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Richard S. Berger

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NOTES

WILFUL MISCONDUCT AND THE GUEST STATUTE—A STUDY IN HETEROLOGY

Wilful misconduct, the shadowy area lying between the sphere of intentional conduct and that of negligence, constituting "a penumbra of what has been called 'quasi-intent,'"¹ has been a source of much litigation. Although the term "wilful misconduct" appears in several sections of the California codes,² it is most frequently encountered by the appellate courts in connection with section 17158 of the Vehicle Code, the California automobile guest statute. It is the purpose of this note to determine whether the cases dealing with wilful misconduct as used in the guest statute have formulated a definition of that term, and, if so, whether such definition has been uniformly applied.

Two major reasons are given for the existence of guest statutes. They were enacted, first, to discourage collusive suits between a guest and his host occasioned by the existence of liability insurance³ and, second, to prevent the apparent injustice of holding an accommodating host liable to a gratuitous guest for mere negligence.⁴ It was largely through the efforts of insurance company officials and the insurance lobby that the guest statutes came into existence.⁵

The original California guest statute was enacted in 1929⁶ as an amendment to the California Vehicle Act of 1923,⁷ limiting a guest's recovery to those cases in which his injury was proximately caused by the driver's intoxication, gross negligence, or wilful misconduct. An amendment in 1931⁸ eliminated gross negligence, leaving only intoxication and wilful misconduct of the driver as grounds for recovery. This was substantially the same as the present statute, which reads in part:

No person who as a guest accepts a ride in any vehicle has any right of action for civil damages against the driver of the vehicle on account of personal injury to or the death of the guest unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver.⁹

Before wilful misconduct may be satisfactorily discussed, the scope of the term must be limited. Wilful misconduct is neither negligence nor intentional conduct

¹ PROSSER, TORTS 188 (3d ed. 1964).

² E.g., CAL. LABOR CODE §§ 4551, 4553.

³ Emery v. Emery, 45 Cal. 2d 421, 432, 289 P.2d 218, 224-5 (1955).

⁴ "As the use of automobiles became almost universal, the proverbial ingratitude of the dog that bites the hand that feeds him, found a counterpart in the many cases that arose, where generous drivers, having offered rides to guests, later found themselves defendants in cases that often turned upon close questions of negligence. Undoubtedly, the legislature, in adopting this act, reflected a certain natural feeling as to the injustice of such a situation." Crawford v. Foster, 110 Cal. App. 81, 87, 293 Pac. 841, 843 (1930).

⁵ PROSSER, TORTS 190-91 (3d ed. 1964); 1954 INS. L.J. 583, 584.

⁶ Cal. Stat. 1929, ch. 787, § 1, at 1580.

⁷ Cal. Stat. 1923, ch. 266, at 517.

⁸ Cal. Stat. 1931, ch. 812, § 1, at 1693.

⁹ CAL. VEHICLE CODE § 17158.

but rather a combination of both.¹⁰ It has been stated repeatedly that wilful misconduct does not require an intent to injure;¹¹ yet wilful misconduct has been described as "something different from and more than negligence, however gross."¹² The legislative history of the guest statute shows that the legislators believed that negligence was legally distinguishable from wilful misconduct.¹³ An early California automobile case attempted to distinguish the terms as follows:

By "negligence" is meant ordinary negligence By gross negligence is meant exceeding negligence mere inadvertence in a superlative degree.
By "wilful negligence" is meant an intentional failure to perform a manifest duty in reckless disregard of the consequences. Such conduct is not negligence in any proper sense, and the term "wilful negligence" is a misnomer.¹⁴

Thus wilful misconduct is not negligence, since the misconduct is intentional, yet it is not an intentional tort, since the consequences of the act are not intended; rather there is an absolute disregard as to whether or not those consequences will occur.¹⁵

