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Automobile Guest Statutes—INFANTS UNDER FOURTEEN YEARS OF AGE HELD INCAPABLE OF ACCEPTING GUEST STATUS—*Smith v. Kauffman*

Virginia's guest statute¹ is a legislative codification of the common law gross negligence rule made applicable to automobile guests.² The purpose of this statute is to protect the gratuitous host from a lawsuit at the hands of the very person to whom he is extending the gratuity, and to prevent collusion between the host and his guest against insurers.³ The increasing popularity of automobile travel has prompted over half of the states to adopt similar legislation,⁴ but unfortunately, these statutes have produced what has been appropriately called a "tangle of confusion."⁵

Not the least among the difficulties presented is the question whether an infant may assume guest status. A guest within the meaning of the Virginia Guest Statute is a person whom the owner or possessor of the vehicle invites or permits to ride with him gratuitously.⁶ In order for a guest to recover

¹ VA. CODE ANN. § 8-646.1 (1957) provides in part that "[n]o person transported by the owner or operator of any motor vehicle as a guest without payment . . . shall be entitled to recover damages . . . unless such . . . injury was caused or resulted from the gross negligence . . . of such owner or operator."

² The Virginia Supreme Court has stated on several occasions that § 8-646.1 represents a codification of the rule set down in *Boggs v. Plybon*, 157 Va. 30, 160 S.E. 77 (1931). See *Smith v. Kauffman*, 212 Va. 181, 182, 183 S.E.2d 190, 194 (1971); *Bradshaw v. Minter*, 206 Va. 450, 455, 143 S.E.2d 827, 830 (1965); *Sibley v. Slayton*, 193 Va. 470, 474, 69 S.E.2d 466, 468 (1952); *Wright v. Osborne*, 175 Va. 442, 445, 9 S.E.2d 452, 454 (1940). Prior to *Boggs*, the established rule in Virginia was that the owner or operator of an automobile was liable to a guest for failure to exercise ordinary care. In *Boggs*, the court overturned this rule and adopted the minority view set down in the Massachusetts case of *Massaletti v. Fitzroy*, 228 Mass. 487, 118 N.E. 168 (1917). There the court stated: "[J]ustice requires that to make out liability in case of a 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." *Id.* at 496, 118 N.E. at 177.

³ *Buckner v. Vetterick*, 124 Cal. App. 2d 417, 269 P.2d 67, 68 (1954); *Rosenbaum v. Raskin*, 45 Ill. 2d 25, 257 N.E.2d 100, 102 (1970); *Horst v. Holtzen*, 249 Iowa 958, 90 N.W.2d 41, 43 (1958); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 187 (4th ed. 1971); Note, *Recovery By Child Under Iowa Guest Statute*, 41 IOWA L. REV. 648, 650 (1956); 33 TEXAS L. REV. 253, 254 (1954); 11 U. FLA. L. REV. 124 (1958).

⁴ 54 NW. U.L. REV. 263 nn.2 & 3 (1960). For a list of states which have guest statutes see AM. JUR. 2d DESK BOOK, Doc. No. 123 and Comment, *The Need for Clarification: Should a Child Under the Age of Seven Be Included Within the Provisions of Automobile Guest Statutes?* 75 DICK. L. REV. 432 n.8 (1971).

⁵ W. PROSSER, HANDBOOK OF THE LAW OF TORTS 382 (4th ed. 1971).

⁶ *Mayer v. Puryear*, 115 F.2d 675 (4th Cir. 1940). "The word 'guest' is used to denote one whom the owner or possessor of a motor car or other vehicle invites or permits to ride with him as a gratuity, that is, without any financial return,

against the owner or possessor of the vehicle, he must show that his injuries resulted from gross negligence or the willful and wanton disregard of his safety.⁷

The jurisdictions which have considered the applicability of the guest statute to infants have produced divergent results,⁸ and may be properly classified into three distinct groups. The first of these holds as a matter of law that a child of "tender years" is a guest within the meaning of the statute.⁹ These courts reason that since the statute makes no exception in favor of minors, they have no authority to include such an exception within the statute.¹⁰ Following this same view, other courts have stated unequivocally that the weight of authority indicates that infants may assume guest status, even though unaccompanied by, and without the consent of, a parent or guardian.¹¹

except such slight benefits as it is customary to extend as a part of the ordinary courtesies of the road." *Id.* at 679.

