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Article 7

# Torts - Guest Statute - the "Minors of Tender Years" Exception now Court-Made Law in Illinois

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# TORTS—GUEST STATUTE—THE "MINORS OF TENDER YEARS" EXCEPTION NOW COURT-MADE LAW IN ILLINOIS

On December 26, 1959, Holly Ann Rosenbaum, a minor four years of age, had her finger crushed by the rear door of Donna Raskin's automobile as Holly was attempting to enter the back seat. Holly entered the automobile at the invitation of the defendant, but without the express permission of her parents. A suit was subsequently filed, based solely on a theory of ordinary negligence. Plaintiff contended that the guest statute[1] was not applicable to minors of tender years and the jury agreed, returning a verdict in Holly's favor.

On appeal, the court reversed the jury's verdict, and remanded the case for new trial. That court held that a minor under the age of seven may be a "guest" within the guest statute, the result hinging on actual or implied parental consent.[2] Thereafter, plaintiff was granted leave to appeal to the Supreme Court of Illinois, where her case was consolidated with *Ragon v. Ragon*.[3]

Charles Ragon, three years of age, died in an automobile collision negligently caused by Ross Ragon and Melvin Brock. Subsequently, an action was brought by Alfred Ragon, Charles' administrator, alleging, *inter alia*, a separate count of negligence against each defendant. The negligence count against defendant Ragon was dismissed by the circuit court, which held that plaintiff-guest would have to allege and prove wanton and wilful misconduct[4] against his host. Plaintiff appealed directly to the

1. ILL. REV. STAT. ch. 95½, § 9-201 (1969). The Illinois guest statute provides as follows: "*No person* riding in or upon a motor vehicle or motorcycle as a guest *without payment* for such ride, or while engaged in a joint enterprise with the owner or driver of such motor vehicle or motorcycle, nor his personal representative in the event of the death of such guest, *shall have a cause of action* for damages against the driver or operator of such motor vehicle or motorcycle, or its owner or his employee or agent for injury, death or loss, in case of accident, *unless* such accident shall have been *caused by the willful and wanton misconduct* of the driver or operator of such motor vehicle or motorcycle or its owner or his employee or agent and unless such willful and wanton misconduct contributed to the injury, death or loss for which the action is brought." (Emphasis added).

2. Rosenbaum v. Raskin, 103 Ill. App. 2d 469, 243 N.E.2d 616 (1969).

3. Rosenbaum v. Raskin and Ragon v. Ragon, 45 Ill. 2d 25, 257 N.E.2d 100 (1970); heretofore referred to as the *Rosenbaum* case, and the *Ragon* case.

4. *Supra* note 1.

supreme court; there, his case was consolidated for opinion with *Rosenbaum*.[5]

In this case of first impression, the Supreme Court of Illinois reversed both decisions, holding that the Illinois guest statute was not applicable to minors of tender years.[6] *Rosenbaum v. Raskin* and *Ragon v. Ragon*, 45 Ill. 2d 25, 257 N.E. 2d 100 (1970).

This decision is significant because the Illinois Supreme Court has, for the first time, carved out of the guest statute an exception for minors of tender years—an exception not expressly warranted by the terms of the statute itself. This note will trace the origin, construction and application of guest statutes, as well as the court-formulated exceptions which have resulted in the preferred status of certain classes. Finally, the current trend of the courts in interpreting and applying their guest statutes will be discussed, as well as any possible future applications.

Prior to the enactment of a "guest statute," the courts employed the common law rule which drew no distinction between the "guest" and a "passenger." The driver or owner of a motor vehicle owed the mere duty to refrain from recklessly exposing the guest or passenger to any hazards or dangers that might cause injury.[7] Under the common rule, no distinction was made between an adult and a minor with respect to the degree of care required of the driver or owner of an automobile.[8] The distinction between adults and minors became meaningful only after guest statutes had been enacted.

The 1920's and 1930's formed the historical setting in which the first

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5. *Supra* note 3, at 25, 257 N.E.2d at 101. "The issues being basically identical, the causes are consolidated for opinion."

6. *Supra* note 3, at 33, 257 N.E.2d at 104. This decision has already been followed by the Appellate Court in Illinois, in the case of Cox v. Nicholes, 122 Ill. App. 2d 252, 258 N.E.2d 394 (1970). This was an action brought by the administrator of the estate of a six-year-old child against his mother's estate. The deaths resulted when a train struck the car that mother was driving. The lower court dismissed the case, finding only ordinary negligence, and stating that the child was a guest within the meaning of the statute and, therefore, could only collect upon the showing of wanton and willful misconduct. This appellate court followed the decision set down in the *Rosenbaum* case and stated, "the guest statute was not intended to apply to a child of tender years."

7. Galloway v. Perkins, 198 Ala. 658, 73 So. 956 (1916); Sheean v. Foster, 80 Cal. App. 56, 251 P. 235 (1926); Munson v. Rupker, 96 Ind. App. 15, 148 N.E. 169 (1925); Redfern v. Redfern, 212 Iowa 454, 236 N.W. 399 (1931), which applied Illinois law; Trosper v. Lawson, 248 Ky. 341, 58 S.W.2d 632 (1933); Garrity v. Mangan, 232 Iowa 1188, 6 N.W.2d 292 (1942).