In *Howard v. Howard*,¹⁶ one of the first cases to arise under the guest statute as modified by the 1931 amendment, wilful misconduct was defined as follows: "Wilful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its *possible* result."¹⁷ This definition was adopted by the California Supreme Court in *Meek v. Fowler*¹⁸ and appears in a modified form in the recent case of *Reuther v. Viall*:¹⁹ "Wilful misconduct means intentional wrongful conduct, done either with knowledge that serious injury to the guest probably will result or with a wanton and reckless disregard of the possible results "²⁰

As may be seen from the foregoing definitions, wilful misconduct may be shown in either of two, bipartite, ways. It is either intentional, wrongful conduct done

¹⁰ Elliott, *Degrees of Negligence*, 6 So. CAL. L. REV. 91, 92-5 (1933).

¹¹ Van Fleet v. Heyler, 51 Cal. App. 2d 719, 729-30, 125 P.2d 586, 592 (1942).

¹² Helme v. Great Western Milling Co., 43 Cal. App. 416, 421, 185 Pac. 510, 512 (1919).

¹³ Turner v. Standard Oil Co., 134 Cal. App. 622, 626, 25 P.2d 988, 989-90 (1933); Walker v. Bacon, 132 Cal. App. 625, 626-27, 23 P.2d 520 (1933); Howard v. Howard, 132 Cal. App. 124, 129, 22 P.2d 279, 281 (1933).

¹⁴ Tognazzini v. Freeman, 18 Cal. App. 468, 474, 123 Pac. 540, 543 (1912). A comparable distinction is made in Helme v. Great Western Milling Co., 43 Cal. App. 416, 421, 185 Pac. 510, 512 (1919).

¹⁵ Howard v. Howard, 132 Cal. App. 124, 129, 22 P.2d 279, 281 (1933). An interesting distinction between wilfulness and intentional conduct was made by Judge Mason of Kansas in *Atchison, T. & S.F. Ry. v. Baker*, 79 Kan. 183, 190, 98 Pac. 804, 807 (1908): "The difference is that between him who casts a missile intending that it shall strike another and him who casts it where he has reason to believe that it will strike another, being indifferent whether it does so or not."

¹⁶ *Supra* note 15.

¹⁷ *Id.* at 129, 22 P.2d at 281.

¹⁸ 3 Cal. 2d 420, 426, 45 P.2d 194, 197 (1935).

¹⁹ 62 Cal. 2d 470, 42 Cal. Rptr. 456, 398 P.2d 792 (1965).

²⁰ *Id.* at 475, 42 Cal. Rptr. at 459, 398 P.2d at 795.

with knowledge that serious injury to the guest probably will result, or intentional, wrongful conduct done with a wanton and reckless disregard of the possible results.

Looking at these phrases separately and taking the latter first, let us consider the term "wanton and reckless." The supreme court held in an early case that recklessness was synonymous with wantonness,²¹ and wantonness was defined as follows:

[A]lthough one might not have the *actual* intent to injure, still if there is on his part a reckless indifference or disregard of the natural or probable consequences of his doing or omitting to do an act, and he does or fails to do the act, *conscious*, from his knowledge of existing circumstances and conditions, *that his conduct will likely or probably result in injury*, he is guilty of wanton negligence.²²

In *Kramm v. Stockton Electric R.R.*²³ the court, in discussing wantonness, concluded: "[W]here the conduct of the defendant exhibits reckless indifference to probable consequences, with knowledge of facts and circumstances likely to result in injury, it becomes wanton negligence."²⁴

There is a conspicuous similarity between these definitions of wantonness and the definition of wilful misconduct as intentional, wrongful conduct done with knowledge that serious injury to the guest probably will result. If the two terms are in fact identical, then the concept of wilful misconduct as intentional, wrongful conduct done with a wanton and reckless disregard of the possible results is merely a repetition of the first definition and adds nothing. It has, however, been contended, both in cases²⁵ and commentary thereon,²⁶ that wilful misconduct may be differentiated from wanton misconduct. The case of *Donnelly v. Southern Pacific Co.*²⁷ is most often cited in support of this point:

