A more pragmatic explanation is that many such suits are of a collusive "friendly nature" which would not be litigated but for the fact that the defendant's insurance coverage would prevent his personal assets from being subjected to satisfaction of a judgment. Since most automobile guests are either social friends, relatives or immediate members of the driver's family, the possibility of collusive, fraudulent negligence suits when the driver is insured becomes strikingly apparent.[14]

The "wanton or wilful" standard of conduct prescribed by the Indiana guest statute is applicable only if the vehicle occupant can be categorized under the technical legal status of a guest.[15] If he can not be so classified, it is settled that he may proceed against the host-driver in an ordinary negligence action.[16] Thus, when one is confronted with an automobile tort and the injured party was an occupant of the potential defendant's vehicle, the first line of inquiry should be directed toward determining whether the injured party was a guest within the meaning of the statute. This is not always a simple task.

It has been held that both an invitation on the part of the owner and an acceptance of the invitation on the part of the guest are necessary to establish the host-guest relationship.[17] Thus, one who is mentally incapable of accepting an invitation could not be a guest.[18] However, one's voluntary presence in an automobile purely for social purposes places him in the status of a guest within the meaning of the statute in that he was "being transported without payment therefor."[19]

Most of the cases in this state that have construed the word "guest" as it is used in the statute arose from situations where it was alleged that there was either a business relationship of some nature between the parties or an express or implied contract as to payment of the expenses of the trip. If the host has received some kind of material benefit or com-

13. 4 BLASHFIELD, *op. cit. supra* note 1, § 2292, at 305.

14. See generally Hodges, *The Automobile Guest Statutes,* 12 TEXAS L. REV. 303 (1934).

15. See Long v. Archer, 221 Ind. 186, 46 N.E.2d 818 (1943).

16. Long v. Archer, 221 Ind. 186, 46 N.E.2d 818 (1943); Lawson v. Cole, 124 Ind. App. 89, 115 N.E.2d 134 (1953); Ott v. Perrin, 116 Ind. App. 315, 63 N.E.2d 163 (1945); Fuller v. Thrun, 109 Ind. App. 407, 31 N.E.2d 670 (1941).

17. Fuller v. Thrun, *supra* note 16.

18. Because of her infancy, a child seven years of age was found to be incapable of entering into the consensual status of an automobile guest. *Ibid.* Arguably, the lack of a consensual agreement would also exclude from the statute one forced against his will to ride in an automobile.

19. Thus, plaintiff was a guest when he was injured while returning with the defendant-driver from a trip which had as its sole purpose the playing of a game of roque. Swinney v. Roler, 113 Ind. App. 367, 47 N.E.2d 846 (1943). *Accord,* Frymier v. Butler, 110 Ind. App. 531, 39 N.E.2d 809 (1942).

pensation from the injured occupant of his vehicle, the occupant escapes the operation of the statute. Such a relationship or contract precludes the guest status because the automobile occupant was not "transported without payment therefor."

The first Indiana decision to explore fully the meaning of guest as it is used in the statute was *Liberty Mutual Ins. Co. v. Stitzle,*[20] decided in 1942. In this case, the plaintiff's insured was an interior decorator employed by a furniture store which was doing business with defendant. It was necessary for the employee and defendant to travel to Chicago in order to select furniture which was then to have been sold to defendant by the furniture store. They drove in defendant's car and the employee was injured on the trip. The latter claimed workmen's compensation, which the plaintiff-insurance company paid. It in turn sued the defendant for her negligence. In holding that the injured employee's presence in the automobile arose from a situation which gave sufficient compensation to the defendant so the jury could reasonably find that the former was out of the guest statute, the Supreme Court formulated the framework within which all subsequent evalutions of the host-guest relationship have been made.

> If the trip is primarily social, incidental benefits though monetary do not exclude the guest relationship. If the trip is primarily for business purposes and the one to be charged receives substantial benefit, though not payment in a strict sense, the guest relationship does not exist. Expectation of a material gain rather than social companionship must have motivated the owner or operator in inviting or permitting the other person to ride. . . . Of primary importance are the motives actuating the parties. . . .[21]

The court considered two factors to be important in determining whether an automobile occupant was "transported without payment" so as to be a guest within the language of the statute. First, the motive and purpose of the driver in inviting the guest must have been directed toward an expectation of a benefit from the relationship. Second, the benefit accruing to the driver must have been substantial and material rather than incidental.

