Chicago-Kent Law Review

Volume 36 | Issue 2 Article 3

October 1959

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Recommended Citation
R. J. Schlake, *The Legal Status of the Juvenile Car Pool Participant*, 36 Chi.-Kent L. Rev. 146 (1959).
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol36/iss2/3

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NOTES AND COMMENTS

THE LEGAL STATUS OF THE JUVENILE CAR POOL PARTICIPANT

The exodus of urban dweller to Suburbia has generated a number of novel problems, of which not the least of these is the matter of transportation. Mechanical carriage from domicile to food supply, to church, to rail lines, and to school is mandatory in these trolleyless and trackless areas. Given, that one-car families were once the rule, the exception now supersedes and the two-car family becomes commonplace. But, one might ask, "Is this actually the solution when coupled with and weighted as it is with the ever attendant note of chattel mortgage, license fees, garage problem and automobile insurance policy?" With the intent of modifying the harshness of the resultant economic burdens, the car pool was born. It serves as a focus for this comment, to-wit: what legal consequences are likely to be suffered by car pool participants as a result of their efforts to effect the most frugal means of transporting their children to and from school?

A seemingly innocuous arrangement entered into by the parents of certain grade school children in Ohio, whereby five mothers alternated in the transportation of their own and each other's children to and from school via private automobile, developed into one of considerable legal significance in the recent Ohio case of *Lisner* v. *Faust*.[1] The plaintiff there, aged six years, was injured when the automobile in which he was being transported by one other than his mother left the road and struck a steel post because of nothing more than simple negligence on the part of the driver. The court of common pleas sustained a demurrer to the petition to recover damages. The court of appeals affirmed but granted plaintiff's motion to certify the record. On further review, the Supreme Court of Ohio found that the plaintiff was not a "guest" within the purview of the Ohio Guest Statute[2] so it reversed the lower court holdings and returned the case for trial. At the time of so reversing, the court said: "These allegations [referring to the parental arrangement for transportation] . . . indicate a definite business relationship whereby each party thereto

[1] 168 Ohio St. 346, 155 N. E. (2d) 59 (1958).

[2] Page's Ohio Rev. Code 1953, § 4515.02, states: "The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, resulting from the operation of said motor vehicle, while such guest is being transported without payment therefor in or upon said motor vehicle, unless, such injuries or death are caused by the wilful and wanton misconduct of such operator, owner, or person responsible for the operation of said motor vehicle."

was saved time and expense in the task of transporting her child to and from school, and it seems to be a bit unrealistic to label such an alleged definite agreement in the category of a mere arrangement incidental to pleasure, hospitality, or good will.''[3]

It is significant that the court did not touch upon the favored consideration which inures to infants of a tender age, particularly those under seven years,[4] by virtue of which several jurisdictions resolve the status of an infant rider on the theory that such a child has no capacity to ''accept'' a ride, the absence of any ''payment'' for the ride notwithstanding. As most of the children carried in the typical to-and-from school car pool are in the 5-13 year age group, there may be occasion to draw a distinction between the several age levels.[5] Aside from this, the question is still one as to whether or not the juvenile participant in a school car pool is to be treated as a guest for liability purposes.

The varied ''guest'' statute makes no special provision for infants as such, with the exception of the one found in Florida which contains an express exclusion of ''children being transported to-and-from school.''[6] Instead, the statutory definition of a guest appears to follow one of three patterns, but with an occasional overlapping or combining of one or more patterns. The largest group of state statutes defines a guest substantially as being ''one who rides without payment for such transportation.''[7] The next group in terms of size qualifies the application of the statute upon the ''acceptance'' of a ride by a guest, either with or without giving compensation therefor.[8] The balance of the statutes define a guest as being any passenger or person riding in the vehicle ''as a guest or by invitation and not for hire,''[9] with the exception of the Vermont statute which declares

[3] 168 Ohio St. 346 at 349, 155 N. E. (2d) 59 at 62.

[4] Lagerstrom v. Jago, 316 Ill. App. 156, 44 N. E. (2d) 330 (1942); Brown v. Murray, 313 Ill. App. 144, 39 N. E. (2d) 83 (1942), involving a six-year old boy; Smith v. Tappen, 208 Ill. App. 433 (1917), a five-year old boy; and Johnson v. N. K. Fairbanks Co., 156 Ill. App. 381 (1910), where the child was four and one-half years of age. See also 4 I. L. P., Automobiles and Motor Vehicles, § 204, p. 398.