8. *See* Eisenhut v. Eisenhut, 212 Wis. 467, 250 N.W. 441 (1933), which dealt with a five-year-old girl; Bohren v. Lautenschlager, 239 Wis. 400, 1 N.W.2d 792 (1942).

guest statutes were enacted.[9] These statutes were centered about the distinction between a *passenger for hire* and a *gratuitous passenger*, commonly referred to as a "guest." The degree of care required of the driver or owner would vary, and be ultimately determined by, the status of his passenger. To a passenger for hire, *e.g.*, a passenger in a taxi cab, the driver or owner would be liable for damages caused by his negligence. Proof of more than ordinary negligence would be required to hold the driver or owner liable to a guest. Breach of this higher degree of care was usually referred to as "wanton and wilful misconduct," "gross negligence," or a "total and reckless disregard" of the rights of the passengers.[10]

Even without a guest statute, some states have nevertheless upheld the theory requiring a guest to prove wanton and wilful misconduct in order to recover from his host.[11] For example, in *Massaletti v. Fitzroy*,[12] the Supreme Judicial Court of Massachusetts drew a distinction between a guest and a passenger stating:

> Justice requires that one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same

9. During the 1920's and 1930's twenty-seven states passed the now called, "guest statute," which limited the liability of a host to his guest. The limitation was that the host no longer would be liable to a guest for ordinary negligence. Each statute sets out its own criteria or requirement which a guest must allege prior to recovery from his host. *See Appendix* which was taken from Comment, *Judicial Nullification of Guest Statutes*, 41 So. CAL. L. REV. 854, 899-901 (1968).

10. The first "guest statutes" were put into effect in 1927 by Connecticut, Iowa, and Oregon. *See Appendix* for the remaining states. Also *see generally*, Note: 41 IOWA L. REV. 648 (1956).

11. Massachusetts and Georgia are two states that permit the same conclusion as that of a "guest statute" by case law rather than by the passage of a "guest statute." *See Georgia*: Hopkins v. Sipe, 58 Ga. App. 511, 199 S.E. 246 (1938); Epps v. Parrish, 26 Ga. App. 399, 106 S.E. 297 (1921); *Massachusetts*: Palden v. Crook, 342 Mass. 173, 172 N.E.2d 686 (1961); Cook v. Cole, 273 Mass. 557, 174 N.E. 271 (1931); Jacobson v. Stone, 277 Mass. 323, 178 N.E. 636 (1931); Baker v. Hurwitch, 265 Mass. 360, 164 N.E. 87 (1928); Marcienowski v. Sanders, 252 Mass. 65, 147 N.E. 275 (1925); Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917); West v. Poor, 196 Mass. 183, 81 N.E. 960 (1907). In Massachusetts when dealing with minors, the courts found that minors were not exempted from alleging and proving "gross negligence" prior to recovery as a guest against a host. *See* Marshall v. Carter, 301 Mass. 372, 17 N.E.2d 205 (1938); Balian v. Ogassin, 277 Mass. 525, 179 N.E. 232 (1931). *Washington*: Washington, prior to the passage of a "guest statute" still followed the theory of a "guest statute." *See* Heiman v. Kloizner, 139 Wash. 655, 247 P. 1034 (1926); Saxe v. Terry, 140 Wash. 503, 250 P. 27 (1926). The above cases were prior to the enactment of a "guest statute." In Upchurch v. Hubbard, 29 Wash. 2d 559, 188 P.2d 82 (1947), the court expresses the reasoning of the legislature in passing a guest statute, "the purpose of that statute was to prevent collusive action between host and guest, committed with the intent to defraud casualty insurance companies. . . ." *Id.* at 566-67, 188 P.2d at 86.

12. *Supra* note 11.

undertaking for pay. There is an inherent difficulty in stating the difference between the measure of duty which is assumed in the two cases [between guest and passenger]. But justice requires that to make out liability in case of gratuitous undertaking the plaintiff ought to prove a materially greater degree of negligence than he has to prove where the defendant is to be paid for doing the same thing.[13]

Thus, it would appear that justice requires different treatment for paying and non-paying passengers.

Although the *Massaletti* court found this interpretation of justice to be persuasive, the Illinois Supreme Court in the case of *Clark v. Storchak*[14] relied exclusively on the legislative purpose behind the guest statute[15] in reaching its decision, although the result was language strikingly similar to *Massaletti*:

That there should be a difference between the liability of a person who, out of the generosity of his heart, renders gratuitously some service to his fellow traveler over those rendering such service for hire and barter, can hardly be questioned. Those who are charitably inclined should not be restrained by fear of the consequences of their own charitable act and the recipients should not be permitted to gain by the generosity of their host. . . . [G]enerous drivers might find themselves involved in litigation that often turned upon questions of ordinary negligence. It was evidently the intention of the legislature not only to correct this abuse but to promote the best interests of the people in their relation to each other. . . .[16]

This reasoning has similarly been expressed in a number of Illinois decisions, both before and after *Clark*.[17]

Cases like *Clark* and *Massaletti* underline one primary reason for the enactment of guest statutes in derogation of the common law—the hospitality of the gratuitous host.[18] There is, however, a further reason for guest statutes—the possibility of collusive lawsuits between driver and guest.[19]

Both rationales are stated in *Stephan v. Proctor*,[20] a California case in which the appellate court declared:

13. Massaletti v. Fitzroy, *supra* note 11 at 510, 118 N.E. at 177.

14. Clarke v. Storchak, 384 Ill. 564, 52 N.E.2d 229 (1943), *cert. den.* 322 U.S. 713 (1944).

15. *Supra* note 1.

16. *Supra* note 14, at 579, 52 N.E.2d at 237.

17. *See* Miller v. Miller, 395 Ill. 273, 69 N.E.2d 878 (1946); Connett v. Winget, 374 Ill. 531, 30 N.E.2d 1 (1940).

