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The Texas Automobile Guest Statute

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COMMENTS

THE TEXAS AUTOMOBILE GUEST STATUTE

The common-law rule[1] requiring an automobile driver to exercise the care of an ordinary, reasonable man for the safety of his guests has been abolished in many jurisdictions by the adoption of "guest statutes," which bar recovery by a guest for injuries caused by the ordinary negligence of his host.[2] The desire to prevent collusive litigation between guests and their insured hosts provided the principal impetus for the passage of such statutes.[3] A subsidiary reason was the feeling that an ungrateful guest should not be permitted to repay his host's hospitality with the institution of a law suit.[4] The Texas statute, derived from that of Connecticut,[5] provides in substance that the guest may recover only if his injury was intentional or caused by the host's heedlessness or reckless disregard of the rights of others.[6]

The purpose of this Comment is to examine the Texas statute and its judicial interpretation. Decisions from other jurisdictions are occasionally discussed and cited for comparative purposes or where there are gaps in the Texas law. Only suits by a guest against his host are treated; suits by the guest against third parties will not be considered.[7]

I. THE "GUEST STATUS"

The usual guest statute contains no definition of a "guest." Terms such as "guest," "invited guest," and "guest without payment" are

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[1] 2 Harper & James, Torts § 16.15 (1956).

[2] For representative statutes see Iowa Code § 321.494 (1958); Kan. Gen. Stat. Ann. § 8-122 (1949); Mich. Stat. Ann. § 9.2101 (1952).

[3] This has been stated to be the controlling reason for the enactment of the Texas statute. See Cedziwoda v. Crane-Longley Funeral Chapel, 155 Tex. 99, 283 S.W.2d 217 (1955); Schiller v. Rice, 151 Tex. 116, 246 S.W.2d 607 (1952).

[4] A classic statement of this viewpoint may be found in Crawford v. Foster, 110 Cal. App. 81, 293 Pac. 841 (1930):

> The situation that this section was apparently designed to prevent is well known. . . . [T]he proverbial ingratitude of the dog that bites the hand that feeds him found a counterpart in the many cases that arose where generous drivers . . . later found themselves defendants. . . . Undoubtedly, the legistlature, in adopting this act, reflected a certain natural feeling as to the injustice of this situation.

See generally Weber, Guest Statutes, 11 U. Cinc. L. Rev. 24, 34-35 (1937).

[5] Conn. Gen. Stat. §1628 (1930). The Connecticut statute was the first passed in the United States and served as a model for the statutes of a number of other states. Hodges, Automobile Guest Statutes, 12 Texas L. Rev. 303 (1934).

[6] Tex. Rev. Civ. Stat. Ann. art. 6701b(1) (1960).

[7] Generally, the guest may recover from a third party for ordinary negligence; the guest statute has no application to suits by a guest against anyone other than the owner or operator of the vehicle in which he was riding.

found in the statutes but determination of what constitutes guest status is left to judicial interpretation on a case-by-case basis.[8] The provisions of the Texas statute are typical in this respect.

> No person transported over the public highways of this State by the owner or operator of a motor vehicle as his *guest without payment* shall have a cause of action for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator, or caused by his heedlessness or his reckless disregard of the rights of others.[9] (Emphasis added.)

Generally, a guest may be defined as the recipient of the voluntary hospitality of the driver or owner.[10] In contrast, a "passenger" is one who makes payment for his transportation by conferring a benefit of a material or pecuniary nature on the owner or operator.[11] It may be mentioned that in Texas an occupant who asserts ordinary negligence against the owner or operator of the car in which he was riding has the burden of proving that he was not gratuitously transported, *i.e.*, that he was not a guest.[12]

A. *Occupants Transported According to Contract*

It is apparent from the language of the statute that if an occupant pays for his transportation in money or money's worth, he is not a "guest without payment." Thus, the clearest cases are those in which the owner contracts to transport the rider in return for an agreed-

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[8] See Comment, 3 Wyo. L.J. 225 (1949).

[9] Tex. Rev. Civ. Stat. Ann. art. 6701b(1) (1960).

[10] Linn v. Nored, 133 S.W.2d 234 (Tex. Civ. App. 1939) error dism. jud. corr. The occupant was clearly the recipient of the driver's voluntary hospitality in McCarty v. Moss, 225 S.W.2d 883 (Tex. Civ. App. 1949) error ref. and Hamilton v. Perry, 109 S.W.2d 1142 (Tex. Civ. App. 1937).

[11] Raub v. Rowe, 119 S.W.2d 190 (Tex. Civ. App. 1938) error ref. "Passenger" is used in this Comment to mean a non-gratuitous occupant. The courts sometimes use "passenger," Rowan v. Allen, 134 Tex. 215, 134 S.W.2d 1022 (1940), Raub v. Rowe, supra, and sometimes "passenger for hire," Easter v. Wallace, 318 S.W.2d 916 (Tex. Civ. App. 1958) error ref. n.r.e., to designate this meaning.

[12] Webb v. Huffman, 320 S.W.2d 893 (Tex. Civ. App. 1959) error ref. n.r.e.; McCarty v. Moss, 225 S.W.2d 883 (Tex. Civ. App. 1949) error ref. The Texas view accords with the weight of authority. See Martinez v. Southern Pac. Co., 45 Cal.2d 244, 288 P.2d 868 (1955); In re Wright's Estate, 170 Kan. 660, 228 P.2d 911 (1951); Baker v. Costello, 300 Mich. 686, 2 N.W.2d 881 (1942). See, however, Dobbs v. Sugioka, 117 Colo. 218, 185 P.2d 784 (1947), holding that a defendant who relies on the guest statute has the burden of affirmatively establishing that the plaintiff was a guest.

If the owner or operator is killed in the accident, the plaintiff may be incompetent to testify regarding the nature of his relationship with the defendant by virtue of the Dead Man's Statute, Tex. Rev. Civ. Stat. Ann. art. 3716 (1926). Cf. Wells v. Wildin, 224 Iowa 913, 277 N.W. 308 (1938) (Iowa Dead Man's Statute held to preclude plaintiff's testimony as to his relationship with defendant). Extension of article 3716 to plaintiff's testimony in this instance is probably warranted by prior case law, cf. Andreades v. McMillan, 256 S.W.2d 477 (Tex. Civ. App. 1953) error dism., but questionable as a matter of policy, see Ray, The Dead Man's Statute—A Relic of the Past, 10 Sw. L.J. 390 (1956).

upon consideration. The decisions are uniform in holding that the occupant who confers a contractual benefit is beyond the pale of the statute.[13] Similarly, if the driver expressly agrees to transport a group of persons for a stated sum, all are passengers for hire.[14]

B. *The Business "Invitee"*

The benefit which constitutes payment and thus negatives the existence of the guest status may be conferred pursuant to contract, but it is not *essential* that its derivation be contractual. Furthermore, the benefit may be prospective rather than immediate. The general rule is that "payment" has been made to the owner or operator if the transportation is incidental to a relationship between the parties likely to result in a definite, tangible benefit to the operator (or in mutual benefit to the parties) and if receipt of the benefit is the motivating reason for the transportation.[15] Therefore, the occupant usually is not a guest where he is a "business invitee" of the driver.[16] In *Johnson v. Smither*,[17] for example, plaintiff had listed her farm with defendant, a real estate broker. While accompanying defendant to the farm in his automobile, plaintiff was injured when defendant negligently collided with a truck. Holding that plaintiff was not a guest, the court stated:

> . . . [T]he statue should not be construed in such manner that its provisions will be made to apply in every case where the passenger has not actually compensated, or agreed to compensate, the owner for his transportation. . . . We do not believe the statute was ever intended to cover cases in which the owner and the . . . [passenger] were making a trip for their mutual benefit.[18]

The defendant in *Elkins v. Foster*[19] had cosigned a note with his

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[13] Parrish v. Ash, 32 Wash.2d 637, 203 P.2d 330 (1949). See also Ward v. Dwyer, 177 Kan. 212, 277 P.2d 644 (1944). The rule stated is equally applicable where payment is made by a third party on behalf of the plaintiff. McGuire v. Armstrong, 268 Mich. 152, 255 N.W. 745 (1934). Further, if the occupant *agrees* to pay for his transportation, the fact that payment is not actually made is immaterial. Cf. Houston Belt & Terminal Co. v. Burmester, 309 S.W.2d 271 (Tex. Civ. App. 1957) error ref. n.r.e.

[14] Freeman v. Ham, 283 S.W.2d 438 (Tex. Civ. App. 1955) error ref. n.r.e. (defendant agreed to transport a group of children for a stated sum; all were held to be passengers for hire). Some difficulty may be encountered in determining whether the driver in fact agreed to transport all of the riders for the stated consideration. Compare Freeman v. Ham, supra, with Cedziwoda v. Crane-Longley Funeral Chapel, 155 Tex. 99, 283 S.W.2d 217 (1955).

[15] Annot., 59 A.L.R.2d 336 (1958).