⁷ VA. CODE ANN. § 8-646.1 (1957).

⁸ For a collection of cases on this subject see 8 AM. JUR. 2d *Automobiles and Highway Traffic* § 483 (1963); Annot., 16 A.L.R.2d 1304 (1951) (Later Case Service at 945); 5 BLASHFIELD, *AUTOMOBILE LAW AND PRACTICE* § 214.6 (1966); 60A C.J.S. *Motor Vehicles* § 399.13 (1969); see 75 DICK. L. REV., *supra* note 4, at 432.

⁹ *Tilghman v. Rightor*, 211 Ark. 229, 199 S.W.2d 943 (1947), (7, 9, 14 yrs. old); *Lynott v. Sells*, 52 Del. 385, 158 A.2d 583 (Super Ct. 1958) (5 yrs. old). After noting the "acceptance theory" and rejecting it, the *Lynott* court said: "The better view, it seems to me, and probably the majority view of American jurisdictions, does not except minors from the operation of Guest Statutes." *Id.* at 386, 158 A.2d at 585. The court went on to say that jurisdictions which do except minors, limit this exception to minors who are guests without parental permission. *Brailsford v. Campbell*, 89 So. 2d 241 (Fla. 1956); *In re Wright's Estate*, 170 Kan. 600, 228 P.2d 911 (1951) (4 yrs. old); *Morgan v. Anderson*, 149 Kan. 814, 89 P.2d 866 (1939) (7 yrs. old); *Letterel v. Cerniglia*, 274 App. Div. 896, 82 N.Y.S.2d 670 (1948) (11 yrs. old); *Kemp v. Parmley*, 16 Ohio St. 2d 3, 45 Ohio Op. 2d 67, 241 N.E.2d 169 (1968) (8 yrs. old); see *Ortunan v. Smith*, 198 F.2d 123 (8th Cir. 1952), *cert. denied*, 344 U.S. 856 (1952) (13 yrs. old); *Audia v. De Angelis*, 121 Conn. 336, 185 A. 78 (1936) (14 yrs. old); *Shiels v. Audette*, 119 Conn. 75, 174 A. 323 (1934) (13 yrs. old); *Johnson v. Chicago & N.W. Ry.*, 9 Ill. App. 2d 340, 132 N.E.2d 678 (1956) (8 yrs. old) (by implication); *Falden v. Crook*, 342 Mass. 173, 172 N.E.2d 686 (1961) (11 yrs. old); *Marshall v. Carter*, 301 Mass. 372, 17 N.E.2d 205 (1938) (5½ yrs. old); *Mitzel v. Hauck*, 78 S.D. 543, 105 N.W.2d 378 (1960); *Schlitz v. Picton*, 66 S.D. 301, 282 N.W. 519 (1938) (10 yrs. old).

¹⁰ "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." *Tilghman v. Rightor*, 211 Ark. 229, 199 S.W.2d 943, 945 (1947) (7, 9, 14 yrs. old); *accord*, *Lynott v. Sells*, 52 Del. 385, 158 A.2d 583 (Super Ct. 1958) (5 yrs. old); *Kolar v. Divis*, 179 Neb. 756, 140 N.W.2d 658 (1966) (13 yrs. old). "It is the province of the Legislature to change the statute and not that of this court." *Id.* at 761, 140 N.W.2d at 663. *Linn v. Nored*, 133 S.W.2d 234 (Tex. Civ. App. 1939).