These factors were next utilized by the Appellate Court in the ostensibly analogous case of *Albert McGann Securities Co. v. Coen,*[22] in which

20. 220 Ind. 180, 41 N.E.2d 133 (1942).
21. *Id.* at 185-86, 41 N.E.2d at 135-36.
22. 114 Ind. App. 60, 48 N.E.2d 58 (1943).

plaintiff unsuccessfully asserted that the business relationship existing between him and defendant was such as to give sufficient compensation to the latter in order to take the case out of the guest statute. Defendant was in the business of buying and selling securities. Plaintiff handled investments and securities for his bank. The parties were making the trip for the purpose of attending a banker's convention. The success of defendant's business depended upon the formation, cultivation and strengthening of friendly relations with customers and prospective customers. This was done in anticipation of new and additional business transactions and consequent pecuniary profit. Utilizing the concepts established in the *Liberty* case, the court concluded that plaintiff was a guest within the meaning of the statute in that defendant had not received payment for the transportation.

It would appear that the essential factor which prevented plaintiff from escaping the operation of the guest statute was his failure to show the expectation of a sufficiently substantial material benefit which defendant was to realize from inviting plaintiff to ride with him. The benefit which defendant anticipated from the relationship was certainly not capable of precise determination, nor was it certain. His invitation to the plaintiff was not motivated by a desire to consummate a planned business transaction; he only desired to cultivate more closely the plaintiff's friendship and make him more amenable and likely to do business with his company in the future.[23]

In the *Liberty* case, the substantiality and certainty of the defendant's benefit were more apparent. There, defendant expected to be able to decorate and furnish her home adequately as a result of plaintiff's assistance at the furniture wholesale houses. In both cases the motives of the defendants were similar; they anticipated gaining definite advantages from having the plaintiffs in their automobiles. However, in the *Coen* case where the guest status was found to exist, the advantages accruing to the host were conditioned entirely upon the uncertainties of future development.

Since the material substantiality and certainty of the payment which accrues to the defendant-driver is the determining factor under the guest statute in establishing or denying the host-guest relationship, it is difficult to formulate precise standards against which any set of facts can be measured. The most that can be said is that the more indications plain-

23. This analysis was utilized to find the host-guest relationship in United States v. Alexander, 234 F.2d 861, 867 (4th Cir. 1956). The means of transportation in this case was an airplane rather than an automobile. Airplane guests are subject to a guest statute substantially identical to the automobile statute. See IND. ANN. STAT. § 14-924 (Burns 1952).

tiff can muster which point toward the defendant's having intended to derive a non-incidental, certain and substantial material benefit from the relationship, the more likely it is that he will be able to exclude himself from the operation of the guest statute.

When the parties have made an express contractual arrangement for the payment of expenses on a trip, the automobile occupant is not a guest and may proceed against his host with a common law negligence action. Thus, when defendant agreed to drive and plaintiff was to pay for the gas, oil and food, the court held that the jury properly could have found that the relationship between the parties was business rather than social.[24]

Several cases have arisen from situations in which the parties had informal arrangements either to drive each other to work on alternating days or for one to drive and the other to pay for the gas and oil consumed. When plaintiff's decedent had driven to and from work with defendant for several months prior to the fatal accident and had been regularly paying the gasoline expenses, it was held that he was not a guest under the statute even though he had not paid for gasoline on the day of the accident.[25] However, if there was no definite arrangement between them for the payment of expenses, the occupant is a guest even though he had been riding with defendant for a long period of time and had occasionally purchased gasoline for the automobile.[26]

The crucial element here is a contract or arrangement between the parties whereby the occupant of the vehicle has agreed to reimburse the driver in some manner for the expenses of his transportation. But the relationship must be such as to indicate more of a business arrangement than a friendly, generous offer by the guest to share the expenses.[27]

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24. Lawson v. Cole, 124 Ind. App. 89, 115 N.E.2d 134 (1953). The court stressed the considerations which prompted the defendant to allow plaintiff to ride in his car. "We must determine in the instant case whether the evidence leads inescapably to the conclusion that social companionship rather than material gain motivated the appellant in inviting or permitting the appellee to ride with him. . . ." *Id.* at 95-96, 115 N.E.2d at 138.

