72.00

Automobile Guests--Joint Enterprise—Passengers

Introduction

The instructions in this section were prepared at a time when the rights of a guest and the duty of a host driver in Illinois were proscribed by the "guest act" (*see* Ill. Rev. Stat. ch. 95 1/2, &p;10-201 (1971)). IPI 72.01, 72.02, and 72.05 were prepared for use in cases brought under the "Guest Act". IPI 72.03 and 72.04 are useful in situations in addition to the guest-host situation.

In 1971, the "Guest Act" was repealed. For occurrences after January 1, 1972, a person riding as a guest need only prove negligence in order to recover from his host. 625 ILCS 5/10-201 (1994). However, a hitchhiker must still prove wilful and wanton conduct on the part of his host in order to recover damages from his host. 625 ILCS 5/10-201 (1994). For the hitchhiker, IPI 14.01, which defines wilful and wanton conduct, and the second portion of IPI 20.01.01, which states the issues in a case requiring proof of wilful and wanton conduct, may be used together with the second portion of IPI B21.02.02, which states the plaintiff's burden in a case requiring proof of wilful and wanton conduct.

Because it is unlikely that "Guest Act" cases remain unresolved, the Committee has withdrawn IPI 72.01, 72.02, 72.05, and 72.06. Where the injury occurred after January 1, 1972, IPI 20.01 (issues) and B21.02 (burden of proof) will be appropriate.

In *Rosenbaum v. Raskin*, 45 Ill.2d 25, 257 N.E.2d 100 (1970) the supreme court refused to apply the Guest Act to a child of 4 years. The court reasoned that a question arises as to mental capacity of a child of tender years to understand and accept the status of a guest-host.

A third person, usually the driver of another car, owes a rider the duty of ordinary care no matter in what legal relationship the rider stands to his own driver.

72.01 Definition of Guest In Motor Vehicle and Motorcycle Cases

Withdrawn

Comment

The "Guest Act" was repealed in 1971, effective January 1, 1972, and therefore this instruction has been withdrawn.

72.02 Definition of Guest--Motor Vehicle and Motorcycle Cases--Issues As To Driver's Authority To Invite

Withdrawn

Comment

The "Guest Act" was repealed in 1971, effective January 1, 1972, and therefore this instruction has been withdrawn.

72.03 Negligence of Driver Not Attributable To Passenger

If you find that there was negligence on the part of the driver of the vehicle in which the plaintiff was riding, then the driver's negligence cannot be charged to the plaintiff. The care required of the plaintiff in this case is that which a reasonably careful person riding as a passenger would use under similar circumstances.

Notes on Use

This instruction may not be given when the plaintiff is either the driver's employer, principal, partner or joint venturer.

This instruction should not be given where there is a dispute as to who was driving the vehicle.

Comment

Generally, the negligence of a driver may not be imputed to a passenger. *Milis v. Chicago Transit Authority*, 1 Ill.App.2d 236, 117 N.E.2d 401 (1st Dist.1954) (negligence of taxicab driver not imputable to passengers); *Ohlweiler v. Central Engineering Co.*, 348 Ill.App. 246, 109 N.E.2d 232 (2d Dist.1952) (error to refuse instruction to this effect in action by guest passenger against driver and highway contractor who failed to erect warning signs on road construction); *Buehler v. White*, 337 Ill.App. 18, 85 N.E.2d 203 (3d Dist.1949) (negligence of husband in parking at highway edge to adjust mechanical difficulty not imputable to plaintiff wife); *Walsh v. Murray*, 315 Ill.App. 664, 43 N.E.2d 562 (2d Dist.1942) (action for wrongful death of minor child of plaintiff; held: misconduct of driver could not be imputed to plaintiff because there was no evidence that driver had been appointed plaintiff's agent to bring minor child home).

An apparent exception to the foregoing rule is *Opp v. Pryor*, 294 Ill. 538, 547; 128 N.E. 580, 584 (1920), where, to sustain her burden of proof that she was in the exercise of ordinary care at the time of the accident, plaintiff relied upon the testimony of the driver and another passenger, the latter sitting in the rear seat while plaintiff occupied the front seat with the driver, as to what they could see. The court held it was erroneous to instruct that if the plaintiff was a guest, had no authority to control the operation of the automobile, and was in the exercise of due care for her own safety, then the negligence of the driver could not be imputed to her. Actually, the reasoning of the court indicates that, under such circumstances, the instruction is confusing because the only evidence from which due care on the part of the plaintiff could be inferred was the testimony of the driver as to her own care in the management of the automobile.

