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# McGeehan v. Bunch - Invalidating Statutory Tort Immunity through a New Approach to Equal Protection Analysis

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# McGEEHAN v. BUNCH—INVALIDATING STATUTORY TORT IMMUNITY THROUGH A NEW APPROACH TO EQUAL PROTECTION ANALYSIS

## INTRODUCTION

In 1975 the New Mexico Supreme Court in *McGeehan v. Bunch*[1] invalidated New Mexico's forty-year old automobile guest statute. In doing so, the court relied on the principle that one does not have to be a paying guest in order to recover for negligently inflicted injury. The adoption of this principle may have far-reaching effects on the general tort law of New Mexico.

McGeehan had sued Bunch for injuries she sustained as a result of Bunch's alleged negligence in driving the car in which she was a guest. The trial court, affirmed by the court of appeals, dismissed McGeehan's suit on the ground that the automobile guest statute denied nonpaying guests a remedy for injuries resulting from ordinary negligence.[2] The supreme court granted certiorari to determine whether the statute unconstitutionally denied equal protection by distinguishing between paying and nonpaying automobile guests. The court held that the statute did violate the equal protection guarantees of both the federal and the state constitutions[3] because the classifications drawn on the basis of compensation bore no "substantial and rational relation to the statute's purposes of protecting the hospitality of the host driver and of preventing collusive lawsuits."[4]

The constitutionality of New Mexico's automobile guest statute had been sustained three times.[5] The decision to invalidate it at this time reflects significant new trends in the attitude of the court. First, the court has recognized that circumstances with regard to liability

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1. 88 N.M. 308, 540 P.2d 238 (1975).
2. The automobile guest statute, N.M. Stat. Ann. § 64-24-1 (Repl. 1972), provided:
   > No person transported by 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 for the rights of others.
3. N.M. Const. art. II, § 18.
4. McGeehan, 88 N.M. at 314, 540 P.2d at 244.
5. Cortez v. Martinez, 76 N.M. 506, 445 P.2d 383 (1968); Mwijage v. Kipkemei, 85 N.M. 360, 512 P.2d 688 (Ct. App. 1973); Romero v. Tilton, 78 N.M. 696, 437 P.2d 157 (Ct. App. 1967) *cert. denied*, Jan. 31, 1968. The guest statute was altered on constitutional grounds by judicial decision in 1964. *See* note 20, *infra*.

insurance have changed considerably since the guest statute was enacted. Second, in examining the validity of the statute in the context of modern conditions, the court applied a new federal standard of equal protection analysis and demonstrated its willingness to take an interventionist position on minimal scrutiny grounds. Third, the opinion clearly disapproves of classifications which deny a remedy for negligently inflicted injury on the basis of compensation. This Note will examine these three elements of the *McGeehan* opinion.

## CHANGING CIRCUMSTANCES

As automobile travel became more prevalent during the early part of this century, most American jurisdictions established the rule that private owners and operators of automobiles owed their passengers a duty of reasonable care in the operation of their vehicles. A small number of jurisdictions, however, applied the doctrine of gratuitous bailees to automobile drivers and thus varied the duty owed by drivers to their passengers on the basis of their status as paying or nonpaying guests.[6] Between 1927 and 1939 twenty-eight states codified the minority rule[7] in automobile guest statutes which allowed nonpaying guests to recover only for injuries resulting from some aggravated misconduct on the part of their host drivers.

The rise of the guest statutes during the 1930's has been attributed to two factors. Although automobile travel was increasing during this period, automobile liability insurance was just appearing.[8] The economic conditions of the Depression made sharing rides a necessity for many people and contributed to an increase in the number of hitch-hikers. There was considerable ill feeling against hitch-hikers as a result of a few highly publicized robberies and murders.[9] Within this context, legislatures felt it was reasonable to encourage hospitality by a means which would protect drivers from the inequitable burden

6. Comment, *The Constitutionality of Automobile Guest Statutes: A Roadmap to the Recent Equal Protection Challenges,* 1975 B.Y.U.L. Rev. 99, 103 [hereinafter cited as *Constitutionality of Guest Statutes*]; Note, *The Present Status of Automobile Guest Statutes,* 59 Cornell L. Rev. 659, 661-3 (1974) [hereinafter cited as *Status of Guest Statutes*]. The origin of the minority rule has been attributed to Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917) (overruled by statute), where the English common law rule of gratuitious bailment of chattels was first applied to automobile drivers.

