Cornell Law Review

Volume 59
Issue 4 *April 1974*

Article 6

Present Status of Automobile Guest Statutes

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NOTE

THE PRESENT STATUS OF AUTOMOBILE GUEST STATUTES

Automobile "guest statutes,"[1] which deny recovery to a non-paying automobile passenger injured as a result of his host driver's ordinary negligence, have existed at one time or another in twenty-eight states.[2] All of these statutes were enacted between 1927 and 1939[3] and were based on the reasoning of prior judicial

[1] While the principal focus of this Note is upon legislative enactments, it must be noted that in three states—Massachusetts, Georgia, and Wisconsin—limitations on a guest's cause of action were exclusively of judicial creation and were never embodied in statutes. *See* Epps v. Parrish, 26 Ga. App. 399, 106 S.E. 297 (1921); Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917); O'Shea v. Lavoy, 175 Wis. 456, 185 N.W. 525 (1921); notes 13-18 and accompanying text *infra*.

[2] The following statutes are listed in both present form (where codified) and initial session law form. Except for the Connecticut statute (which was never codified), the California statute (which was nullified), and the Florida and Vermont statutes (which were repealed), the original enactments appear in parentheses: ALA. CODE tit. 36, § 95 (1959) (No. 442, [1935] Ala. Acts 918); ARK. STAT. ANN. § 75-913 (1947) (No. 61, [1935] Ark. Acts 138); ch. 787, § 1, [1929] Cal. Stat. 1580 (codified at CAL. VEHICLE CODE § 17158 (West 1971)) (declared unconstitutional 1973); COLO. REV. STAT. ANN. § 13-9-1 (1963) (ch. 118, § 1, [1931] Colo. Laws 460); ch. 308, §§ 1-2, [1927] Conn. Acts 4404 (repealed 1937); DEL. CODE ANN. tit. 21, § 6101 (1953) (ch. 270, §§ 1-2, [1929] 36 Del. Laws 795 (declared unconstitutional 1932); amended by ch. 26, §§ 1-2, [1933] 38 Del. Laws 159); ch. 18033, §§ 1-2, [1937] Fla. Laws 671 (codified at FLA. STAT. ANN. § 320.59 (1968)) (repealed 1972); IDAHO CODE §§ 49-1401 to -1402 (1967) (ch. 135, §§ 1-2, [1931] Idaho Laws 232); ILL. ANN. STAT. ch. 95 1/2, § 10-201 (Smith-Hurd Supp. 1973) (§ 42-1, [1935] Ill. Laws 1221); IND. STAT. ANN. § 9-3-3-1 (Burns 1973) (ch. 201, §§ 1-2, [1929] Ind. Acts 679); IOWA CODE ANN. § 321.494 (Supp. 1972) (ch. 119, § 1, [1927] Iowa Acts 112); KAN. STAT. ANN. § 8-122b (1964) (ch. 81, § 1, [1931] Kan. Laws 146); MICH. STAT. ANN. § 9.2101 (1968) (No. 19, § 1, [1929] Mich. Acts 43); MONT. REV. CODES ANN. §§ 32-1113 to -1116 (1947) (ch. 195, §§ 1-4, [1931] Mont. Laws 550); NEB. REV. STAT. § 39-740 (1968) (ch. 105, § 1, [1931] Neb. Laws 278); NEV. REV. STAT. § 41.180 (1971) (ch. 34, § 1, [1933] Nev. Stat. 29); N.M. STAT. ANN. §§ 64-24-1 to -2 (1972) (ch. 15, §§ 1-2, [1935] N.M. Laws 26); N.D. CENT. CODE §§ 39-15-01 to -03 (1972) (ch. 184, §§ 1-3, [1931] N.D. Laws 310); OHIO REV. CODE ANN. § 4515.02 (Page 1965) (File No. 25, [1933] Ohio Laws 57); ORE. REV. STAT. § 30.115 (1971) (ch. 342, § 1, [1927] Ore. Laws 448 (declared unconstitutional 1928); amended by ch. 401, §§ 1-2, [1929] Ore. Laws 550); S.C. CODE ANN. § 46-801 (1962) (No. 659, §§ 1-2, [1930] S.C. Acts 1164); S.D. COMPILED LAWS ANN. § 32-34-1 (1969) (ch. 147, § 1, [1933] S.D. Laws 154); TEX. REV. CIV. STAT. art. 6701b (1969), *as amended* ch. 28, § 3, [1973] Tex. Laws 42 (ch. 225, §§ 1-2, [1931] Tex. Laws 379); UTAH CODE ANN. § 41-9-1 (1970) (ch. 52, §§ 1-2, [1935] Utah Laws 129); No. 78, § 1, [1929] Vt. Laws 87 (codified at VT. STAT. ANN. tit. 23, § 1491 (1967)) (repealed 1970); VA. CODE ANN. § 8-646.1 (1957) (ch. 285, § 1, [1938] Va. Acts 417); WASH. REV. CODE § 46.08.080 (1970) (ch. 18, §§ 1-2, [1933] Wash. Laws 145); WYO. STAT. ANN. § 31-233 (1967) (ch. 2, § 1, [1931] Wyo. Laws 3).

[3] Tipton, *Florida's Automobile Guest Statute*, 11 U. FLA. L. REV. 287, 288 (1958) [hereinafter cited as Tipton].

decisions.[4] Since their first appearance, guest statutes have been subject to some praise[5] but a great deal more criticism.[6] Nevertheless, for over thiry years, where they have been enacted, guest statutes have remained in operation with almost no significant changes.[7]

In 1969, however, the Vermont legislature repealed that state's guest statute.[8] The Florida legislature followed suit in 1972.[9] And in 1973, the Supreme Court of California declared that state's guest statute unconstitutional.[10] These and other recent developments suggest that state legislatures and courts have begun to reexamine guest statutes more critically than ever before. This new assessment raises the fundamental issue of whether the guest statutes are compatible with modern legal and social standards, and if not, how they are to be treated.

I

BACKGROUND OF THE GUEST STATUTES

A. *Judicial Origin*

Automobile guest statutes have their origins in judicial decisions.[11] In the early part of this century, the rapid development of the automobile brought a corresponding expansion of litigation dealing with automobile accidents. Inevitably, claims by injured guest passengers against their host drivers arose, and courts were

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[4] *See, e.g.*, Epps v. Parrish, 26 Ga. App. 399, 106 S.E. 297 (1921); Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917); Boggs v. Plybon, 157 Va. 30, 160 S.E. 77 (1931); Saxe v. Terry, 140 Wash. 503, 250 P. 27 (1926).

[5] *See, e.g.*, Crawford v. Foster, 110 Cal. App. 81, 293 P. 841 (1930); Weber, *Guest Statutes*, 11 U. CIN. L. REV. 24 (1937); 18 CALIF. L. REV. 184 (1930).

[6] *See, e.g.*, Stevens v. Stevens, 355 Mich. 363, 94 N.W.2d 858 (1959); W. PROSSER, LAW OF TORTS 187, 382-85 (4th ed. 1971) [hereinafter cited as PROSSER]; Lascher, *Hard Laws Make Bad Cases–Lots of Them (The California Guest Statute)*, 9 SANTA CLARA LAW. 1 (1968); White, *The Liability of an Automobile Driver to a Non-Paying Passenger*, 20 VA. L. REV. 326 (1934); 14 IOWA L. REV. 243 (1929); Note, *Liability Under Automobile Guest Statutes*, 1 WYO. L.J. 182 (1947).

[7] In general, the only changes in most statutes have been relatively minor additions, deletions, or rewordings. In Delaware, for example, the guest statute was amended in 1949 to cover boats, airplanes, and other vehicles, Ch. 49, § 1, [1949] 47 Del. Laws 91.

[8] No. 194, § 1, [1969] Vt. Laws Adj. Sess. 70 (effective 1970); *see* notes 120-32 and accompanying text *infra*.

[9] Ch. 72-1, [1972] Fla. Laws 113; *see* notes 133-45 and accompanying text *infra*.

[10] In Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973), the court found that the guest statute (CAL. VEHICLE CODE § 17158 (West 1971)) violated the equal protection guarantees of the California and United States Constitutions. *See* notes 156-82 and accompanying text *infra*.

[11] *See* note 4 *supra*.

faced with the problem of determining the nature and extent of the host's liability to his injured passenger.[12]

An early case on the subject was *Massaletti v. Fitzroy,*[13] in which the plaintiff was injured as a result of the negligent driving of the defendant's chauffeur. There was no question as to the plaintiff's status as a nonpaying guest. Nor was there any doubt that the defendant's servant had been negligent and that such negligence was properly imputed to the defendant. However, the plaintiff failed to allege or prove the existence of "gross negligence"[14] on the part of the defendant. The question for the Supreme Judicial Court of Massachusetts was whether, in the absence of gross negligence, the defendant-employer could be held liable to the plaintiff-guest for the ordinary negligence of the chauffeur.

Following the reasoning of pre-automobile cases,[15] the court determined that the defendant's duty of care to the plaintiff was no greater than that of a gratuitous bailee.[16] The court adhered to the rule that, in the case of a gratuitous undertaking, the defendant would be held liable only if found guilty of gross negligence.[17] In concluding, the court acknowledged the difficulties involved in distinguishing between the degrees of negligence, but emphasized that such distinctions were necessary in order to achieve a just result.[18]

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[12] This issue arises only in the context of private, as opposed to commercial, claims. Public carriers have always been held to a high standard of care for the safety of passengers. *See, e.g.,* PROSSER 180.

[13] 228 Mass. 487, 118 N.E. 168 (1917).

[14] *Id.* at 489, 118 N.E. at 168.