A difficult problem is presented where the owner is a passenger.

In *Palmer v. Miller*, 380 Ill. 256, 43 N.E.2d 973 (1942) a guest sued the son of the car owner for injuries received when the son's friend negligently drove the car in which the three were riding into a tree. The Supreme Court held that there could be no agency between the driver and the son because of the son's minority; that the negligence of the driver could not be imputed to the son, and that any liability of the son had to rest on his own negligence in failing to control the driving of the car.

In *Rigdon v. Crosby*, 328 Ill.App. 399, 66 N.E.2d 190 (2d Dist.1946) (abstract), it was held error to instruct that the plaintiff could recover if the injuries were caused by the defendant's negligence and if the plaintiff was exercising due care, because it omitted the question of the due care of the driver of the car where plaintiff owned the car and had a duty to control the driver.

In *Koch v. Lemmerman*, 12 Ill.App.2d 237, 139 N.E.2d 806 (4th Dist.1956), the defendant owner was a passenger in the rear seat and his son was driving. Noting that there was evidence of wilful and wanton misconduct and that the owner had the right to control the manner in which the car was driven and had a duty to control the driver, the court sustained a recovery by another passenger against the owner. *See also Staken v. Shanle*, 23 Ill.App.2d 269, 162 N.E.2d 604 (3d Dist.1959); *Simaitis v. Thrash*, 25 Ill.App.2d 340, 166 N.E.2d 306, 311 (2d Dist.1960).

IPI 72.03 was held proper under the facts of the case. *Butler v. Chicago Transit Authority*, 38 Ill.2d 361, 367-368; 231 N.E.2d 429, 432-433 (1967).

It was held in *Dooley v. Darling*, 26 Ill.App.3d 342, 324 N.E.2d 684 (5th Dist.1975), that the use of IPI 72.03 is not precluded in owner-passenger cases. However, the court ruled that it may have been desirable and appropriate to temper the instruction in view of the plaintiff's de facto ownership powers over the use of the automobile. In this case, the plaintiff (passenger-owner's administrator) made a claim against his driver and the driver of the other car involved.

In *Bauer v. Johnson*, 79 Ill.2d 324, 403 N.E.2d 237, 38 Ill.Dec. 149 (1980), the Illinois Supreme Court reviewed the current cases and settled the law regarding the obligation of the owner-passenger. The court held an owner-passenger-plaintiff can be contributorily negligent in failing to control the conduct of the driver:

> The passenger's ownership of the car is relevant only insofar as it is a circumstance which gives the passenger reason to believe that his or her advice, directions or warnings would be heeded. (Restatement (Second) of Torts §495, comment *e* (1965).) But no passenger has a duty to keep a lookout or to control the driver unless the plaintiff knows or should know that such actions are essential to his or her safety. Restatement (Second) of Torts §495, comments *c* and *d* (1965).

Id. at 332, 403 N.E.2d at 241, 38 Ill.Dec. at 153.

72.04 Joint Enterprise--Definition

One of the issues to be decided by you is whether ____ and ____ were engaged in a joint enterprise. A joint enterprise exists if these four elements are present:

(1) An agreement, express or implied, between ____ and ____; and

(2) A common purpose to be carried out by ____ and ____; and

(3) A common business interest in that purpose between ____ and ____; and

(4) An understanding between them that each had a right to share in the control of the operation of the car.

As to the fourth element, the question for you to decide is whether there was a right in each to share the control of the operation of the car rather than the actual exercise of the right.

Notes on Use

Fill in the blanks with the names of the persons claimed to have been engaged in the joint enterprise at the time of the occurrence.

This instruction should be given only when the issues and burden of proof instructions include the "joint enterprise" element.

Comment

The previous version of this instruction required only a finding of a "community of interest" on the part of a driver and passenger rather than a common business enterprise. That instruction was criticized in a note in *Campanella v. Zajic*, 62 Ill.App.3d 886, 379 N.E.2d 866, 20 Ill.Dec. 33 (2d Dist.1978). In that case, the court carefully reviewed the law of Illinois with respect to a joint enterprise and also relied upon the Restatement (Second) of Torts, §§491 and 548. The previous version of this instruction did in fact omit the "common business enterprise" requirement established by the cases and the Restatement. For that reason, the instruction has been redrawn to incorporate the "common business enterprise" and the other requirements of the Restatement (Second) of Torts to accurately state the issues involved in a joint enterprise.