¹¹ *Morgan v. Anderson*, 149 Kan. 814, 89 P.2d 866 (1939) (7 yrs. old). "The weight

A second group of cases hold that a child of "tender years" may assume guest status depending on the presence of parental consent.¹² Here the courts have found either a provision in the statute,¹³ or read into the statute,¹⁴ a requirement of acceptance,¹⁵ either express,¹⁶ or implied,¹⁷ of

of authority is that a minor as well as an adult can be a 'guest' even though unaccompanied by parent or guardian, and even though no express consent of parent or guardian has been shown." *Id.* at 816, 89 P.2d at 868. *Accord, In re Wright's Estate*, 170 Kan. 600, 228 P.2d 911 (1951) (4 yrs. old). *But see In re Wright's Estate, supra* at 917 (dissenting opinion).

¹² See *Coleman v. Guarantee Reserve Life Ins. Co.*, 337 F.2d 288 (5th Cir. 1964) (applying Georgia law); *Rocha v. Hulén*, 6 Cal. App. 2d 245, 44 P.2d 478 (1935) (5 yrs. old); *Wood v. Morris*, 109 Ga. App. 148, 135 S.E.2d 484 (1964) (11 yrs. old); *Chancey v. Cobb*, 102 Ga. App. 636, 117 S.E.2d 189 (1960); *Whitfield v. Bruegel*, 134 Ind. App. 636, 190 N.E.2d 670 (1963) (6 yrs. old); *Horst v. Holtzen*, 249 Iowa 958, 90 N.W.2d 41 (1958) (13 days old); *Balian v. Ogassian*, 227 Mass. 525, 179 N.E. 232 (1931) (4½ yrs. old); *Wendel v. Shaw*, 361 Mo. 416, 235 S.W.2d 266 (1950) (Kan. statute); *Snelling v. Pieper*, 178 Neb. 818, 135 N.W.2d 707 (1965); *Welker v. Sorenson*, 209 Or. 402, 306 P.2d 737 (1957) (29 mos. old); *Favatella v. Poulsen*, 17 Utah 2d 24, 403 P.2d 918 (1965) (7 yrs. old).

¹³ See *Buckner v. Vetterick*, 124 Cal. App. 417, 269 P.2d 67, 68 n.1 (1954) (15 mos., 24 mos. old); *Rocha v. Hulén*, 6 Cal. App. 2d 245, 44 P.2d 478 (1935) (5 yrs. old); *Horst v. Holtzen*, 249 Iowa 958; 90 N.W.2d 41 (1958) (13 days old). "The California statute . . . defines a guest as one who 'accepts a ride in any vehicle upon a highway without giving compensation for such a ride.'" *Id.* at 961, 90 N.W.2d at 44.

¹⁴ See *Green v. Jones*, 136 Colo. 512, 319 P.2d 1083 (1957) (2 yrs. old); *Kudrna v. Adamski*, 188 Or. 396, 216 P.2d 262 (1950) (4 yrs. old). Here the statute does not contain the word "accept" but "this court has defined a guest as one who 'accepts' a ride." *Id.* at 398, 216 P.2d at 264.

¹⁵ *Rocha v. Hulén*, 6 Cal. App. 2d 245, 44 P.2d 478 (1935) (5 yrs. old). "To be a guest one must have accepted the ride in the vehicle involved." *Id.* at 248, 44 P.2d at 482. *Green v. Jones*, 136 Colo. 512, 319 P.2d 1083 (1957) (2 yrs. old). "The status of 'guest' under the statute is acquired only by knowingly and voluntarily accepting the invitation to become so." *Id.* at 515, 319 P.2d at 1806. *Rosenbaum v. Raskin*, 45 Ill. 2d 25, 257 N.E.2d 100 (1970) (4 yrs. old). "The term guest, as used in the statute, contemplates some sort of extension of hospitality and acceptance thereof as a requisite of that status." *Id.* at 26, 257 N.E.2d at 102. *Fuller v. Thrun*, 109 Ind. App. 407, 31 N.E.2d 670 (1941) (6 yrs. old).