18. *Supra* note 3, at 102. "[T]his court has so applied the Illinois guest statute, ever mindful, however, that, being in derogation of the common law, it is to be strictly construed." *See also* Rocha v. Hulen, 6 Cal. App. 2d 245, 44 P.2d 478 (1935); Hunter v. Baldwin, 268 Mich. 106, 255 N.W. 431 (1934); Ille v. Lamphere, 60 Ohio App. 4, 18 N.E.2d 989 (1938).

19. For a general discussion of both reasons and a history see: Comment, 19 CHI.-KENT L. REV. 281 (1941); Comment 41 IOWA L. REV. 648 (1956); Comment, 41 So. CAL. L. REV. 884 (1968).

20. 235 Cal. App. 2d 228, 45 Cal. Rptr. 124 (1965).

The primary policy underlying the guest statute is to prevent recovery for ordinary negligence by a guest who has accepted the hospitality of the owner. A secondary policy, of course, is to prevent collusive suits between friends where the driver admits negligence in order to shift the burden to his insurance carrier.[21]

These reasons have led to the enactment of guest statutes in a total of twenty-seven states; at present, there are two states which have guest statutes in theory only; the remainder, a substantial minority, retain the common law rule.[22]

Mere passage of guest statutes was not the end-all of the problem, as they were soon attacked on due process constitutional grounds. For example, the 1927 Oregon guest statute was attacked on the grounds that the statute allowed *no* cause of action by a guest against his host. Accordingly, in the case of *Stewart v. Houk*,[23] this statute was struck down. Thereafter, in 1929, Oregon passed its current guest statute.[24] This statute was likewise challenged in the case of *Perozzi v. Ganiere*;[25] this time, however, it was upheld as being a valid exercise of the state's police power. Kansas[26] and Connecticut[27] have also had their guest statutes

21. *Id.* at 230, 45 Cal. Rptr. at 125. This case has combined both reasons in its evaluation. Kitchens v. Duffield, 83 Ohio App. 41, 76 N.E.2d 101 (1947) based its reasoning on the collusion argument. In Rocha v. Hulen, *supra* note 18, at 254, 44 P.2d at 482, the court expressed its thoughts on the legislative purpose for enacting a "guest statute:" "The legislature, at the time of enacting the section referred to [guest statute], evidently had in mind the redress of an obvious wrong, to wit, the readiness with which both driver and guest would pool issues to exact tribute from an insurance company." So protecting the insurance companies who are the real defendants, from collusion, because it is easier for the driver to admit to ordinary negligence than it is for him to admit to "gross negligence," "wanton and willful misconduct," or "drunkeness," which might carry with them other penalties, revocation of drivers license or possible criminal charges. As to the question of hospitality, many courts have used it as its basic reasoning. Shelby v. Hagood, 182 Call. App. 2d 760, 6 Cal. Rptr. 422 (1960); Ray v. Hanisch, 147 Cal. App. 2d 742, 306 P.2d 30 (1957); Martinez v. Southern Pac. Ry., 45 Cal. 2d 244, 288 P.2d 868 (1955); Kudrna v. Adamski, 188 Ore. 396, 216 P.2d 262 (1950); and in Crawford v. Foster, 110 Cal. App. 81, 293 P. 841, 843 (1930), the court stated its reason as being compared to the old saying, don't bite the hand that feeds you.

22. *See Appendix* for the 27 states; for the two states who haven't passed a "guest statute" but still require the same degree of care *see supra* note 11.

23. 127 Ore. 589, 271 P. 998 (1928).

24. ORE. REV. STAT. tit. 3, § 30.115 (1960).

25. 149 Ore. 330, 40 P.2d 1009 (1935). The police power argument was also expressed in Shea v. Olson, 185 Wash. 143, 53 P.2d 615 (1936) where the court stated: "[I]n the exercise of such power, may prescribe laws tending to promote the health, peace, morals, education, good order and welfare of the people . . . [it] is an attribute of sovereignty, an essential element of the power to govern . . . ." *Id.* at 153, 53 P.2d at 619.

26. Wright's Estate v. Pizel, 168 Kan. 493, 214 P.2d 328 (1950).

27. Silver v. Silver, 108 Conn. 371, 143 A. 240 (1928).

challenged, but, as in Oregon, the statutes were upheld as being a valid exercise of police power.

Upon recognizing the constitutionality of guest statutes, the problems now facing the courts were those of application and interpretation. The first of these problems was the genesis of the host-guest relationship itself, but courts soon began to utilize two basic criteria to aid them in their solution.

These two criteria, which of necessity must be implemented simultaneously, are: (1) that the guest-host relationship is based upon the *hospitality* of the host, and not payment; and (2) that this relationship must be voluntarily *accepted* by the passenger. Both criteria were employed in the *Rosenbaum* decision:[28] "The term guest, as used in the statute, contemplates some sort of *extension of hospitality* and an *acceptance* thereof as a requisite of that status."[29]

In the case of *Connett v. Winget*,[30] another Illinois Supreme Court decision, the court elucidated further on the application of the criteria:

> [I]f it confers only a benefit incident to hospitality, companionship, or the like, the passenger is a guest, but if the carriage tends to promote mutual interests of both . . . the passenger is not within the meaning of such enactments.[31]

Acceptance, therefore, is an important element in the establishment of a guest-host relationship. Some states, California for example,[32] expressly include the word "accept" in their guest statute. Other states, by judicial interpretation, have incorporated the word "accept" as part of their statute.[33] The prior criteria may be expressed in different ways. The Louisiana Appellate Court in the case of *Chanson v. Morgan's Louisiana T.R. & S.S. Co.*[34] defined a guest as: "[a] person received and enter-

28. *Supra* note 3.