25. Kempin v. Mardis, 123 Ind. App. 546, 111 N.E.2d 77 (1953). Similarly, plaintiff is not a guest when the parties had taken turns driving one another to work. Ott v. Perrin, 116 Ind. App. 315, 63 N.E.2d 163 (1945).

26. Lee Brothers v. Jones, 114 Ind. App. 688, 54 N.E.2d 108 (1944). Here, defendant did not expect decedent to pay anything or contribute any gasoline.

27. One must determine the basic purpose of the automobile trip. If this purpose is more social than business, the fact that the guest has volunteered or agreed to share the expenses will not in itself change this purpose and take the guest out of the statute. Thus, in Albert McGann Securities Co. v. Coen, 114 Ind. App. 60, 48 N.E.2d 58 (1943), even plaintiff's payment of a portion of the gasoline expenses in addition to other elements indicating a business purpose were not sufficient to eliminate the guest status. Isolated and unsolicited purchases of gasoline or contributions toward the costs of a trip are not sufficient payment to preclude the guest status. Lee Brothers v. Jones, *supra* note 26. *Cf.* Allison v. Ely, 153 N.E.2d 384 (Ind. 1958).

The definition of guest as it is used in the statute has arisen in one other context in Indiana. If plaintiff is an employee of defendant-driver and at the time of the accident is acting in the course of his employment, he is not a guest within the meaning of the statute.[28]

Once it has been determined that an automobile occupant is a guest, one must next consider whether the defendant's conduct was such that there may be recovery under the statute. It should be noted at the outset that the present guest statute is not the only one that has been in existence in this state. The first guest statute was enacted in 1929. Under the terms of that act an automobile operator was not liable to his guest unless ". . . such accident shall have been intentional on the part of such owner or operator or caused by his reckless disregard of the rights of others."[29] In 1937, the present statute replaced the former. The language of this statute requires that the injuries be ". . . caused by the wanton or wilful misconduct . . . ." of the vehicle owner or operator.[30] Construction of the dissimilar language could have resulted in different standards of conduct for liability under the two statutes. However, this did not happen. There is no appreciable difference in the factors which have been considered important in assessing liability of an automobile host under the two acts. The courts that have applied the 1937 act have utilized the same descriptive words and phrases that had been used under the 1929 act to determine a host's liability to his guest.[31] Thus, there is no determinable difference in the results of similar cases under the two acts.[32] For the foregoing reasons, the cases which have determined the standard of care under the two statutes will be considered without differentiation as to which statute was applicable.

The conduct set forth in the statute which gives rise to liability is

28. Long v. Archer, 221 Ind. 186, 46 N.E.2d 818 (1943). Similarly, inmates of a state institution would not be guests while being transported under authority of the institution. See 1939 OPS. IND. ATT'Y GEN. 41.

29. IND. REV. STAT. c. 201, § 1 (1929).

30. IND. ANN. STAT. § 47-1021 (Burns 1952).

31. The case of Bedwell v. DeBolt, 47 N.E.2d 176 (Ind. App. 1943), *rev'd on other grounds,* 221 Ind. 600, 50 N.E.2d 875 (1943), was the first to utilize the 1937 act for a determination of conduct sufficient for liability. The Appellate Court recognized that it would have to determine "whether the phrase 'wanton or wilful misconduct' is essentially different from 'an act intentional or caused by reckless disregard of the rights of others.'" *Id.* at 181. This question was only indirectly answered in the case. The court noted that under the original act the guest had to prove "more than negligence" in order to establish liability and said about the 1937 Act that, "in view of the manifest purpose of the Act, it is clearly apparent that something more than 'negligence' was ascribed to the meaning of the word 'wanton' as used in the amendatory Act of 1937." *Ibid.* The court did not more definitively ascertain whether the legislature had intended to change the conduct required for liability under the guest statute.

32. *Compare* Hettmansperger v. Hettmansperger, 103 Ind. App. 632, 5 N.E.2d 685 (1937), *with* Bybee, v. Brooks, 123 Ind. App. 129, 106 N.E.2d 693 (1952).