[15] The leading pre-automobile case was West v. Poor, 196 Mass. 183, 81 N.E. 969 (1907), in which a child riding in a milk wagon without the driver's permission, but with his knowledge, was injured while climbing down from the wagon. The court held that the driver was not liable because he owed the child no greater duty of care than "that of a licensor or *gratuitous bailee.*" *Id.* at 185, 81 N.E. at 969 (emphasis added).

[16] "The measure of liability of one who undertakes to carry *gratis* is the same as that of one who undertakes to keep *gratis.*" 228 Mass. at 508, 118 N.E. at 176-77. To a large degree, the court's analogy to gratuitous bailments can be traced to Chief Justice Holt's opinion in Coggs v. Bernard, 2 Ld. Raymond 909, 92 Eng. Rep. 107 (K.B. 1703), which also distinguished between gross and ordinary negligence. For a discussion of the degrees of negligence, see PROSSER 180-86.

[17] 228 Mass. at 506, 118 N.E. at 176.

[18] The court stated this as follows:

> Justice requires that the one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay. There is an inherent difficulty in stating the difference between the measure of duty which is assumed in the two cases. But justice requires that to make out liability in the 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 he paid for doing the same thing.

Id. at 510, 118 N.E. at 177. *See generally* note 77 *infra.*

The *Massaletti* rule was subsequently adopted by courts in Georgia, Washington, and Virginia.[19] Many other courts, however, rejected the *Massaletti* rule. Even before the Massachusetts court's decision, the Alabama Supreme Court had declared that it would exact a standard of "reasonable care" from automobile hosts.[20] Maine adopted a similar position, insisting that "the gratuitous undertaker shall be mindful of the life and limb of his guest and shall not unreasonably expose her to additional peril."[21] Several other courts adopted this line of reasoning,[22] some pointing to the *Massaletti* rule's potential for anomalous results.[23] As a result, until

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[19] Epps v. Parrish, 26 Ga. App. 399, 106 S.E. 297 (1921); Boggs v. Plybon, 157 Va. 30, 160 S.E. 77 (1931); Saxe v. Terry, 140 Wash. 503, 250 P. 27 (1926). In *Boggs*, the Supreme Court of Appeals of Virginia embellished the Massachusetts court's view with its own notion of hospitality by declaring that "[t]o hold that a guest who, for his own pleasure, is driving with his host may recover from him for injuries suffered where there is no culpable negligence, shocks one's sense of justice." 157 Va. at 39, 160 S.E. at 81.

Some courts, while approving of *Massaletti*'s notions of justice, preferred the analogy of the licensee on real property. Wisconsin adopted this rationale in O'Shea v. Lavoy, 175 Wis. 456, 185 N.W. 525 (1921). However, as Dean Prosser stated:

> The soundness of the analogy to passive conditions on land may be doubted, since one who is driving a car with bad brakes is certainly engaged in a dangerous active operation, even though he does not know that they are bad.

PROSSER 383. Wisconsin eventually did away with the rule in McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

[20] The express or implied duty of the car owner and driver to tbe occupant of the car is to exercise reasonable care in its operation not to unreasonably expose to danger and injury the occupant by increasing the hazard of that method of travel. He must exercise the care and diligence which a man of reasonable prudence, engaged in like business, would exercise for his own protection and the protection of his family and property—a care which must be reasonably commensurate witb the nature [of] and hazards attending this particular mode of travel.

Perkins v. Galloway, 194 Ala. 265, 272, 69 So. 875, 877 (1915), *aff'd*, 198 Ala. 658, 73 So. 956 (1916).

[21] Avery v. Thompson, 117 Me. 120, 128, 103 A. 4, 7 (1918).

[22] Munson v. Rupker, 96 Ind. App. 15, 148 N.E. 169 (1925) (and cases collected therein); Marple v. Haddad, 103 W. Va. 508, 118 S.E. 113 (1927). It is interesting to note that in states following the *Massaletti* rule prior to Erie R.R. v. Tompkins, 304 U.S. 64 (1938), federal courts sitting in diversity cases sometimes used the doctrine of "federal common law" to circumvent application of state court decisions denying recovery to guests. *See, e.g.*, Hewlett v. Schadel, 68 F.2d 502 (4th Cir. 1934) (avoiding application of Virginia law).

[23] In Munson v. Rupker, 96 Ind. App. 15, 148 N.E. 169 (1925), the court said that

> [i]t will not do to say that the operator of an automobile owes no more duty to a person riding with him as a guest at sufferance, or as a self-invited guest, than a gratuitous bailee owes to a block of wood.

Id. at 30, 148 N.E. at 174. The Alabama Supreme Court highlighted this point with the following hypothetical situation:

> [I]f plaintiff is only entitled to protection against wanton injury, tben it may bappen that if a person requests gratuitous transportation for himself and also for a basket of apples, the gratuitous private carrier may be liable for the injury to the property, but not for injury to him, although he committed his person to the keeping of the carrier as fully as he did the property.

Wurtzburger v. Oglesby, 222 Ala. 151, 155, 131 So. 9, 12 (1930).

about 1930, it remained a minority rule,[24] and the prevailing standard in most jurisdictions was the common law rule that a guest could recover for injuries caused by his host's ordinary negligence.[25]

B. *The Rise of the Statutes*

In 1927, Iowa and Connecticut enacted the nation's first statutes denying recovery to injured guest passengers whose host drivers were guilty of no more than ordinary negligence.[26] The Iowa guest statute provided simply that an automobile guest could not recover for his injuries unless his host was driving while intoxicated or was guilty of "reckless operation" of the motor vehicle.[27] The Connecticut statute was more elaborate, denying recovery to a gratuitous guest in all cases except where the operator's conduct was "intentional" or evinced "heedlessness" or "reckless disregard of the rights of others."[28] Unlike the Iowa statute, the Connecticut law specifically stated that it did not apply to cases in which the passenger was riding with a carrier or with a seller demonstrating a car for sale.[29] In both states, however, it was obvious that, for most cases, the respective legislatures wanted to

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[24] Only Massachusetts, Georgia, Wisconsin, Washington, and Virginia ever adopted a *judicial* standard of gross negligence. *See* notes 1 & 4 *supra.*

[25] *See generally* 2 F. HARPER & F. JAMES, LAW OF TORTS 950-51 (1956) [hereinafter cited as HARPER & JAMES].

[26] The Iowa statute provided that

> . . . the owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, unless damage is caused as a result of the driver of said motor vehicle being under the influence of intoxicating liquor or because of the reckless operation by him of such motor vehicle.

Ch. 119, § 1, [1927] Iowa Acts 112.

The Connecticut law read:

> Section 1. No person transported hy the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others.
>
> Sec. 2. This act shall not relieve a public carrier or any owner or operator of a motor vehicle while the same is being demonstrated to a prospective purchaser of responsibility for any injuries sustained by a passenger being transported by such public carrier or by such owner or operator.

Ch. 308, §§ 1-2, [1927] Conn. Acts 4404.

Oregon also passed a guest statute in 1927. However, because it released a host from liability for *any* degree of negligence on his part, it was declared unconstitutional the following year. *See* notes 52-55 and accompanying text *infra.*

[27] Ch. 119, § 1, [1927] Iowa Acts 112.

[28] Ch. 308, § 1, [1927] Conn. Acts 4404.

[29] *Id.* § 2.

prevent a driver from being held liable to his guest for ordinary negligence.

Although legislative history regarding guest statutes is almost nonexistent in Iowa and Connecticut and in other states which followed their lead,[30] several basic reasons for passage of guest statutes have been offered by courts and commentators.[31] The justification most frequently espoused in one form or another has been the notion of protecting the hospitable driver from suits by an ungrateful guest.[32] The economic conditions of the 1930's gave particular force to the hospitality rationale for the guest statutes. The Depression is credited with causing a substantial increase in the number of hitchhikers on America's highways.[33] It was feared that these strangers would take advantage of generous but unsuspecting motorists, and thus offend society's sense of justice and hospitality.[34] Although the fear of "hitchhiker suits" had almost no statistical basis,[35] it nevertheless became a popular and frequently-cited justification for the statutes.[36]

The most important reason for the passage of guest statutes, however, was effective lobbying on the part of insurance companies.[37] Although it has been suggested that other lobbies

[30] For example, the Connecticut House and Senate Journals for 1927 give only the bare essentials of the statute's history (as House Bill 376), *i.e.*, its sponsors, committees reporting on it, and its passage.

[31] *See generally* Tipton 287-303. *See also* 2 HARPER & JAMES 961; PROSSER 187.

[32] In Crawford v. Foster, 110 Cal. App. 81, 293 P. 841 (1930), the court characterized the state's guest statute as a legislative frown upon the guest who, like the dog in the proverb, "bites the hand that feeds him." *Id.* at 87, 293 P. at 843. This innate feeling that a guest should not be allowed to recover from a host guilty of no more than ordinary negligence is a tacit assumption embodied in all guest statutes. *See* Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 581 (1931); 18 CALIF. L. REV. 184 (1930).

[33] *See, e.g.*, Tipton 287.

[34] As one observer put it:

> [S]uch suits should be discouraged, inasmuch as they are unsportsmanlike and an abuse of hospitality; they saddle the owner or driver of the car with an unreasonable burden and thereby discourage invitations to guests, thus preventing those who cannot afford to own automobiles from obtaining the health and pleasure derived from their use.

18 CALIF. L. REV. 184 (1930).

[35] Dean Prosser commented dryly on the "hitchhiker rationale": "In legislative hearings there is frequent mention of the hitch-hiker, who gets little sympathy. The writer once found a hitch-hiker case, but has mislaid it. He has been unable to find another." PROSSER 187 n.8.