[16] Strictly speaking, a business invitee is one who is invited to enter another's *land* for a purpose directly or indirectly connected with business dealings between them. 2 Restatement, Torts § 332 (1934). A landowner or occupier owes a business invitee the duty to exercise reasonable care. 2 Harper & James, Torts § 27.12 (1956).

[17] 116 S.W.2d 812 (Tex. Civ. App. 1938) error dism.

[18] Id. at 814.

[19] 101 S.W.2d 294 (Tex. Civ. App. 1936) error dism.

brother, a postmaster. The brother's position was in jeopardy, and defendant enlisted the aid of the plaintiff (a "man of considerable influence"[20]) in securing retention of the postmastership. Defendant offered to drive plaintiff to the latter's office so that plaintiff's efforts and progress could be discussed. A collision ensued resulting in injury to plaintiff. The statute was held inapplicable, since the ride was related to plaintiff's efforts, which were of financial benefit to defendant.

If there is only a remote possibility that the relationship will result in benefit to the owner or operator, the occupant will not be accorded the status of passenger. In *Franzen v. Jason*,[21] the defendant, a farmer, went to Beaumont to procure laborers to assist in the harvesting of his rice crop. One of the defendant's neighbors had requested that defendant obtain some workers for him if any extra ones were available. Plaintiff, a laborer, was injured while being transported from Beaumont to the farming section by the defendant for the benefit of his neighbor. The court held that the plaintiff was a guest.

> Undoubtedly, appellee [plaintiff] was a guest within the purview of Article 6701b unless it can be said that there was a *definite*, tangible, and established custom among the farmers in the community where defendant resided to transport laborers to their community for the benefit of their neighbors . . . when labor was scarce. . . . While . . . there was a general custom . . . for farmers to transport laborers to the farming country for the accommodation of their neighbors . . . the record does not disclose that . . . [defendant] had profited by said custom in the past *or that it was probable that he would benefit thereby in the future*.[22] (Emphasis added.)

The Texas statute specifically provides that a prospective automobile purchaser to whom the vehicle is being demonstrated is not a guest,[23] but the status of other prospective purchasers who are transported by a salesman in the course of negotiating or effecting a sale has not been definitively determined. The decisive question in such a case is whether the chance of benefit to the salesman is sufficient to constitute payment. Decisions from other jurisdictions indicate that the possibility of profit to the salesman is sufficient to remove

[20] Id. at 297.

[21] 166 S.W.2d 727 (Tex. Civ. App. 1942) error ref.

[22] Id. at 728, 729.

[23] Article 6701b(2) states that "this Act shall not relieve . . . any owner or operator of a motor vehicle while the same is being demonstrated to a prospective purchaser, of responsibility for any injuries sustained by [the prospective purchaser] . . . ." Tex. Rev. Civ. Stat. Ann. art. 6701b(2) (1960). Some jurisdictions have exempted auto purchasers by judicial decision. See, e.g., Bookhart v. Greenlease-Lied Mtr. Co., 215 Iowa 8, 244 N.W. 721 (1932).

the prospective purchaser from the reach of the statute.[24] Thus, it has been held that prospects for merchandise,[25] real estate,[26] and life insurance[27] are not guests within the purview of the pertinent guest statutes. It was apparently assumed in *Johnson v. Smither*[28] that the potentiality of profit to a broker from his relationship with a client is an adequate benefit. It is true that the broker-client relationship is contractual while the salesman-prospect one is not, but there would appear to be no distinction between the two with regard to profit possibility. Thus, based on precedent established in other jurisdictions and analogy to *Johnson v Smither*, it would seem that Texas should regard the prospective purchaser as a passenger.[29]

A recent civil appeals case, *Gregory v. Otts*,[30] involved a fact situation of frequent occurrence. Defendant arranged to have her automobile serviced. Lacking transportation to her place of employment, she also made arrangements to drive plaintiff, an attendant at the service station, to her place of employment. Plaintiff was then to return with the car to the service station. En route to her place of employment, defendant negligently collided with a third party, injuring plaintiff. The court held that the plaintiff was a passenger. This holding is clearly correct since the transportation was incident to a mutually beneficial contractual relation between defendant and plaintiff's principal. However, the court did not discuss the benefit flowing to defendant from the *contract*. Instead, it found the requisite benefit to defendant to be the convenience of delivering the automobile at her place of employment rather than at the station.

A final commercial aspect is that in which the occupant and driver are, respectively, employee and employer. Since the employer-employee relationship is one mutually beneficial to the parties, the employee can recover for ordinary negligence if he is being transported

[24] But see Liberty Mut. Ins. Co. v. Stitzle, 220 Ind. 180, 41 N.E.2d 133 (1942), stating that the possibility of benefit is too remote.

[25] Thomas v. Currier Lumber Co., 283 Mich. 134, 277 N.W. 857 (1938).

[26] Robb v. Ramey Associates, Inc., 40 Del. 520, 14 A.2d 394 (1940).

[27] Piercy v. Zeiss, 8 Cal. App.2d 595, 47 P.2d 818 (1935). In Burt v. Lochausen, 151 Tex. 289, 249 S.W.2d 194 (1952), defendant, an insurance agent, procured an application for life insurance from plaintiff and accompanied the latter to take a medical examination. After conclusion of the examination, plaintiff and defendant went to lunch, then commenced drinking. Several hours later, plaintiff was injured while riding home with defendant. The court held that the business relation had clearly ceased before the accident. Hence the question whether plaintiff would have been a passenger had the accident occurred during the existence of the relation was not considered.

[28] 116 S.W.2d 813 (Tex. Civ. App. 1938) error dism.

[29] It could be argued, however, on the basis of the maxim *expressio unius est exclusio alterius* that since the automobile customer is expressly exempted from the operation of the act, other purchasers are by implication denied exemption. For a rejection of this argument see Weber, supra note 4, at 38.

[30] 329 S.W.2d 904 (Tex. Civ. App. 1959).

in the scope of his employment by the employer.[31] Of course, if the transportation is not incident to the employment relation, the employee is a guest.[32]

C. *The Social Companion*

The benefit which the occupant confers on the operator must, in order to remove him from the operation of the statute, be material or pecuniary in nature. Companionship is not of this character and thus where plaintiff and defendant take a pleasure trip in defendant's automobile, plaintiff is a guest.[33] Often, the plaintiff will have agreed to contribute his proportionate share of the expenses of the trip. An expense-sharing arrangement results in pecuniary benefit to the owner, but the settled rule is that it does not transform the occupant into a passenger.[34] The rationale is that receipt of the benefit in this instance is not the motivating reason for the transportation. The plaintiff may also share driving responsibility. However, this does not alter his gratuitous status, since driving assistance is regarded merely as a reciprocal measure of hospitality or a social amenity and not as compensation for the ride.[35]

It should be noted that dictum in two civil appeals cases has indicated that if the rider and driver are engaged in a joint enterprise, the rider is not a guest within the meaning of the statute.[36] The usual

[31] Kruy v. Smith, 108 Conn. 628, 144 Atl. 304 (1929). Kruy v. Smith is binding on the Texas courts. When a statute is adopted, previous judicial decisions of the state from which it was adopted interpreting the statute are generally binding on the adopting state. 2 Sutherland, Statutory Construction § 5209 (3d ed. 1943).

[32] Knutson v. Lurie, 217 Iowa 192, 251 N.W. 147 (1933).

[33] Choisser v. Ramey, 314 S.W.2d 664 (Tex. Civ. App. 1958) error ref. n.r.e.; El Paso City Lines, Inc. v. Sanchez, 306 S.W.2d 396 (Tex. Civ. App. 1957) error ref. n.r.e.; McCarty v. Moss, 225 S.W.2d 883 (Tex. Civ. App. 1949) error ref.

[34] The leading Texas case is Raub v. Rowe, 119 S.W.2d 190 (Tex. Civ. App. 1938) error ref. See also Easter v. Wallace, 318 S.W.2d 916 (Tex. Civ. App. 1958) error ref. n.r.e.; McClain v. Carter, 278 S.W.2d 877 (Tex. Civ. App. 1955) error ref. n.r.e. The majority of American jurisdictions are in accord, Annot., 10 A.L.R.2d 1351 (1950), although others hold that if the occupant agrees *prior* to the trip to share expenses, he is not a guest, even though the payment of expenses is not the quid pro quo for the transportation. See, e.g., Kerstettor v. Elfman, 327 Pa. 17, 192 Atl. 663 (1937).

[35] Ray v. Hanisch, 147 Cal. App.2d 742, 306 P.2d 30 (1957).

[36] See Webb v. Huffman, 320 S.W.2d 893 (Tex. Civ. App. 1959) error ref. n.r.e.; Johnson v. Smither, 116 S.W.2d 812 (Tex. Civ. App. 1938) error dism. In the Webb case the court stated at 896-97:

> [W]e believe the burden was upon appellee to establish by a preponderance of the evidence the relationship of joint enterprise or else Archie [plaintiff's decedent] would have occupied the status of his brother's guest. . . . We realize cases by Courts of Civil Appeals in this state leave the law in a state of confusion as to what facts are necessary to establish joint enterprisers and remove a claimant rider, seeking to recover from the driver or owner of the automobile, from the requirements of proof under our guest statute.