Negligence is an unintentional tort, a failure to exercise the degree of care in a given situation that a reasonable man under similar circumstances would exercise to protect others from harm. A negligent person has no desire to cause the harm that results from his carelessness and he must be distinguished from a person guilty of willful misconduct, such as assault and battery, who intends to cause harm. Willfulness and negligence are contradictory terms. If conduct is negligent, it is not willful; if it is willful, it is not negligent. It is frequently difficult, however, to characterize conduct as willful or negligent. A tort having some of the characteristics of both negligence and willfulness occurs when a person with no intent to cause harm intentionally performs an act so unreasonable and dangerous that he knows, or should know, it is highly probable that harm

²¹ "To commit an act recklessly is to commit it wantonly" *Esrey v. Southern Pacific Co.*, 103 Cal. 541, 545, 37 Pac. 500, 501 (1894). Prosser, as quoted in *Givens v. Southern Pacific Co.*, 194 Cal. App. 2d 39, 44, 14 Cal. Rptr. 736, 739 (1961), gives "wantonness" and "recklessness" the same definition. PROSSER, TORTS 188 (3d ed. 1964).

²² *Harrington v. Los Angeles Ry.*, 140 Cal. 514, 525, 74 Pac. 15, 19 (1903).

²³ 3 Cal. App. 606, 86 Pac. 738, *rehearing denied*, 3 Cal. App. 616, 86 Pac. 903 (1906).

²⁴ *Id.* at 618, 86 Pac. at 904.

²⁵ *E.g.*, *McDevitt v. Welch*, 202 Cal. App. 2d 816, 825, 21 Cal. Rptr. 251, 257 (1962).

²⁶ *E.g.*, Quint, "Wilful Misconduct," "Wanton and Reckless Misconduct," "Gross Negligence," 40 J.S.B. CAL. 481, 482-83 (1965).

²⁷ 18 Cal. 2d 863, 118 P.2d 465 (1941).

will result. Such a tort has been labeled "willful negligence," "wanton and willful negligence," "wanton and willful misconduct," and even "gross negligence." It is most accurately designated as wanton and reckless misconduct. It involves no intention, as does willful misconduct, to do harm, and it differs from negligence in that it does involve an intention to perform an act that the actor knows, or should know, will very probably cause harm.²⁸

A close analysis of this statement, however, leads to the conclusion that the court in fact makes no distinction between wilful misconduct and wanton misconduct. The opinion uses "willful misconduct" as an equivalent of "intentional tort." The example used by the court to describe "willful misconduct" is assault and battery, the classic example of an intentional tort. Furthermore, the court says that "willful misconduct" involves an intent to do harm. Yet California courts have indicated that "willful misconduct" as used in the guest statute involves no intent to injure.²⁹ It appears that what the *Donnelly* court has done, perhaps injudiciously, is to substitute "willful" for "intentional" and then to postulate a new term, "wanton and reckless," to take the place of "willful" as it is commonly used.³⁰

If "wanton and reckless" is synonymous with "wilful misconduct," why then is the former used to define the latter? The term "wanton and reckless" was introduced into the California definition of wilful misconduct in a quotation from a Massachusetts case³¹ in *Helme v. Great Western Milling Co.*³² Under Massachusetts law, "wanton" and "wilful" are distinguishable. "Wilful" is synonymous with intentional, while "wanton" is used to describe the "grey" area between negligence and intentional conduct. One who acts wantonly "is so utterly indifferent to the rights of others that he acts as if such rights did not exist."³³ Evidently the Cali-

²⁸ *Id.* at 869, 118 P.2d at 468-69.

