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The Illinois Guest Statute: Judicial Exemption of Infants Rosenbaum v. Raskin, 4 J. Marshall J. of Prac. & Proc. 137 (1970)

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THE ILLINOIS GUEST STATUTE: JUDICIAL EXEMPTION OF INFANTS

ROSENBAUM v. RASKIN

The Illinois Supreme Court consolidated the two cases described below on appeal because the issues involved were basically the same: whether or not the Illinois "guest statute"[1] embraced children of "tender years"[2] as a matter of law. The court held that the legislative intent was to *exclude* children of tender years from the scope of the Illinois guest statute.

The first of these cases was *Ragon v. Ragon*,[3] a suit originating in the Circuit Court of Fulton County, Illinois. Ross Ragon was the owner and operator of a motor vehicle in which Charles Ragon, his three year old nephew, was riding. The vehicle collided with another driven by the co-defendant Brock. The child suffered severe physical injuries from which he later died.

The complaint contained two counts. The first alleged that the owner and operator of the car in which the plaintiff was a passenger committed certain negligent acts which proximately caused the collision with Brock's vehicle and the resultant fatal injuries to the Ragon infant. The second count attributed various acts of negligence to the co-defendant Brock. Defendant Ragon moved to dismiss the complaint as to him, alleging that recovery was barred by the Illinois guest statute, and the court thereupon dismissed the first count. The plaintiff moved to vacate the court's dismissal of Ragon and in support of his position filed an answer to the motion which attacked the guest statute as being inapplicable to minors under seven years of age. Nevertheless, the motion to vacate was denied and the plaintiff appealed directly to the Supreme Court of Illinois, challenging the statute's constitutionality as applied to minors of tender years.

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[1] ILL. REV. STAT. ch. 95½ §9-201, (1969).

Liability for bodily injury to or death of guest.

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 wilful 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 wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought.

Nothing contained in this section shall be construed to relieve a motor vehicle or motorcycle carrier of passengers for hire of responsibility for injury or death sustained by any passenger for hire.

[2] The term child of "tender years" is meant to refer to those children under seven years of age. An "infant" is of the same age group.

[3] 45 Ill. 2d 25, 257 N.E.2d 100 (1970).

Rosenbaum v. Raskin,[4] the second of the cases, also involved an injury to a child. Holly Ann Rosenbaum, four years of age, was at the Raskins' home playing with their two children. Mrs. Raskin, preparing to do some errands, told the children to get into the car. The plaintiff and one of the Raskin children got into the front seat, whereupon Mrs. Raskin asked the girls to get into the back seat of the car. As the plaintiff backed out, she put her left hand on the center post for support. While her hand was sliding down the post Mrs. Raskin opened the rear door. Plaintiff's finger was crushed between the post and the front edge of the rear door.

The *Rosenbaum* case was not tried on a guest statute approach, but on simple tort negligence. The complaint, in part, contained the following allegations: (1) that the defendants, Mr. and Mrs. Raskin, owned, operated, and controlled the standing automobile, (2) that the plaintiff was a minor of four years of age seated in the car at the defendant's request and invitation, and (3) that Mrs. Raskin had invited the plaintiff to enter the car in order to have company for her own children.[5] The only wrongful conduct alleged was negligence in the operation of the rear door and in the failure to give warning that the door was being opened. No attempt was made by the defendants to establish the plaintiff's status as a guest[6] or passenger, and the defendants failed to deny the allegations of invitation.

When the defendant moved for a directed verdict at the end of the plaintiff's evidence and at the end of all the evidence, the argument both times centered upon whether actual or implied parental consent was present.[7] The defendant tendered an instruction setting up the guest statute as applicable law and the trial court refused to allow it.[8] The verdict and judgment were for the plaintiff and the defendant appealed to the Illinois Appellate Court.

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[4] *Id.*

[5] To determine a rider's status in a host-guest question, it is necessary to inquire into who is the person advantaged by the carriage. If it promotes mutual interests or is primarily for the benefit of the operator, the passenger is not a guest. Miller v. Miller, 395 Ill. 273, 69 N.E.2d 878 (1946).

[6] The guest statute is not an affirmative defense which is necessary to be pleaded. Fischer v. Ross, 79 Ill. App. 2d 372, 223 N.E.2d 722 (1967).

[7] The plaintiff was the niece of the defendants. Both lived on the same street about one-half block apart. The plaintiff frequently went to the defendant's home to play with the young Raskin children and on this occasion plaintiff's mother called to find out if it would be all right for her daughter to come over. It was explained that the defendants were planning to leave early that afternoon. The defendants alleged at the trial that express consent was granted by the telephone conversation and implied consent was granted by allowing the defendants custody of the child in addition to consent in the past for other automobile trips.

