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# The Unwelcome Involuntary Guest

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# COMMENTS

## THE UNWELCOME INVOLUNTARY GUEST


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"One swallow," the old saw has it, "does not make a summer," and by the same token experience teaches that one decision of the Washington court by no means makes a rule. On this premise it may well be that nothing should be said about *Akins v. Hemphill*;[1] immured within its own unique facts, its implications lost for that very reason to him who runs casting for a "case in point," it might survive simply as a sport, never to work a mutation of its own small cosmos. Yet the seed of change is there; sprouting, it could shift the entire approach of the court to guest statute problems. It is the purpose of this comment to discuss whether such a shift should be made.

The facts of the case are as spare and clean cut as though invented to raise its issue. Joyce Akins, sixteen, was invited by Robbie Hemphill to ride with him in his car; it was not until they had proceeded some


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[1] 33 Wn.(2d) 735, 207 P.(2d) 195 (1949).

way on their journey that she discovered he was intoxicated and driving in an increasingly reckless manner. Frightened, she demanded repeatedly to be let out; he heard, refused, increased his speed, and presently collided with the rear of another car to Joyce's severe and permanent injury A general demurrer to her complaint was sustained and upon her refusal to plead further judgment was entered dismissing her action. This judgment was affirmed *en banc* on appeal.

It is a clear guest statute problem, uncontaminated by any suggestion of contributory negligence or assumption of risk, and, since on demurrer, without the usual controversy over the facts. It offers an unparalleled opportunity for an analysis of the host-guest relationship, a thoughtful probing into the background and purposes of the statute itself. Instead, the majority opinion is content to rest upon authority· " we are committed (to the rule) that when she became a guest of the respondent driver, she became one for the entire journey, and did not terminate the host-guest relationship by her demands."[2] This is a neat and economical solution, but to make it also an acceptable one it is necessary to inquire into the matter of whether the court is in fact committed to the rule it cites, and secondly, even if it is so committed, whether that rule is a sensible one.

As to the first matter, there can scarcely be room for difference of opinion. *Taylor v. Taug*,[3] the case relied upon, may have done a number of different things, but among them it certainly did not "commit" the court to any such rule as that for which it is cited. The rule as there stated is *obiter dictum* in the purest sense: not only is it unnecessary to, and not relied on, in the decision of the case, but it relates to an issue which was never raised by the evidence, the opinion specifically pointing out that "there was a total failure of proof that the driver heard the statement or that he refused any request made by his guest."

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[2] *Id.* at 738.

[3] 17 Wn.(2d) 533, 136 P.(2d) 176 (1943) Plaintiff was a guest in a car driven by defendant, whom she knew had been drinking beer; alarmed at his speed, she requested to be let out; there was a dispute as to whether the request was heard, in any event nothing was done and the driver shortly lost control of the car to plaintiff's injury. Judgment of dismissal was affirmed on the twin grounds of assumption of risk and contributory negligence, predicated on the fact that plaintiff was aware that the driver had taken some beer before starting out. The result may be supported on the basis of three assumptions as to the facts, which the dissenting judges thought rather violent: (1) that the driver was drunk; (2) that the plaintiff knew it; and (3) that the drunkenness caused him to lose control. The court seems to adopt the somewhat remarkable rule that it is contributory negligence to ride with a driver who has been drinking, without regard to what he drank, the amount, the extent to which his abilities to drive were affected, or that the injury might not in fact have been caused by the drinking at all. The case is discussed in 24 WASH. L. REV., 105-107 (1949).

Stripped thus of authority, it must have been the reasoning behind the dictum in the *Taylor* case which led the court in *Akins v. Hemphill* to adopt it without argument. Just how persuasive *is* that reasoning? Here it is, in outline:[4]

1. After quoting the guest statute and remarking that its manifest purpose was to prevent collusive suits in fraud of insurance companies, the court characterizes the host-guest relationship as being gratuitous, and consensual though not contractual.

2. Appellant's argument is stated to the effect that the relationship, and hence the host's immunity under the statute, terminated when appellant asked to be let out of the car, and the driver refused.

3. *Blanchard v. Ogletree*[5] is summarized, apparently in a quotation from appellant's brief, the court there holding that the jury should have been instructed that if they found that the passenger had requested to be let out, and had been refused, then the legal relationship of host-guest had changed, and when the passenger ceased to be the voluntary and gratuitous guest of the defendant, he would thereupon be bound to exercise ordinary care for her safety (The applicable guest statute made liability hinge on gross negligence.)