"wanton *or* wilful misconduct."[33] [Emphasis added] These two adjectives are used in the alternative or disjunctive rather than in the conjunctive.[34] Thus, the defendant would be liable to his guest either for "wanton misconduct" or for "wilful misconduct." Under the common law, prior to enactment of the guest statute, there had been a dissimilarity in the meanings which the judiciary ascribed to "wilful" and "wanton."[35] However, in applying the guest statute the courts have not acknowledged that there is any essential difference in the meanings of these two words.[36] In holding the vehicle owner or operator liable to his guest they always declare that he was guilty of "wanton or wilful misconduct" without indicating which of the two concepts was given dominant consideration.[37]

If the words were to be used conjunctively, the guest would always have to allege and prove that defendant's conduct was "wilful" in addition to "wanton" in order to establish liability.[38] Such an interpretation would result in a paucity of recoveries under the guest statute in that a fact situation will seldom arise in which the defendant's conduct could be characterized as "wilful."[39] The cases have not imposed this stringent

33. IND. ANN. STAT. § 47-1021 (Burns 1952).

34. There has been no specific holding that the words were intended to be used disjunctively. However, use of the disjunctive "or" supports such a conclusion. In no case has there been the slightest suggestion that the conjunctive use was intended. Furthermore, the discussion in several cases appears to be predicated upon the underlying assumption that the words are used disjunctively. See, *e.g.*, Rickner v. Haller, 124 Ind. App. 369, 380, 116 N.E.2d 525, 530 (1954); Bedwell v. De Bolt, 47 N.E.2d 176, 181 (Ind. App. 1943), *rev'd on other grounds*, 221 Ind. 600, 50 N.E.2d 875 (1943).

35. When plaintiff alleged that defendant had "wilfully" injured him, his burden of proof was close to that required to establish an intentional tort. In such a case the plaintiff had to show that the act was intentionally committed or that there was a design or purpose to inflict the injury. See, *e.g.*, Vandalia R. Co. v. Clem, 49 Ind. App. 94, 96 N.E. 789 (1911). Allegation of "wanton" conduct placed somewhat less of a burden of proof upon the plaintiff. The defendant need not have intended to commit the act nor to have caused the injury, but he must have been guilty of more than negligence because the plaintiff's contributory negligence was not an adequate defense. In order to establish that defendant's conduct was "wanton," plaintiff had to show that defendant was conscious that the natural and probable consequence of his action would be to injure another. BERRY, THE LAW OF AUTOMOBILES § 1231 (7th ed. 1935). The meanings of "wilful" and "wanton" lost what significance they had held when it was finally settled that there were no degrees of negligence in Indiana. See Union Traction Co. v. Berry, 188 Ind. 514, 121 N.E. 655 (1919).

36. See, *e.g.*, Kahan v. Wecksler, 104 Ind. App. 673, 12 N.E.2d 998 (1938).

37. All of the Indiana cases decided under the 1937 Act bear this out.

38. Under the definitions of "wilful" and "wanton" in note 35 *supra*, "wilful" conduct involves more culpability and fault than is the case with "wanton" conduct. Thus, if one's conduct were such that it could be classified as "wilful," it would necessarily meet the less stringent requirements of "wanton" conduct. The converse, however, would not be true.

39. In only one of the more than forty reported cases involving the guest statute has the defendant's conduct been such that it would come close to meeting the requirements for "wilful misconduct" as it has been defined herein. See Trent v. Rodgers, 123 Ind. App. 139, 104 N.E.2d 759 (1952). There is an excellent factual explanation for the paucity of such fact situations. Before the defendant-driver's conduct can be charac-

burden upon the plaintiff.[40] Since "wanton or wilful" modifies "misconduct" disjunctively, the plaintiff needs to prove only that defendant's conduct was "wanton" even if it was in fact "wilful." Thus, for all practical purposes, the word "wilful" is of small consequence in applying the guest statute.

The cases under the guest statute have emphasized two factors which the injured guest must prove before the owner or operator of an automobile can be held liable for "wanton or wilful misconduct." First, defendant must have had knowledge of the impending danger. Second, defendant's action must have exhibited his indifference to the consequences of his conduct. This last phase of the test represents the core of "wanton or wilful misconduct"; its existence is established by proof of the preceding condition and defendant's subsequent conduct.

Thus, it is first necessary to determine whether defendant had knowledge or was aware of the danger to the safety of his guest; he must have perceived the hazardous environmental conditions with which he was confronted and he must have been conscious that a high probability of danger existed. It may be shown that his knowledge of the hazardous conditions was obtained either through his own perception[41] or from others.[42] Certainly the plaintiff is in a much better position to prove this if one of the occupants of the vehicle had called his attention to the hazardous circumstances. In ascertaining whether defendant was aware of the situation confronting him, the standard so sacred to negligence actions, the reasonably prudent man, is discarded to the extent that the required knowledge must have been real rather than that which should have been known by a reasonable man in similar circumstances.