29. *Supra* note 3, at 30, 257 N.E.2d at 102 (Emphasis added).

30. Connett v. Winget, *supra* note 17; followed in, Boyd v. Mueller, 320 Ill. App. 303, 50 N.E.2d 847 (1943).

31. Connett v. Winget, *supra* note 17, at 534, 30 N.E.2d at 3.

32. *See* CAL. VEH. CODE § 17158 (West 1960) which states: "No person who as a guest *accepts* a ride . . . has any right of action for civil damages against the driver . . . on account of personal injury . . . unless . . . such injury . . . proximately resulted from the intoxication or willful misconduct of said driver." (Emphasis added).

33. For cases in which the courts supply "acceptance" by interpretation: Fuller v. Thrun, 109 Ind. App. 407, 31 N.E.2d 670 (1941); Bailey v. Neale, 63 Ohio App. 62, 25 N.E.2d 310 (1939); Kudrna v. Adamski, *supra* note 21; *see also* Rocha v. Hulen, *supra* note 18, the court also questioned whether a five-year-old child has capacity to accept in any legal sense. This issue basically is what was decided in the *Rosenbaum* case.

34. 18 La. App. 602, 136 So. 647 (1931).

tained in the automobile of another."[35] These different definitions have created some confusion in the courts as to who is a guest.

The first criterion has had its share of interpretational problems. There is, of course, no problem when an individual is paying for a ride in a common carrier, *e.g.*, a bus or a taxicab. Courts can readily determine that this individual is a passenger, and not a guest. Courts do, however, have difficulty when certain methods of "payment" are used by the rider in a vehicle.[36] When dealing with carpools, the California court in *Huebatter v. Follett*,[37] held that, as a matter of law, a person who is riding under a share-a-ride plan is a paying passenger, and not a guest. Three years after this decision, the California Appellate Court, in *Lyon v. Long Beach*[38] refined the prior reasoning. The court decided that a rider's status in a carpool is dependent upon whether the accident occurred during a trip to or from work or on a subordinate trip.

Other problem areas are ventures wherein people share the expenses of the trip. For instance, in California[39] and several other states[40] courts have held that sharing the cost of gas and oil on a vacation was nothing more than a social amenity and was, therefore, not actual compensation; as such, the rider was a guest. Washington courts have ruled that when a trip is purely for a social purpose, the shared expense would not elevate one to the status of a passenger.[41] But if it were for a non-social purpose, then the shared expense might be considered compensation, making the rider a passenger.

Who then bears the burden of proving the guest-host relationship *vel*

35. *Id.* at —, 136 So. at 649. In Weber, *Guest Statutes*, 11 CIN. L. REV. 24, 44 (1937), the author suggests that, "one, to be a guest, must not only be received and entertained by another but must also have sufficient mental age to be able to accept that hospitality with a realization that he is receiving a favor. . . ." This theory was carried even farther by Richards, *The Washington Guest Statute*, 15 WASH. L. REV. 87 (1940). He contends that the capacity must be so that th person who is going to assume the status of a guest realizes, appreciates and assumes the risks involved in being a "guest" within the meaning of the statute.

36. The Illinois "guest statute," ILL. REV. STAT. ch. 95½ § 9-201 (1969) states: "[A]s a guest without payment." So determining whether a payment is enough to take one out of the "guest statute" is a very important consideration.

37. 27 Cal. 2d 765, 167 P.2d 193 (1946).

38. 92 Cal. App. 2d 472, 207 P.2d 73 (1949).

39. *See* McCann v. Hoffman, 9 Cal. 2d 279, 70 P.2d 909 (1937).

40. Wagnon v. Patterson, 260 Ala. 297, 70 So. 2d 244 (1954); Brand v. Rorke, 225 Ark. 309, 280 S.W.2d 906 (1955); Loeffler v. Crandall, 129 Colo. 384, 270 P.2d 769 (1954); Bedenbender v. Walls, 177 Kan. 531, 280 P.2d 630 (1955).

41. Erickson v. Rossi, 65 Wash. 2d 155, 396 P.2d 170 (1964); McUne v. Fuqua, 42 Wash. 2d 65, 253 P.2d 632 (1953); Hayes v. Brower, 39 Wash. 2d 372, 235 P.2d 482 (1951).

*non*? This is an area in which most courts agree. In *Miller v. Miller*,[42] an Illinois Supreme Court decision, the court stated: "Plaintiff alleged a passenger-for-hire relationship, and the duty devolved upon him to show that he actually paid for his transportation and was not, instead, 'a guest, without payment'."[43] This view was followed in *Burns v. Storchak*,[44] where the court stated: "The burden of proof was on the plaintiff to produce evidence to show that plaintiff was not a guest. . . ."[45] The burden of proof, therefore, was on the plaintiff in both the *Rosenbaum* and *Ragon* cases.[46]

The second criterion, *i.e.*, acceptance, also has not been without its share of interpretational difficulties. To whom and in what situations did the legislature intend the guest statute to apply? When dealing with consenting adults, courts universally state that, if the adult plaintiff has met the first criterion, he is also capable of meeting the second. Therefore, the guest would have to allege and prove more than ordinary negligence in order to recover.

Even though courts have uniformly accepted the two well-established criteria, they have, nevertheless, occasionally attempted to circumvent their application by finding the facts of a particular case to be without the meaning of the statute. In *O'Donnell v. Mullaney*,[47] the California court noted that the wording of the guest statute expressly required the accident to occur on a *highway*. Section 360 of the California Vehicle Code defined "highway" as a "public roadway." Because this accident occurred on a *private roadway*, the guest statute did not apply.[48] The exceptions, however, as far as adults are concerned, are applied very infrequently.