7. *Status of Guest Statutes, supra* note 5, at 659, 665.

8. Comment, *Review of the Past, Preview of the Future: The Viability of Automobile Guest Statutes,* 42 U. Cin. L. Rev. 709, 711 (1973).

9. Tipton, *Florida's Automobile Guest Statute,* 11 U. Fla. L. Rev. 287, 287 (1958). Prosser, Handbook of the Law of Torts, 180, § 34 (4th ed. 1971), has noted, "[i]n legislative hearings there is frequent mention of the hitch-hiker, who gets little sympathy. This writer once found a hitch-hiker case, but has mislaid it. He has been unable to find another."

of bearing all the costs of automobile accidents[10] and prevent "lawsuits instituted by ungrateful guests who have benefited from a free ride."[11]

The more important factor in the rise of the guest statutes was the effective lobbying of insurance companies.[12] It was reasoned that nonpaying guests are usually closely related to the host driver, and because of this relationship, "the driver may falsely admit liability in order for his guest to recover from the driver's insurance company."[13] On the basis of this reasoning, insurance companies convinced legislators that the elimination of this type of lawsuit would result in lower automobile insurance rates.[14]

No guest statute has been enacted since 1939, but several state legislatures have repealed their statutes.[15] In 1973 the California Supreme Court in *Brown v. Merlo*[16] became the first state court to hold an automobile guest statute unconstitutional. The California decision was quickly followed by five other state court decisions,[17] including *McGeehan,* all of which have considered changes in the availability of liability insurance as a major factor in invalidating the statutes.

In examining the statute's purpose of promoting hospitality, the New Mexico Supreme Court in *McGeehan* pointed out that, while at one time it may have been inequitable to have the host bear the burden of his negligence, the trend toward mandatory liability insurance for automobile owners had shifted that burden to the host's insurance company and to the general motoring public. With respect to the state's interest in protecting the host from ingratitude, the court was unable to find any element of ingratitude in suing one's host's insurance company.[18]

10. Note, *Guest Statutes and the Common Law Categories: An Inseparable Duality?,* 51 Notre Dame Law. 467, 469 (1976).

11. Brown v. Merlo, 8 Cal. 3d 855, 864, 506 P.2d 212, 218, 106 Cal. Rptr. 388, 394 (1973).

12. *Status of Guest Statutes, supra* note 5, at 664.

13. McGeehan, 88 N.M. at 312, 540 P.2d at 242.

14. *Id.* at 313, 540 P.2d at 243.

15. Connecticut, the first state to enact an automobile guest statute, repealed its statute in 1937. McGeehan, 88 N.M. at 313, 540 P.2d at 243. Vermont repealed its guest statute in 1969 and Florida in 1972. *Status of Guest Statutes, supra* note 5, at 660.

16. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973). In *Brown,* as in *McGeehan,* California's guest statute was held to violate both the federal and the state constitutions.

17. Primes v. Tyler, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975); Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974); Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974); Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974) *rehearing denied,* May 24, 1974.