That the defendant's knowledge must be actual is illustrated by the case of *Hoesel v. Cain*,[43] in which the defendant was driving at night on a road with which he was familiar. The road was straight and level,

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terized as "wilful" it must be found that he intentionally performed the dangerously injurious act or that he had a design to cause the injury. The driver of a vehicle is enclosed within the machine just as is his guest and he is scarcely better protected from the consequences of a wreck than his guest. In view of these circumstances, few drivers would intentionally embark upon a course of conduct designed to harm the guest when the possibility of injury is as great for the driver as it is for the guest.

40. In Blair v. May, 106 Ind. App. 599, 19 N.E.2d 490 (1939), the court upheld the trial court's refusal to give an instruction tendered by the defendant which ". . . embodied the idea that no recovery could be had if 'there was no purpose or design on the part of the defendant to inflict the injuries complained of. . . .'"

41. See Miller v. Smith, 125 Ind. App. 293, 124 N.E.2d 874 (1955); Rickner v. Haller, 124 Ind. App. 369, 116 N.E.2d 525 (1954).

42. See Bybee v. Brooks, 123 Ind. App. 129, 106 N.E.2d 693 (1952); Hettmansperger v. Hettmansperger, 103 Ind. App. 632, 5 N.E.2d 685 (1937).

43. 222 Ind. 330, 53 N.E.2d 165 (1944). *Accord,* Brown v. Saucerman, 145 N.E.2d 898 (Ind. 1957); Becker v. Strater, 117 Ind. App. 504, 72 N.E.2d 580 (1947).

but there was a slight dip which obscured oncoming cars. Defendant drove onto the left lane in order to pass a car; he saw the lights of a car coming toward him out of the dip and attempted to get back into his own lane, but was unable to do so and collided with the other automobile. He was exonerated from liability to the injured guest because it was not shown that he had knowledge of the approach of the other car before he crossed the center line of the road.[44]

After it is established that defendant had perceived the external conditions which posed the threat to safety, it must be shown from his own voluntary conduct and its relation to the hazard that he was conscious that a high probability of danger existed.[45] It may be shown that defendant was conscious of the danger when one or more of the guests had remonstrated and called the situation to his attention. Several cases of this character have arisen in Indiana.[46] In such a situation if the danger was more real than imaginary and if the driver paid no heed to the warnings, his consciousness may be proved easily. Without proof of such warnings it is more difficult to show that defendant was conscious of the danger. In practice the trier of fact is called upon to decide whether the defendant, knowing of the hazardous conditions confronting him, should have inferred the existence of danger.[47]

The final element which plaintiff must prove in order to establish liability for "wanton or wilful misconduct" is that the defendant exhibited an indifference toward the consequences of his conduct. This is the one factor which more than anything else differentiates an action under the guest statute from a common law negligence action. In order to gain recovery of damages under a negligence theory, plaintiff must prove that defendant's conduct was below that which would have been pursued by an ordinary man in similar circumstances. However, to make out a case of "wanton or wilful misconduct" under the guest statute, it has to be shown that defendant's conduct was such as to indicate that he was not concerned whether he was about to injure another person. This

44. In most cases the proof required to establish defendant's knowledge has been more direct than inferential. However, there have been a few cases in which knowledge was shown without any direct proof; knowledge of the surrounding circumstances was proved only by circumstantial evidence. This has been particularly true when defendant was involved in a situation in which it would have been next to impossible for him to be unaware of the hazards confronting him. See, *e.g.*, Eikenberry v. Neher, 126 Ind. App. 571, 134 N.E.2d 710 (1956); Miller v. Smith, 125 Ind. App. 293, 124 N.E.2d 874 (1955).

45. Consciousness of danger was stressed heavily in the recent case of Brown v. Saucerman, 145 N.E.2d 898 (Ind. 1957).

46. Loehr v. Meuser, 120 Ind. App. 630, 93 N.E.2d 363 (1950); Ridgway v. Yenny, 223 Ind. 16, 57 N.E.2d 581 (1944); Jay v. Holman, 106 Ind. App. 413, 20 N.E.2d 656 (1939).