4. "We are unable to agree with appellant's argument or the reasoning of the cited case."

5. *Parker v. Taylor*[6] is quoted to the effect that a guest assumes the risk of all injuries, except those intentionally caused by the owner or driver, and the opinion then remarks that there was no showing of intentional injury here.

6. The cases in which protest or failure to protest the way in which a car was being driven, on the issue of contributory negligence, are cited, and the court remarks that it had never held, nor intended to hold, that such protests affected the host-guest relationship.

7 "The contention of appellant is answered by the quotation from *Parker v. Taylor, supra,* which we have set out. When appellant

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[4] *Ibid.,* 537-539.

[5] 41 Ga. App. 4, 152 S.E. 116 (1930). Curiously enough, this seems to be the only case, other than the one subject to our discussion, in which the effect of a request-and-refusal on the guest status has been raised.

[6] 196 Wash. 22, 81 P.(2d) 806 (1938) Defendant speeded up his car as he approached a hump in the road, to give his nephews in the back seat a thrill by bouncing them in the air; his sister, riding with them, suffered a broken back. *Held*. No liability under the the guest statute in the absence of a showing that the *injury* was intended, the court unfortunately summing up by a statement to the effect that under the statute, a guest "assumes the risk" of all injuries except those intentionally inflicted by the driver—an expression which may describe the *effect* of the statute, but is certainly not an accurate explanation of its operation.

accepted a ride with respondent, she became a guest for the entire journey To hold otherwise would nullify the plain wording and intent of the host-guest statute."

Aside from numbers 4 and 7, it is apparent that there is not even the semblance of an argument in support of the rule. Number 4 is simply a flat rejection. As to number 7, it is submitted with all due deference that appellant's contention is not even touched, let alone answered, by *Parker v. Taylor*; that case dealt solely with the effect of the statute when the host-guest relationship was established; it did not, and indeed could not, conceivably apply to the problem of whether the relationship existed at all. As to the statement that a contrary holding "would nullify the plain wording and intent" of the statute—the argument seems finally to come down to this—something more must be said.

The statute[7] provides that no person transported by the owner or operator of a motor vehicle as an invited guest or licensee without payment for such transportation shall have a cause of action in case of accident unless such accident shall have been intentional. Surely it is a curious usage to say that the statute is "nullified" by a finding that a passenger is not a guest within its terms, a process which has been going on in numerous cases since the statute was first enacted in 1933. Is it then the "plain wording" which is nullified? It would seem to be just the other way around: the "plain wording" is nullified every time the courts hold a person to be within the statute who should properly be found to be without. Certainly there is nothing in the statute, "plain" or otherwise, to indicate that a person who becomes a guest must continue to be one; indeed, the characterization of the host-guest relationship at the beginning of the opinion as being consensual though not contractual carries with it by necessary implication the requirement that it is terminable at will by either party And so far as nullifying the "intent" of the statute is concerned, he who runs may read in its "plain wording" what that intent is: to prevent a guest or licensee without payment for transportation to recover for anything short of a battery by the driver or owner. This seems somewhat different from an intent to prevent someone who is *not* a guest from recovering for ordinary negligence.

What the court has done in adopting the so-called rule of the *Taylor* case is to breed, by *Akins* out of *Taylor*, a creature surely anomalous

[7] REM. REV. STAT. § 6360-121 [P.P.C. § 295-95]. The paraphrase is sufficiently accurate for the discussion.

and possibly monstrous: the involuntary guest. It is hard to believe that had defendant abducted plaintiff in the first place she would be treated as his guest; it is equally hard to believe there was any less of an abduction when, heedless of her requests, he forced her to accompany him in the car. What would the court have done had plaintiff brought her action on the theory of false imprisonment, her injuries being named as consequential damages;[8] could it then conceivably have found her consent to be irrevocable? What possible reason can there be for this unhappy contretemps?