18. McGeehan, 88 N.M. at 312, 540 P.2d at 242. The court pointed out also that the enactment of the Financial Responsibility Act, N.M. Stat. Ann. § § 64-24-42 *et seq.* (Repl. 1972), had established "a policy for protection of the public involved in motor vehicle accidents." Although the court may have intended to imply that this policy was in conflict

In discussing the prevention of collusion rationale the court noted that, in contrast to predictions by insurance companies, the enactment of an automobile guest statute did not necessarily result in lower insurance rates. In Connecticut, for example, insurance rates had not decreased after the enactment of an automobile guest statute in 1927, nor had rates increased after the statute's repeal ten years later.[19]

It is significant that the *McGeehan* court discussed changing circumstances only with regard to liability insurance while other state courts invalidating their guest statutes have considered judicial and legislative changes in general tort doctrine as well.[20] This is one indication of the degree of importance which the court placed on the interest affected by the statute. It also demonstrates the innovativeness of the decision in terms of general New Mexico tort law. More significant is the fact that the *McGeehan* court, and other state courts invalidating their automobile guest statutes, have judged the rationality of these statutes in terms of contemporary circumstances rather than circumstances which existed at the time the statutes were enacted. This analysis was made possible by the application of a new standard of equal protection review.

## THE EQUAL PROTECTION ANALYSIS

In 1967 the New Mexico Court of Appeals in *Romero v. Tilton*[21] sustained the constitutionality of the distinction made by the guest statute between owner drivers who were protected from liability to nonpaying guests for their ordinary negligence and non-owner drivers who were not extended this immunity.[22] The federal equal protec-

with the policy of the automobile guest statute in denying a part of the public a remedy for ordinary negligence, it did so only indirectly.

19. *Id.* at 313, 540 P.2d at 243.

20. The Brown v. Merlo decision, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973), on which *McGeehan* relied heavily, was founded in part on the abolition in California of common law categories with status determining liability, leaving automobile guests in a unique position from guests in other situations. Both Primes v. Tyler, 43 Ohio St. 2d at ____, 331 N.E.2d at 728, and Thompson v. Hagan, 96 Idaho at ____, 523 P.2d at 1368, relied in part on the reasoning of their earlier rejection of the doctrine of charitable immunity. In Johnson v. Hassett, 217 N.W.2d at 780, the court stated that North Dakota's recent enactment of comparative negligence was incompatible with the retention of an automobile guest statute.

21. 78 N.M. 696, 437 P.2d 157 (Ct. App. 1967) *cert. denied,* Jan. 31, 1968.

22. As originally enacted, New Mexico's guest statute provided that nonpaying guests could not recover from either owners or operators of motor vehicles for injuries resulting from ordinary negligence. In Gallegos v. Wallace, 74 N.M. 760, 398 P.2d 982 (1964) *rehearing denied,* Feb. 19, 1965, the court declared that the statute was void as to non-owner drivers for failure of the title of the statute to expressly include them as required by Article IV, Section 16, of the New Mexico Constitution.

tion standard followed by the court provided in part that in determining the reasonableness of a classification drawn by a statute, "if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts *at the time the law was enacted* must be assumed."[23]

The formula used by the court in *Romero* represents one of two completely disparate standards of equal protection review which have been applied by the United States Supreme Court in a strongly consistent pattern. Under this two-tier approach the Court first determines whether a suspect category[24] or a fundamental interest[25] is present in the statutory scheme under attack. If so, the Court applies a strict scrutiny test. In all other cases minimal scrutiny or a restrained review is utilized.[26] The initial selection of the test to be applied has usually been determinative of the outcome of the decision.

The test under strict scrutiny places on the state the unsurmountable burden of proving not only that its legislation is necessary for the achievement of a compelling state interest,[27] but also that the means selected are the least restrictive alternative.[28] When applying strict scrutiny the Court has consistently found the classification challenged to be violative of equal protection.[29] In contrast, the test for minimal scrutiny, characterized by the *Romero* opinion, in effect provides no review at all because it creates an almost irrebutable presumption of constitutionality.[30] It neither restricts the state's choice of alternative means nor condemns means which imperfectly

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23. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) (emphasis added), quoted in Romero v. Tilton, 78 N.M. at 700, 437 P.2d at 161.