[36] *See, e.g.*, Dobbs v. Sugioka, 117 Colo. 218, 185 P.2d 784 (1947) (referring to "bums" and "hitchhikers").

Interestingly, of the guest statutes currently in operation, only the Illinois statute is directed exclusively against hitchhikers. This was accomplished by a recent amendment. *See* notes 146-49 and accompanying text *infra*.

[37] PROSSER 187; Tipton 288. Unfortunately, because of the generally "quiet" nature of

aided the campaign,[38] it is logical that the insurance companies would be the driving force behind the legislation. With the rise of the automobile and automobile liability insurance, the incentives for drivers and passengers to engage in collusive actions to defraud insurers increased correspondingly.[39] The implicit assumption of the insurance companies' argument was that the best way to prevent collusive lawsuits was to prevent suit by *anyone* who might bring such an action.[40] By 1939, whether through desire to protect generous drivers, dislike of hitchhikers, pressure from insurance companies, or a combination of these factors, twenty-six states[41] had adopted guest statutes similar to those of Iowa and Connecticut.

C. *Constitutionality*

Having been a leader in the adoption of guest statutes, Connecticut became the first state to adjudicate some of the major constitutional issues arising under this type of legislation. In *Silver v. Silver,*[42] the Connecticut Supreme Court of Errors upheld the statute against a plaintiff's contention that it "denie[d] to guests in motor vehicles the equal protection of the laws."[43] The court rested its judgment on the conclusion that the matters regulated by the statute were well within the police power of the state. Accordingly, there was no inherent unreasonableness in the fact that the automobile was used as the basis for determining the operator's duty to a guest.[44]

In the dissenting opinion, however, Chief Justice Wheeler

lobbying practices, very little is known about the lobbyists' role in influencing guest legislation other than the fact that it was highly successful. It is perhaps more than mere coincidence that one of the first guest statutes was enacted in the nation's "insurance capital," Connecticut.

[38] In some states, farm groups also may have pressed for adoption of the statutes. *See* Pedrick, *Taken for a Ride: The Automobile Guest and Assumption of Risk,* 22 LA. L. REV. 90, 91 (1961).

[39] Weber, *supra* note 5, at 35.

[40] For a response to this argument, see notes 169-72 and accompanying text *infra.* As one commentator suggested while discussing the Connecticut statute, "[t]he prevention of collusive suits hardly seems to justify the legislature's departure from the established common law rule." 38 YALE L.J. 267, 268 (1928).

[41] *See* note 2 *supra.*

[42] 108 Conn. 371, 143 A. 240 (1928).

[43] *Id.* at 376, 143 A. at 242.

[44] The court stated its position as follows:

> The duty which the owner or operator owes to his guest in the operation of the automobile being a legitimate subject-matter of legislation, the guest is not deprived of the equal protection of the law because that duty is made to vary from that owed to a house guest or a guest in some other mode of conveyance.

Id. at 378, 143 A. at 242.

considered the classifications "unreasonable" and "arbitrary."[45] They violated the equal protection clause, he said, because they took away from the automobile guest "a right of action for ordinary negligence which the guest in every other mode of conveyance still enjoys under the law."[46]

The plaintiff appealed to the United States Supreme Court, and in 1929 the Court upheld the validity of the statute and refused to inquire into the "wisdom" of its enactment.[47] The Court stressed the familiar doctrine that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,"[48] in this case the elimination of "vexatious litigation" arising from automobile guest cases.[49] Because the statute "strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs," *i.e., automobile* guest cases, the Court concluded that the statute did not deprive automobile guest passengers of the equal protection of the laws.[50]

Once the Supreme Court had made this pronouncement, it is probable that those state legislatures which had contemplated adoption of guest statutes, but which had awaited an adjudication of constitutionality, now felt secure enough to pass them.[51] Several states, however, ran into state constitutional obstacles. Guest laws were enacted in Oregon[52] and Delaware[53] which released the host from liability to a guest for *any* degree of negligence on his part. The respective state courts held these statutes unconstitutional as violating state constitutional guarantees against legislative abolition of rights of action for injury to persons and property.[54] But, in both states, when the statutes were amended to allow recovery for

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[45] *Id.* at 386, 143 A. at 245.

[46] *Id.* at 380, 143 A. at 243.

[47] Silver v. Silver, 280 U.S. 117, 123 (1929). This has become the leading case on the constitutionality of guest statutes. *See* note 161 and accompanying text *infra.*

[48] 280 U.S. at 122.

[49] *Id.* at 123.

[50] *Id.* at 124. It is important to note that the United States Supreme Court, like the Supreme Court of Errors of Connecticut, was not concerned with the distinction "between passengers who pay and those who do not," but rather with the distinction "between gratuitous passengers in automobiles and those in other classes of vehicles." *Id.* at 123. Later cases raised the question of the validity of the distinction between paying and nonpaying *automobile* guests. *See* notes 162-72 and accompanying text *infra.*

[51] For dates of enactment, see note 2 *supra.*

[52] Ch. 342, § 1, [1927] Ore. Laws 448.

[53] Ch. 270, §§ 1-2, [1929] 36 Del. Laws 795.

[54] Coleman v. Rhodes, 35 Del. 120, 159 A. 649 (1932); Stewart v. Houk, 127 Ore. 589, 271 P. 998 (1928), *petition for rehearing denied,* 127 Ore. 597, 272 P. 893 (1928).

certain types of aggravated misconduct, the courts upheld their validity.[55]

The Court of Appeals of Kentucky, however, found that guest statutes per se violated the Kentucky Constitution.[56] The court felt that "the conclusion is inescapable that the intention of the framers of the Constitution was to inhibit the Legislature from abolishing the rights of action for damages for death or injuries caused by negligence."[57] Although other guest statute jurisdictions had similar constitutional provisions,[58] none seemed to find them a serious obstacle to the validity of the statutes.[59] And for over forty years, until the recent California decision in *Brown v. Merlo*,[60] no other guest statute was held unconstitutional.[61]

II

CRITICISM OF GUEST STATUTES

A. *Theoretical Problems*

Almost simultaneously with the passage and implementation of the guest statutes, substantial criticism of their theoretical foundation began to appear. The strongest lines of early criticism attacked two basic elements of the statutes: (*1*) their abrogation of the common law rule of reasonable care,[62] and (*2*) their validity under state and federal constitutions.[63] Although both of these arguments

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[55] Gallegher v. Davis, 37 Del. 380, 183 A. 620 (1936); Perozzi v. Ganiere, 149 Ore. 330, 40 P.2d 1009 (1935).

[56] In Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347 (1932), the court found that the guest statute (ch. 85, [1930] Ky. Acts 253), contravened §§ 14, 241, and principally § 54 of the Kentucky Constitution. The latter reads: "The general assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."

[57] 243 Ky. at 539, 49 S.W.2d at 350.

[58] *See, e.g.*, CONN. CONST. art. I, § 10.

[59] In fact, the Kentucky court's interpretation of the state constitutional provisions (*see* note 56 *supra*), has been criticized as being too literal. *See* Weber, *supra* note 5, at 30-32. It is likely, however, that similar constitutional provisions were at least partially responsible for the refusal of many states to adopt any form of limitation on a guest's right to recover damages.

[60] 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); *see* notes 156-82 and accompanying text *infra*.

[61] A good example of a fairly recent adjudication of constitutionality is Westover v. Schaffer, 205 Kan. 62, 368 P.2d 251 (1970), in which the Kansas guest law was found to violate neither the federal nor the state constitution.

[62] *See* note 40 *supra*.

[63] As one early critic put it:

> [T]his statute without reason discriminates in favor of guests who are not occupants of automobiles, guests who ride as paying guests and guests of reckless or intoxicated drivers and against ordinary nonpaying guests in automobiles. Such a

had been answered in some degree by the United States Supreme Court,[64] the criticism did not abate. And these two issues remain the principal points of departure for modern attacks on the statutes.[65]

The theoretical weaknesses of the guest statutes have proven especially helpful in attacks by judicial critics. Trial and appellate judges, although constrained by the pronouncements supporting the statutes' constitutionality and modification of the common law,[66] found a useful tool in the principle of strict construction of statutes in derogation of the common law.[67] Courts using this device have been able to narrowly circumscribe the operation of their jurisdictions' statutes so that they deny recovery to as few people as possible.[68]

The basic policy rationale for the statutes was also subject to attack. While recognizing that perjury and collusion *might* be present in a suit by a guest against his host driver, many commentators were disturbed by the fact that the statutes were based upon a *presumption* that these evils were present.[69] Moreover, the wholesale denial of litigation rights to so broad a class as all automobile guests seemed especially unnecessary and harsh in the light of preexisting methods of dealing with perjury and collusion.[70] In short, even though the statutes passed constitutional muster, and even though they might have prevented some abuses of the judicial process,

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classification is so arbitrary that the denial of equal protection of the law seems to appear beyond a reasonable doubt.

14 IOWA L. REV. 243, 246 (1929); *see* Annot., 111 A.L.R. 1011 (1937). *See also* notes 52-57 and accompanying text *supra*.

[64] In New York Cent. R.R. v. White, 243 U.S. 188 (1917), the Court, in referring to statutory modification of common law rules, declared that "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *Id.* at 198. In Silver v. Silver, 280 U.S. 117 (1929), the Court had followed this reasoning. *See* note 48 and accompanying text *supra*.

[65] *See generally* Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); Stevens v. Stevens, 355 Mich. 363, 94 N.W.2d 858 (1959); Lascher, *supra* note 6.

[66] *See* note 64 *supra*.

[67] *See* notes 72-75 and accompanying text *infra*.