²⁹ *Reuther v. Viall*, 62 Cal. 2d 470, 475, 42 Cal. Rptr. 456, 459, 398 P.2d 792, 795 (1965); *Hallman v. Richards*, 123 Cal. App. 2d 274, 279, 266 P.2d 812, 814 (1954); *Van Fleet v. Heyler*, 51 Cal. App. 2d 719, 730, 125 P.2d 586, 592 (1942). *But see* *Hagglund v. Nelson*, 23 Cal. App. 2d 348, 353, 73 P.2d 265, 268 (1937) (wilful misconduct may include intentional injury).

³⁰ This confusion between "wilful," "wanton," and "reckless" is not peculiar to the California courts. BERRY, *AUTOMOBILES* § 2.340 (7th ed. 1935) says, "Wantonness, as in the operation of an automobile, is the conscious doing of some act or the omission of some duty with knowledge of existing conditions, and conscious that, from the act or omission, injury will likely result to another." On the other hand, 4 BLASHFIELD, *CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE* 110 (Permanent ed. 1935) states, "Wilful misconduct is the intentional doing of something which should not be done, or the intentional failure to do something which should be done, in the operation of the automobile, under circumstances tending to disclose the operator's knowledge, express or implied, that an injury to the guest will be a probable result of such conduct." If it is assumed that both of these authorities are correct, then it is apparent that "wanton" and "wilful" are synonymous.

The California courts have reached a similar conclusion when dealing with CAL. VEHICLE CODE § 23103, where reckless driving has been held to mean wilful misconduct. *People v. Young*, 20 Cal. 2d 832, 837, 129 P.2d 353, 356 (1942); *Harlow v. Van Dusen*, 137 Cal. App. 2d 547, 550, 290 P.2d 911, 913 (1955).

³¹ *In re Burns*, 218 Mass. 8, 105 N.E. 601 (1914).

³² 43 Cal. App. 416, 421, 185 Pac. 510, 512 (1919).

³³ *Isaacson v. Boston, Wor. & N.Y. St. Ry.*, 278 Mass. 378, 387, 180 N.E. 118, 122 (1932).

forma court in *Helme* adopted the Massachusetts terms, but not the definition of those terms. Rather it applied the California definitions which, as has been shown, are identical. Thus the definition of wilful misconduct becomes "intentional, wrongful conduct, done with knowledge that serious injury to the guest probably will result."

Knowledge

This synthesis of the first clauses of the *Howard* and *Reuther* definitions indicates that wilful misconduct contains two essential elements—"knowledge" and "intent."³⁴ "Knowledge" is a subjective concept. Only the actor is capable of stating what he "knows" at any particular moment. Thus the courts, realizing that a guest, if required to demonstrate that a driver had actual knowledge of the probable consequences of his act, would in effect have to establish at least an intent to do bodily harm,³⁵ held from the earliest cases that knowledge may be either actual or implied from the circumstances.³⁶

This, however, did not change the subjective nature of the term. Implied knowledge was interpreted to mean the knowledge that the actor must have had, rather than the knowledge he should have had.³⁷ The use of implied knowledge did not relieve the inherent difficulty of satisfying the requirement of knowledge. This is exemplified by *McLeod v. Dutton*,³⁸ where the driver, on a foggy night, raced another car, pulled over to the wrong side of the road to pass at a speed greater than seventy miles per hour, swung back to the right, and collided with a third car crossing the highway. The court held there was no wilful misconduct, since it could find no knowledge on the part of the driver, either express or implied, that there was a probability that his guest might be injured.

While the California courts were struggling with a subjective test of knowledge, an objective test was available in the *Restatement of Torts*, where, using "reckless" in place of "wilful misconduct,"³⁹ it was suggested that:

In order that the actor's conduct may be reckless, it is not necessary that he himself recognize it as being extremely dangerous. His inability to realize the danger may be due to his own reckless temperament or to the abnormally favorable results of previous conduct of the same sort. It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct.⁴⁰

³⁴ "[B]oth the element of intent and the element of knowledge of the probability of resulting injury must be present in order to constitute wilful misconduct." *Browne v. Fernandez*, 140 Cal. App. 689, 696, 36 P.2d 122, 125 (1934).