[5] The importance of this distinction is pointed out in an annotation appearing in 16 A. L. R. (2d) 1304.

[6] Fla. Stat. Ann. 1949, § 320.59.

[7] Ala. Code 1940, Ch. 36, § 95; Ark. Stat. 1947, Ch. 75, § 915; Colo. Rev. Stat. 1953, Ch. 13, Art. 9, § 1; Del. Code Ann. 1953, Ch. 21, § 6101; Ida. Code 1947, Ch. 49, §1001; Ill. Rev. Stat. 1957, Vol. 2, Ch. 95½, § 9-201; Burn's Ind. Stat. Ann. 1952, Ch. 47, § 1021; Kan. Gen. Stat. 1957, Ch. 8, § 122B; Mich. Comp. Laws 1948, Ch. 256, § 29; N. M. Stat. 1953, Ch. 64, § 24-1; Page's Ohio Rev. Code 1953, § 4515.02; Ore. Rev. Stat. 1958, § 30.110; S. Car. Code of Laws 1952, Ch. 46, § 801; S. Dak. Code 1939, Ch. 44 § 0362; Vernon's Tex. Civ. Stat. 1948, Ch. 116, § 6701b; Va. Code 1950, Ch. 8, § 646.1; Wyo. Comp. Stat. Ann. 1945, Ch. 60, § 1201.

[8] West Cal. Ann. Code 1956, § 403; Neb. Rev. Stat. 1943, Ch. 39, § 740; Nev. Rev. Stat. 1957, Ch. 41, § 180; N. Dak. Rev. Code 1943, Ch. 39, § 1502; Utah Code Ann. 1953, Ch. 41, § 9-1; Rev. Code Wash. 1951, Ch. 46, § 08.080.

[9] Iowa Code Ann. 1946, § 321.494; Mont. Rev. Code Ann. 1947, Ch. 32, § 1113.

that the owner or operator shall not be liable in damages for injuries received by any occupant unless the owner or operator has "received or contracted to receive payment."[10]

The three phrases used in these statutory patterns, that is payment for, acceptance of, or invitation to take a ride, are with few exceptions far from conclusive in harmonizing the decisions of the various jurisdictions in relation to juvenile riders. For example, neither "accept" nor "invitation" is included in the Indiana statute, yet the Indiana Appellate Court decision in the case of *Fuller* v. *Thrun*[11] stressed the lack of capacity, on the part of a six-year old girl, to accept a ride as being decisive on the question of her "passenger" status. The court there said that it was of the opinion that a child under the age of seven years was a person conclusively presumed to be *non sui juris,* hence incapable in law of "accepting the appellant's invitation and hospitality."[12] Conversely, although the California statute calls for no more than an "acceptance" of a ride, yet, according to the case of *Rocha* v. *Hulen,*[13] such an acceptance on the part of a child of tender years would not be significant unless authorized by the parent or guardian. In another California case, however, where infants aged fifteen and twenty-six months respectively were accompanied by their mother, her acceptance was imputed to the children and her guest status attached to them also.[14]

While an Oregon court had earlier held that a four-year old child who had entered an automobile with its mother could not be said to have accepted a ride because it did not do so of its own free will,[15] the same court, adverting to the "imputed status" theory of California in an apparent effort to reconcile its holding with the California view, later decided that a twenty-nine month old child, when accompanied by her guest mother, was also to be considered as a guest.[16] By contrast, and apparently on the ground that a twelve-year old child in the custody of her "passenger" mother had no option other than to accompany her mother because no one was at home to care for the child, the Supreme Court of Washington, in the case of *Hart* v. *Hogan,*[17] appears to have considered such a child to be a passenger. Colorado also seems to adhere to this minority view-

10 Vt. Stat. 1947, Ch. 434, § 10,223.

11 109 Ind. App. 407, 31 N. E. (2d) 670 (1941).

12 109 Ind. App. 407 at 413, 31 N. E. (2d) 670 at 672.

13 6 Cal. App. (2d) 245, 44 P. (2d) 479 (1935), where a five-year old girl was transported without the express consent of her parents and the case was held to be excluded from the guest statute.