See also Urban v. Chars, 1 Wis.2d 582, 85 N.W.2d 386 (1957). The accident in the Urban case occurred in Texas, and thus the court applied Texas law. Leflar, Conflict of Laws § 110 (1959).

social trip is not, however, a joint enterprise. Even if the rider shares expenses or driving responsibility, he does not necessarily have the right to control the use of the vehicle. A joint enterpriser, on the other hand, must by definition have an equal right to control.[37]

Where a social trip is involved, the incidental performance of some *service* in consideration for the transportation is treated like the sharing of expenses, and hence will not vitiate the host-guest relationship. In *Rowan v. Allen*,[38] for example, plaintiff and defendant planned a trip to the races. Plaintiff agreed that if defendant would transport her in his automobile, her daughter would attend defendant's ill son until they (plaintiff and defendant) returned. The court held that plaintiff was a guest; the social relationship between plaintiff and defendant was not "commercialized by the plaintiff's hiring out her daughter to defendant in consideration of the latter's agreement to transport the plaintiff to the races."[39]

Where the plaintiff and defendant are both personal friends and business associates, a trip may involve multiple purposes. In this event, the principal purpose of the trip is decisive. In *El Paso City Lines, Inc. v. Sanchez*,[40] the defendant was a friend of the plaintiff, who was an insurance agent. Defendant contacted the plaintiff to discuss the possibility of securing employment in the latter's insurance business. After discussing this matter, the parties visited some mutual friends and then decided to have lunch. Defendant offered to drive his automobile so that he and plaintiff could talk further about the defendant's prospective employment. The court of civil appeals affirmed the trial court's finding that the plaintiff was a guest.

> It is plain to us that the main purpose of the trip to town was to get food. . . . [T]he discussion of business . . . was merely *incidental* to the trip.[41] (Emphasis added.)

In summary, the guest statute has been rigorously applied in the social journey realm. Explanation for this stringent application lies in the obvious fact that the danger of collusion is greatest where the host and guest are bound by ties of friendship. The Texas courts have utilized a "primary purpose" approach; if the trip is primarily social

[37] El Paso Elec. Co. v. Leeper, 60 S.W.2d 187 (Tex. Comm. App. 1933). It should be noted that the fact that the rider and the driver were engaged at the time of the rider's injury in a joint enterprise will not itself preclude the rider from recovering damages in a suit instituted against the driver. LeSage v. Pryor, 137 Tex. 455, 154 S.W.2d 446 (1941). The reason is that the doctrine of imputed negligence is inapplicable to a controversy between the parties to a joint enterprise.

[38] 134 Tex. 215, 134 S.W.2d 1022 (1940).

[39] 134 S.W.2d at 1024.

[40] 306 S.W.2d 396 (Tex. Civ. App. 1957) error ref. n.r.e.

[41] Id. at 402.

in nature, the occupant will be regarded as a guest even though some slight financial or business benefit accrues to the host.

D. *Can the Owner be a Guest?*

Suppose that the owner and occupant embark on a pleasure trip. If the journey is of substantial length, the occupant will probably share driving responsibility. If an accident occurs while the occupant is operating the vehicle, can the owner recover of the occupant only upon proof of the degree of fault required by the applicable guest statute?

Utilizing one or more of several theories, the courts have quite uniformly held that the owner is *not* a guest under these circumstances and thus can recover from the driver for ordinary negligence. One theory advanced is that the dictionary definition of guest cannot accommodate the owner. A guest is the recipient of voluntary hospitality; the owner is not riding in his own automobile by virtue of the driver's beneficence.[42] In *Lorch v. Eglin*,[43] the view was taken that the owner is not a guest because he has paid for his transportation by contributing the equivalent of the rental value of his car. A final basis is that the owner generally retains the right, inconsistent with the status of guest, to direct and control the driver.[44] Where the owner retains the right of control, the driver is treated as the owner's agent for the purpose of operating the automobile, and thus the owner is liable to third parties for the driver's negligence. If the owner were to surrender this right and cease to be liable under the doctrine of respondeat superior, the owner would, if the control theory alone were applied, be held to be a guest.[45] However, even in this event, the owner would probably be regarded as a passenger on the ground that he was not being transported gratuitously.[46]

Reliance on the dictionary definition of guest is not without precedent in Texas.[47] It is probably reasonable to predict, therefore, that Texas courts will hold that this definition does not encompass the owner. It is believed, however, that the courts should follow the reasoning of *Lorch v. Eglin*,[48] thereby producing consistent use of the benefit concept in guest statute litigation.

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[42] Gledhill v. Connecticut Co., 121 Conn. 102, 183 Atl. 379 (1936).

[43] 369 Pa. 314, 85 A.2d 841 (1952).

[44] Ray v. Hanisch, 147 Cal. App.2d 742, 306 P.2d 30 (1957). There is a rebuttable presumption that the owner retains control when he remains in the car.

[45] Weber, supra note 4, at 49.

[46] Lorch v. Eglin, 369 Pa. 314, 85 A.2d 841 (1952).

[47] See, e.g., McClain v. Carter, 278 S.W.2d 877 (Tex. Civ. App. 1955) error ref. n.r.e.; Linn v. Nored, 133 S.W.2d 234 (Tex. Civ. App. 1939) error dism. jud. corr.

[48] 369 Pa. 314, 85 A.2d 841 (1952).

E. *Effect of Minority, Intoxication, and Insanity*

The applicability of guest statutes to insane[49] and intoxicated persons[50] is apparently established. Furthermore, some courts have held that the statutes apply with full force although the guest is an infant.[51] Other courts, however, have carved out an exception for infants of "tender years."[52] In *Kudrna v. Adamski*,[53] for example, the Oregon guest statue, which is virtually identical to Texas', was held inapplicable to a child of four. The basis of the court's holding is found in the following language:

> In the Albrecht case 159 Or. at page 337, 80 P.2d at page 65 the word "guest," as used in the statute, was said to mean one who accepts a ride in any motor vehicle without payment therefor, and for his own pleasure or business. . . . Thus, the statute implies that to become a guest one must exercise a choice in the matter and we think that a 4 year old does not have the legal capacity to exercise such a choice, just as he is incapable of negligence.[54]

The exception for children of "tender years" apparently applies to those below the age of seven, since it stems from the common-law rule that a child of less than seven years is incapable of criminal intent[55] and the derivative tort law rule, accepted in some jurisdictions, that a child who is less than seven years old cannot be negligent.[56]

In *Tilghman v. Rightor*,[57] which is representative of the opposing view, the Arkansas Supreme Court held the applicable statute binding on *all* infants.

> It well [sic] be observed that in defining a guest the statute makes no exception in favor of minors, and we have no authority to write that exception into the statute.[58]

Linn v. Nored[59] is the sole Texas case in this area. Linn, the plaintiff, was under the influence of alcohol when he entered the de-

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[49] Cf. Lombardo v. DeShance, 167 Ohio St. 431, 149 N.E.2d 914 (1958).

[50] Linn v. Nored, 133 S.W.2d 234 (Tex. Civ. App. 1939) error dism. jud. corr.; Lombardo v. DeShance, supra note 49.

[51] Tilghman v. Rightor, 211 Ark. 229, 199 S.W.2d 943 (1947); Shiels v. Audette, 119 Conn. 75, 174 Atl. 323 (1934).

[52] See, e.g., Fuller v. Thrun, 109 Ind. App. 407, 31 N.E.2d 670 (1941); Kudrna v. Adamski, 188 Ore. 396, 216 P.2d 262 (1950).

[53] Kudrna v. Adamski, supra note 52.

[54] 216 P.2d at 263. The rationale that a very young child is incapable of becoming a guest is readily applicable where the statute defines a guest as any person who "accepts" a gratuitous ride. See Rocha v. Hulen, 6 Cal. App.2d 245, 44 P.2d 478 (1935) (five year old child has no capacity to accept).

[55] Clark & Marshall, Crimes § 6.12 (6th ed. 1958).

[56] Prosser, Torts § 31 (2d ed. 1955).

[57] 211 Ark. 229, 199 S.W.2d 943 (1947).

[58] 199 S.W.2d at 945.

[59] 133 S.W.2d 234 (Tex. Civ. App. 1939) error dism. jud. corr.

fendant's automobile. The court of civil appeals rejected Linn's contention that his intoxication prevented him from becoming a guest. The opinion contains language similar to that found in *Tilghman v. Rightor,* indicating an unwillingness to deviate from the literal wording of the statute.

> Manifestly our statute makes no distinction between a drunk and sober person, or between minors and adults, or sane and insane persons. . . .[60]

Moreover, it is settled in Texas that an infant can be negligent despite his age.[61] The probabilities are, therefore, that a plaintiff's age and mental capacity are to be regarded as immaterial in determining whether he is a guest or passenger.