[68] *See, e.g.*, 2 HARPER & JAMES 961.

[69] One judge exclaimed indignantly, "[W]hat right has this court to assume that actions by guest passengers are attended by collusion, fraud, and perjury. There is no justification for any such assumption . . . ." Naudzius v. Lahr, 253 Mich. 216, 234, 234 N.W. 581, 587 (1931) (McDonald, J., dissenting).

[70] "The charge of perjury and collusion between the driver and passenger is a matter peculiarly for the criminal courts. It furnishes no sound reason for altering the substantive rights and duties of the driver and passenger." White, *supra* note 6, at 333 (footnote omitted).

many observers remained convinced of the basic unsoundness of the policy and rationale behind the statutes.[71]

B. *Practical Problems*

1. *Construction*

From the very beginning, problems began to arise in connection with the implementation of the guest statutes. One of the most serious difficulties concerned whether the statutes should be construed strictly or liberally.[72] On this point courts differed radically. A few took the view that the statutes must be liberally construed in order to carry out their legislative intent.[73] The vast majority, however, followed the old maxim that, being in derogation of the common law, the statutes were to be strictly construed.[74] To complicate matters, some courts even managed to combine strict and liberal rules of construction in certain cases.[75]

Included in the matter of construction is the interpretation of the terms used in the statutes. Who is a "guest"[76] and what constitutes "gross negligence"[77] are the questions which a court

[71] It is interesting to note that, toward the end of the flurry of legislation enacting the guest statutes, Connecticut apparently had second thoughts about its own trailblazing statute and repealed it in 1937. *See* ch. 82, § 540e, [1937] Conn. Stat. 277 (Supp. 1939).

[72] *See generally* Georgetta, *The Major Issues in a Guest Case,* 1954 INS. L.J. 583. *See also* 5 D. BLASHFIELD, AUTOMOBILE LAW AND PRACTICE 109-11 (1966).

[73] The South Dakota Supreme Court stated the doctrine as follows:

> While the common law is in force in this jurisdiction except where changed by statute or by other expression of the sovereign will, . . . the rule of strict construction of statutes in derogation of common law does not obtain in this state. Our function is to effectuate the legislative purpose through liberal construction.

Scotvold v. Scotvold, 68 S.D. 53, 58, 298 N.W. 266, 268 (1941). Similarly, Iowa adheres to the view that "[a]lthough our guest statute is in derogation of the common law it is to be liberally construed with a view to promote its objects and assist the parties in securing justice." Rainsbarger v. Shepherd, 254 Iowa 486, 492, 118 N.W.2d 41, 44 (1962).

[74] *E.g.,* Prager v. Israel, 15 Cal. 2d 89, 98 P.2d 729 (1940); Green v. Jones, 136 Colo. 512, 319 P.2d 1083 (1957); Mumford v. Robinson, 231 A.2d 477 (Del. 1967); Summersett v. Linkroum, 44 So. 2d 662 (Fla. 1950); Summers v. Summers, 40 Ill. 2d 338, 239 N.E.2d 795 (1968); Hunter v. Baldwin, 268 Mich. 106, 255 N.W. 431 (1934); Miller v. Treat, 57 Wash. 2d 524, 358 P.2d 143 (1960).

[75] *E.g.,* Miller v. Fairley, 141 Ohio St. 327, 48 N.E.2d 217 (1943). One commentator describes this process as strictly construing the definition of "guest" while liberally construing the definition of "intoxication," "willful misconduct," and "gross negligence." Georgetta, *supra* note 72, at 584. This, of course, would limit the operation of the statute. However, precisely the opposite approach can be utilized to expand the statute's scope.

[76] There are probably as many definitions of "guest" as there are guest statutes. *See, e.g.,* PROSSER 187 (listing some questions involved in determining guest status). *See also* 18 CORNELL L.Q. 621 (1933).

[77] American judicial recognition of the difficulty involved in fixing degrees of negligence dates back at least as far as the middle of the nineteenth century. In Steamboat New

must answer in a typical case involving a guest statute. Because of the ambiguity of the statutory terms and their apparent immunity from concrete definition, perhaps the most striking feature of the courts' application of the guest laws has been its uncertainty and lack of uniformity.[78] As a result, the field has been thrown into a state of massive confusion.[79]

The significance of this confusion is twofold. First, it has led to anomalous and often bizarre results.[80] Widely differing treatment of similar fact situations is common. This is true with respect to courts within the same state[81] and courts in different states.[82] Attempting to predict when a statute will apply and when it will not is virtually impossible except at the most obvious extremes.

The second consequence of the confusion surrounding the

World v. King, 57 U.S. (16 How.) 469 (1853), the Supreme Court wrestled with the definition of "gross negligence" in the context of a gratuitous steamboat passenger's claim against his carrier. But the Supreme Court, like most other courts since that time, was unable to arrive at a hard and fast formula for determining the existence of gross negligence.

The gross negligence requirement of the statutes can create special problems in a jurisdiction whose courts do not recognize degrees of negligence. Michigan is an example of such a jurisdiction. *See generally* 35 MICH. L. REV. 804 (1937).

Some courts have pressed for certainty of definition. The Oregon Supreme Court, for example, stressed the need to "provide the clearest possible formula for the treatment of . . . [guest] cases so as to provide a workable guide for the bar and the trial bench." Williamson v. McKenna, 223 Ore. 366, 371, 354 P.2d 56, 58 (1960). Unfortunately, the court only succeeded in adding to the confusion by equating "gross negligence" with "recklessness." *Id.* at 388, 354 P.2d at 66.

[78] W. PROSSER, LAW OF TORTS 259 (1st ed. 1941).

[79] "The law as to the duty owed by the driver of an automobile to a guest in his car is in a tangle of confusion . . . ." PROSSER 382.

[80] For example, in determining whether a rider is a "guest" within the meaning of the statute, the California Supreme Court has held that, where *P* accompanied *D* for the purpose of helping *D* to select Christmas presents, *P*'s services were sufficient "compensation" to take the case out of the "guest" category. Kruzie v. Sanders, 23 Cal. 2d 237, 143 P.2d 704 (1943). However, the California court has held that sharing expenses is not of itself sufficient to take the passenger out of the "guest" category. McCann v. Hoffman, 9 Cal. 2d 279, 70 P.2d 909 (1937).

[81] *See generally* 2 HARPER & JAMES 950-62.

[82] *Id.* A striking example of the disparity between different courts' interpretations of similar rules is illustrated by the following two cases:

(*1*) *P*, having set one foot out of *D*'s car, was injured when the car lurched suddenly. The guest statute did not preclude recovery because the car was not "moving upon a public highway" and *P* was not "riding" within the meaning of the statute. Prager v. Israel, 15 Cal. 2d 89, 94, 98 P.2d 729, 732 (1940).

(*2*) *P* was leaning against *D*'s automobile conversing with its occupants with one foot on the ground and the other on the running board. *P* was injured when the vehicle lurched suddenly. The court held that "[w]hen the plaintiff stepped on the running board . . . the defendant's duty of care toward her ceased to be measured by his duty toward travellers in general," and as a guest, *P* could not recover. Mendes v. Costa, 326 Mass. 608, 610, 96 N.E.2d 161, 162 (1950).

guest statutes is a flood of litigation concerning fine points of statutory construction.[83] The difficulties which the courts have had with such ambiguous terms as "guest," "compensation," "gross negligence," and "willful and wanton misconduct" are not surprising. It is ironic, however, that one of the early justifications for the statutes, as espoused by the United States Supreme Court, was to rid the courts of "vexatious litigation" instituted by automobile guests against their hosts.[84] In reality, the statutes have probably had almost no effect on the number of claims asserted, while at the same time they have probably caused an increase in the time spent in court on guest claims.[85] As a result, most courts regard guest statute cases as a judicial headache,[86] even though many courts are in general sympathy with the objectives of the legislation.[87]

2. *Collateral Problems*

Aside from the basic difficulties of statutory construction and interpretation,[88] guest statutes have created other problems for courts and litigants. One of these is how to deal with guest statutes in comparative negligence jurisdictions. Some courts have found limitations upon a guest's right of action against his host to be at cross purposes with the doctrine of comparative negligence.[89] As

[83] "There is perhaps no other group of statutes which have filled the courts with appeals on so many knotty little problems involving petty and otherwise entirely inconsequential points of law." PROSSER 187. A brief look at the annotations following any guest statute is sufficient to confirm this view.

[84] Silver v. Silver, 280 U.S. 117, 123 (1929).

[85] While there are no statistical studies either supporting or denying the validity of this assertion, it seems logical. The ambiguity of the statutory terms no doubt encourages a plaintiff-guest to litigate anyway, in the hope that he can persuade the court that he was not a guest or that the defendant's misconduct was grave enough to allow recovery. The plaintiff, in most cases, could not simply be thrown out of court. The question of his status or the defendant's conduct would have to be litigated. Then, if the plaintiff "passed" this "test," the case could be handled as if it were a "normal" accident case. Therefore, although the guest statutes have probably cut down on the number of successful claims, they probably have not cut down on the amount of time spent litigating these claims.

[86] Stevens v. Stevens, 355 Mich. 363, 371, 94 N.W.2d 858, 862 (1959) (commenting on difficulty of harmonizing statute with common law).

[87] Rainsbarger v. Shepherd, 254 Iowa 486, 493, 118 N.W.2d 41, 45 (1962) (lamenting necessity of case-by-case approach).

[88] *See* notes 72-87 and accompanying text *supra*.

[89] The comparative negligence rule seeks to avoid the wholesale denial of recovery to any party who is only partially responsible for an accident. Guest laws—judicial and legislative—accomplish the opposite result, denying recovery to plaintiffs who are usually totally free of any kind of negligence. Thus, they contravene the spirit of comparative negligence.

In McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962), the court held that the judicial guest statute promulgated in O'Shea v. Lavoy, 175 Wis. 456,

the comparative negligence rule continues to spread to more American jurisdictions,[90] it is not difficult to envision numerous situations in which the juxtaposition of guest statutes against comparative negligence rules will lead to more conflicts and inconsistencies.[91]

Another difficulty concerns conflict of laws problems involving guest statutes.[92] This is especially true when a court must decide whether to apply the law of a guest statute jurisdiction or the law of a non-guest statute jurisdiction. Non-guest statute jurisdictions have been especially reluctant to apply foreign guest statutes.[93] In a leading case[94] the Supreme Court of New Hampshire applied five factors to resolve the conflict[95] and concluded that it "should not go out of [its] way to enforce such a law of another state as against the better law of [its] own state."[96] Other courts have similarly utilized conflicts rules to avoid application of foreign guest statutes,[97] indicating the increasing unpopularity of the statutes in states not having them.

C. *Incompatibility with Recent Developments*

Over the years, criticism of the guest statutes has relied increasingly on public policy and evidence of a growing inconsistency between the rationale of the statutes and the emerging emphasis on responsibility for gratuitous undertakings and compensation for

185 N.W. 525 (1921), was no longer applicable and declared that "the new rule [of reasonable care] announced herein is more in harmony with the principle of comparative negligence . . . than was the former rule." 15 Wis. 2d at 384-85, 113 N.W.2d at 20.

[90] *See, e.g.*, ABA SPECIAL COMM. ON AUTOMOBILE ACCIDENT REPARATIONS, REPORT 74 (1969) (recommending adoption of Wisconsin-type comparative negligence doctrine in other states).

[91] *See, e.g.*, ABA SPECIAL COMM. ON AUTOMOBILE ACCIDENT REPARATIONS, MINORITY REPORT OF ORVILLE RICHARDSON 22-23 (1969).

[92] *See generally* Ehrenzweig, *Guest Statutes in the Conflict of Laws*, 69 YALE L.J. 595 (1970).

[93] New Hampshire and New York are two good examples. *See, e.g.*, Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966) (refusing to apply Vermont guest statute); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (refusing to apply Ontario guest statute). *But see* Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965) (distinguishing *Babcock* and applying Colorado guest statute over strong dissent).

[94] Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966).

[95] The court summarized them as follows: (*1*) "predictability of results," (*2*) "maintenance of reasonable orderliness and good relationship among the states," (*3*) "[s]implification of the judicial task," (*4*) "advancement of [a state's own] . . . governmental interests" over those of other states, and (*5*) "the court's preference for what it regards as the sounder rule of law, as between the two competing ones." *Id.* at 354-55, 222 A.2d at 208-09. These five considerations were first articulated as a group by Professor Leflar in *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 282-304 (1966).

[96] 107 N.H. at 357, 222 A.2d at 210.

[97] *See* Ehrenzweig, *supra* note 92, at 602-03.

accident victims. The laws have been labelled "archaic"[98] and are said to "contradict the spirit of the times."[99] It is probably the changing of circumstances that has done the most to increase the flow of criticism.

1. *Gratuitous Undertakings*

One consequence of almost universal ownership and use of automobiles is that giving and accepting free rides is not unusual. No longer is the host driver deemed to be conferring any special gift of "health and pleasure"[100] upon his gratuitous passengers. In other words, the more modern view is that the driver is not put out very much by giving a free ride and, from an economic standpoint, "the favor is hardly worth the price exacted from the injured in thus absolving the wrongdoer."[101]

This view coincides with the reasoning of the *Restatement of Torts* concerning gratuitous undertakings.[102] According to the *Restatement,* one who enters upon the performance of a service involving the safety of another is bound by the standard of "reasonable care" if the other relies upon the undertaking.[103] Although this logic is usually applied to "emergency" situations,[104] there is no reason to doubt that a guest passenger is just as likely as an emergency rider to rely upon the safe driving of the host driver. It supports the view that one who does not pay for a ride does not, by his failure to pay, waive the right to expect that his host will exercise reasonable care for his safety.

2. *Insurance and Compensation*

Circumstances and attitudes relating to automobile liability insurance have changed considerably since the enactment of the first guest statutes. If they were not before, critics are now well

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[98] 1 WYO. L.J. 182, 186 (1947).

[99] Clark v. Clark, 107 N.H. 351, 357, 222 A.2d 205, 210 (1966).

[100] 18 CALIF. L. REV. 184 (1930).

[101] Cohen v. Kaminetsky, 36 N.J. 276, 283, 176 A.2d 483, 487 (1961).

[102] RESTATEMENT (SECOND) OF TORTS § 323 (1965).

[103] § 323. Negligent Performance of Undertaking to Render Services

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

Id.

[104] *See id.* (comments (a)-(b)).

aware of the role played by insurance companies in pushing guest statutes through the state legislatures.[105] In other words, the statutes are now seen as pieces of special interest legislation for the principal benefit of insurance companies. As insurance companies, and not drivers' pocketbooks, have become the principal source of compensation for injuries, this point has become increasingly clear.[106] With compulsory liability insurance and financial responsibility laws in effect in nearly all jurisdictions, it is the exception, rather than the rule, that a host would ever have to pay a claim by a guest out of his own pocket.

Our society's attitude toward insurance in general has also changed in recent years. At the time the guest statutes were enacted, the prevailing view of automobile liability insurance was that it was a *protective* rather than a *compensatory* device.[107] As a general rule, the primary goal of the insurance companies was to defeat claims against their policyholders. Over the years, however, this exclusively protective attitude has come to be regarded as increasingly unresponsive to the modern attitude favoring compensation for those injured in automobile accidents.[108]

This increased emphasis on the compensation of accident victims is largely responsible for the numerous proposals for reform of the prevailing tort approach to automobile accident litigation—including the various "reparations" or "no-fault" plans.[109] The enthusiasm that has built up for no-fault insurance

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[105] It has been pointed out that there obviously could not have been any counter-balancing lobby group of "unknown injured persons of the future." Tipton 288. Dean Pedrick also noted the effectiveness of the insurance lobby:

> It is a tribute to the lobby system of legislation that in this country a surgeon operating on a charity patient is bound to exercise ordinary care but is permitted, should he drive his patient home from the hospital, to abandon that standard and be subjected to liability only on proof of gross negligence or wilful and wanton misconduct.

Pedrick, *supra* note 38, at 92; *see* notes 37-41 and accompanying text *supra*.

[106] *See* McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, 383, 113 N.W.2d 14, 19 (1962).

[107] "[I]nsurance is given primarily as a protection to the operator, not as an accident policy to assist the injured person." Weber, *supra* note 5, at 59.

[108] The virtually universal adoption of "financial responsibility" laws is evidence of the growing concept of insurance as a compensatory device. According to one court, one of the most evident policies behind the enactment of such laws was "to . . . provide compensation for those injured through no fault of their own." Interinsurance Exch. v. Ohio Cas. Ins. Co., 58 Cal. 2d 142, 154, 373 P.2d 640, 646, 23 Cal. Rptr. 592, 598 (1962).

[109] *See, e.g.*, COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, REPORT TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES (1932); A. EHRENZWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM (1954); L. GREEN, TRAFFIC VICTIMS: TORT LAW AND INSURANCE (1958); R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965); J. O'CONNELL, THE INJURY INDUSTRY AND THE REMEDY OF

since the mid-1960's[110] is indicative of the emerging view that automobile liability insurance ought to be *both* protective and compensatory, rather than merely protective.[111] And automobile guests—particularly family members and friends—are usually the people whom policyholders would most like to see compensated for their injuries.[112] Although allowing claims by family members and friends opens up the *possibility* of collusion,[113] the insurer would seem to be well protected against such fraudulent claims by existing criminal sanctions[114] and by the usual insurance policy conditions requiring the insured to cooperate with the insurer.[115]

One possible drawback to the extension of compensation to injured guests is the claim by defenders of the guest statutes that this would cause insurance rates to skyrocket.[116] On the surface, broadening coverage to include guests might appear to be an invitation to premium increases, and it is only logical to assume that extended coverage would increase the cost of insurance. However, according to one survey[117] comparing rates in guest statute and non-guest statute jurisdictions, the existence or nonexistence of a guest statute was found to be essentially irrelevant to differences in rates. One must conclude that, although the existence of a guest statute would be expected to have *some* lowering effect on insurance rates, this effect is so overshadowed by other factors, such as

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NO-FAULT INSURANCE (1971). These plans and their subsequent statutory embodiments are dealt with in notes 183-98 and accompanying text *infra*.

[110] The Keeton-O'Connell "Basic Protection Insurance" plan has been the focal point of discussion concerning no-fault insurance. *See, e.g.*, ABA SPECIAL COMM. ON AUTOMOBILE ACCIDENT REPARATIONS, REPORT (1969); AMERICAN INSURANCE ASSOC. SPECIAL COMM. TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT REPARATIONS, REPORT (1968).

[111] *See, e.g.*, Gibson, *Let's Abolish Guest Passenger Legislation*, 35 MANITOBA B. NEWS 274 (1965).

[112] ABA SPECIAL COMM. ON AUTOMOBILE ACCIDENT REPARATIONS, MINORITY REPORT OF ORVILLE RICHARDSON 23 (1969).

For the treatment of guest passengers under the various no-fault laws currently in force, see notes 183-98 and accompanying text *infra*.

[113] *See, e.g.*, 1 HARPER & JAMES 650.

[114] These sanctions cover both perjury and collusion. *See* White, *supra* note 6, at 333.