¹⁶ See *Coleman v. Guarantee Reserve Life Ins. Co.*, 337 F.2d 288 (5th Cir. 1964); *Chancey v. Cobb*, 102 Ga. App. 636, 117 S.E.2d 189 (1960). "A minor child of tender years riding at the invitation of the driver and owner of an automobile, with express consent and acceptance of its mother, even though, on account of its tender years, incapable of itself giving consent or accepting the invitation, is a guest. . . . *Id.* at 636, 117 S.E.2d at 189. *Favatella v. Poulsen*, 17 Utah 2d 24, 403 P.2d 918 (1965) (7 yrs. old).

¹⁷ See *Buckner v. Vetterick*, 124 Cal. App. 2d 417, 269 P.2d 67 (1954) (15 mos., 24 mos. old); *Wood v. Morris*, 109 Ga. App. 148, 135 S.E.2d 484 (1964) (11 yrs. old); *Whitfield v. Bruegel*, 134 Ind. App. 636, 190 N.E.2d 670 (1963) (6 yrs. old). "Therefore, as a matter of law the father by permitting an unlimited and unrestricted

the invitation¹⁸ extended by the host as a requisite to becoming a guest. These courts reason that if the child himself is too young to be capable of accepting, then his parents,¹⁹ or the person in whom custody has been entrusted,²⁰ may accept for him. This line of reasoning finds the acceptance by the parent to be analogous to the numerous other important decisions which the law allows the parent to make on behalf of the child.²¹

A very small minority of jurisdictions, making up the third group, hold as a matter of law, that a child of "tender years" cannot be a guest within the meaning of the statute.²² Disregarding parental consent, but ascribing

custody relationship between the defendant and the minor child had implied his consent. . . . Thus, the conclusion is inescapable that the child was a guest. . . ." *Id.* at 638, 190 N.E.2d at 672. *Morgan v. Anderson*, 149 Kan. 814, 89 P.2d 866 (1939) (7 yrs. old). Since there were no directions or admonitions by the parent against taking the child on automobile trips, the "[d]efendant's custody under such circumstances certainly implies a reasonable latitude in the care of the child." *Id.* at 817, 89 P.2d at 868. In *Wendel v. Shaw*, 361 Mo. 416, 235 S.W.2d 266 (1950) it was held that the defendant was transporting the child of tender years with the implied consent of the parents and therefore the child had "accepted" the invitation.

¹⁸ *Fuller v. Thrun*, 109 Ind. App. 407, 31 N.E.2d 670 (1941) (6 yrs. old). "A guest . . . is one who is invited either directly or by implication to enjoy the hospitality of the driver. . . ." *Id.* at 409, 31 N.E.2d at 672.

¹⁹ *Horst v. Holtzen*, 249 Iowa 958, 90 N.W.2d 41 (1958) (13 days old). "There seems no good reason why the natural guardian, usually the parent, could not accept an invitation to ride gratuitously in a motor vehicle, for the child." *Id.* at 960, 90 N.W.2d at 44. *Accord*, *Chancey v. Cobb*, 102 Ga. App. 636, 117 S.E.2d 189 (1960); *see* *Coleman v. Guarantee Reserve Life Ins. Co.*, 337 F.2d 288 (5th Cir. 1964); *Buckner v. Vetterick*, 124 Cal. App. 2d 417, 269 P.2d (1954) (15 mos., 26 mos. old). "[W]hen a parent accepts a ride as a guest of the operator of a motor vehicle and takes along her small children she also accepts the ride for them. . . ." *Id.* at 419, 269 P.2d at 69. *Rocha v. Hulens*, 6 Cal. App. 2d 245, 44 P.2d 478 (1935) (5 yrs. old); *Wood v. Morris*, 109 Ga. App. 148, 135 S.E.2d 484 (1964) (11 yrs. old); *Whitfield v. Bruegel*, 134 Ind. App. 636, 190 N.E.2d 670 (1963) (6 yrs. old); *Snelling v. Pieper*, 178 Neb. 818, 135 N.W.2d 707 (1965); *Welker v. Sorenson*, 209 Or. 402, 306 P.2d 737 (1957) (29 mos. old).