F. *Termination of the Guest Status*

The host's negligent operation of the vehicle may prompt a protest from the guest or a demand that the host let him out of the car. A controversial question is whether the guest's vocal acts work a cessation of the guest relation.[62] It is well settled that a mere protest by the guest, however violent, is ineffective to terminate his status as guest.[63] There is a division of authority with regard to the effect of protest coupled with a demand to be released. Two decisions, notably the very recent one in *Andrews v. Kirk,*[64] have recognized the efficacy of this action, reasoning that the existence of the guest relation requires the consent of the guest, which is withdrawn when protest and demand are made.[65] Taking a contrary position, several other cases have held that a person initially a guest remains a guest despite his subsequent conduct.[66]

The liberal view allowing termination treats a guest whose demands for release have been refused like one who has initially been *kidnapped.*[67] There is support for this theory in analogous authority for it has been held that a guest whose demands to be released from

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[60] Id. at 236-37.

[61] Sorrentino v. McNeil, 122 S.W.2d 723 (Tex. Civ. App. 1938) error ref.

[62] For a discussion of whether the guest status terminates immediately when the guest alights from the vehicle, see Annot., 50 A.L.R.2d 974 (1956).

[63] Annot., 25 A.L.R.2d 1448 (1952). For illustrative cases see Wachtel v. Bloch, 43 Ga. App. 756, 160 S.E. 97 (1931); Vance v. Grohe, 223 Iowa 1109, 274 N.W. 902 (1937); Hayes v. Brower, 39 Wash.2d 372, 235 P.2d 482 (1952). Evidence of the protest is relevant, however, to establish gross negligence on the part of the host and the guest's lack of contributory negligence. See pp. 85, 96 infra.

[64] ___ Fla. ___, 106 So. 2d 110 (1958), Case Note, 14 Sw. L.J. 129 (1960).

[65] The other case is Blanchard v. Ogletree, 41 Ga. App. 4, 152 S.E. 116 (1930).

[66] Atkins v. Hemphill, 33 Wash.2d 735, 207 P.2d 195 (1949); Taylor v. Taug, 17 Wash.2d 533, 136 P.2d 176 (1943).

[67] See Andrews v. Kirk, ___ Fla. ___, 106 So. 2d 110, 118 (1958).

the automobile are refused remains in the car under duress and thus may bring an action against the owner for false imprisonment.[68] It was recognized in *Linn v. Nored*[69] that one who is abducted initially by the driver is not a guest, since he is not the recipient of hospitality on the part of the driver. Thus, if the language in *Linn v. Nored* is logically extended, Texas may be expected to adhere to the *Andrews v. Kirk* position. The courts could, on the other hand, adopt the more stringent "once a guest-always a guest" rule in order to prevent plaintiff and defendant from thwarting the policy of the statute by fabricating testimony that a protest and demand were made in order to visit liability on the defendant's insurance company. However, the limitation in *Andrews v. Kirk* that the plaintiff must have a "real and reasonable fear that an accident causing death or bodily injury may likely result"[70] before his protest and demand will alter his status would seem to furnish adequate protection against collusion.[71]

II. Heedlessness or Reckless Disregard of the Rights of Others

A. *Validity and Construction*

Article 6701b deprives a guest who is being transported by the owner or operator of a motor vehicle over the highways of this state of a cause of action for damages against such owner or operator for injuries, death or loss, in case of an accident, *unless* the accident was intentionally caused by the owner or operator, or was caused by "his heedlessness or reckless disregard of the rights of others."[72]

The constitutionality of the statute was first specifically assailed[73] in *Bowman v. Puckett*[74] on the ground that it was inconsistent with the Texas constitutional provision permitting recovery of exemplary damages from one whose gross neglect causes the death of another.

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[68] Cieplinski v. Severn, 269 Mass. 261, 168 N.E. 722 (1929).

[69] 133 S.W.2d 234 (Tex. Civ. App. 1939) error dism. jud. corr.

[70] 106 So. 2d 110, 118 (1958).

[71] It could also be argued that since evidence of the protest and demand is admissible to establish the host's gross negligence and the guest's lack of contributory negligence, see pp. 85, 96 infra, it is unnecessary to admit it on the issue of the occupant's status.

[72] Tex. Rev. Civ. Stat. Ann. art. 6701b(1) (1960). A discussion of the host's intentional conduct is omitted from this Comment for the reason that this portion of the statute is clear and has never troubled the courts.

A peculiar case, worthy of note, arose in Schoremoyer v. Barnes, 190 F.2d 14 (5th Cir. 1951), where the court held that this statute does not apply to accidents resulting from the operation of motorboats upon waterways and navigable lakes of Texas.

[73] In Campbell v. Paschall, 132 Tex. 226, 121 S.W.2d 593 (1938), the constitutionality of the statute was first upheld by the supreme court without any discussion.

[74] 144 Tex. 125, 188 S.W.2d 571 (1945).

The basis of the contention was that proof of "heedlessness or reckless disregard of the rights of others" placed a greater burden on the plaintiff than proof of "gross negligence" as used in article XVI, section 26 of the Texas Constitution. The court followed prior decisions which had construed article 6701b to require only a showing of gross negligence by the guest or his representative in order to recover,[75] and thus upheld the constitutionality of the statute.

Once it was determined that the true meaning of the phrase "heedlessness or reckless disregard of the rights of others" was gross negligence, the supreme court[76] accepted the definition of that term it had previously pronounced in *Missouri Pac. Ry. Co. v. Shuford*.[77]

> Gross negligence . . . should be that entire want of care which would raise a belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it.[78]

In addition, the court stated that the existence of gross negligence is dependent upon proof by the guest of some persistent or continued course of action by the host.[79]

B. *The Conscious Indifference Test of Gross Negligence*

The plain meaning of the "conscious indifference" test of gross negligence seems to be that the host is consciously indifferent if he knows that his conduct is creating an unreasonable risk of injury to his guest and is unconcerned about the consequences which may result if an accident ensues. In other words, the test emphasizes the importance of the host's mental attitude.[80] Nevertheless, considerable confusion has arisen in its application to given fact situations.

1. *Significance of the Host's Mental Attitude*

While the line between conduct which amounts to ordinary negligence and that which constitutes gross negligence is not easily

[75] In reaching its conclusion the court relied on its prior decision in Rowan v. Allen, 134 Tex. 215, 134 S.W.2d 1022 (1940).

[76] Rowan v. Allen, supra note 75. See also Bowman v. Puckett, 144 Tex. 125, 188 S.W.2d 571 (1945).

[77] 72 Tex. 165, 10 S.W. 408 (1888).

[78] 10 S.W. at 411.

[79] Bowman v. Puckett, 144 Tex. 125, 188 S.W.2d 571 (1945).

[80] See, e.g., Rice v. Schiller, 241 S.W.2d 330 (Tex. Civ. App. 1951), aff'd in part, 151 Tex. 116, 246 S.W.2d 607 (1952), where it was held that a charge defining "heedlessness or reckless disregard of the rights of others" was erroneous in so far as it stated that such heedlessness or reckless disregard did not depend upon the actual mental state of the host. But see Scott v. Gardner, 137 Tex. 628, 156 S.W.2d 513 (1941), where the court held that liability for heedlessness or reckless disregard of the rights of others, like ordinary negligence, arises out of the act or omission of the host, not out of his mental condition.

drawn,[81] the distinguishing factor seems to be found in the host's indifferent mental attitude, as manifested by his words and actions, toward the consequences of his conduct. The absence of this factor is fatal to the guest's suit. For instance, courts have consistently held that an accident caused by the host's excessive speed,[82] failure to keep a proper lookout,[83] failure to apply brakes,[84] or failure to slacken speed[85] are acts of ordinary negligence and do not per se constitute actionable conduct under the guest statute. In addition, it has been held that the mere fact that the host *consciously* violates a statute or ordinance (and thus is guilty of negligence per se) does not necessarily amount to gross negligence.[86]

The importance of proving an improper mental attitude of the host, *i.e.*, a conscious indifference toward the rights or welfare of the person or persons to be affected by his conduct, was stressed by Justice Griffin in *Rogers v. Blake*,[87] quoting from *Texas Pac. Coal & Oil Co. v. Robertson*:[88]

> In discussing the meaning of "gross negligence," this Court has said: "It is to be observed that the definition quoted uses the words 'conscious indifference,' thus stressing the mental attitude of the person charged to have been grossly negligent. Gross negligence is positive or affirmative, rather than merely passive or negative as ordinary negligence often, and perhaps usually, is. Mere indifference is not enough. The indifference must be *conscious. The indifference is to the rights or welfare of the person or persons who may be affected by the act or omission.* Thus the doctrine of foreseeableness becomes important."[89]

Unfortunately, the emphasis on the host's mental attitude has

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[81] Hernandez v. Castillo, 303 S.W.2d 508 (Tex. Civ. App. 1957), mandate amended, 309 S.W.2d 938 (Tex. Civ. App. 1958) error ref.