[115] *See* 1 HARPER & JAMES 650. *See also* Allstate Ins. Co. Crusader Policy, CCH AUTO. L. REP. ¶¶ 2703, 2980 (1972). Paragraph 2980, the "Assistance and Cooperation" clause, provides in part that "[t]he insured shall cooperate with Allstate, disclosing *all pertinent facts known or available to him.*" (Emphasis added). In addition, ¶ 2703, entitled "Proof of Claim; Medical Reports," provides: "The insured and every other person making claim hereunder shall submit to *examinations under oath* by any person named by Allstate and subscribe the same, as often as may reasonably be required." (Emphasis added).

[116] *See, e.g.*, Naudzius v. Lahr, 253 Mich. 216, 224, 234 N.W. 581, 584 (1931).

[117] Tipton 304-07.

population density,[118] that the net effect of the statute on rates is negligible.[119] Therefore, as a practical matter, guest statutes cannot be said to have brought about noticeable decreases in insurance premiums.

III

THE NEW ATTACK ON THE STATUTES

A. *Repeal*

In 1969—thirty years after the last guest statute was enacted[120]—the state of Vermont repealed its guest statute.[121] In doing so, Vermont became the second state—after Connecticut[122]—to legislatively abandon the doctrine that a guest could only recover for injuries caused by the driver's "gross or willful negligence."[123] Repeal came about quietly and, interestingly enough, with no active opposition from the state's insurance lobby.[124]

The principal reasons for repeal related to the difficulties faced by the courts in attempting to apply the statute.[125] Prior to the adoption of the statute, different degrees of negligence were not recognized in Vermont.[126] The guest statute forced the courts to distinguish between the different degrees of negligence, with resulting confusion and uncertainty.[127] After forty years of operation, the statute had so beclouded the issue of degrees of

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[118] *Id.* at 305.

[119] *Id.* at 306-07.

[120] *See* notes 2-3 *supra.*

[121] *See* note 8 *supra.*

[122] *See* note 71 *supra.*

[123] VT. STAT. ANN. tit. 23, § 1491 (1967).

[124] According to the sponsor of the bill (H. Bill 297), Representative Timothy O'Connor, there was no pressure of any kind from insurance companies. Telephone conversation with Vermont State Representative Timothy O'Connor, October 30, 1973 (notes on file at the *Cornell Law Review*).

[125] *Id.*

[126] In one of the first cases arising under the guest statute, the Vermont Supreme Court observed:

> [H]eretofore the term "gross negligence" has found no separate division or degree of negligence [in Vermont common law] except, perhaps, in the law of bailments. The term "wilful negligence" has been hitherto completely unknown to us. But although the doctrine of definitive degrees of negligence is not recognized as a part of our common law, where, as here, it has been made the basis of a legislative rule, it cannot be treated as meaningless or denied application.

Sorrell v. White, 103 Vt. 277, 281, 153 A. 359, 361 (1931) (citations omitted).

[127] *See, e.g.*, Rivard v. Roy, 124 Vt. 32, 196 A.2d 497 (1963) (attempting to define "gross negligence"). *See also* Chamberlain v. Delphia, 118 Vt. 193, 103 A.2d 94 (1954) (observing that distinctions must be made on case-by-case basis).

negligence that it was virtually impossible to distinguish between ordinary and gross negligence.[128] In addition, the Vermont statute suffered from the common difficulty of determining who is a "guest."[129]

The repeal bill initially encountered opposition as a "lawyers' bill."[130] This resistance subsided, however, when attention was called to the inequities and inconsistencies of the guest statute, and the repeal passed quickly.[131] Repeal became effective in 1970.[132]

Two years later, the Florida legislature followed the same course.[133] In Florida, opposition to the guest statute had been building for some time[134] and attempts to repeal the statute had been made at least as early as 1966.[135] According to the repeal bill's sponsor, the basic reason for eliminating the Florida law was that it was "just a bad statute" based on the "unreal" rationale of trying to prevent suits by ungrateful hitchhikers against their hosts.[136] It was felt that the statute operated to frustrate the "reasonable expectations" of the insured that an injured passenger should be compensated, regardless of his relationship to the driver.[137] Therefore, it was considered a bad piece of legislation whose repeal was long overdue.

As in Vermont,[138] pressure from the insurance industry proved

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[128] This "watering down" of the statute was cited by the repeal bill's sponsor as the principal reason for eliminating the statute. Conversation with Rep. O'Connor, *supra* note 124.

[129] *See, e.g.,* Stevens v. Nurenburg, 117 Vt. 525, 97 A.2d 250 (1953); Russell v. Pilger, 113 Vt. 537, 37 A.2d 403 (1944); Shappy v. McGarry, 106 Vt. 466, 174 A. 856 (1934).

[130] Conversation with Rep. O'Connor, *supra* note 124. Presumably, this was a reference to the fact that lawyers might be expected, if the statute were repealed, to increase their "business" by taking claims by guests, who were not heretofore able to recover for ordinary negligence.

[131] Representative O'Connor pointed out that, under the guest statute, a situation could arise in which a truck driver, who was transporting a neighbor's cow and who picked up the neighbor's hitchhiking son, could negligently drive both into an accident as a result of which the neighhor could recover for injuries to his cow, but not for injuries to his son. This illustration apparently proved persuasive. *Id.*

[132] *See* note 8 *supra.*

[133] *See* note 9 *supra.*

[134] For a critical discussion of the Florida statute, see Tipton.

[135] Telephone conversation with former Florida State Senator Harold S. Wilson, September 6, 1973 (notes on file at the *Cornell Law Review*). Some attempts may have been made earlier. According to Senator Wilson, the sponsor of the successful repeal bill, this was when he first introduced the bill. *Id.*

[136] *Id.*

[137] In Senator Wilson's view, when motorists were guilty of negligence and their friends were injured, they expected their friends to be compensated. They did not expect their insurance companies to "hide" behind the guest statute. *Id.*

[138] *See* note 124 *supra.*

to be virtually nonexistent.[139] One probable explanation for this lack of opposition to repeal lies in the fact that Florida had just passed a no-fault automobile liability insurance law during the previous legislative session.[140] The new law provided coverage for "passengers"[141] which would probably include *guest* passengers. The insurance companies, therefore, probably felt that, with guests already covered to a large extent by the no-fault law, there would be little point in opposing repeal of the guest statute.[142]

A more important, if not the most important, factor seems to have been the legislature's desire to eliminate what it considered a "basically unfair" piece of legislation.[143] But, in addition, it is expected that, in both states, repeal will eliminate the numerous and complex questions that necessarily had to be litigated under the guest statutes. And, while the number of suits by guests may logically be expected to rise, a large number of "knotty little problems involving petty and otherwise entirely inconsequential points of law"[144] will no longer have to be litigated. Courts will be able to turn away from such questions as whether or not the plaintiff was a "guest," and can concentrate on the basic issue of whether or not the defendant was negligent.[145]

B. *Partial Repeal*

Both Illinois and Texas, although not eliminating their statutes entirely, have recently modified them. In 1971, Illinois amended its guest statute by narrowing its previously broad definition of "guests" to include only those who illegally solicit rides.[146] In thus

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[139] Telephone conversation with former Sen. Wilson, *supra* note 135.

[140] FLA. STAT. ANN. §§ 627.730-.741 (1972).

[141] *Id.* § 627.736(1).

[142] Under the no-fault plan, the injured party would recover up to the statutory maximum. According to Senator Wilson, the insurance companies probably felt that a sufficient number of guest claims would fall within this range to prevent lobbying against repeal from being worth the effort and expense. At the same time, however, Senator Wilson emphasized that, although no-fault may have softened opposition to repeal, it was not the motivating force behind the legislature's action. Telephone conversation with former Sen. Wilson, *supra* note 135.

[143] *Id.*

[144] PROSSER 187.

[145] As one observer suggested long before repeal, such a simplification of the Florida law "would tend to bring back order, equality, and harmony [and] . . . would get the Florida Supreme Court 'off the hook.'" Tipton 311.

[146] As amended, the guest law reads in relevant part:

> No person riding in or upon a motor vehicle or motorcycle as a guest without payment for such ride *and who has solicited such ride in violation of Subsection (a) of*

restricting the class of persons denied recovery for ordinary negligence to "true" hitchhikers, the Illinois legislature appears to have recognized the desire of most motorists to guarantee compensation for injured friends and family members[147] but not for "ungrateful" hitchhikers.[148] Because the number of guest cases involving hitchhikers is relatively small,[149] it can be expected that the Illinois statute will operate to deny recovery to only a very small percentage of automobile guests.

Texas, although not circumscribing its guest statute to so great an extent, nevertheless eliminated some of the law's harshness by revising it to deny recovery only to guests "who [are] related within the second degree of consanguinity or affinity to the owner or operator of a motor vehicle."[150] In allowing recovery by non-related passengers, the Texas legislature apparently felt that the "hospitality rationale" for guest statutes was no longer viable. And by denying recovery only to related passengers, the legislature indicated that it considered collusion a danger only where a family relation existed between the plaintiff and the defendant.[151] By this "partial repeal," therefore, the statute loses much of its "overinclusiveness,"[152] but retains its potential for confusion and unfairness in cases involving related individuals.

Section 11-1006 of this Act [prohibiting hitchhiking], nor his personal representative in the event of the death of such guest, shall have a cause of action . . . .

ILL. ANN. STAT. ch. 95 1/2, § 10-201 (Smith-Hurd Supp. 1973) (emphasis added). This portion of the statute formerly read:

> 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 . . . .

Section 9.201, [1957] Ill. Laws 2806 (emphasis added).