²⁰ *Balian v. Ogassian*, 227 Mass. 525, 179 N.E. 232 (1931) (4½ yrs. old). Here it was held that the grandmother as custodian could consent on behalf of the child.

²¹ *Buckner v. Vetterick*, 124 Cal. App. 2d 417, 269 P.2d 67 (1954) (15 mos., 26 mos. old).

Many decisions of more importance and involving greater hazard are made by parents for their small children daily. An example is the right of a parent to consent to an operation on his child and the right of the surgeon to rely on that consent. The same principle prevails where an adult child is an incompetent and has no legally appointed guardian. Thus a parent may speak and act for his child when the child is legally incapable of acting for itself and others may properly rely on the action of the parent in such circumstances. *Id.* at 419, 269 P.2d at 69.

Accord, *Horst v. Holtzen*, 249 Iowa 958, 90 N.W.2d 41 (1958) (13 days old). *But see*, 33 TEXAS L. REV. 253, 254 (1954).

²² *See* *Green v. Jones*, 136 Colo. 512, 319 P.2d 1083 (1957) (2 yrs. old); *Rosenbaum v. Raskin*, 45 Ill. 2d 25, 257 N.E.2d 100 (1970) (4 yrs. old); *Fuller v. Thrun*, 109 Ind. App. 407, 31 N.E.2d 670 (1941) (6 yrs. old); *Burhans v. Witbeck*, 375 Mich. 235, 134

to the theory that acceptance is a prerequisite to the assumption of guest status, these courts reason that a child of "tender years" is not possessed of sufficient mental capacity to assume the risks inherent in automobile travel, and consequently cannot accept guest status.²³

The Virginia Supreme Court was confronted with this problem in the recent case of *Smith v. Kauffman*.²⁴ In *Smith*, a seven-year-old child brought an action against the administrator of her stepfather's estate to recover for personal injuries suffered in an automobile accident, allegedly as a result of the stepfather's negligence. The trial court had held alternatively, that even if the plaintiff could maintain the action,²⁵ the guest statute provided that her stepfather only owed a duty of slight care because the child was a gratuitous guest-passenger.²⁶ In reversing this decision, the Virginia Supreme Court held that "a child under the age of fourteen years is incapable of knowingly and voluntarily accepting an invitation to become a guest in an automobile so as to subject himself to the gross negligence rule."²⁷

The *Smith* court adopted the proposition that acceptance is a prerequisite to the assumption of guest status,²⁸ but rejected the concept of parental acceptance on behalf of the child.²⁹ The court also impliedly held that parental acceptance does not take into account the realities of the situation,³⁰ but neglected to define these disqualifying realities. It follows from this reasoning that an infant's guest status rests solely on the capacity of the infant to accept the invitation to become a guest in his own behalf. The court then

N.W.2d 225 (1965) (5, 7 yrs. old). In *Burbans* the court held children under seven not to be guests as a matter of law, but as to children seven and over, the issue became a question of fact for the jury. *Kudrna v. Adamski*, 188 Or. 396, 216 P.2d 262 (1950) (4 yrs. old); *Hart v. Hogan*, 173 Wash. 598, 24 P.2d 99 (1933) (12 yrs. old).

Kudrna, *Hart*, and *Fuller* have been distinguished in *Welker v. Sorenson*, 209 Or. 402, 306 P.2d 737 (1957), *Buckner v. Vetterick*, 124 Cal. App. 2d 47, 269 P.2d 67 (1954), and *Whitfield v. Bruegel*, 134 Ind. App. 636, 190 N.E.2d 670 (1963), and should not be held to stand for the proposition that as a matter of law a child cannot be a guest.

²³ *Green v. Jones*, 136 Colo. 512, 319 P.2d 1083 (1957) (2 yrs. old); *Rosenbaum v. Raskin*, 45 Ill. 2d 25, 257 N.E.2d 100 (1970) (4 yrs. old).

²⁴ 212 Va. 181, 183 S.E.2d 190 (1971).