Another problem area faced by the courts in their treatment of guest statutes is the statutes' application to minors. Courts have solved this problem to a certain extent by classifying minors into two categories: those over seven years of age, and those seven or under—minors of tender

42. *Supra* note 17.

43. *Supra* note 17, at 288, 69 N.E.2d at 885.

44. 331 Ill. App. 347, 73 N.E.2d 168 (1947).

45. *Id.* at 351, 73 N.E.2d at 170.

46. *Supra*, note 3. *See also* Leonard v. Stone, 381 Ill. 343, 45 N.E.2d 620 (1943); Weinrob v. Heintz, 346 Ill. App. 30, 104 N.E.2d 534 (1952). *See also* Fischer v. Ross, 79 Ill. App. 2d 372, 223 N.E.2d 722 (1967).

47. 66 Cal. 2d 994, 429 P.2d 160 (1967).

48. *See generally* Comment: 41 So. CAL. L. REV. 884 (1968), where the author shows the trend of judicial nullification of guest statutes throughout the country.

years.[49] Courts as a general rule treat minors over seven according to the same standard as adults. In *Audia v. De Angelis*,[50] a Connecticut court found that a fourteen year old was within the scope of the guest statute. A similar decision was reached by a Washington court in the case of *Hart v. Hogan*,[51] which dealt with a twelve year old.

It is when dealing with minors of seven or under, however, that the true nature of the problem is seen. In general, three lines of reasoning have been used by the courts to except minors from the application of guest statutes:[52] (1) the preferred status afforded to minors under the law; (2) the legislative intent that minors are excepted from these statutes, and (3) the incapacity of minors to accept a guest status.

Historically, minors of tender years have enjoyed a protected and preferred status under the law. In criminal law cases, both under the common law and by statute, preferential treatment has been awarded to minors. At common law, children seven and under had no legal capacity to commit a crime.[53] Illinois, in a change from the common law, has by statute extended the age of incapacity to thirteen.[54]

Minors have also enjoyed a preferred status in the field of torts. Professor Prosser, when dealing with the standard of conduct and the capacity required of an individual for negligence[55] or contributory negligence states:[56]

> As to one very important group of individuals, it has been necessary, as a practical matter, to depart to a considerable extent from the objective standard of capacity. . . . Although other limits have been set, those most commonly accepted are taken over from the arbitrary rules of criminal law, as to the age at which children are capable of crime. Below the age of seven, the child is arbitrarily held to be incapable of any negligence.[57]

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49. *Supra* note 3, at —, 257 N.E.2d at 102, where the court refers to minors of tender years.

50. 121 Conn. 336, 185 A. 78 (1936); *see also* Shiels v. Audette, 119 Conn. 75, 174 A. 323 (1934); *contra*, Kastel v. Stieber, 297 P.2d 932 (Cal. App. 1931), where the court held their guest statute inapplicable to a minor eight years old.

51. 173 Wash. 598, 24 P.2d 99 (1933).

52. *See generally, infra* notes 53-90.

53. PERKINS, PERKINS ON CRIMINAL LAW 837 (2nd Ed. 1969).

54. Infancy is a defense to a crime in Illinois. The infancy statute reads: "No person shall be convicted of any offense unless he had attained his 13th birthday at the time the offense was committed." ILL. REV. STAT. ANN. ch. 38, § 6-1 (Smith-Hurd 1964).

55. In Queens Ins. Co. v. Hammond, 374 Mich. 655, 132 N.W.2d 792 (1965), the court felt a minor child under seven was incapable of negligence or an intentional tort.

56. In Baker v. Alt, 374 Mich. 492, 132 N.W.2d 614 (1965), the court felt that a minor under the age of seven was incapable of contributory negligence.

57. PROSSER, THE LAW OF TORTS, 157-58 (3rd ed. 1964). For other authors us-

This preferential treatment is often read into an analysis of legislative intent to determine the status of a minor of tender years under a particular statute.

After a law has been enacted, it is for the courts, in applying the law, to determine the legislative intent prevailing at the time of passage. In exercising this function, courts may either strictly or liberally construe a law. In *McDonald v. City of Spring Valley*,[58] a minor of seven years was injured by the defendant municipality, but did not comply with the six-month notice that was required by statute to preserve the cause of action. The Illinois Supreme Court, finding that plaintiff was excused from compliance with the six-month notice statute, stated:

> Statutes general in their terms are frequently construed to contain exceptions, when considered in connection with well-known rules of law, without courts being subjected to the criticism of having entered the legislative field. . . . From time immemorial the status of a minor of tender years has been recognized in the law to be different from that of one of more mature years. . . . The recognition, by the law, of the status of infants, and of their exemption up to a certain age from liability under the law, is so well known that it must be presumed that the Legislature, in enacting the statute as the one under consideration, did not intend by the general language used to include within its provisions a class of persons which the law has universally recognized to be utterly devoid of responsibility.[59]

In the *Rosenbaum* and *Ragon* cases[60] this same reasoning was used when the court determined that the legislative intent in passing the guest statute was to exclude minors of tender years.[61]

This same interpretation of legislative intent was used in the dissenting opinion in *In Re Wrights' Estate*,[62] a Kansas case. In determining whether the Kansas guest statute was intended by the legislature to apply to a minor of tender years, this dissent declared:

> Our judicial history is replete with instances of legislative acts and judicial decision to the effect that a child is conclusively presumed to be non sui juris, incapable of committing crime, not responsible for its torts, not guilty of contributory negligence

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ing the same reasoning *see generally* Shulman, *The Standard of Care Required of Children*, 37 YALE L.J. 618 (1927); Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9 (1924); Wilderman, *Contributory Negligence of Infants*, 10 IND. L.J. 427 (1935).