³⁵ *Cope v. Davison*, 30 Cal. 2d 193, 207, 180 P.2d 873, 881 (1947) (dissent).

³⁶ *Helme v. Great Western Milling Co.*, 43 Cal. App. 416, 421, 185 Pac. 510, 512 (1919).

³⁷ This is clearly shown in the earlier cases. *Compare Norton v. Puter*, 138 Cal. App. 253, 32 P.2d 172 (1934) (wilful misconduct found, in that the driver *must* have known probable consequences) *with Howard v. Howard*, 132 Cal. App. 124, 22 P.2d 279 (1933) (fact that driver *should* have known the probable consequences of his act was not sufficient proof of knowledge).

³⁸ 13 Cal. App. 2d 545, 57 P.2d 189 (1936).

³⁹ RESTATEMENT, TORTS § 500, special note (1934).

⁴⁰ *Id.* § 500, comment c. This provision is now RESTATEMENT (SECOND), TORTS § 500, comment c (1965). Furthermore, an early California case, *Harrington v. Los*

The first allusion to the objective "reasonable man" standard of knowledge in California was in 1937,⁴¹ but it was not until 1939 that a California court said: "The probability of injury must have been an apparent consequence to a man of ordinary prudence and intelligence."⁴² Two years later, in *Rawlins v. Lory*,⁴³ the court said, "In determining whether the circumstances are sufficient to disclose implied knowledge of such probability [of injury to a guest], an external standard is implied."⁴⁴ The suggested objective test was discussed and approved in *Van Fleet v. Heyler*⁴⁵ and has been applied in most subsequent wilful misconduct cases.

This objective test does not obviate the distinction between negligence and wilful misconduct.⁴⁶ The knowledge supplied by the reasonable man test for negligence is the knowledge of the peril to be apprehended; that is, the knowledge of the circumstances under which the actor has acted. The knowledge supplied by the reasonable man test for wilful misconduct is, on the other hand, the knowledge of the probability of injury; that is, knowledge of the consequences.⁴⁷

Of course, when proving wilful misconduct, there must also be shown a knowledge of the facts or circumstances. This knowledge must be actual, although it may be implied from circumstantial evidence.⁴⁸ If this were not true, a constructive knowledge of consequences could be predicated upon a fictional knowledge of facts, and every case of negligence could become a case of wilful misconduct. The *Restatement of Torts* illustrates the problem with the following example: Intentionally driving through a known stop sign into an intersection may be wilful misconduct, whereas the same failure to stop may merely be negligence if the driver, although knowing of the existence of the stop sign, inadvertently failed to realize that he was approaching the intersection.⁴⁹ "Wilful or wanton misconduct cannot be found by charging a driver with knowledge of facts which he did not have, but which would have been known to the man of ordinary prudence . . ."⁵⁰

Intent

The element of intent has been interpreted by the courts in a confused manner.⁵¹ Intent, in the context of wilful misconduct, is more than merely a conscious

Angeles Ry., 140 Cal. 514, 523, 74 Pac. 15, 18 (1903), dealing with the alleged wilful misconduct of a streetcar motorman charged with running over a bicyclist, said, in defining the "actual or implied knowledge" requirement of wilful misconduct: "This, however, does not mean that defendant must know that injury is inevitable if he fails to exercise care, and the decisions indicate no such requirement. It is enough that the circumstances of which the defendant has knowledge are such as to convey to the mind of a reasonable man a question as to whether the other party will be able to escape the threatened injury."

⁴¹ *Jones v. Hathaway*, 22 Cal. App. 2d 316, 320-21, 70 P.2d 681, 683 (1937).

⁴² *Stacey v. Hayes*, 31 Cal. App. 2d 422, 426, 88 P.2d 165, 167 (1939).

⁴³ 44 Cal. App. 2d 20, 111 P.2d 973 (1941).

⁴⁴ *Id.* at 24, 111 P.2d at 975.