[147] *See* note 112 and accompanying text *supra.*

[148] *See* notes 32-36 and accompanying text *supra.*

[149] *See* PROSSER 187 & n.8.

[150] Ch. 28, § 3, [1973] Tex. Laws 42, *amending* TEX. REV. CIV. STAT. art. 6701b (1969). This amendment added the caveat that "[n]othing in this Act affects any judicially-developed and developing rules under which a person is or is not totally or partially immune from tort liability to another by virtue of a family relationship." It is interesting to note that this amendment was approved on April 9, 1973, and on April 24, 1973, the Texas no-fault law (including coverage for "guest occupants") was enacted. *See* note 195 *infra.*

[151] A comparison of the Texas and Illinois modifications indicates that, while the Texas legislature considered the hospitality rationale no longer viable but felt that collusion was still a danger in intrafamily suits, the Illinois legislature took the opposite view that hospitality still required some protection but that collusion prevention was no longer a valid object of its statute. *See* notes 146-49 and accompanying text *supra.*

[152] This would probably render it much less susceptible to the type of constitutional attack that was mounted against the California guest statute in the *Brown* case. *See* notes 156-81 and accompanying text *infra.*

C. *Judicial Nullification*

Prior to 1973, the principal form of judicial attack upon guest statutes consisted of progressively weakening them through restrictive interpretation.[153] In many guest statute jurisdictions, the definition of "guest" grew narrower and the definition of "gross negligence" (and similar terms for misconduct) grew broader with each judicial interpretation.[154] The intent and the result of such construction was, of course, to limit the operation of the guest statutes wherever possible.[155]

Of course, there are limits to this technique. When the plaintiff is unquestionably a guest and the defendant's misconduct clearly falls short of "gross negligence," a court may be unable or unwilling to give the plaintiff relief through a strained interpretation of statutory language. A court in that situation may be forced to take a more forthright approach—as did the Supreme Court of California in the 1973 case of *Brown v. Merlo*[156]—and declare its state's guest statute[157] unconstitutional. In *Brown,* the plaintiff fell "squarely within the class of persons to whom the guest statute denie[d] recovery for simple negligence."[158] His cause of action for "willful misconduct" resulted in an adverse jury verdict from which he took no appeal. The only appeal, which was taken from the trial court's granting of the defendant's motion for summary judgment against the plaintiff's cause of action in negligence, was based squarely on the plaintiff's assertion that the guest statute was "an unconstitutional denial of equal protection of the law."[159]

Although other courts had viewed the United States Supreme

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[153] *See* notes 72-75 *supra.*

[154] *See, e.g.,* note 75 *supra.*

[155] The maxim that statutes in derogation of the common law were to be strictly construed was the most frequent justification for this approach. *See* note 74 *supra.* This rationale is criticized severely in Comment, *Judicial Nullification of Guest Statutes,* 41 S. CAL. L. REV. 884 (1968).

[156] 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973). The case is commented upon in 23 DRAKE L. REV. 216 (1973).

[157] The California statute read:

> No person riding in or occupying a vehicle owned by him and driven by another with his permission and no person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the driver on account of personal injury to or the death of the owner or guest during the ride, unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver.

CAL. VEHICLE CODE § 17158 (West 1971).

[158] 8 Cal. 3d at 860-61, 506 P.2d at 215-16, 106 Cal. Rptr. at 391-92.

[159] *Id.* at 860, 506 P.2d at 215, 106 Cal. Rptr. at 391.

Court's adjudication in *Silver*[160] as determinative of the constitutionality of most guest statutes,[161] the California court did not find *Silver* to be a major obstacle. The court felt that the *Silver* Court had considered only the statutory distinction between automobile guests and guests in other kinds of conveyances and had left untouched two additional distinctions: those "between 'guests' and paying passengers and between different categories of automobile guests."[162]

The court then proceeded to attack the two traditional justifications for the statute: the protection of hospitality and the prevention of collusive lawsuits.[163] The protection of hospitality was found to be a poor basis for the statute's classifications. The fact that automobile guests were treated differently from other social guests was considered contrary to modern trends in California law,[164] and the court found "no realistic state purpose which supports such a [discriminatory] classification scheme."[165] The California court pointed out numerous inconsistencies in the hospitality rationale[166] and concluded that, even if that rationale had been valid at one time, changed circumstances had caused it to lose whatever validity it might have had.[167] On this basis, "the statute's

[160] 280 U.S. 117 (1929); *see* notes 42-50 and accompanying text *supra*.

[161] *See, e.g.*, Roberson v. Roberson, 193 Ark. 669, 101 S.W.2d 961 (1937); Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 587 (1931).

[162] 8 Cal. 3d at 863 n.4, 506 P.2d at 217-18 n.4, 106 Cal. Rptr. at 393-94 n.4. It can be argued that the California court was overenthusiastic in dismissing *Silver* as a controlling case because of its age and the changing of circumstances. The United States Supreme Court, as recently as 1972, dismissed "for want of a substantial federal question" the appeal of a plaintiff guest passenger who claimed that the Ohio guest statute violated the federal and state constitutions. Retza v. Fortune, 409 U.S. 810 (1972). Nevertheless, certain features (*see* notes 173-77 and accompanying text *infra*) of the California statute are sufficiently unique to severely restrict any comparison with statutes previously adjudicated.

[163] 8 Cal. 3d at 864, 506 P.2d at 218, 106 Cal. Rptr. at 394.

[164] *Id.* at 865, 506 P.2d at 219-20, 106 Cal. Rptr. at 395-96. The court stated that "[u]nder current California law, . . . guests or recipients of hospitality may generally demand that their hosts exercise due care so as not to injure them." *Id.* at 865, 506 P.2d at 219, 106 Cal. Rptr. at 395 (citing Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), which eliminated most distinctions regarding guests on real property).

[165] 8 Cal. 3d at 865, 506 P.2d at 219, 106 Cal. Rptr. at 395.

[166] *Id.* at 866-69, 506 P.2d at 220-21, 106 Cal. Rptr. at 396-97. The court pointed to such anomalies as protecting pedestrians or guests in other cars, but not protecting the driver's own guest. In addition, the court pointed out that in an age when virtually all drivers are covered by liability insurance, the filing of an insurance claim against the host's insurer cannot be considered an act of "ingratitude" toward the host.

[167] *Id.* (citing Milnot v. Richardson, 350 F. Supp. 221 (S.D. Ill. 1972), and Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924)). In *Sinclair*, Justice Holmes, speaking for the Court, had declared that "[a] law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change *even though valid when passed.*" 264 U.S. at 547-48 (emphasis added).

discriminatory treatment of auto guests [could not] be upheld against plaintiff's constitutional attack."[168]

Similarly, the California Supreme Court found that the "collusion prevention" rationale did not justify "the statute's wholesale elimination of all automobile guests' causes of action for negligently inflicted injury."[169] Again, recent developments in the law were a major factor. In a series of cases abrogating intrafamilial immunity[170] the court had declared that

> the fact that there may be greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class. Courts must depend upon the efficacy of the judicial processes to ferret out the meritorious from the fraudulent in particular cases.[171]

Because of this "overinclusiveness" and because the absence of compensation is not determinative of a willingness to commit perjury, the court concluded that the statute also "fail[ed] to accord equal treatment to those who are similarly situated with respect to its goal of the prevention of collusion."[172]

Finally, the court found that not even all automobile guests were treated alike under the statute. Because of various exceptions and loopholes arising from the statutory language, recovery often depended upon factors bearing no relation to the protection of hospitality or the prevention of collusion.[173] Liability could depend on such factors as whether or not the passenger had one foot on the ground,[174] or whether the vehicle was moving on the highway or on the shoulder of the highway.[175] The court had previously found that, as a result of these and similar technicalities, "the relationship between the driver and occupant of a motor vehicle

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[168] 8 Cal. 3d at 872, 506 P.2d at 224, 106 Cal. Rptr. at 400.

[169] *Id.*

[170] Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (rejecting collusion rationale as bar to child-parent suit); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962) (applying similar reasoning to suit between husband and wife); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955) (rejecting collusion rationale as reason for barring suit by two sisters against their brother).

[171] Emery v. Emery, 45 Cal. 2d 421, 431, 289 P.2d 218, 225 (1955).

[172] 8 Cal. 3d at 878, 506 P.2d at 228, 106 Cal. Rptr. at 404.

[173] In addition to limiting its coverage to automobile guests, section 17158 conditions the denial of a cause of action for negligence on three independent matters: the injury must take place (1) "during the ride," (2) "in any vehicle" and (3) "upon the highway."

Id. at 879, 506 P.2d at 229, 106 Cal. Rptr. at 405.

[174] *See, e.g.*, Prager v. Israel, 15 Cal. 2d 89, 98 P.2d 729 (1940) (discussed in note 82 *supra*).

[175] *See, e.g.*, Olson v. Clifton, 273 Cal. App. 2d 359, 78 Cal. Rptr. 296 (1969).

may fluctuate during the course of a *single trip,* as circumstances bring them within or without the language of the statute."[176] The inconsistencies thus arising gave added weight to the proposition that the statute afforded unequal treatment to similarly situated persons and therefore denied equal protection.[177]

While recognizing that not "only the common law rules of negligence can govern automobile liability,"[178] and that "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances,"[179] the court concluded that the "irrational discrimination [of the statute] cannot be squared with the applicable constitutional standards."[180] The court summarized its holding as follows:

> [W]e have concluded that the classifications which the guest statute creates between those denied and those permitted recovery for negligently inflicted injuries do not bear a substantial and rational relation to the statute's purposes of protecting the hospitality of the host-driver and of preventing collusive lawsuits. We therefore hold that, as applied to a negligently injured guest, the guest statute violates the equal protection guarantees of the California and United States Constitutions.[181]

With this stroke, California returned to a common law rule enacted in statutory form in 1872 declaring that "[a] carrier of persons without reward must use ordinary care and diligence for their safe carriage."[182]

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[176] O'Donnell v. Mullaney, 66 Cal. 2d 994, 998, 429 P.2d 160, 162, 59 Cal. Rptr. 840, 842 (1967) (emphasis added). For a satirical, yet logically plausible, hypothetical illustration of this "fluctuating liability," see Lascher, *supra* note 6, at 14, in which the liability of a husband driving his wife to the post office changes with virtually every move the parties make.