47. Miller v. Smith, 25 Ind. App. 293, 124 N.E.2d 874 (1955).

point is aptly illustrated by the case of *Trent v. Rodgers*.[48] Defendant had taken plaintiff out for a social evening; they had an altercation and plaintiff wanted to be taken home. Defendant suddenly turned into an alley, rapidly backed out into the street and hit another car. He later admitted that he had seen the lights of the car, but that he was so "damned mad" he did not care whether he hit it or not.

Conduct based upon an honest mistake of judgment is not sufficient to show that defendant was indifferent to the consequences of such conduct. Thus, there was no liability when, as defendant neared a cross-road, his guest warned him of a car approaching on an intersecting road. Defendant looked at the car, observed its movement, concluded that it was stopping, and proceeded on his course at a high rate of speed without paying further attention to it. Defendant's belief that he would successfully avoid the other automobile negated the allegation that his mental attitude was one of indifference to the consequences of his conduct.[49] Similarly, it is not shown that defendant was unconcerned over whether he was about to injure another person when the accident resulted from inadvertance,[50] falling asleep[51] or failing to anticipate the conduct of another driver.[52]

An important consideration in determining defendant's indifference to the consequences of his conduct is whether the injury resulted from a persistent or continuing course of misconduct. This, in itself, is not an entirely adequate guide, as a momentary act may be wanton, whereas a continuing course of misconduct may not be. Nevertheless, a momentary act usually does not reveal an indifference to consequences, whereas a continuing course of misconduct is more likely to indicate such indifference. The cases bear out this proposition. Thus, when defendant violated a statute governing conduct on the road,[53] when he acted in an emergency[54] or acted thoughtlessly,[55] it has been held that his conduct was not such as manifested an indifference to the consequences. On the

48. 123 Ind. App. 139, 104 N.E.2d 759 (1952).
49. Swinney v. Roler, 113 Ind. App. 367, 47 N.E.2d 846 (1943).
50. Becker v. Strater, 117 Ind. App. 504, 72 N.E.2d 580 (1947).
51. Coconower v. Stoddard, 96 Ind. App. 287, 182 N.E. 466 (1932).
52. Lee Brothers v. Jones, 114 Ind. App. 688, 54 N.E.2d 108 (1944); Albert McGann Securities Co. v. Coen, 114 Ind. App. 60, 48 N.E.2d 58 (1943).
53. Brown v. Saucerman, 145 N.E.2d 898 (Ind. 1957); Becker v. Strater, 117 Ind. App. 504, 72 N.E.2d 580 (1947). Although violation of a statute is not in itself sufficient to uphold a finding of wanton or wilful misconduct, such violation may properly be considered in conjunction with other conduct in order to assess defendant's liability. See Rickner v. Haller, 124 Ind. App. 369, 116 N.E.2d 525 (1954); Pierce v. Clemens, 113 Ind. App. 65, 46 N.E.2d 836 (1943); Kraning v. Taggart, 103 Ind. App. 62, 1 N.E.2d 689 (1936).
54. Sheets v. Stalcup, 105 Ind. App. 66, 13 N.E.2d 346 (1938).
55. Hoesel v. Cain, 222 Ind. 330, 53 N.E.2d 165 (1944).

other hand, when the evidence shows that defendant during an extended length of time prior to the mishap had committed a series of unlawful or perilous acts[56] or had been engaged in the same dangerous behavior which caused the injury for a period of time immediately before the mishap,[57] it will be sufficient to establish that he was indifferent to the consequences of his conduct. When such a course of misconduct is established, the conclusion of defendant's indifference to the consequences of his conduct is not averted even when the defendant later relents and attempts to extricate his vehicle and passengers from the situation.[58]

The emergency doctrine is utilized with cases arising under the guest statute in the same manner as in the law of negligence.[59] Thus, when it has been found that defendant's conduct was "wanton or wilful" and such conduct was responsible for placing the automobile and its passengers in a position of imminently serious peril, he will be liable to his guest notwithstanding his subsequently skillful operation of the vehicle in a manner calculated to be the most likely to avoid the peril.[60]

When it has been established that the automobile owner or operator is guilty of "wanton or wilful misconduct" one must determine, as the final analytical step, whether one or more of several defenses may defeat the guest's recovery.