[8] Presumably, the court's refusal was not based on the plaintiff's infancy but more likely on the fact that a host-guest relationship had not developed.

[9] Rosenbaum v. Raskin, 103 Ill. App. 2d 469, 243 N.E.2d 616 (1968).

On the appellate level[9] the applicability of the guest statute was again argued. The plaintiff cited several cases from foreign jurisdictions which allowed recovery by infants,[10] the court attempted to distinguish them from the case at bar,[11] and the defendant urged cases which disallowed recovery.[12] The court then held: (1) nothing in the Illinois statute indicated an intent to exempt infants,[13] and (2) a child of four can be a guest within the meaning of the statute if the child's parent actually or impliedly consented to that status.[14] Hence, the plaintiff could be a guest and barred from recovery. The trial court's judgment for plaintiff was reversed and the case remanded. This judgment was then appealed to the Supreme Court of Illinois which consolidated it with the *Ragon* case for opinion.

The Supreme Court reviewed the two factual situations and the contentions of the parties below, and recognized that the issue was of first impression in this state. The court alluded to the summary of foreign jurisdictional approaches found in the appellate opinion of the *Rosenbaum* case and noted that a spectrum of results had been reached dealing with guest statutes similar to that of Illinois.[15]

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[10] *Id.* at 475-78, 243 N.E.2d at 619-20. Plaintiff urged as support: Rocha v. Hulen, 6 Cal. App. 2d 245, 44 P.2d 478 (1935) (an infant cannot be a guest under California statutes, for without parent he cannot accept); Green v. Jones, 136 Colo. 512, 319 P.2d 1083 (1957) (infant cannot accept guest status); Fuller v. Thrun, 109 Ind. App. 407, 31 N.E.2d 670 (1941) (minor under seven [here six months of age] cannot exercise choice to become guest); Kudrna v. Adamski, 188 Ore. 396, 216 P.2d 262 (1950) (same); Burhans v. Witbeck, 375 Mich. 253, 134 N.W.2d 225 (1965) (infant under five not subject to guest statute); Lynott v. Sells, 52 Del. 385, 158 A.2d 583 (1958) (infant unable to become guest without parental consent).

[11] Rosenbaum v. Raskin, 103 Ill. App. 2d 469, 243 N.E.2d 616 (1968). The court distinguished each case forwarded by plaintiff. Rocha v. Hulen, 6 Cal. App. 2d 245, 44 P.2d 478 (1935): a subsequent case, Bruckner v. Vetterick, 124 Cal. App. 2d 417, 269 P.2d 67 (1954) held infants had guest status of mother whom they accompany; Green v. Jones, 136 Colo. 512, 319 P.2d 1085 (1957): driver was mother's agent and hence not a "host"; Fuller v. Thrun, 109 Ind. App. 407, 31 N.E.2d 670 (1941): defendant's acts were not within the granted parental consent and instruction; Kudrna v. Adamski, 188 Ore. 396, 216 P.2d 262 (1950): driver was agent of another and thus not a "host"; Burhans v. Witbeck, 375 Mich. 253, 134 N.W.2d 225 (1965): perhaps not a host-guest relationship.

[12] Rosenbaum v. Raskin, 103 Ill. App. 469, 477, 243 N.E.2d 616, 620 (1968); Snelling v. Pieper, 178 Neb. 818, 135 N.W.2d 707 (1965) (minor with parental consent may be guest); Favatella v. Poulsen, 17 Utah 2d 24, 403 P.2d 918 (1965) (same); Balian v. Ogassin, 277 Mass. 525, 179 N.E. 232 (1931) (statute applicable when infant in full custody of another); Morgan v. Anderson, 149 Kan. 814, 89 P.2d 866 (1939) (same); *In re* Wright's Estate, 170 Kan. 600, 228 P.2d 911 (1951) (same); Whitfield v. Bruegel, 134 Ind. App. 636, 190 N.E.2d 670 (1963) (implied consent brings infant within statute).

[13] Rosenbaum v. Raskin, 103 Ill. App. 2d 469, 478, 243 N.E.2d 616, 620 (1968).

[14] *Id.*

[15] *See generally*, Letterel v. Cernigilia, 82 N.Y.S.2d 670 (1948) (eleven year old with parents, a guest); Tilghman v. Rightor, 211 Ark. 229, 199 S.W.2d 943 (1947) (seven, nine, and fourteen year old "hitch-hikers" held to be guests); Hart v. Hogan, 173 Wash. 598, 24 P.2d 99 (1933) (mother

The intent of the Illinois guest statute was judicially explained as protection afforded to he who, "out of the generosity of his heart, renders gratuitously some service to his fellow traveler."[16] Practically speaking, the purpose has frequently been stated to be protection for insurance companies against collusive claims,[17] but courts have shown great concern that the purpose of the statute not be perverted.[18]

There are clearly three approaches that may be taken to the problem of the application of guest statutes to children of tender years. The first, and strictest view, is that a child of tender years, riding at the invitation of the host, *is* a guest and therefore incapable of recovering without a showing of wilful and wanton misconduct.[19] Secondly, there is the view that a child of tender years *may* be a guest depending upon the presence of actual or implied parental consent. A survey of the case law will indicate that this is actually the only approach to be found.[20] The third possibility is that a child of tender years *is not* a guest as a matter of law.