58. 285 Ill. 52, 120 N.E. 476 (1918).

59. *Id.* at 55, 120 N.E. at 477; this same reasoning was followed in, Costello v. City of Aurora, 295 Ill. App. 510, 15 N.E.2d 38 (1938) when dealing with a notice statute.

60. *Supra* note 3.

61. *Supra* note 3, at —, 257 N.E.2d at 102, where the court cites McDonald v. City of Spring Valley.

62. 170 Kan. 600, 228 P.2d 911 (1951); *see also* Burhans v. Witbeck, 375 Mich. 253, 134 N.W.2d 225 (1965), another case where the court felt that a child as a matter of law is not a guest.

and incapable of making a binding contract. In the light of these and many other considerations given persons under a disability, can it now be said that our legislature intended to eliminate the advantageous position that a child has heretofore enjoyed? I think not. . . . *Surely the law should not be construed to say that these helpless children* are bound by the same standards applicable to persons of mature years. . . . *It appears to me* to be a harsh rule of law which denies the innocent victim of tender years or the mentally disabled redress against the negligent wrongdoer.[63]

By recognizing that the legislature must have realized the preferred status that the law has historically attributed to minors and disabled persons, courts have carved out exceptions for them, even though the statute with which they were dealing did not expressly provide for such exceptions.

However, this same exception has not always been necessarily applied in legislative interpretation of all statutes. The Indiana Supreme Court in the case of *Sherfey v. City of Brazil*,[64] considering the applicability of a notice statute to preserve a cause of action, brought on behalf of a nine year old against a municipality, declared: "neither infancy nor incapacity can suspend the obligation to give statutory notice,"[65] thus reaching a result opposite that of the *McDonald* court. In *Sims v. Cumby*,[66] Arkansas held the notice requirement to apply to minors without any exception. The court stated:

We fully realize the hardships and injustice of the act, and would gladly, if in our power, avert the evils that it threatens; but the legislature has enacted it in plain terms, and we cannot modify or annul it by construction.[67]

Thus, this language shows the patent refusal by this court to deviate from the express wording of the statute.

When dealing specifically with a guest statute, most jurisdictions have exhibited an unwillingness to permit an exception for minors, which places the dissenting opinion in *In Re Wrights' Estate*,[68] and the decision in *Rosenbaum* and *Ragon*[69] in the minority. In *Tilghman v. Rightor*,[70] an Arkansas court denied recovery in a guest statute case to a child of seven. The court, in refusing to create an exception for minors, declared: "It well [sic] be observed that in defining a guest the statute makes no

63. *In re* Wright's Estate, *supra* note 62, at 609, 228 P.2d at 917 (Emphasis added).

64. 213 Ind. 493, 13 N.E.2d 568 (1938); for another case not distinguishing between adults and minors, *see* Barcolini v. Atlantic City S.R. Co., 82 N.J.L. 107, 81 A. 494 (1911).

65. Sherfey v. City of Brazil, *supra* note 64, at 507, 13 N.E.2d at 574.

66. 53 Ark. 418, 14 S.W. 623 (1890).

67. *Id.* at 422, 14 S.W. at 624.

68. *Supra* note 62.

69. *Supra* note 3.

70. 211 Ark. 229, 199 S.W.2d 943 (1947).

exception in favor of minors and we have no authority to write that exception into the statute."[71] In *Lynott v. Sells*[72] and *Linn v. Nored*,[73] the Delaware and Texas courts followed suit. The *Linn* court specifically stated: "It is quite generally held that a minor plaintiffs' tender years do not take the case out of the statute, because the age does not affect the degree of care required . . . ."[74] In retrospect, in looking at the examples cited, one can readily see that courts, in exercising their discretionary power of interpreting legislative intent, have generally lacked uniformity in their decisions. Needless to say, this has created much confusion among lawyers and judges.[75]

Another reason used by the courts in determining whether or not a guest statute is applicable to a minor of tender years is whether the requirements needed to obtain a guest-host relationship can be fulfilled. Can a minor of tender years accept the status of a guest to create a guest-host relationship?

In *Green v. Jones*,[76] the Colorado Supreme Court ruled that a two-year old did not fall within the meaning of the applicable guest statute, and declared:

> We take judicial notice of the fact that a two-year old child is incompetent to accept or reject an invitation. The status of "guest" under the statute is acquired only by knowingly and voluntarily accepting the invitation to become so.[77]

Since acceptance is a prerequisite to the establishment of a guest-host relationship, this court recognized that a minor of tender years was incapable of becoming a guest. This same reasoning was expressed in *Fuller v. Thrun*.[78] Here, the Indiana Appellate Court found that the guest statute did not apply to a minor of six, stating that such a child is "presumed *non sui juris* and therefore incapable in law of accepting the

71. *Id.* at 232, 199 S.W.2d at 945.

72. 52 Del. 385, 158 A.2d 583 (1958). In *Linn* the court was dealing with a 5-year-old child. For other cases that rejected the exception as applied to minors when a "guest statute" is involved, *see* Shiels v. Audette, 119 Conn. 75, 174 A. 323 (1934); Palden v. Crook, 342 Mass. 173, 172 N.E.2d 686 (1961); Mitzel v. Hauck, 78 S.D. 543, 105 N.W.2d 378 (1960); Ruett v. Nottingham, 200 Va. 722, 107 S.E.2d 402 (1959).

73. 133 S.W.2d 234 (Tex. 1939).

74. *Id.* 133 S.W.2d at 236.