²⁵ *Id.* at 182, 183 S.E.2d at 191-92. The stepfather stood *in loco parentis* to the child and as a result was immune from liability. On appeal the court abolished the intra family tort immunity in actions involving automobile negligence.

²⁶ *Id.* at 182, 183 S.E.2d at 192.

²⁷ *Id.* at 187, 183 S.E.2d at 195.

²⁸ *Id.* at 187, 183 S.E.2d at 195.

²⁹ *Id.* at 187, 183 S.E.2d at 195.

³⁰ The court impliedly adopts the reasoning in *Rosenbaum v. Raskin*, 45 Ill. 2d 25, 257 N.E.2d 100 (1970) where it was held that parental consent does not take into account the realities of the situation. *Rosenbaum* cites Prosser as authority but neither *Smith*, *Rosenbaum*, nor Prosser elect to define these realities.

pronounced the rule that a child under the age of fourteen is not possessed of this capacity. This decision places Virginia squarely in line with the minority of jurisdictions which hold as a matter of law that a child of "tender years" cannot be a guest within the meaning of the statute.

The jurisdictions in the first group which draw no distinction between infants and adults are not confronted with the problem of the capacity of a child to accept guest status. However, those courts which do ascribe to the "acceptance theory" find it necessary to draw a line with respect to the age of the child. Most of these jurisdictions find an analogy in the common law principle that a child between the ages of zero and seven is *non sui juris* and incapable of negligence.³¹ A child of this age therefore would also be incapable of assuming a risk, and consequently, could not accept guest status and become a guest in the absence of parental consent. With respect to children between the ages of seven and fourteen, the common law presumption of no negligence is rebuttable.³² Accordingly then, in the absence of parental consent, the question of assumption of risk and acceptance of guest status becomes one for the trier of fact based on the age, intelligence, and experience of the child.³³

The *Smith* court noted the above proposition, but rejected it, implying that the capacity to assume a risk was not readily comparable to the capacity to be negligent. This reasoning seemingly suggests the tenuous proposition that it requires more intelligence and judgment on the part of a child to assume a risk than it does to be guilty of negligence.³⁴ This result rightly provided the basis for the dissenting opinion.³⁵ The principle of assumption of risk is derived from the law of contracts and is based on consent.³⁶ Under the guest statute, assumption of risk involves consent to ordinary negligence.³⁷ This amounts to an election to run the everyday risks inherent in automobile travel without recourse against the host.³⁸ Negligence is

³¹ See *Rocha v. Hulen*, 6 Cal. App. 2d 245, 44 P.2d 478 (1935) (5 yrs. old); *Rosenbaum v. Raskin*, 45 Ill. 2d 25, 257 N.E.2d 100 (1970) (4 yrs. old); *Fuller v. Thrun*, 109 Ind. App. 407, 31 N.E.2d 670 (1941) (6 yrs. old); *Burhans v. Witbeck*, 375 Mich. 253, 134 N.W.2d 225 (1965) (5, 7 yrs. old); *Kudrna v. Adamski*, 188 Or. 396, 216 P.2d 262 (1950) (4 yrs. old).

³² See *Rosenbaum v. Raskin*, 45 Ill. 2d 25, 257 N.E.2d 100 (1970) (4 yrs. old); *Burhans v. Witbeck*, 375 Mich. 253, 134 N.W.2d 225 (1965) (5, 7 yrs. old); *Smith v. Kauffman*, 212 Va. 181, 187, 183 S.E.2d 190, 195 (1971).

³³ *Burhans v. Witbeck*, 375 Mich. 253, 134 N.W.2d 225, 227 (1965), (5, 7 yrs. old).

³⁴ *Smith v. Kauffman*, 212 Va. 181, 188, 183 S.E.2d 190, 195 (1971) (dissenting opinion).

³⁵ *Id.*

³⁶ 65A C.J.S. *Negligence* § 117 (1950); 18 WASH. & LEE L. REV. 316, 319 (1961).

³⁷ See *Boggs v. Plybon*, 157 Va. 30, 160 S.E. 77 (1931).