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who had no alternative but to take twelve year old daughter with her for business, not a guest); Fuller v. Thrun, 109 Ind. App. 407, 31 N.E.2d 670 (1941) (six year old left in custody of another without consent for a ride, not a guest; child incapable of assenting to invitation).

[16] Rosenbaum v. Raskin, 45 Ill. 2d 25, 29-30, 257 N.E.2d 100, 102 (1970). The court quoted from Clarke v. Storchak, 384 Ill. 564, 579, 52 N.E.2d 229 (1943):

> 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 the fear of the consequences of their own charitable act and the recipients should not be permitted to gain by the generosity of their host. Undoubtedly the Legislature, in adopting this act, was aware of the frequency of litigation in which passengers, carried gratuitously in automobiles, have sought the recovery of large sums for injuries alleged to have been due to negligent operation, and where, in the use of automobiles, which is almost universal, generous 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. To that end, this 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.

Id. at 30, 257 N.E.2d at 10.

[17] Truitt v. Gaines, 199 F. Supp. 143 (1961) (Delaware law); Rogers v. Lawrence, 227 Ark. 117, 296 S.W.2d 899 (1956); Stephan v. Proctor, 45 Cal. Rptr. 124 (1965); Ehrsam v. Borgen, 185 Kan. 776, 347 P.2d 260 (1959); Dym v. Gordon, 262 N.Y.S.2d 463, 16 N.Y.2d 120, 209 N.E.2d 792 (1965); Naphtali v. Lafazan, 186 N.Y.S.2d 1010 (1959); Schlim v. Gau, 80 S.D. 403, 125 N.W.2d 174 (1963); Houston Belt v. Burmester, 309 S.W.2d 271 (Tex. 1957).

[18] Truitt v. Gaines, 199 F.Supp. 143 (1961) (Delaware law); Colombo v. Sech, 52 Del. 575, 163 A.2d 270 (1960); Ehrsam v. Borgen, 185 Kan. 776, 347 P.2d 260 (1959); Stephan v. Proctor, 45 Cal. Rptr. 776 (1965); Johnson v. Kolovos, 224 Or. 266, 355 P.2d 1115 (1960).

[19] Illinois courts have applied the guest statute to an eight and fourteen year old. Farley v. Mitchell, 282 Ill. App. 555 (1935); Johnson v. Chicago & N.W. Ry. Co., 9 Ill. App. 2d 340, 132 N.E.2d 678 (1956).

[20] See note 11 *supra*.

In analyzing the creation of a guest status, the court faced the critical question of whether or not a child of tender years has the mental capacity to accept that status[21] or reject it by making payment.[22] To answer this, the court first reiterated the doctrine that general statutes may be construed to incorporate well-known rules by law.[23] By applying this doctrine to the factual situations of the cases at bar, it was held to be unnecessary to decide the constitutionality of the guest statute[24] as to children of tender years, for infants have repeatedly been exempted from civil and

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[21] Illinois Pattern Jury Instructions, Motor Vehicles §72.01 (Automobile Guests) states:

> A person is a guest [in a motor vehicle] when he is there at the invitation, either expressed or implied, of [the driver or operator] of the vehicle and if he *accepts* the invitation without making or being expected to make any payment therefore. (Emphasis added.)

[22] See note 5 *supra*. "An important, if not decisive test, under the statute is payment." Miller v. Miller, 395 Ill. 273, 287, 69 N.E.2d 878, 885 (1946).

[23] Ragon v. Ragon, 45 Ill. 2d 25, 30, 257 N.E.2d 100 (1970), citing McDonald v. City of Spring Valley, 285 Ill. 52, 120 N.E. 476 (1918). In *McDonald*, plaintiff, aged seven, was injured on city property and failed to give notice of the injury complained of within the statutory six month period. (Hurd's Stat. 1917, p. 1663). Defendant demurred to the complaint and the court answered as follows:

> Statutes general in their terms are frequently construed to contain exceptions, when considered in connection with well known rules of law, without the courts being subjected to the criticism of having entered the legislative field. This is done upon the theory that statutes, though general in their terms, have been enacted with the full recognition of rules of law which have become well known and well established. From time immemorial the status of a minor of tender years has been recognized in law to be different from that of one of more mature years. The law recognizes that up to the age of seven years a child is incapable of such conduct as will constitute contributory negligence, and our courts have uniformly so stated the law in their instructions to juries. [citations] At common law an infant within seven years of age could not be convicted on a criminal charge, as he was conclusively presumed not to be capable of committing a crime, and between the ages of seven and fourteen he was still presumed to be incapable; but between those ages this presumption might be overcome by proof. These rules of law are based upon the well-known fact of the incapacity of children of tender years, and they are not held to the same accountability as are adults. 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 such a 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.