75. *See generally*, Comment, 41 S. CAL. L. REV. 854 (1968); for a discussion of the erosion of the application of the Illinois "guest statute" *see generally*, Comment, 54 Nw. U.L. REV. 263 (1959).

76. 136 Cal. 512, 319 P.2d 1083 (1958).

77. *Id.* at 517, 319 P.2d at 1086.

78. *Supra* note 33.

appellant's invitation and hospitality, this invitation however, being necessary in establishing a host-guest relationship."[79]

How then can the necessary criterion of acceptance be fulfilled by a minor of tender years? Some courts have stated that *parental* consent, either expressed or implied, creates the necessary acceptance for the establishment of a guest-host relationship. For example, in *Buchner v. Vetterick*,[80] the California Appellate Court determined that the guest statute was applicable to minors aged fifteen to twenty-six months. Since the mother accompanied the children, they assumed the same status of the mother. Thus, if she had been a guest, so were the children. However, in *Kudrna v. Adamski*,[81] the Oregon court stated that even though the mother had accepted the status of a guest, this acceptance could not be imputed to her four-year-old child. Even though the court did not expressly state that minors of tender years were excluded from the guest statute, the requirement of acceptance rendered it impossible for a minor to attain the status of a guest. The court stated that, to become a guest, "one must exercise a choice in the matter . . . and *we think* that a four-year-old child has not the legal capacity to exercise such a choice. . . ."[82] The court decided that a minor of tender years *as a matter of law* could not legally accept the status of a guest.

The above two cases indicate the doctrine of express parental consent, possibly conferring the necessary criterion of acceptance on a minor of tender years, thus creating the host-guest relationship. Other courts have dealt with *implied* parental consent. In *Morgan v. Anderson*,[83] the Kansas court held the guest statute applicable to a seven-year-old child. The courts' reasoning was that the: "[w]eight of authority is that a minor as well as an adult can be a 'guest,' even though unaccompanied by a parent or guardian and even though no express consent of parent or guardian has been shown."[84] Since the child was left in the unrestricted custody[85] of the defendant, this was an implied parental consent; the court concluded that necessary acceptance had been conferred on the minor and, therefore, that he was a guest within the meaning of the statute. Another example

79. *Supra* note 33, at 413, 31 N.E.2d at 672.

80. 127 Cal. App. 2d 414, 269 P.2d 67 (1954). *See also, Legislation Note,* 41 IOWA L. REV. 648, 655 (1956), the author feels that "necessary 'acceptance' . . . can be fulfilled by parental consent."

81. *Supra* note 21.

82. Kudrna v. Adamski, *supra* note 21, at 399, 216 P.2d at 263 (emphasis added).

83. 149 Kan. 814, 89 P.2d 866 (1939).

84. *Id.* at 817, 89 P.2d at 868.

85. *Id.* at —, 89 P.2d at 868, this unrestricted custody theory was also expressed in the majority opinion of, *In re* Wright's Estate, *supra* note 62.

of the concept of implied parental consent is found in *Balian v. Ogassin*,[86] where the Massachusetts court held that, even without express consent, there was implied parental consent, which created a guest-host relationship. The court declared: "Though there was evidence that his parents did not expressly consent to the transportation by the defendant, authorized assent thereto by the temporary custodian, the childs' grandmother, was not negatived."[87] In *Whitfield v. Bruegel*,[88] an Indiana case, the court also found the concept of implied parental consent to exist between the father of a minor child and the defendant. Therefore, the court held the guest statute applicable.

But in *Kastel v. Stieber*,[89] the California Appellate Court found no implied parental consent, hence no acceptance, and held that an eight-year-old child does not fall within the meaning of the guest statute. Likewise, in the case of *Rocha v. Hulen*,[90] that same court, in dealing with a five-year-old child, said that there was no express or implied consent, and therefore no acceptance.

In the *Rosenbaum* and the *Ragon* cases,[91] the court felt that not only does a minor of tender years lack the requisite capacity to accept the status of a guest, but also that the express or implied consent of a parent will not confer such status on the minor.[92] The court in utilizing a legislative intent argument, determined that the Illinois legislature did not intend the guest statute to apply in such a case. Because the case was decided on these issues, the court did not deem it necessary to consider the questions of constitutionality of the guest statute with regard to their application. This case used all three arguments in finding an exception to the guest statute for minors of tender years. In summary, they are: (1) the preferred status of minors; (2) legislative intent; and (3) incapacity of minors to accept the status.

By continuing to follow the lead of other courts which have found exceptions to guest statutes, the *Rosenbaum-Ragon* court perpetuates the vacillation of court-created law, thus generating criticism among those who would leave such matters to the legislature. Such criticism has stemmed both from the academic world,[93] and, strangely enough, from

86. *Supra* note 11.
87. Balian v. Ogassin, *supra* note 11, at 529, 179 N.E.at 234.
88. 134 Ind. App. 636, 190 N.E.2d 670 (1963).
89. 297 P. 932 (Cal. App. 1931).
90. *Supra* note 18.
91. *Supra* note 3.
92. *Supra* note 3, at 30, 257 N.E.2d at 103.
93. *See also* Comment, *The Ohio Guest Statute*, 22 OHIO ST. L.J. 629 (1961);

the judiciary, which itself creates such exceptions. Thus, in *Clark v. Clark*,[94] we find a judge stating:

> Automobile guest statutes were enacted in about half of the states, in the 1920's and early 1930's as a result of vigorous pressures by skillful proponents . . . New Hampshire never succumbed to this persuasion. No American state has newly adopted a guest statute for many years. Courts of states which did adopt them are today construing them much more narrowly, evidencing their dissatisfaction with them.[95]

And writers echoing the same dissatisfaction state:

> If courts are unwilling to declare guest statutes unconstitutional, they should apply them in conformity with these expounded purposes and allow the legislature to establish criteria for recovery. This type of judicial administration would improve the predictability necessary for attorneys, insurance companies, lower courts, drivers and passengers. Possibly even more significant, it would allow the courts to write intellectually honest opinions.[96]

This criticism may be harsh on the judiciary and its functioning, but laws should not only be written with greater clarity but also interpreted with greater uniformity and consistency.