⁴⁵ 51 Cal. App. 2d 719, 728-30, 125 P.2d 586, 591-92 (1942).

⁴⁶ *Lovett v. Hitchcock*, 192 Cal. App. 2d 806, 813, 14 Cal. Rptr. 117, 121 (1961).

⁴⁷ *Id.* at 812, 14 Cal. Rptr. at 120.

⁴⁸ *Ibid.*

⁴⁹ RESTATEMENT (SECOND), TORTS § 500 comment b (1965).

⁵⁰ *Lovett v. Hitchcock*, 192 Cal. App. 2d 806, 812-13, 14 Cal. Rptr. 117, 121 (1961).

⁵¹ See, e.g., *Wright v. Sellers*, 25 Cal. App. 2d 603, 613, 78 P.2d 209, 215 (1938).

act or failure to act. It is a state of mind evidencing either a willingness that injury occur or an utter disregard of consequences.⁵² Yet, intent, much like "knowledge," is a subjective concept and as such is incapable of accurate determination. Early cases requiring actual proof of the element of intent led to results such as that in *Halter v. Malone*,⁵³ where a driver, seeing a truck emerge from a driveway ahead of him, maintained his speed toward the truck in the belief that he could pass behind it, between it and the curb. The truck, however, started moving back toward the driveway. The car did not slow until it was within thirty feet of the truck, at which time it was too late to avoid a collision. The court, in reversing a judgment entered on a verdict which required a jury finding of wilful misconduct, held that there was a lack of substantial evidence of an intention on the part of the driver to act in "wanton and reckless" disregard of possible results and that the conduct was, at worst, gross negligence.

Community standards, however, are not subjective in nature, and, in the words of Mr. Justice Cardozo: "A jurisprudence that is not constantly brought into relation to objective or external standards, incurs the risk of degenerating into what the Germans call *Die Gefühlsjurisprudenz*, a jurisprudence of mere sentiment or feeling."⁵⁴ Although the courts were loathe to dispense with the necessity of proving subjective intent in wilful misconduct, they realized that such an entirely subjective standard was impractical in that a driver will rarely admit to having driven with the requisite culpable intention.⁵⁵ To remedy this situation the courts indulged in a legal fiction. The actor's conduct was characterized as wilful through a permissive inference that the aggravated misconduct was intended.⁵⁶

The final step in the transmutation of intent from a subjective to an objective concept was reached in two recent cases. In *Pelletti v. Membrilla*⁵⁷ the court states: "[W]hen conduct falls sufficiently below the acceptable norm to become grossly deficient, we characterize it as imbued with a bad intent which we call wilful misconduct. We attribute a malicious state of mind to the actor irrespective of any actual specific intent."⁵⁸ Similarly, in *Chappell v. Palmer*⁵⁹ "[T]he pragmatic test that has evolved in wilful misconduct cases is whether a reasonable man under the same or similar circumstances as those faced by the actor would be aware of the dangerous character of his conduct."⁶⁰ Although these two statements appear,

In the superior court trial of *Hastings v. Serleto*, 61 Cal. App. 2d 672, 143 P.2d 956 (1943), the trial judge referred to *California Jury Instructions*' standard instruction on wilful misconduct as impossible, improbable and confusing. Brief for Appellant, p. 29, Record, vol. 1778, p. 222, San Francisco County Law Library, *Hastings v. Serleto*, *supra*.

⁵² *Weber v. Pinyan*, 9 Cal. 2d 226, 233-34, 70 P.2d 183, 187 (1937).

⁵³ 11 Cal. App. 2d 79, 53 P.2d 374 (1935).

⁵⁴ CARDOZO, *The Nature of the Judicial Process*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 151 (Hall ed. 1947).

⁵⁵ *Hoffman v. Slocum*, 219 Cal. App. 2d 100, 102-03, 32 Cal. Rptr. 635, 637 (1963); *Levizon v. Harrison*, 198 Cal. App. 2d 274, 281, 18 Cal. Rptr. 284, 288 (1961); *Hastings v. Serleto*, 61 Cal. App. 2d 672, 680-81, 143 P.2d 956, 960 (1943).