[82] Bruton v. Shinault, 314 S.W.2d 143 (Tex. Civ. App. 1958); McCarty v. Moss, 225 S.W.2d 883 (Tex. Civ. App. 1950) error ref.; Mayer v. Johnson, 148 S.W.2d 454 (Tex. Civ. App. 1941) error dism. jud. corr.; Linn v. Nored, 133 S.W.2d 234 (Tex. Civ. App. 1939) error dism. judg. corr.; Glassman v. Feldman, 106 S.W.2d 721 (Tex. Civ. App. 1937); Crosby v. Strain, 99 S.W.2d 659 (Tex. Civ. App. 1936) error dism.; cf. Mondello v. Pastiro, 78 So. 2d 64 (La. App. 1955); Cone v. Smith, 76 So. 2d 46 (La. App. 1954); see Bowman v. Puckett, 144 Tex. 125, 188 S.W.2d 571 (1945) (dictum).

[83] See, e.g., Wood v. Orts, 182 S.W.2d 139 (Tex. Civ. App. 1944); Linn v. Nored, 133 S.W.2d 234 (Tex. Civ. App. 1939) error dism. judg. corr.

[84] Gill v. Minter, 233 S.W.2d 585 (Tex. Civ. App. 1950) error ref.; see Wood v. Orts, supra note 83.

[85] See Wood v. Orts, 182 S.W.2d 139 (Tex. Civ. App. 1944).

[86] Rogers v. Blake, 150 Tex. 373, 240 S.W.2d 1001 (1951) (failure to stop at a stop sign); Glassman v. Feldman, 106 S.W.2d 721 (Tex. Civ. App. 1937) (violation of speed law).

[87] Supra note 86.

[88] 125 Tex. 4, 79 S.W.2d 830 (1935). This case did not involve an action under the guest statute.

[89] 150 Tex. at 376, 240 S.W.2d at 1003. (Emphasis added by Justice Griffin.).

resulted in imposing an undue burden[90] on the guest, for proving the subjective mental attitude of the host is a considerable task. Almost without exception the only available proof consists of inferences derived from outward manifestations.

An excellent illustration of proof of the host's mental attitude by outward manifestations and other circumstantial evidence is found in *Kirkpatrick v. Neal.*[91] Here the plaintiff, a guest in the defendant's automobile, brought suit to recover for injuries she received when the vehicle crashed into a bridge while traveling at a high rate of speed on a dangerous curve. It was shown at the trial that the defendant had been warned of the curve and bridge before beginning the trip; that his proposal of marriage to the plaintiff made immediately before they departed on the trip had been rejected; that the rejection offended him; and that during the trip he drove at excessive speeds, *after being warned* by the plaintiff and other occupants of the automobile to reduce his speed and watch for the bridge. In affirming a jury finding of gross negligence, the court of civil appeals held that the verdict was supported by ample evidence, emphasizing the various factors giving rise to an inference of "conscious indifference" by the defendant.

A different approach was taken in sustaining a trial court's finding of gross negligence in *Bowman v. Puckett.*[92] The supreme court relied upon the existence of a persistent course of conduct by the host which evinced a "conscious indifference" to the consequences of his conduct. The following facts were established: the host was driving at an extremely high rate of speed when he entered the city limits of a small town; he continued to drive at this speed into a residential and business district on a road which he *knew* was heavily traveled; he *knew* that his brakes were prone to grab when pressure was applied to the brake pedal; and the reason for his speed was his desire to reach home quickly. These factors were regarded by the court as indicating that the host-driver knew of the probability of danger to himself, to his guest and to other drivers and pedestrians, and that his indifference to that danger and the welfare of others was "conscious." While the court recognized the

[90] Texas courts have consistently held that the guest has the burden of proving the host's gross negligence. Bullock v. Atlantic Ref. Co., 289 S.W.2d 618 (Tex. Civ. App. 1956) error ref. (action by surviving heirs of the guest); Mims v. Seltzer, 143 S.W.2d 973 (Tex. Civ. App. 1940) error dism. (action by the guest's personal representative); McMillian v. Sims, 112 S.W.2d 793 (Tex. Civ. App. 1937) error dism. agr. (action by the guest); Munves v. Buckley, 70 S.W.2d 605 (Tex. Civ. App. 1934) error dism.

[91] 153 S.W.2d 519 (Tex. Civ. App. 1941) error ref. w.o.m.

[92] 144 Tex. 125, 188 S.W.2d 571 (1945). The court stated that there must be something of a continued or persistent course of action in order to constitute gross negligence.

existence of certain mitigating factors[93] inconsistent with the existence of gross negligence, it stated that these factors were not conclusive; rather they were merely circumstances to be considered in determining the issue of the host's gross negligence.

One of the fallacies of the "conscious indifference" test is clearly illustrated in the situation where the host-driver loses consciousness or becomes semi-conscious because of sleep or intoxication. In this situation he may be incapable of having the mental attitude necessary to constitute gross negligence. As to the effect of unconsciousness caused by sleep, Texas courts have adopted the view that the host-driver may be held liable if his undertaking to drive, or continuing to drive, involved antecedent gross negligence.[94] In other words, gross negligence is dependent upon the existence of facts which would charge him with knowledge, or a duty to know, that he was likely to "pass out" or "go to sleep."[95] It would seem that the same rationale would apply to the situation where the host-driver was intoxicated. But in *Scott v. Gardner*,[96] the court reasoned that liability under the guest statute *arises out of the act or omission* of the host-driver, *not out of his mental condition*, and that the host-driver's intoxication which has not rendered him completely unconscious will not excuse his reckless or heedless conduct. The *Scott* case is factually distinguishable from the "sleep" cases in that the host-driver in the former did not lose consciousness. It is interesting to note that the court declined to resolve the question of liability where intoxication caused the host-driver to lose complete consciousness at the wheel of the automobile. In such a case his liability would seem to be dependent upon proof of antecedent gross negligence, *i.e.*, his undertaking or continuing to drive when he knew or had reason to know that he was likely to "pass out."[97] This probably would be the only possible basis for his liablility, since he

[93] These factors which are inconsistent with the allegation of gross negligence are the host's endeavor to reduce his speed by applying his brakes and his friendly relationship with his guest.

[94] McMillian v. Simms, 112 S.W.2d 793 (Tex. Civ. App. 1937) error dism. agr.; Napier v. Mooneyham, 94 S.W.2d 564 (Tex. Civ. App. 1936) error dism. See also Potz v. Williams, 113 Conn. 278, 155 Atl. 211 (1931).

[95] Napier v. Mooneyham, supra note 94. See also Annot., 28 A.L.R.2d 12, 72 (1953).

[96] 137 Tex. 628, 156 S.W.2d 513 (1941).

[97] Cf. Napier v. Mooneyham, 94 S.W.2d 564 (Tex. Civ. App. 1936) error dism. See Wood v. Orts, 182 S.W.2d 139 (Tex. Civ. App. 1944), where the court, in concluding that there was no evidence which could sustain a finding of gross negligence, placed considerable emphasis on the fact that no occupant of the car warned the host-driver that he was driving in a reckless manner, or that he was too sleepy to drive, or that he was too intoxicated to drive, but, on the contrary, seemed to be satisfied with the manner in which he was driving.

would be incapable, after "passing out," of volitional action or inaction, essential to tort liability.[98]

2. *The Effect of Friendship Between Host and Guest*

The effect of friendship between the host-driver and the guest on the issue of gross negligence was first considered in *Rowan v. Allen*,[99] where the supreme court stated:

> Bearing in mind the relationship existing between the parties and all other surrounding circumstances, this evidence does not raise the issue that the defendant drove in reckless disregard of the rights of plaintiff or was consciously indifferent to her welfare. . . .
>
> This case as a whole will permit no inferences other than that these parties, as friends, attended the races together for their mutual enjoyment, the plaintiff as defendant's guest, and that the defendant on his way committed acts of ordinary negligence. . . .

The effect of this language on the issue of gross negligence was not clarified until the case of *Bowman v. Puckett*,[100] which held that friendship is merely an inconclusive circumstance to be considered with other facts and circumstances in determining the existence of gross negligence. This seemed to settle the law. However, the supreme court in *Rogers v. Blake*[101] cast doubt upon the issue when it quoted with approval the language in *Rowan v. Allen* without mentioning *Bowman v. Puckett*. Justice Garwood, in his dissent in the *Rogers* case, expressed the opinion that the majority was tacitly overruling the *Bowman* case and creating a legal presumption against the existence of gross negligence based upon the host-guest friendship.[102] Although no recent decisions have discussed the problem, it is probable that the court in the *Rowan* and *Rogers* cases did not intend to create

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[98] Annot., 28 A.L.R.2d 12, 35 (1953).