The answer is to be found in the majority opinions of neither the *Taylor* nor the *Akins* cases, but is very likely disclosed in the concurring opinion in the latter case written by Justice Hill. At long last the court will not merely talk about the public policy back of the guest statute, it will do something about it: it will eliminate the possibility of rampant collusion between passenger and driver in fraud of insurance carriers by keeping from the jury any case in which the host-guest relationship is in issue. True, Justice Hill does not in terms go so far. "To announce any other rule than that adhered to by the majority," he says, "would again make a jury question out of any host-guest case in which the plaintiff would testify, truly or falsely, that he or she had attempted to terminate the host-guest relationship prior to the accident."[9] But can he or the court in reason stop there, with that little case? What possible difference can there be, in fact or theory, between the problem of the inception of the relationship and the problem of its termination, between—to be specific—joint adventure, "payment" under the *Syverson*[10] and *Fuller*[11] rules, and termination by request as in the *Akins* situation?[12] It is as easy to rig one kind of a case as

[8] This was the situation in *Cieplinski* v. *Severn*, 269 Mass. 261, 168 N.E. 722 (1929), noted, 10 B. U. L. REV. 263 Plaintiff, a hitch-hiker, recovered for injuries suffered in attempting to escape from defendant's car after he refused to let her out, on the theory of false imprisonment. *Compare* Griffin v. Clark, 55 Idaho 364, 42 P.(2d) 297 (1935) Plaintiff was induced to *enter* the car against her will by the fact that defendants put her handbag in it; *held* false imprisonment, and her injuries in a subsequent collision recoverable as consequential damages.

[9] *Supra* note 1 at page 739.

[10] Syverson v. Berg, 194 Wash. 86, 77 P.(2d) 382 (1938) the "payment" referred to in the statute must amount to a "business advantage or material consideration" accruing to the host as the result of the transportation.

[11] Fuller v. Tucker, 4 Wn.(2d) 426, 103 P.(2d) 1086 (1940) The formula as to "payment" is elaborated, there must be "(1) an actual or potential benefit in a material or business sense resulting or to result to the owner, and (2) that the transportation be motivated by the expectation of such benefit."

[12] The difficulty of drawing a distinction between the inception problem and the termination problem is illustrated in *Parrish* v. *Ash*, 32 Wn.(2d) 637, 203 P.(2d) 330 (1949) Plaintiff insisted that she was not a guest in defendant's car because she had paid ten cents for the ride, defendant asserted that the payment was not for the ride,

another in this field, and indeed the chances, by actual count, of collusion running rampant are so far thirty-six to one in the inception as opposed to the termination problem; if the court feels the need of a drastic remedy in the one, so much more should it apply it in the other. There can be no half measures; let the court once become entangled in an attempt to separate cases for trial on the basis of credibility of testimony (particularly without having heard it, as in the *Akins* case) and confusion will reign supreme. It is a strong solution, but as Justice Hill points out, "the legislature in effect said that it is better that there be an occasional injustice than a wholesale perversion of justice."[13]

Perhaps a somewhat more even balance could be struck were the court actually to grapple with the fundamentals of the problem. If it is fraudulent collusion against insurers that is to be prevented, why should the court ignore the simple, the obvious, the decisive test: does the defendant *have* insurance? If he does not, there can be no collusion, and the case can go to trial without fear of any perversion of justice, even on the retail level; if he does, throw out the case. If this solution seems ridiculous, it is no more so than that used in the *Akins* case, where the court adopted an unsupportable rule to defeat the plaintiff simply because the defendant *might* have insurance, and the plaintiff or defendant or both *might* lie, and the jury *might* believe them.

Actually there is no need for these alarums and excursions, these curious cases laying down spurious rules. A problem can scarcely be emergent which has plagued us for seventeen years. We are not alone in our difficulties; Washington is merely one of twenty-six states which adopted a guest statute in some form in the years lying roughly between 1929 and 1940, the rash breaking out in its most acute form in the first four years of that period.[14] Presumably all of these were sponsored

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but for two loaves of stale bread which were to be used for chicken feed. It was held to be a jury issue, which the plaintiff won, Justice Hill dissenting without opinion. Whether or not the facts were substantial enough to go to the jury on the "payment" issue may very well be a matter of opinion, but surely the facts are no stronger, the danger of collusion or wholesale perversion of justice no greater, than in the *Akins* case, unless one takes the somewhat remarkable position that the demurrer in the latter case, presumably filed by the hypothetical insurer, itself indicates collusion.

[13] *Supra* note 1 at p. 739.