In *Grubb v. Illinois Terminal Co.*, 366 Ill. 330, 338-340; 8 N.E.2d 934, 938-939 (1937), the court held that an instruction which stated that the negligence of the driver could not be imputed to the passenger was erroneous where the evidence showed that three sisters were traveling to Springfield in order to purchase materials to decorate their home and that the expense of these materials and the cost of the trip were to be shared equally in accordance with an arrangement made before the trip started. *Birnbaum v. Kirchner*, 337 Ill.App. 25, 29-31; 85 N.E.2d 191, 192-194 (3d Dist.1949) (a guest en route to spend a weekend in the driver's cabin was not engaged in a joint enterprise while extricating the car from the ditch because he did not have "some" control over the operation); *Schmalzl v. Derby Foods, Inc.*, 341 Ill.App. 390, 94 N.E.2d 86 (1st Dist.1950) (a person who rode home from work every night with the driver who

occasionally paid some money to the driver had neither a common interest nor some right to control the enterprise).

It has been held error to instruct with respect to joint enterprise where the issue is not submitted and the term defined. *Stahnke v. American Carloading Corp.*, 308 Ill.App. 318, 31 N.E.2d 323 (1st Dist.1941) (abstract). However, in *Miller v. Green*, 345 Ill.App. 255, 261-263; 103 N.E.2d 188, 191, 192 (1st Dist.1951), the court held that failure to include a definition of joint enterprise in an instruction stating that plaintiff would be chargeable with the driver's negligence in case the jury found that the three police officers who were making their rounds in a private car owned by one of them were engaged in a joint enterprise was not reversible error. In that case the plaintiff who was appealing had himself offered an instruction on joint enterprise which did not contain a definition of joint enterprise.

The refusal of an instruction on joint enterprise was not error when there was no evidence of a business enterprise. *Smith v. Bishop*, 32 Ill.2d 380, 205 N.E.2d 461 (1965).

The giving of a joint enterprise instruction was reversible error where there was no evidence of a business enterprise. *Babington v. Bogdanovic*, 7 Ill.App.3d 593, 288 N.E.2d 40 (4th Dist.1972).

No common interest or business enterprise may be inferred from sharing incidental expenses or aiding a friend in shopping for an automobile. *Galliher v. Holloway*, 130 Ill.App.3d 628, 474 N.E.2d 797, 85 Ill.Dec. 837 (5th Dist.1985).

No joint enterprise existed between a mother and her sons who were traveling together in the family automobile to work at a restaurant. The relationship between two employees is not a joint enterprise. *Andes v. Lauer*, 80 Ill.App.3d 411, 399 N.E.2d 990, 993; 35 Ill.Dec. 701, 704 (3d Dist.1980).

72.05 Duty of Driver To Guest or Joint Venturer In Motor Vehicle or On Motorcycle

[Withdrawn]

Comment

The "Guest Act" was repealed in 1971, effective January 1, 1972, and therefore this instruction has been withdrawn.

72.06 Duty of Guest Rider To Warn Driver

[Withdrawn]

Comment

The "Guest Act" was repealed in 1971, effective January 1, 1972, and therefore this instruction has been withdrawn.

72.07 Gratuitous Bailment--Negligence of Driver Not Attributable To Owner

If you find that there was negligence on the part of the driver of the vehicle owned by the plaintiff, that driver's negligence cannot be charged to the plaintiff.

Notes on Use

This instruction is new. It should only be given where there is no issue of agency involved. If agency is an issue, use IPI 50.07.

Comment

In an action by an owner against a negligent third party for damage to the owner's property while in the possession of a gratuitous bailee, the negligence of the bailee is not imputed to the owner absent agency or negligent entrustment. This is true even if the owner is in the vehicle at the time of damage. *Andes v. Lauer*, 80 Ill.App.3d 411, 399 N.E.2d 990, 35 Ill.Dec. 701 (3d Dist.1980).

"It is settled law that the negligence of a bailee is not imputed to the bailor." *Eckerty v. Lowman*, 16 Ill.App.3d 373, 306 N.E.2d 356, 357 (4th Dist.1974).

"The modern rule supported by most authorities is that the bailee's negligence is not imputable to the bailor in the latter's action against a third person for injury to, or destruction of, the subject of the bailment." 8 Am. Jur. 2d *Bailments*, §269 (1980).