⁵⁶ *Van Fleet v. Heyler*, 51 Cal. App. 2d 719, 125 P.2d 586 (1942). *Pelletti v. Membrilla*, 234 Cal. App. 2d 606, 610, 44 Cal. Rptr. 588, 590 (1965), has interpreted this case as containing an assumption that the wilful misconduct was intended.

⁵⁷ *Supra* note 56.

⁵⁸ *Id.* at 611, 44 Cal. Rptr. at 591.

⁵⁹ 236 A.C.A. 35, 45 Cal. Rptr. 686 (1965).

⁶⁰ *Id.* at 38, 45 Cal. Rptr. at 688.

at first, to eliminate the element of intent from wilful misconduct, such is not the case. In *Pelletti*, following the above statement, the court says:

But if specific proof of the wanton state of mind of the actor is also produced, then a dual case has been made for the plaintiff, who has the advantage of the presumption which follows from aggravated misconduct as well as specific evidence from which the presence of malicious intent may be inferred.⁶¹

Certainly, here, the court is not denying the existence of intent in wilful misconduct. The intent, however, need not be proved by the plaintiff. The problem presented is whether the presumption of the existence of "a malicious state of mind" is a conclusive or rebuttable presumption. The presumption indulged in here is similar in form to that in section 1963(2) of the Code of Civil Procedure, which presumes an unlawful intent from the commission of an unlawful act.⁶² This is a rebuttable presumption, but it would seem that in the *Pelletti* definition it should be interpreted as conclusive. There can be no willingness to injure, nor can there be disregard of probable consequences, without a prior knowledge of the consequences. Conversely, it seems logical that an act done with knowledge of the probability of ensuing injury should conclusively evince such willingness or disregard as is termed intent with respect to wilful misconduct.

In the *Chappell v. Palmer* definition there is no mention of the element of intent, but the entire definition deals with the problem of intent, for it was rendered in response to the court's own question: "[W]hat test should be applied to determine the sufficiency of circumstantial evidence of intent?"⁶³ Since the existence of wilful misconduct is a question of fact,⁶⁴ it logically follows that any element of wilful misconduct, such as intent, is a matter of fact. What this means, according to *Chappell*, is that if there is any substantial evidence in support of the jury's finding, the verdict will not be overturned by an appellate court. "Substantial evidence" in this context is evidence which a fair and reasonable mind would accept as adequate to support a conclusion. Thus the reasonable man standard may also be applied in determining the existence of an intent, which is still considered to be an integral part of wilful misconduct.

Validity of Definitions

The definitions of wilful misconduct set out by the recent cases are unquestionably the clearest and most workable propounded by the courts, but may be of questionable validity when considered in context with the California automobile guest statute. Guest statutes are in derogation of the common law right of recovery for a loss caused by another's negligence,⁶⁵ and thus the courts have required that they be strictly construed.⁶⁶ However, in opposition to this and in accord with the

⁶¹ 234 Cal. App. 2d at 611, 44 Cal. Rptr. at 591.

⁶² This section of the code has recently been repealed, and will have no effect after January 1, 1967. Cal. Stat. 1965, ch. 299, § 2, at 1298 and § 110, at 1363. Reasons for the repeal are given in 7 REPORTS, RECOMMENDATIONS, AND STUDIES OF THE CALIFORNIA LAW REVISION COMMISSION 341 (1965).

⁶³ *Chappell v. Palmer*, 236 A.C.A. 35, 37, 45 Cal. Rptr. 686, 688 (1965).

⁶⁴ See, e.g., *Levizon v. Harrison*, 198 Cal. App. 2d 274, 279-80, 18 Cal. Rptr. 284, 287 (1961).

⁶⁵ *Prager v. Isreal*, 15 Cal. 2d 89, 93, 98 P.2d 729, 731 (1940).