[99] 134 Tex. 215, 222, 134 S.W.2d 1022, 1025 (1940).

[100] 144 Tex. 125, 188 S.W.2d 571 (1945).

[101] 150 Tex. 373, 240 S.W.2d 1001 (1951). The court relied upon the Rowan case primarily to bolster its prior conclusion that there was no evidence which would support a finding of gross negligence.

[102] Justice Garwood strongly criticizes the majority opinion and poses the question:

> Do we now hold that where driver and guest are good friends, there is some sort of legal presumption against the driver's conscious indifference? . . . Perhaps we should say that friendship is alone enough to prevent the existence of "conscious indifference," to that extent expressly overrule Bowman v. Puckett, and thereby eliminate practically all cases of liability under the guest statute. Or can we follow Bowman v. Puckett and treat the matter solely as a circumstance for the fact-finder to consider in connection with the main issue of "conscious indifference."

In conclusion the dissenter views the majority's opinion as creating a presumption based on the host-guest friendship. Rogers v. Blake, 150 Tex. 373, 380, 240 S.W.2d 1001, 1005 (1951). Cf. Sims v. Smith, 332 S.W.2d 99 (Tex. Civ. App. 1960), where the court emphasized the host-guest friendship in concluding that the host's indifference was not conscious.

a presumption based upon the host-guest friendship, and that the *Bowman* case remains intact as the prevailing authority on this point.

3. *Momentary Thoughtlessness, Inadvertence, Error of Judgment*

Apparently in an effort to afford a more flexible rationale of the concept of gross negligence, courts have often taken a negative approach to the problem, stating that momentary thoughtlessness, inadvertence, or error of judgment on the part of the host do not constitute "heedlessness or reckless disregard of the rights of others" within the meaning of the statute.[103]

Under this approach courts have consistently held that certain acts or omissions of the host, as, *e.g.*, his conscious failure to halt at a stop sign,[104] kissing while driving,[105] loss of control of the automobile as a result of panic created by the shouts of another occupant,[106] driving in the middle[107] or on the left-hand side[108] of the highway in an unsuccessful effort to avoid a collision, or excessive speed,[109] which merely display momentary thoughtlessness, inadvertence, or error of judgment by the host, are not actionable under the statute.

Reliance upon this approach seems to indicate some judicial dissatisfaction with the positive or "conscious indifference" rationale of gross negligence.[110] This may have been prompted either by the difficulty in delving into the nebulous subjective state of mind of the host or by the harshness of the result which usually follows from the guest's inability to establish the host's improper mental attitude. In any event the trend within the last few years has been to deemphasize the importance of this mental attitude in determining the existence of gross negligence.

4. *Recent Trend Away from the "Conscious Indifference" Test*

The rationale of gross negligence (the "conscious indifference" test), first accepted by our supreme court in *Rowan v. Allen*,[111] and

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[103] See, e.g., Rogers v. Blake, 150 Tex. 373, 240 S.W.2d 1001 (1951); Bowman v. Puckett, 144 Tex. 125, 188 S.W.2d 571 (1945); Wright v. Carey, 169 S.W.2d 749 (Tex. Civ. App. 1943); Mims v. Seltzer, 143 S.W.2d 973 (Tex. Civ. App. 1940) error dism.

[104] Rogers v. Blake, supra note 103.

[105] Wright v. Carey, 169 S.W.2d 749 (Tex. Civ. App. 1943).

[106] Mims v. Seltzer, 143 S.W.2d 973 (Tex. Civ. App. 1940) error dism.

[107] Pfeiffer v. Green, 102 S.W.2d 1077 (Tex. Civ. App. 1937).

[108] Hamilton v. Perry, 109 S.W.2d 1142 (Tex. Civ. App. 1937).

[109] Webb v. Karsten, 308 S.W.2d 114 (Tex. Civ. App. 1957) (the court emphasized the carefree attitude of the occupants of the automobile during the time of the excessive driving); Gill v. Minter, 233 S.W.2d 585 (Tex. Civ. App. 1950) error ref.; Linn v. Nored, 133 S.W.2d 234 (Tex. Civ. App. 1939) error dism.

[110] See Justice Garwood's dissent in Rogers v. Blake, 150 Tex. 373, 379, 240 S.W.2d 1001, 1005 (1951).

[111] 134 Tex. 215, 134 S.W.2d 1022 (1940).

subsequently qualified in *Bowman v. Puckett*,[112] requiring a persistent or continued course of action by the host, was reaffirmed in 1951 by the supreme court in *Rogers v. Blake*,[113] over a strong dissent by Justice Garwood.[114] Justice Garwood was extremely critical of the rationale, stating:

> From Texas Pacific Coal & Oil Co. v. Robertson and especially Bowman v. Puckett it is quite plain that we . . . require proof of an admission of the defendant that he cared not and knew he cared not whether his possible victims should survive or perish. The important thing is not whether he [the driver] actually was thus indifferent. As indicated in the Restatement, Torts, § 500, comment c, there will be many cases of liability for gross negligence, in which there was no immoral attitude on the part of the defendant, such as "conscious indifference" suggests, but merely an excessive confidence in his own judgment or skill, or a habit of not worrying about unpleasant possibilities. . . . The essential question . . . is: What did the defendant do or omit to do? The only sound and practical distinction of gross negligence is therefore one which speaks less in general terms of mental attitude and more in specific terms of actual conduct.[115]

The dissent advocated that Texas accept the American Law Institute's definition of "reckless disregard of safety" as the test of actionable conduct under the statute.[116]

Since Garwood's dissent in the *Rogers* case, the supreme court has been more receptive of his views, thus indicating a trend away from the conventional rationale of gross negligence which stressed the host's mental attitude.

The first case indicative of this trend is *Burt v. Lochausen*,[117] decided in 1952. Here the defendant was driving his automobile after dark at a speed of seventy to seventy-five miles per hour on a highway which he knew well. In passing a van truck on a curve, he found himself in the path of oncoming traffic, and in an effort to avoid collision

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[112] 144 Tex. 125, 188 S.W.2d 571 (1945).

[113] 150 Tex. 373, 240 S.W.2d 1001 (1951).

[114] Id. at 389, 240 S.W.2d at 1005.

[115] Id. at 383, 240 S.W.2d at 1007. Cf. Scott v. Gardner, 137 Tex. 628, 636, 156 S.W.2d 513, 517 (1941), where the court stated:

> . . . [L]iability for heedless and reckless disregard of the rights of others under the guest statute, like liability for negligence, . . . arises out of the act or omission of the defendant and not out of his mental condition.

[116] 150 Tex. 373, 383, 240 S.W.2d 1001, 1008 (1951):

> Reckless Disregard of Safety—The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him.

[117] 151 Tex. 289, 249 S.W.2d 194 (1952).

he cut sharply to the right, which placed his automobile in close proximity with the front of the truck. Immediately thereafter, he lost control of his vehicle, which struck a guard rail and turned over, thus causing the death of his guest. In reversing a judgment non obstante veredicto in favor of the defendant, the supreme court found there was sufficient evidence to support a jury finding of gross negligence, and rendered judgment for the plaintiff.

The *Burt* case is significant because the court apparently based its holding entirely on the defendant's excessive speed,[118] which according to prior authority was in itself insufficient to sustain a finding of gross negligence.[119] Inconsistent also with the finding of gross negligence was defendant's testimony that he did everything he could to control the automobile and prevent the accident. At most the defendant's conduct amounted only to what courts had previously termed momentary thoughtlessness, inadvertence, or error of judgment.

In a later case, *Bernal v. Seitt*,[120] the host, a truck driver who had received numerous safe-driving awards, was traveling at a speed of sixty-five to seventy miles per hour on a two-lane highway which he frequently traversed. The highway had several sharp curves all of which were plainly marked with warning signs giving advisory speeds. Prior to the accident the host had deviated from the highway while attempting to proceed around a curve at excessive speed. At one or more times during the trip he had been warned of his excessive speed and requested by an occupant of the car to surrender control of the vehicle to another, all to no avail. In an attempt to negotiate a curve, plainly marked by a warning sign giving an advisory speed of forty-five miles per hour, at a speed of approximately seventy miles per hour, the host's automobile veered into the path of an approaching truck which was plainly visible, resulting in a head-on collision. The trial court's judgment for the plaintiff, based

[118] Justices Garwood and Calvert dissented on the ground that the facts show no more gross negligence on the part of the defendant than was shown in Rogers v. Blake, 150 Tex. 373, 240 S.W.2d 1001 (1951), and that the only proof which might be argued to show a persistent course of misconduct is the testimony that the defendant was familiar with the road and the curve in question. They conclude that the court, without saying so, is basing its decision largely on the matter of high speed. Justice Garwood suggests that this might solve a number of gross negligence cases: "To say that one who knowingly and without special justification, drives over seventy miles an hour under any circumstances is reckless, and not just careless, would probably seem quite sensible to a great many people." 249 S.W.2d at 202.