[14] ALA. CODE 1940 Tit. 36 § 95, POPE'S DIGEST OF ARK. STAT. 1937 §§ 1302-04, CAL. VEHICLE CODE 1935, § 403, COLO. STAT. ANN. 1935, c. 16 § 371, DEL. REV. CODE 1935, § 5713, FLA. STAT. 1941, § 320.59; IDAHO ANN. CODE 1932, §§ 48-901, 48-902, ILL. REV. STAT. 1947, c. 95½ § 58a, BURNS IND. ANN. STAT. 1938, § 47-1021, IOWA CODE 1939, § 5037.10; KAN. GEN. STAT. 1935, § 8-122b; MICH. COMP. LAWS 1929, § 4648, MONT. REV. CODES 1935, §§ 1748.1-1748.4, NEB. REV. STAT. 1935, § 39174, NEV. LAWS 1933, c. 34, N. M. ST. ANN. 1941, § 68-1001, N. D. REV. CODE 1943, § 39:1501, THROCKMORTON'S OHIO CODE 1936, § 6308-6, ORE. COMP. L. ANN. 1940, § 115.1001, S. C. CODE 1932, § 5908, S. D. CODE 1939, § 44.0362, VERNON'S TEXAS

by the insurance lobby, though that is neither here nor there; it is simply an unfortunate truth that no legislation is enacted without the backing of some interested and organized body These statutes vary in their terms, since what one legislature could be induced to adopt would not necessarily be stomached by another; it is perhaps a matter for congratulation to our local lobby that our statute is the most stringent of the lot in requiring intentional injury as the basis for recovery The reasons for, the intent of, the purposes, the public policy behind these statutes—however one chooses to put it—were of course never expressed by their makers, but the courts supplied a variety of them, ranging from the contradictory extremes of striking at the vice of ingratitude to the prevention of collusive suits in fraud of insurers. Our own court listed four purposes which put the statute within the police power of the legislature: to reduce the number of reckless drivers, to encourage careful drivers to invite guests to ride with them, to make highways safer for all concerned, and to reduce (one cannot in conscience say prevent) the number of collusive suits in fraud of insurers.[15] For reasons which are surely obvious, only one item of this listing has survived, does that one, then, justify the result in the *Akins* case, or, to use the words of Justice Hill in his concurring opinion, make the reason for it "crystal clear"?

Putting it somewhat bluntly, the answer is no. To take these cases from the jury gives a protection which the hypothetical insurance carrier does not need, is not entitled to, and which certainly is not given by the statute itself. The very fact that the statute operates to bar only "invited guests and licensees without payment for such transportation" makes it, to borrow a phrase, crystal clear that persons *not* within this category are free to recover for ordinary negligence, and there is nothing to indicate that the ordinary means of classification—that is to say, the jury—should not be used to determine which is which. It is a mistake to think of these cases as being a battle between Good and Evil, between Justice and Injustice; it is even a mistake to think of them as a fight between a helpless and put-upon insurer and a wily perjurer, with an eager and venal jury at hand to leap in and dirk the defendant at the first opportunity with a false verdict. These cases are simply a matter of deciding, by ordinary processes and with blood pressure and temperature perfectly normal, whether the particular

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STAT. 1948, § 6701b, UTAH ANN. CODE 1943, 57-11-7, VT. PUB. LAWS 1933, § 5113, MICHIE'S VA. CODE 1942, § 2154-232, WYO. COMP. STAT. 1945, § 60:1201.

[15] Shea v. Olson, 185 Wash. 143, 155, 53 P.(2d) 615 (1936).

plaintiff, under the particular facts of the particular case, falls within or without the statutory definition. The court has developed various devices to aid in that decision, and, intelligently applied, they can be made to work very well indeed. The *Fuller* rule[16] as to what constitutes "payment" will handle every case involving such a problem when wielded properly by a courageous trial judge; joint adventure seems finally to be under control, if the court will stick with the requirements of the *Poutre*[17] case. And as to the problem with which we started, there is no basis in authority, in the statute, and above all in reason for the involuntary guest of the *Akins* case, and the sooner that synthetic monster is destroyed the better.[18]

[16] *Supra*, note 11.

[17] Poutre v. Saunders, 19 Wn.(2d) 561, 143 P.(2d) 554 (1943) The court imposes the requirement, in the nonbusiness joint adventure, that equal right of control be established as a matter of fact by proving a contract which by its terms specifically provides for the right of control. The case is extensively discussed in 24 WASH. L. REV. 118-121 (1949).

[18] Other discussions of the *Akins* case may be found in 63 HARV. L. REV. 528 (1950), and 3 VAND. L. REV. 149 (1949).