³⁸ *Id.* at 39, 160 S.E. at 81.

derived from the law of torts and is based on fault.³⁹ Fault results from recognizing or failing to recognize a risk, and running it, when the magnitude of the risk outweighs the utility of the conduct.⁴⁰ Both principles involve the election to run a risk. Accordingly then, it should not require more intelligence to do so in the former case than it does in the latter.

The decision in *Smith* circumvented a small amount of Virginia case authority which, by way of implication, would seem to have produced an opposite result.⁴¹ It also represents an unwarranted extension of what might be termed a recent trend⁴² to exclude infants from the operation of guest statutes. This holding is likely to result in the anomalous situation in which a host will be liable for a greater degree of care to a child than he would be to an accompanying parent.⁴³ It should be noted that the two cases relied on by the Virginia Court dealt with children of ages two and four. These courts referred to children of "tender years." In an examination of all cases dealing with this issue, it will be found that the phrase "tender years" has been used in conjunction with children of considerably younger age than the limit prescribed by the Virginia Court.⁴⁴

In their efforts to establish the rule, the court in *Smith* was faced with a seven-year-old, a child just beyond the zero to seven age category. Thus, in a laudable attempt to provide for future expediency and to avoid vagueness in interpretation, the court adopted the next "logical" dividing line at age fourteen. Had the plaintiff in *Smith* been below the age of seven, the law in Virginia might very well be different today.

A solution more in keeping with the purpose of the statute would be to accept the proposition of parental consent.⁴⁵ Then, in its absence, to apply

³⁹ 65 A.C.J.S. *Negligence* § 117 (1950); 18 WASH. & LEE L. REV. 319 (1961).

⁴⁰ RESTATEMENT (SECOND) OF TORTS § 291 (1965).

⁴¹ See *Laughorn v. Eanes*, 207 Va. 584, 151 S.E.2d 378 (1966); *Ruett v. Nottingham*, 200 Va. 722, 107 S.E.2d 402 (1959). The question as to whether a child could become a guest was not decided by either case. However, both cases impliedly held that a child may become a guest, as no recovery was allowed in the absence of gross negligence.

⁴² *Rosenbaum v. Raskin*, 45 Ill. 2d 25, 257 N.E.2d 100 (1970) (4 yrs. old); *Cox v. Nicholes*, 122 Ill. App. 2d 252, 258 N.E.2d 394 (1970) (6 yrs. old); *Burhans v. Witbeck*, 375 Mich. 253, 134 N.W.2d 225 (1965) (5, 7 yrs. old); *Kelly v. Bywater*, 18 Mich. App. 238, 171 N.W.2d 58 (1969). Although these recent cases have held that a child is not a guest as a matter of law, none of them have specifically set an age limit as high as the Virginia court in *Smith*.

⁴³ *Buckner v. Vetterick*, 124 Cal. App. 2d 417, 269 P.2d 67, 68 (1954) (15 mos., 26 mos. old).

⁴⁴ See the commentary within the footnotes for the ages of the children.

⁴⁵ Parental consent should be considered only where the parent accompanies the child in the vehicle. The parent would then be in the position to terminate the host-guest relationship at any time by protesting negligent conduct on the part of the host, thereby protecting the child's right of recovery which would otherwise be lost. 75 DICK. L. REV., *supra* note 4, at 444.

the common law presumptions regarding the capacity of infants to be negligent, in their entirety, to the principles of assumption of risk. Such a solution would then provide that in the absence of parental consent, a child between the ages of zero and seven would be incapable of accepting guest status, and cases involving children from seven to fourteen would present a question of fact for the jury. The language in *Smith*, however, is explicit, and leaves no room for any further judicial interpretation. This decision forecasts an increase in litigation as it has added thousands of persons to the list of prospective plaintiffs. Furthermore, the increase in litigation may well be accompanied by an increase in collusion between the host and his guest in an attempt to defraud insurers. The propriety of the *Smith* decision therefore is questionable since the aggregate result is directly contra to the purpose of the statute.

W. L. P. III