14 See Buckner v. Veterick, 124 Cal. App. (2d) 417, 269 P. (2d) 67 (1954).

15 Kudrna v. Adamski, 188 Ore. 396, 216 P. (2d) 262, 16 A. L. R. (2d) 1297 (1950).

16 Welkern v. Sorenson, 209 Ore. 402, 306 P. (2d) 737 (1957).

17 173 Wash. 598, 24 P. (2d) 99 (1933).

point for it has recently decided that a two-year old child was to be deemed incapable of accepting a ride because of her tender years.[18]

Following what would appear to be the majority view, the Supreme Court of Iowa, in the case of *Horst* v. *Holzen,*[19] declared that a thirteen-day old infant in the company of its mother, notwithstanding its obvious incapacity to accept a ride, had to be treated as a guest. Even stronger is the statement of the Supreme Court of Kansas in a situation where a seven-year old had been transported without the express or implied consent of the parent. That court declared: "The weight 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."[20] This interpretation of the Kansas statute was followed by the Supreme Court of Missouri when it stated, by way of dictum, that a child of tender years, being transported with the implied consent of its parents, had "accepted" an invitation to ride, hence could be considered as a guest.[21] The Supreme Court of Arkansas, subscribing to the majority rule, commented on the status of a seven-year old boy who had been injured while hitching a ride on the tail gate of a truck by saying: "It will be observed that in defining a guest the statute makes no exception in favor of minors and we have no authority to write that exception into the statute."[22] Mention might also be made of the fact that, in *Linn* v. *Nored,*[23] the Texas Court of Civil Appeals responded to a contention that only a person *sui juris* could become a guest by pointing out that is "quite generally held that a minor plaintiff's tender years do not take the case out of the statute because the age does not affect the degree of care required of the defendant, although it may affect the nature thereof."[24]

In none of the aforementioned cases was the minor being carried under any form of a car pool arrangement, so the instant case is novel in that respect. Nevertheless, the holding therein may have been foreshadowed by another Ohio case where the Supreme Court of that state collaterally expressed the idea that an infant of tender years could be a guest when it discussed the position of one who was mentally incapable of accepting an

18 Green v. Jones, 136 Colo. 512, 319 P. (2d) 1083 (1957).

19 249 Iowa 958, 90 N. W. (2d) 41 (1958).

20 Morgan v. Anderson, 149 Kan. 814 at 817, 89 P. (2d) 866 at 868 (1939). See also the case of In re Wright's Estate, 170 Kan. 600, 228 P. (2d) 911 (1951), treating a four-year old child as a guest.

21 Wendel v. Shaw, 361 Mo. 416, 235 S. W. (2d) 266 (1950).

22 Tilghman v. Rightor, 211 Ark. 299 at 232, 199 S. W. (2d) 943 at 945 (1947).

23 133 S. W. (2d) 234 (Tex. Civ. App., 1939).

24 133 S. W. (2d) 234 at 236.

invitation to ride in an automobile because of an advanced state of intoxication.[25]

Turning to the case law in Illinois and particularly to those cases wherein the term "guest" has been in any way defined,[26] it may be noted that direct comment on the status of minors, whether of tender age or otherwise, is conspicuously absent. As a consequence, it may be said that so far as Illinois is concerned the question is open to conjecture. It might be inferred, from the situation disclosed in the case of *Johnson* v. *Chicago & North Western Railway Company,*[27] that an eight-year old boy could come within the terms of the Illinois statute,[28] for the judgment there sustained on behalf of the infant plaintiff rested upon a wilful and wanton count. But this is a negative inference at best for nothing was said therein as to what the result would have been if only ordinary negligence had been shown present. In the only other reported case anywhere near in point, that of *Krantz* v. *Nichols,*[29] a five-year old boy injured while riding on a neighbor's farm tractor was said to be a licensee rather than an invitee, so the court was able to dispose of a problem concerning the applicability of the statute without deciding it. In fact, it said the application of the statute was "immaterial since our conclusion as to the minor's status raises the same standard of proof of defendant's misconduct as that required under the Guest Statute."[30] One cannot then do more than hazard a guess as to the law of Illinois on the point here concerned.