[177] 8 Cal. 3d at 882, 506 P.2d at 231, 106 Cal. Rptr. at 407.

[178] *Id.*

[179] *Id.* (citing Munn v. Illinois, 94 U.S. 113, 134 (1877)).

[180] 8 Cal. 3d at 883, 506 P.2d at 232, 106 Cal. Rptr. at 408.

[181] *Id.* at 882, 506 P.2d at 231, 106 Cal. Rptr. at 407. It is interesting to note that with this decision, the court fulfilled the prophecy of one observer made five years earlier:

> Three and a half decades of confusion, illogic, solecism, gamesmanship—and unconstitutionality—are enough. . . . [I]t is time for some court to play the role of the proverbial small boy and point out the truth to the sovereign—that the legislation is unclothed by constitutionality.
>
> One tends to suspect that somewhere in this great state the right court is just waiting to be asked in the right way in the right case.

Lascher, *supra* note 6, at 31.

[182] CAL. CIV. CODE § 2096 (West 1954).

After the *Brown* decision, the California legislature amended § 17158 to delete any reference to "guests." The statute now denies recovery only to a person riding in his own car while it is being "driven by another person with his permission." CAL. VEHICLE CODE § 17158 (West Supp. 1974), *as amended* ch. 803, § 4, [1973] Cal. Stat. —.

D. *Modification Through No-Fault Plans*

In 1970, Massachusetts became the first state to adopt a no-fault automobile liability insurance plan.[183] Among the provisions of its "personal injury protection" scheme was coverage for various injured persons, *"including a guest occupant."*[184] Thus, by the specific language of the statute, all guest passengers injured in the state were to receive the financial benefits of no-fault insurance at least up to the amount provided by the statute.[185]

A year later, the legislature, apparently realizing that "[i]t would be rather anomalous to allow recovery to a guest up to the statutory maximum under the 'no-fault' plan and yet require that he prove *gross* negligence for a common law recovery,"[186] passed a statute allowing a guest recovery for "ordinary negligence" on the part of the operator.[187] This act, of course, abrogated the fifty-four year old rule of *Massaletti v. Fitzroy*[188] that an automobile guest "ought to prove a materially greater degree of negligence" than a paying passenger.[189] Consistent adherence to the concept of no-fault insurance, according to the Massachusetts legislature, required that restrictions on a guest passenger's cause of action against his host be eliminated.[190]

No-fault insurance laws have been influential in effecting similar changes in other guest statute jurisdictions. The repeal of the Florida guest statute,[191] while not considered a direct result of no-fault legislation, certainly appears to have been aided by the prior passage of the no-fault law.[192] Had the legislature not repealed the guest statute, an anomaly similar to that which existed for a short time in Massachusetts[193] would have arisen whereby a guest could collect up to the no-fault policy maximum, but would

[183] MASS. ANN. LAWS ch. 90, § 34A-N (Supp. 1972).

[184] *Id.* (emphasis added).

[185] At the time of enactment, the minimum coverage was "at least two thousand dollars" with additional provisions for lost wages and other expenses. *Id.*

[186] Smith, *Duty Owed to Guest Occupants in Motor Vehicles–A Comment on the New Massachusetts Statute (Chapter 865 of the Acts of 1971)*, 57 MASS. L.Q. 59, 61 (1972).

[187] MASS. ANN. LAWS ch. 231, § 85L (Supp. 1972):

> In an action of tort for personal injuries, property damage or consequential damages caused by or arising from the operation of a motor vehicle in which the plaintiff was a passenger in the exercise of due care, the plaintiff may recover in an action against the operator upon proof that said operator was guilty of ordinary negligence resulting in said injuries or damages.

[188] 228 Mass. 487, 118 N.E. 168 (1917).

[189] *Id.* at 510, 118 N.E. at 177.

[190] Smith, *supra* note 186, at 61.

[191] *See* notes 133-45 and accompanying text *supra*.

[192] *See* notes 140-42 and accompanying text *supra*.

[193] *See* note 186 and accompanying text *supra*.

be precluded from suing for damages in excess of that amount without a showing of gross negligence.[194] Such anomalies persist, however, in twelve guest statute jurisdictions that have recently adopted no-fault plans.[195] Once recovery is allowed at all, it seems illogical to allow it up to a certain amount and then to cut it off entirely.[196]

Despite the legislative modifications undertaken in Massachusetts and Florida, the inconsistencies between the guest statutes and the emerging no-fault laws will probably remain for some time. Unfortunately, interested groups have failed to take a decisive stand on the desirability of eliminating the anomalous coexistence of guest laws and no-fault statutes. The American Bar Association, for example, has recommended adoption of a no-fault plan whose coverage would include "guest passengers in the insured's vehicle."[197] At the same time, however, the Association has failed to make any recommendations with regard to the guest statutes, declaring that "[t]he decision to retain or repeal them is an uncomplicated one [that] . . . should be left to the states."[198] Without leadership from the bar or other influential organizations

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[194] The benefit provisions of the statute cover "passengers." There is no basis to conclude that this term would bave excluded "*guest* passengers." *See* notes 140-42 and accompanying text *supra.*

[195] ARK. STAT. ANN. §§ 66-4014 to -4021 (Supp. 1973); COLO. REV. STAT. ANN. §§ 13-25-1 to -22 (19—) (CCH AUTO. L. REP. ¶ 1946 (1973)); DEL. CODE ANN. tit. 21, § 2118 (19—) (CCH AUTO. L. REP. ¶ 1948 (1973)); ILL. ANN. STAT. ch. 73, §§ 1065.150-.163 (Smith-Hurd Supp. 1973) (declared unconstitutional because of technical flaws in Crace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972)); KAN. STAT. ANN. §§ 40-3101 to -3121 (1973); MICH. STAT. ANN. §§ 24.13101-.13179 (Supp. 1973); ch. 530, §§ 1-60, [1973] Nev. Laws 822; ORE. REV. STAT. §§ 743.805-.835 (1971); S.D. COMPILED LAWS ANN. §§ 58-23-6 to -8 (Supp. 1973); TEX. INS. CODE art. 5.06-3 (Supp. 1973); UTAH CODE ANN. §§ 31-41-1 to -22 (Supp. 1973); VA. CODE ANN. §§ 38.1-3801.1, 46.1-497.1 (Supp. 1973).

Althougb only three statutes—those of Illinois, Oregon, and Texas—specifically refer to guests, it would be hard to argue that the failure of other statutes to mention guests reveals an intent to exempt them from coverage. The broadness of the terms used—*e.g.*, "passengers"—indicates that guests are to be included in the coverage provisions.

[196] This arbitrary cut-off of recovery might be considered a ratification of the idea that a guest is only "ungrateful" when bis injuries exceed a certain monetary limit; and the more severely he is injured, the more "ungrateful" he is. *See* Note, *The Future of the Automobile Guest Statutes*, 45 TEMP. L.Q. 432, 445 (1972).

[197] Kornblum, *No-Fault Automobile Insurance–A Comparison of the State Plans and the Uniform Act*, 8 A.B.A.F. 175, 176 (1972).

[198] ABA SPECIAL COMM. ON AUTOMOBILE ACCIDENT REPARATIONS, REPORT 86-87 (1969). The Minority Report criticized the majority's cursory examination of the guest statute problem and urged the ABA to "take a forthright position on this highly controversial matter." ABA SPECIAL COMM. ON AUTOMOBILE ACCIDENT REPARATIONS, MINORITY REPORT OF ORVILLE RICHARDSON 22 (1969). Richardson looked at the statutes in much more detail and found them to be at crosspurposes with numerous majority recommendations such as tbe adoption of comparative negligence and the abolition of family tort immunities. *Id.* at 22-23.

it is doubtful that there will ever be a concerted effort to modify or repeal the guest statutes. It may take several years of ambiguity, inconsistency, and unfairness before the individual state legislatures fully realize the extent of the conflict between the guest statutes and the spirit of no-fault insurance.

CONCLUSION

The tension between the archaic philosophy of the guest statutes and modern views of negligence and insurance compensation has become increasingly evident. Yet the difficulties of eliminating this inconsistency are manifest. The statutes are favored in the courts by precedent, age, and judicial restraint. In the legislatures, the statutes are not the objects of the massive popular outrage that can be so potent a force in bringing about the repeal of laws that discriminate against groups more cohesive than automobile guests.

Nevertheless, the rise of no-fault insurance and the corresponding reevaluation of insurance and responsibility for negligence offer the state legislatures a new opportunity to reexamine their guest statutes. And, as the contrast between the punitive thrust of the guest laws and the compensatory emphasis of the no-fault laws becomes sharper, the states, in the interest of consistency and certainty, will no doubt gradually begin repealing their guest statutes. It seems likely, therefore, that the era of the automobile guest statutes will end "[n]ot with a bang but a whimper."[199]

Stanley W. Widger, Jr.

[199] T.S. ELIOT, *The Hollow Men*, in THE COMPLETE POEMS AND PLAYS: 1909-1950 (1971).