Since recovery under the guest statute is allowed only upon a finding of "wanton or wilful" misconduct, it is not defeated by the common law defense of contributory negligence.[61] However, the guest himself may be guilty of "wanton or wilful misconduct" which contributed to his injuries. The proof of such defense will preclude the guest's recovery.[62] Thus, "wanton or wilful misconduct" on the part of the plaintiff is just as efficient to offset a defendant's "wanton or wilful misconduct" as contributory negligence is to offset ordinary negligence. The result is

56. Loehr v. Meuser, 120 Ind. App. 630, 93 N.E.2d 363 (1950); Ridgway v. Yenny, 223 Ind. 16, 57 N.E.2d 581 (1944); Pierce v. Clemens, 113 Ind. App. 65, 46 N.E.2d 836 (1943).

57. Eikenberry v. Neher, 126 Ind. App. 571, 134 N.E.2d 710 (1956); Bybee v. Brooks, 123 Ind. App. 129, 106 N.E.2d 693 (1952).

58. See, *e.g.*, Loehr v. Meuser, 120 Ind. App. 630, 93 N.E.2d 363 (1950).

59. See PROSSER, THE LAW OF TORTS § 32, at 137-38 (2d ed. 1955).

60. Bybee v. Brooks, 123 Ind. App. 129, 106 N.E.2d 693 (1952). See Armstrong v. Binzer, 102 Ind. App. 497, 199 N.E. 863 (1936).

61. Conconower v. Stoddard, 96 Ind. App. 287, 182 N.E. 466 (1932); Hoeppner v. Saltzgaber, 102 Ind. App. 458, 200 N.E. 458 (1936) (dictum). That this point appears to be almost universally recognized is evidenced by the fact that it has been raised on appeal in only two of the reported cases, notwithstanding that in over half of such cases sufficient facts appear to establish contributory negligence.

62. Thus in Pierce v. Clemens, 113 Ind. App. 65, 46 N.E.2d 836 (1943), the trial court was held to have been in error for its refusal to instruct the jury that the plaintiff's wanton or wilful misconduct would bar his recovery. *Cf.* Ridgeway v. Yenny, 223 Ind. 16, 57 N.E.2d 581 (1944).

that one who was equally to blame with another for producing his injury is prevented from shifting his loss to the other person.

The defense that the guest assumed the risk, or, as it is generally said in Indiana, "incurred" the risk,[63] is available to the host under the guest statute.[64] In order to incur the risk, one must know of the impending danger and then he must voluntarily submit himself to such danger. An automobile guest is not in a position where he can easily flee from the hazards posed by his host's misconduct. In many situations an attempt to escape from the automobile would be as likely to injure the guest as remaining in the vehicle and taking a chance that the driver could avoid an accident.[65] Additionally, the conditions which would confront the guest once he leaves the automobile must be taken into consideration. Frequently such conditions would subject the guest to danger perhaps equal to or greater than that presented by remaining in the vehicle. Under such circumstances it could hardly be asserted that the guest voluntarily exposed himself to the danger by remaining in the vehicle.[66] The defenses of contributory wanton or wilful misconduct and assumption of risk have not been litigated extensively under the guest statute. However, there are no legal obstacles to prevent these defenses from being successfully utilized in the proper circumstances.

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63. See, *e.g.*, Pierce v. Clemens, 113 Ind. App. 65, 75-76, 46 N.E.2d 836, 840-41 (1943).

64. This defense has been raised in only three reported cases. Ridgway v. Yenny, 223 Ind. 16, 57 N.E.2d 581 (1944); Pierce v. Clemens, 113 Ind. App. 65, 46 N.E.2d 836 (1943); Johnson v. Pedicord, 105 Ind. App. 71, 10 N.E.2d 295 (1937). In none of these cases were the facts sufficient to establish assumption of risk. However, the cases acknowledged that it would be a valid defense under the proper circumstances.

65. In most cases the guest's ability to remove himself from the danger would depend almost entirely upon the consent and cooperation of his host. Such cooperation is rarely achieved. The situation is illustrated by the many cases where the guest has first warned the driver and then has pleaded unsuccessfully with him to stop the vehicle so that he could get out. See, *e.g.*, Loehr v. Meuser, 120 Ind. App. 630, 93 N.E.2d 363 (1950).

66. See Ridgway v. Yenny, 223 Ind. 16, 57 N.E.2d 581 (1944).