⁶⁶ *Prager v. Isreal*, 15 Cal. 2d 89, 93, 98 P.2d 729, 731 (1940); *Rocha v. Hulen*, 6

legislative intent of discouraging collusive suits between a guest and his host, most earlier decisions, instead of construing the statute strictly, construed the terms of the statute, especially "wilful misconduct," strictly. Due to this narrow interpretation of "wilful misconduct" the guest statute was actually applied broadly, contrary to the judicial policy of attempting to preserve common law rights of recovery wherever possible. The recent cases of *Pelletti*,⁶⁷ *Chappell*⁶⁸ and *Reuther*,⁶⁹ however, cannot be said to construe "wilful misconduct" strictly.⁷⁰ Dean Prosser says that when the intent element of wilful misconduct is determined by an objective standard, as it was in the abovementioned cases,

"wilful," "wanton" or "reckless" conduct tends to take on the aspect of highly unreasonable conduct, or an extreme departure from ordinary care, in a situation where a high degree of danger is apparent. As a result there is often no clear distinction at all between such conduct and "gross" negligence, and the two have tended to merge and take on the same meaning, of an aggravated form of negligence, differing in quality rather than in degree from ordinary lack of care.⁷¹

The California courts have not gone so far as to equate wilful misconduct and gross negligence. There is still a difference, in that to find wilful misconduct there must be demonstrated a knowledge of the probable consequences in addition to a knowledge of the facts and circumstances, while in negligence there need be knowledge only of the latter. The California courts have "elasticized" the definition of wilful misconduct in order to encompass borderline guest statute cases. The objectivity of the definition, insofar as it no longer requires proof of actual knowledge or intent, makes it easier for a plaintiff to get his case to the jury. The broad and indefinite terms of the newer definition and the broadened interpretations of the older definitions of wilful misconduct give the court more freedom and admit of the sustaining of verdicts which would be set aside under the old, strict definition.⁷² It appears that wilful misconduct has become a sort of existentialist concept, taking on that meaning demanded by public policy and expressed through judicial interpretation.

Again adopting the words of Mr. Justice Cardozo:

[T]he tendency today is in the direction of a growing liberalism. The new spirit has made its way gradually; and its progress, unnoticed step by step, is visible in retrospect as we look back upon the distance traversed. The old forms remain, but they are filled with a new content. We are getting away from the conception of a lawsuit either as a mathematical problem or as a sportsman's game. We

Cal. App. 2d 245, 254, 44 P.2d 478, 483 (1935).

⁶⁷ 234 Cal. App. 2d 606, 44 Cal. Rptr. 588 (1965).

⁶⁸ 236 A.C.A. 35, 45 Cal. Rptr. 686 (1965).

⁶⁹ 62 Cal. 2d 470, 42 Cal. Rptr. 456, 398 P.2d 792 (1965).

⁷⁰ Compare *Reuther v. Viall*, *supra* note 69 (wilful misconduct) with *Porter v. Hofman*, 12 Cal. 2d 445, 85 P.2d 447 (1938) (no wilful misconduct).

⁷¹ PROSSER, TORTS 189 (3d ed. 1964).

⁷² Compare *Reuther v. Viall*, 62 Cal. 2d 470, 42 Cal. Rptr. 456, 398 P.2d 792 (1965) (wilful misconduct in taking eyes off road) with *Bartlett v. Jackson*, 13 Cal. App. 2d 435, 56 P.2d 1298 (1936) and *Porter v. Hofman*, 12 Cal. 2d 445, 85 P.2d 447 (1938) (no wilful misconduct). Compare *Hill v. Perry*, 224 Cal. App. 2d 290, 36 Cal. Rptr. 530 (1964) (wilful misconduct; faulty brakes caused car to swerve into oncoming traffic) with *Spencer v. Scott*, 39 Cal. App. 2d 109, 102 P.2d 554 (1940) (no wilful misconduct).