Even supposing that a minor can effectively, either expressly or impliedly, consent to be a guest, there is still a question as to what would constitute "payment" for the transportation provided to take the case out of the statute. Absent any transfer of actual monetary consideration, the school ride cases can probably best be resolved by reference to the analogous car pool cases concerned with the "share a ride" arrangement in going to and from work. There, at least, the decisions appear to be numerically in favor of applying a passenger status to the co-operating

25 Lombard v. DeSchance, 167 Ohio St. 431, 149 N. E. (2d) 914 (1958).

26 See the cases of Miller v. Miller, 395 Ill. 273, 69 N. E. (2d) 878 (1946); Connett v. Winget, 374 Ill. 531, 30 N. E. (2d) 3 (1940); Perrine v. Charles T. Bisch & Sons, 346 Ill. 321, 105 N. E. (2d) 543 (1952); and Dirksmeyer v. Barnes, 2 Ill. App. (2d) 496, 119 N. E. (2d) 813 (1954). See also notes in 19 CHICAGO-KENT LAW REVIEW 281 and 1 John Marshall L. Q. 193.

27 9 Ill. App. (2d) 340, 132 N. E. (2d) 678 (1956).

28 Ill. Rev. Stat. 1957, Vol. 2, Ch. 95½, § 9-201.

29 11 Ill. App. (2d) 37, 135 N. E. (2d) 816 (1956).

30 11 Ill. App. (2d) 37 at 42, 135 N. E. (2d) 816 at 819.

parties,[31] Illinois included,[32] with the few minority decisions being somewhat weakened by the influence of wartime shortages and rationing.[33] It certainly seems to be well established that the actual payment for the ride need not originate from the injured party transported so, if the driver receives payment or direct benefit from another, the transportation is not gratuitous and a guest relationship is excluded.[34]

Since only a minority of the guest statutes subscribe to the "sheltered niche" approach with respect to infants of tender age, it would appear reasonable to conclude that no special consideration should be shown to minors who choose to ride in automobiles. But the instant case should serve as a warning to parents that the saving of time and expense in transporting children to school via a car pool may turn out to be something other than a blessing in disguise.

R. J. SCHLAKE

PROTECTION AGAINST LIABILITY FOR SCAFFOLDING ACCIDENTS

Back in 1894, at a time when he was leaving the home of John Carlson, Charles Elliott stepped or fell from a platform which was not protected by a railing and he was seriously injured. Elliott sued Carlson in a common law tort action for damages. There was a judgment for the defendant in the trial court and, on appeal, the Appellate Court of Illinois affirmed the decision.[1] The high court, following the rule set forth in *Chapin & Gore* v. *Walsh*,[2] indicated that as the exposure was open, undisguised and patent to view, if the plaintiff did not want to incur the obvious risk, he should not have used the platform. In much the same way, others who came upon a real property owner's premises and were injured when they

31 Huebotter v. Follett, 27 Cal. (2d) 765, 167 P. (2d) 193 (1946); Ott v. Perrin, 116 Ind. App. 315, 63 N. E. (2d) 163 (1945); Sparks v. Getz, 170 Kan. 287, 225 P. (2d) 106 (1950); Coerver v. Haab, 23 Wash. (2d) 481, 161 P. (2d) 194 (1945). See also annotation in 161 A. L. R. 909.

32 Kenney v. Kraml Dairy, Inc., 20 Ill. App. (2d) 531, 156 N. E. (2d) 623 (1959).

33 Everett v. Burg, 301 Mich. 734, 4 N. W. (2d) 63 (1942); Miller v. Fairley, 9 Ohio Supp. 209, 47 N. E. (2d) 243 (1942).

34 Davis v. Woodcock, 101 Cal. App. (2d) 618, 225 P. (2d) 918 (1951); Elliott v. Behner, 146 Kan. 827, 73 P. (2d) 116 (1937); McGuire v. Armstrong, 268 Mich. 152, 255 N. W. 745 (1934); Wendel v. Shaw, 361 Mo. 416, 235 S. W. (2d) 266 (1950); Sprenger v. Braker, 71 Ohio App. 349, 49 N. E. (2d) 958 (1942); and Blanchette v. Sargent, 87 N. H. 15, 173 A. 383 (1934), applying the Vermont statute.

1 Elliott v. Carlson, 54 Ill. App. 470 (1894).

2 37 Ill. App. 526 (1890). In that case, at p. 529, the court said: "The owner or occupant of land who, by invitation, expressed or implied, induces or leads others to come upon his premises for any lawful purpose, is liable in damages to such persons, they using due care, for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was *known to him* and not to them, and was negligently suffered to exist *without timely notice* to the public or those likely to act upon such invitation." Italics added.