[119] Cf. Gill v. Minter, 233 S.W.2d 585 (Tex. Civ. App. 1950) error ref.; Wood v. Orts, 182 S.W.2d 139 (Tex. Civ. App. 1944); Wright v. Carey, 169 S.W.2d 749 (Tex. Civ. App. 1943); Linn v. Nored, 133 S.W.2d 234 (Tex. Civ. App. 1939) error dism.; Hamilton v. Perry, 109 S.W.2d 1142 (Tex. Civ. App. 1937).

[120] ___ Tex. ___, 313 S.W.2d 520 (1958).

upon a jury finding of gross negligence, was reversed by the civil appeals court. The supreme court reversed and rendered judgment for the plaintiff, reasoning that there were several circumstances affirmatively pointing toward the host's conscious indifference to the safety of others, *viz.*, persistence, after repeated warnings, in maintaining an excessive speed over a known, difficult road and at a marked curve after dark with the consequent increase of danger from the lights of an approaching truck.

While the facts of the *Bernal* case would clearly warrant a finding of gross negligence under the traditional "conscious indifference" test, the decision is important because of the language used by the court, speaking through Justice Garwood:

> Obviously every instance of gross negligence includes one of ordinary negligence; and here we have circumstances beyond mere speed, failure to keep control and so on, from which the jury might not unreasonably draw the inference of conscious indifference. *The undoubted skill and experience of the driver cuts both ways. Although he had reason for self-confidence, as distinguished from callousness, he also had reason to appreciate the danger and to know that even the most skillful drivers have accidents.*[121] (Emphasis added.)

Apparently, the court for the first time accepted the views expressed by Justice Garwood in his dissenting opinion in *Rogers v. Blake.*[122]

Following the *Bernal* case came the supreme court decision in *Fancher v. Cadwell,*[123] which represents an almost complete departure from the traditionally accepted rationale of gross negligence. In the first place, the court overruled that part of the *Bowman* case which required a persistent or continued course of action by the host in order to constitute gross negligence.[124] Further, the court, while ad-

[121] 313 S.W.2d at 522.

[122] 150 Tex. 373, 383, 240 S.W.2d 1001, 1008 (1951).

[123] ___ Tex. ___, 314 S.W.2d 820 (1958).

[124] 314 S.W.2d at 825. The court approved the following jury charge:

> By the term, 'Gross Negligence,' as used in this charge, is meant more than momentary thoughtlessness, inadvertance or error of judgment. There must be an entire want of care to raise the belief or presumption that the act or ommission complained of was the result of conscious indifference to the rights, welfare or safety of the persons affected by it.

The court held that the trial court did not err in refusing to submit in its charge the requested definition which was identical to the one given, except the one requested contained the additional phrase "and such act or conduct must be something in the nature of a continued or persistent course of action." The persistency or continuity of the driver's conduct is not the sole criterion for determining gross negligence, for the quality of the act or omission in question is of primary importance. However, compare Sims v. Smith, 332 S.W.2d 99 (Tex. Civ. App. 1960).

Note that the court uses the phrase "*act or omission* complained of." An interesting question arises whether in special issue submission in a gross negligence case the court may charge the jury in such a way as to permit them to consider the totality of the defendant's conduct, e.g., excessive speed, failure to keep a proper lookout, failure to stop at a stop

hering to the "conscious indifference" test of gross negligence, applied the rationale of gross negligence proposed by Justice Garwood in his dissenting opinion in the *Rogers* case.[125]

The defendant in the *Fancher* case, without turing on his lights, had backed his automobile out of a driveway onto the shoulder of a four-lane divided highway. He then proceeded diagonally across the highway into the path of an oncoming automobile which he estimated to be approaching at a speed of seventy-five miles per hour, thinking he could make it across the highway without a collision. In a suit brought by the defendant's guest the trial court rendered judgment non obstante veredicto for the defendant on the ground that his conduct evinced only momentary thoughtlessness, inadvertence, or error of judgment and did not display anything in the nature of a persistent or continued course of action. In reversing and rendering judgment for the plaintiff the supreme court reasoned:

> The facts heretofore pointed out clearly show that the respondent was consciously indifferent to the rights or welfare of the petitioner as well as others. Consequently, he knew or should have known from all such facts and circumstances that the petitioner or someone in the other automobile would probably sustain injuries as a result of such conscious indifference. The fact that he thought he could make it across the highway does not alter our view. . . . *In this case we find the respondent consciously and knowingly driving his automobile from a place of safety directly into the path of an automobile which was approaching at a speed of between seventy and seventy-five miles per hour, at a time and place that would make the collision inevitable.*[126] (Emphasis added.)

Although the court still recognizes the "conscious indifference" test as the true rationale of gross negligence under the statute, the

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sign, failure to apply his brakes, and driving on the left-hand side of the road, in deciding the issue of gross negligence. Probably not, for under our special issue system in ordinary negligence cases, the plaintiff is entitled only to submission of ultimate fact issues (i.e., specific acts or omissions, *each* representing a separate theory or ground of negligence). Panhandle & S. F. Ry. Co. v. Miller, 44 S.W.2d 790 (Tex. Civ. App. 1931); Butler v. Herring, 34 S.W.2d 307 (Tex. Civ. App. 1930); City of Fort Worth v. Ware, 1 S.W.2d 464 (Tex. Civ. App. 1927). See Rio Grande E. P. & S. F. R. Co. v. Guzman, 214 S.W. 628 (Tex. Civ. App. 1919), where the court stated that it was error to submit negligence in broad general terms. Although there are no cases directly in point under the statute, it would seem that the same reasoning applied in ordinary negligence cases would apply to special issue submission in gross negligence cases. The language in the Fancher case gives some support for this analogy, as does the following language in Wood v. Orts, 182 S.W.2d 139, 140 (Tex. Civ. App. 1944):

> Driving at an excessive rate of speed, failure to keep a proper lookout, driving on the left-hand side of the road, failure to apply the brakes and failure to slacken the speed, are all *acts* of ordinary negligence, and do not *in themselves* constitute reckless and heedless disregard of the rights of others. (Emphasis added.)

[125] 150 Tex. 373, 383, 240 S.W.2d 1001, 1008 (1951).

[126] ___ Tex. ___, 314 S.W.2d 820, 824 (1958).

above language is more consistent with the theory of gross negligence or "reckless disregard of safety" suggested by Justice Garwood in his dissent in *Rogers v. Blake*.[127] The two concepts are not analogous. The traditional concept requires proof of the improper mental attitude of the host, while the latter emphasizes the host's conduct in the light of his knowledge or duty to know of an almost inevitable hazard.[128] Of the two rationales of gross negligence the latter represents the more practical approach. It is submitted that, if the court is going to apply the latter rationale in determining the existence of "conscious indifference," express recognition should be given to Justice Garwood's theory. This would dispel much confusion which heretofore has been created by the "conscious indifference" test.

C. *Imputed Gross Negligence*

Under the doctrine of *respondeat superior*, the owner of a vehicle has been held responsible to his guest even though the owner was not present when the accident occurred.[129] In order for him to be held liable in such a case, two factors must be proved, *viz.*, (1) the driver of the vehicle was the owner's employee, acting within the scope of his employment,[130] and (2) the accident was the result of the employee's gross negligence.[131]

In *Bernal v. Seitt*[132] this doctrine was applied to hold the owner of an automobile, who was present but not driving, liable for the gross negligence of the driver who had not been *expressly* employed by the owner. The basis for the court's decision was the *implied* employment of the driver, resulting from the owner's request for him to drive.

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[127] 150 Tex. 373, 383, 240 S.W.2d 1001, 1008 (1951).

[128] Ibid. This view is accepted in 2 Harper & James, Torts § 16.15 (1956), where it is stated:

> If the defendant's conduct, in the light of circumstances he knew or should have known involved a high degree of manifest danger, that should be enough without regard to defendant's mental attitude.

[129] Bullock v. Atlantic Ref. Co., 289 S.W.2d 618 (Tex. Civ. App. 1956) error ref.

[130] See Thomas v. Southern Lumber Co., 181 S.W.2d 111 (Tex. Civ. App. 1944) (The court stated that the guest had the burden of proving the driver was acting within the scope of his employment.).

[131] Bullock v. Atlantic Ref. Co., 289 S.W.2d 618 (Tex. Civ. App. 1956) error ref.

[132] ___ Tex. ___, 313 S.W.2d 520 (1958). The court relied upon the following language in Lusk v. Onstott, 178 S.W.2d 549, 553 (Tex. Civ. App. 1944):

> A principal is usually liable for injuries inflicted upon third persons or their property by the malicious or wanton conduct of his agent when committed within the scope of the agency, but where one seeks to ascribe to the principal acts of malice or wantonness of his agent in order to recover exemplary damages, the evidence must show that the principal had knowledge of, or participated in, the malice or that he ratified and adopted the acts of the agent which constituted the alleged malice.

Since no recovery of exemplary damages was sought, the court declined to answer the question of whether the owner could be held liable for such under the circumstances, but held that compensatory damages could be recovered from the owner under the above rule.