The *Rosenbaum* and *Ragon*[97] decisions have already been followed to the letter by the Illinois Appellate Court in *Cox v. Nicholas*.[98] But their true significance lies elsewhere, for every exception carved out of a statute weakens its effectiveness and destroys its vitality. Regardless of the validity of the reasons behind these exceptions, and in spite of the emotional appeal that lies in the allowance of recoveries to very young children, legislative re-examination of the philosophy behind the guest statutes is needed, either for total repeal, or for uniform exceptions to a law so charged with a high propensity for needed change.

*Aaron Taksin*

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Schantz, *Oregon's Guest Statute*, 1 WILLAMETTE L.J. 425 (1961); *see also* for criticism of the "guest statute" and also judicial interpretation of "guest statutes" *supra* note 75.

94. 107 N.H. 351, 222 A.2d 205 (1966).

95. *Id.* at 356-57, 222 A.2d at 210.

96. *Supra* note 75, 41 So. CAL. L. REV. 884, 898.

97. *Supra* note 3.

98. 122 Ill. App. 2d 252, 258 N.E.2d 394 (1970).

## APPENDIX

| STATE | STATUTE | CRITERIA |
|---|---|---|
| Alabama | Ala. Code tit. 36, § 95 (1958). | Willful or wanton misconduct. |
| Arkansas | Ark. Stat. Ann. § 75-913, 914 (1947). | Willful or wanton operation in disregard of the rights of others (self-invited guests or guests at sufferance). |
| | Ark. Stat. Ann. §§ 75-915 (1947). | Willful misconduct (non-paying guest). |
| California | Cal. Vehicle Code § 17158 (West 1960). | Intoxication or willful misconduct. |
| Colorado | Colo. Rev. Stat. Ann. § 13-9-1 (1963). | Intentional accident, intoxication or willful and wanton disregard of rights of others. |
| Delaware | Del. Code Ann. tit. 21, § 6101 (1953). | Intentional accident, or willful or wanton disregard of the rights of others. |
| Florida | Fla. Stat. Ann. § 320.59 (1965). | Gross negligence or willful and wanton misconduct. |
| Idaho | Idaho Code Ann. §§ 49-1401, 1402 (1965 Cum. Supp.). | Intentional accident or intoxication or gross negligence. |
| Illinois | Ill. Rev. Stat. ch. 95½, § 9-201 (1965). | Willful and wanton misconduct. |
| Indiana | Ind. Ann. Stat. §§ 47-1021, 1022 (1965). | Wanton or willful misconduct. |
| Iowa | Iowa Code Ann. § 321.494 (1954). | Driver under influence of intoxicating liquor or reckless operation. |
| Kansas | Kan. Stat. Ann. § 8-122(b) (1963). | Gross and wanton negligence. |
| Michigan | Mich. Stat. Ann. § 257.401 (Supp. 1956). | Gross negligence or willful and wanton misconduct. |
| Montana | Mont. Rev. Codes Ann. §§ 32-113, 32-116 (1947). | Grossly negligent and reckless operation. |
| Nebraska | Neb. Rev. Stat. § 39-740 (1943). | Intoxication or gross negligence. |
| Nevada | Nev. Rev. Stat. § 41.180 (1963). | Intoxication, willful misconduct or gross negligence. |
| New Mexico | N.M. Stat. Ann. §§ 64-24-1, 2 (1953). | Intentional accident or heedless or reckless disregard of the rights of others. |
| North Dakota | N.D. Cent. Code §§ 39-15-01 to 39-15-03 (1943). | Intoxication, willful misconduct or gross negligence. |
| Ohio | Ohio Rev. Code Ann. § 4515.02 (Page 1953). | Willful or wanton misconduct. |
| Oregon | Ore. Rev. Stat. § 30.115 (1960). | Intentional accident, gross negligence or intoxication. |
| South Carolina | S.C. Code Ann. § 46-801 (1962). | Intentional accident, heedlessness or reckless disregard of the rights of others. |

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|---|---|---|
| South Dakota | S.D. Code § 44.0362 (Supp. 1960). | Willful and wanton misconduct. |
| Texas | Tex. Rev. Civ. Stat. Ann. art. 6701(b) (1948). | Intentional accident, heedlessness or reckless disregard of the rights of others. |
| Utah | Utah Code Ann. §§ 41-9-1, 2 (1953). | Intoxication or willful misconduct. |
| Vermont | Vt. Stat. Ann. tit. 23, § 1491 (1959). | Contract or receipt of pay for carriage of occupant or injuries are caused by gross or willful negligence of the operator. |
| Virginia | Va. Code Ann § 8-646.1 (1950). | Gross negligence or willful and wanton disregard of the safety of occupant. |
| Washington | Wash. Rev. Code Ann. § 46.08.080 (Supp. 1967). | Intentional accident, gross negligence or intoxication. Proof of cause of action must be corroborated by competent evidence or testimony of parties to action. |
| Wyoming | Wyo. Stat. Ann. § 31-233 (1957). | Gross negligence or willful and wanton misconduct. |