McDonald v. City of Spring Valley, 285 Ill. 52, 54, 120 N.E. 476, 477 (1918). As supportive authority the court relied upon Murphy v. Village of Ft. Edward, 213 N.Y. 397, 107 N.E. 716 (1915); Born v. City of Spokane, 27 Wash. 719, 68 P. 386 (1902); Erhardt v. City of Seattle, 33 Wash. 664, 74 P. 827 (1903).

[24] The general constitutionality of the Illinois guest statute was attacked in the case of Clarke v. Storchak, where its validity was upheld by the Supreme Court of Illinois as a permissible extension of the state police power. 384 Ill. 564, 52 N.E.2d 229 (1943), *appeal dismissed*, 322 U.S. 713 (1943).

Plaintiff attacked the statute as a violation of the due process clauses of the United States Constitution and the Illinois Constitution in addition to violating the state clause which prohibits the destruction of legal remedies (Ill. Const. Art. II §§2, 19). It was held that the statute violated neither constitutional provision and that the statute was a proper exercise of the state police power.

criminal actions because of their assumed mental incapacity,[25] and they similarly will be exempted from the guest statute.

A secondary issue to be decided was whether the actual or implied consent of a parent could put a young child within the guest status, as was contended by Raskin. The court held no, that it could not, and stated that the consent theory is but "a fiction which does not take account of the realities of the situation,"[26] and that to so hold would impute the negligence of the parent to the child, and this the court would not do.[27]

CONCLUSION

The Illinois Supreme Court has thus exempted children under the age of seven from the effects of the guest statute by holding: (1) that they are incapable of assenting to a guest status, and (2) that actual or implied parental consent is ineffective and does not place the child within a guest status. In order to so hold, it was necessary to liberally construe the Illinois statute.[28] The effect of this holding is likely to be widespread in the states with statutes similar to Illinois. This is the first case exempting infants as a matter of law, and the concept is sure to gain acceptance.

Decisions in many areas of the law frequently evidence a departure from the letter of the law in order to do justice. The exclusion of children of tender years from the confines of the statutory language is but a similar departure. Such limitations evidence judicial cognizance of the harsh and often unjust results of statutory fiat and demonstrate a desire to remedy these inequities. While the supreme court should be heartily applauded for its enlightened interpretation of the guest statute, the legislature should be assiduously encouraged to seek a more realistic approach to the problems of the host-guest relationship than is to be found in the guest statutes currently in force.

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[25] Rosenbaum v. Raskin, 45 Ill. 2d at 30-31, 257 N.E.2d at 103 (1970).

[26] *Id.* at 31, 257 N.E.2d at 10.

[27] *Id.* at 32, 257 N.E.2d at 10.

[28] The Supreme Court reversed the appellate court's strict construction of the statute in order to apply the "well known rules of law." See text at note 22. The following jurisdictions liberally construe guest statutes: Hardwick v. Bublitz, 253 Ia. 49, 111 N.W.2d 309 (1961) (to be literally construed); Borstad v. LaRogue, 98 N.W.2d 16 (N.D. 1959) (same); Peterson v. Snell, 805 S.D. 496, 127 N.W.2d 142 (1964); Gregory v. Otts, 329 S.W.2d 904 (Tex. Civ. App. 1959) (liberally construed to effectuate purpose of statute; strictly to determine rider's status). *Contra*: Baldwin v. Hill, 315 F.2d 738 (6th Cir. 1963); Rogers v. Lawrence, 227 Ark. 117, 296 S.W.2d 899 (1957); Hoffman v. Davis, 239 Ark. 99, 387 S.W.2d 338 (1965); Green v. Jones, 136 Colo. 512, 319 P.2d 1083 (1957); Serkes v. Parsekian, 73 N.J. Super. 344, 179 A.2d 785 (1962); Naphtall v. Lafazan, 8 App. Div. 2d 22, 186 N.Y.S. 2d 1010 (1959); Economou v. Anderson, 4 Ohio App. 2d 1, 211 N.E.2d 82 (1965); Masone v. Ferino, 32 Misc. 2d 15, 221 N.Y.S.2d 472 (N.Y. City Ct. 1961) (Florida law); Brown v. Gamble, 60 Wash. 2d 376, 374 P.2d 151 (1962).