III. Common-law Defenses of the Host

For several years after the enactment of article 6701b, courts were divided on the question of whether the traditional defenses to an ordinary negligence action would defeat the guest's action against his host under the statute. The first case to consider the problem concluded that the guest's contributory negligence would defeat his recovery against the host.[133] Conversely, another court of civil appeals within the same year held that contributory negligence was no defense to the guest's action.[134] Subsequently, dictum in two other cases supported the former view.[135] In 1952 the supreme court in *Schiller v. Rice*[136] expressly recognized the existence of common-law defenses, *viz.*, voluntary exposure to risk, volenti non fit injuria[137] and contributory negligence, to defeat the guest's action under the statute.[138] The basis for the court's holding was prior authority[139] to the effect that "ordinary contributory negligence" is a defense to an action for exemplary damages under the gross negligence provision of the Texas Constitution.

Ordinarily, contributory negligence is a question of fact for the jury to decide.[140] However, where the facts are such that reasonable men may not differ on the question of contributory negligence, the court may determine this issue as a matter of law without referring the question to a jury. Texas courts have recognized two instances

[133] Napier v. Mooneyham, 94 S.W.2d 564, 566 (Tex. Civ. App. 1936) error dism. The court stated: "Where the undisputed evidence shows the existence of a danger and that the plaintiff, or injured party, had knowledge, or was chargeable with knowledge, of the danger, and exercised no care whatever, there is shown a case of contributory negligence as a matter of law."

[134] Aycock v. Green, 94 S.W.2d 894 (Tex. Civ. App. 1936) error dism. The court reasoned that since Texas adopted Connecticut's guest statute, it adopted Connecticut's construction thereof, which is that contributory negligence is no defense, citing Bordonaro v. Senk, 109 Conn. 428, 147 Atl. 136 (1929); Grant v. MacLelland, 109 Conn. 517, 147 Atl. 138 (1929); accord, Scott v. Gardner, 106 S.W.2d 1109 (Tex. Civ. App. 1937) error dism.

[135] McMillian v. Sims, 112 S.W.2d 793 (Tex. Civ. App. 1937) error dism. (The court indicated that both contributory negligence and the doctrine of assumed risk would be available as a defense to the guest's suit.); Crosby v. Strain, 99 S.W.2d 659 (Tex. Civ. App. 1936) error dism.

[136] 151 Tex. 116, 246 S.W.2d 607 (1952).

[137] These doctrines were distinguished from the assumption of risk doctrine which is applicable only to contractual relationships such as master-servant. The *volenti* doctrine has been defined as "that to which a person assents is not esteemed in law an injury." Schiller v. Rice, supra note 136, at 609.

[138] The court stated at page 616 that to hold otherwise would subvert the very purpose of the statue, viz., to give added protection to the host-driver of an automobile and his insurer against suits by nonpaying guests.

[139] Citing Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 70 S.W.2d 397 (1934); McDonald v. International & G. N. Ry., 86 Tex. 1, 22 S.W. 939 (1893).

[140] Walsh v. Dallas Ry. & Terminal Co., 140 Tex. 385, 167 S.W.2d 1018 (1943); Gulf, C. & S. F. Ry. v. Gascamp, 69 Tex. 545, 7 S.W. 227 (1888). For a discussion of this problem see Note, 8 Sw. L.J. 253, 262 (1954).

where contributory negligence follows as a matter of law upon proof of certain facts.

The first of these instances is illustrated by the rule announced by the supreme court in *Schiller v. Rice*.[141]

> One who voluntarily enters a motor vehicle to ride with a driver then known to be intoxicated, or, who, having entered without such knowledge, discovers the intoxicated condition of the driver and fails to leave if fair and reasonable opportunity to leave is afforded, cannot be heard to say that while he knew the driver to be intoxicated he did not know the danger of entering or remaining in the vehicle. The law will charge him with knowledge of the danger [and] . . . with acting in heedless and reckless disregard of his own safety, for no person, exercising even the slightest degree of care for his own safety, would voluntarily enter or voluntarily remain in a motor vehicle being driven by one known to him to be intoxicated. . . . Moreover, one so charged in law with knowledge of the danger, but who nevertheless voluntarily enters or remains in the vehicle, will be held to have voluntarily exposed himself to the risks involved . . . so as to bar a recovery under the test of the volente doctrine. . . . [I]t will be held as a matter of law also that entering or failing to leave the vehicle under the circumstances is a proximate cause of any injuries sustained by reason of the intoxication of the driver.

Thus, once it is determined that the driver was intoxicated and the guest entered the vehicle with knowledge thereof, or, if he had no such knowledge upon entry, but gained such after entry, and refused to leave the vehicle when a fair and reasonable opportunity to leave arose, the guest is barred from recovery against the host-driver as a matter of law. The sole function of the jury in such a case is to find the existence of the ultimate facts (assuming they are in dispute), *e.g.*, intoxication of the host-driver, knowledge of such by the host, voluntary entry into the automobile with such knowledge, or failure to leave the automobile upon gaining such knowledge when a reasonable opportunity to leave arose.

The rule announced in the *Schiller* case was extended to a different fact situation in *Sargent v. Williams*.[142] In this case a boy of thirteen, having borrowed the family car, was taking two girls of the same age on a social trip to a city some sixty miles distant. Ten miles short of their destination, while traveling approximately at the speed of one-hundred-ten miles per hour, the boy lost control of the automobile, causing serious injuries to the girls. The parents of the girls sued individually and as guardians *ad litem* of the girls for damages

[141] 151 Tex. 116, 126, 246 S.W.2d 607, 614 (1952).
[142] 152 Tex. 413, 258 S.W.2d 787 (1953).

resulting from their injuries. The jury found that the girls knew the boy was an incompetent, reckless driver and that he had no driver's license, but that riding with him having this knowledge did not constitute negligence on their part. The jury further found that the girls protested the speed at which the boy was driving and thus were not negligent in that regard. A judgment for the plaintiffs was reversed by the court of civil appeals which, as a matter of law, held the girls guilty of contributory negligence. The supreme court in affirming drew an analogy to *Schiller v. Rice* and stated there was no difference between the risk of a driver who is drunk and that of one who is both reckless and incompetent in his natural state. Proceeding to the logical conclusion of an application of the *Schiller* case, the girls were held negligent in undertaking the trip with the defendant, notwithstanding jury findings to the contrary, and such negligence was held to be the proximate cause of their injuries. The fact that the girls protested the speed at which the boy was driving and had no opportunity to leave the car after beginning the trip was regarded as immaterial since their negligent act was in *entering* rather than *remaining* in the automobile after the boy began to drive recklessly. The court's reasoning was based on the knowledge of the girls as to the boy's "wild" driving habits and on the fact that inherently reckless drivers do not usually become safe drivers even after promising to drive carefully.

With the *Schiller* and the *Sargent* cases providing stare decisis, the next logical step was to hold that a guest who made no protest as to the manner in which the automobile was being driven, and who failed to leave the vehicle upon learning of the reckless habits of the driver after reasonable opportunity to do so arose, was guilty of contributory negligence as a matter of law.[143] The supreme court in *Bernal v. Seitt*[144] was confronted for the first time with this fact situation, but concluded that at most a fact question was raised as to the guest's contributory negligence. The court distinguished the *Schiller* and *Sargent* cases on two grounds, *viz.*, (1) the danger in the *Schiller* and *Sargent* cases was definitely more obvious and serious from the outlook of the passenger, and (2) the guest's opportunity to abandon the party was definitely more favorable in *Schiller* and *Sargent*. Another distinguishing factor which the court did not mention is: in the *Schiller* and *Sargent* cases the guest knew of the danger when he *entered* the automobile and thus was negligent in entering the vehicle, while in the *Bernal* case the guest had no knowledge of the

[143] Webb v. Karsten, 308 S.W.2d 114 (Tex. Civ. App. 1957).
[144] ___ Tex. ___, 313 S.W.2d 520 (1958).

dangerous driving habits of his host when he entered the automobile. The only possible basis for the guest's contributory negligence was his failure to protest the speed of the host and his failure to leave the automobile when a reasonable opportunity arose. The court's conclusion was based on the fact that reasonable men might differ on the issue of whether the guest was afforded a reasonable opportunity to leave the automobile after discovery of the reckless driving habits of the host; therefore, it could not be held as a matter of law that the guest was contributorily negligent.

IV. Conclusion

The substantive conclusions are contained in the body of this Comment, and it is unnecessary to summarize them here. It should be added, however, that many of the problems relating to guest status and gross negligence have not been resolved, since comparatively few cases have been litigated under the Texas statute. This lack of litigation apparently stems from the reluctance of guests, apprehensive of the difficult burden of proof imposed by the statute, to seek recovery against an automobile host. Recent case law developments, however, have enhanced the guest's chances of recovery. Thus, the courts may have paved the way for a future increase in the number of guest-host lawsuits.

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