24. Suspect categories include those based on race, Loving v. Virginia, 388 U.S. 1 (1967), national ancestry, Korematsu v. United States, 323 U.S. 214 (1944), and alienage, Graham v. Richardson, 403 U.S. 365 (1971).

25. Fundamental interests include specific constitutional guarantees like the right to counsel in a criminal trial, Powell v. Alabama, 287 U.S. 45 (1932), as well as guarantees which can be implied from the Constitution such as the right to procreate, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942), and the right of privacy, Griswold v. Connecticut, 381 U.S. 479 (1965).

26. McGeehan, 88 N.M. at 310, 540 P.2d at 240.

27. Eisenstadt v. Baird, 405 U.S. 438, 477 n.7 (1972); McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

28. *See* McLaughlin v. Florida, 379 U.S. at 196.

29. Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1, 19 (1972) [hereinafter cited as *Gunther's Model*]. In fact, the only case in which the Court has ever sustained a statute reviewed under the strict scrutiny test is Korematsu v. United States, 323 U.S. 214 (1944).

30. Comment, *Judicial Activism in Tort Reform: The Guest Statute Exemplar and a Proposal for Comparative Negligence,* 21 U.C.L.A. Law Rev. 1566, 1571 (1974) [hereinafter cited as *Judicial Activism in Tort Reform*].

effectuate the state's goals so long as there is a rational relation between the classifications drawn by the statute and a valid state purpose.[31] In determining the rationality of statutes the Court has often relied on its imagination to hypothesize not only the relationship between classifications and state purposes, but also what purposes the legislature may have considered in enacting statutes.[32]

Using this rigid two-tier approach, the interventionist Warren Court had succeeded in applying strict scrutiny to a wide range of state activity by enlarging the scope of fundamental interests.[33] More recently the Court has shown a dissatisfaction with this tactic. The result has been the application of a more vigorous minimal scrutiny which has allowed the Court to intervene in state activity without resorting to strict scrutiny and thus to avoid a further expansion of the list of fundamental interests.[34] Constitutional scholar Gerald Gunther has defined the characteristics of this new model for equal protection analysis on the basis of a study of fifteen equal protection cases decided by the Burger Court during the 1971 term and also on the basis of his perception of what is compatible with the Court's position of modest interventionism.[35] Gunther's model suggests a means-focused analysis which would avoid the value-laden criticism characteristic of strict scrutiny by concentrating on legislative means rather than ends. It establishes the test that legislative means must substantially further legislative ends.[36]

> It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing.[37]

The *McGeehan* court expressly acknowledged the new equal protection standard defined by Gunther as one which recognizes "the existence of substantial claims under the equal protection clause on minimal rationality grounds and has, to some extent, blurred the distinction between strict and minimal scrutiny."[38] The court cites

31. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 51 (1973) (dissenting opinion); Railway Express Agency v. New York, 336 U.S. 106, 110 (1949).

32. *Gunther's Model, supra* note 29, at 21. *See* Railway Express Agency v. New York, 336 U.S. 106 (1949).

33. *Gunther's Model, supra* note 29, at 12.

34. *Id.*

35. *Id.* at 12, 48.

36. *Id.* at 20.

37. *Id.* at 21.

38. 88 N.M. at 310, 540 P.2d at 240.

the current federal constitutional standard from *Reed v. Reed*,[39] a case which was characterized by Gunther as representative of the new invigorated minimal scrutiny. The *Reed* standard provides:

> The Equal Protection Clause . . . deny[s] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[40]

Although this formula is not a new one,[41] it has under traditional minimal scrutiny been applied with an extreme deference to legislative authority.[42] Under the new approach the New Mexico Supreme Court has attempted to make a realistic appraisal of the relationship between the classifications drawn by the automobile guest statute and its acknowledged purposes of promoting hospitality and preventing collusive lawsuits.

In discussing the promotion of hospitality, the court defined two rationales which have been advanced in its support. The first is the assumption that those who pay are entitled to a higher standard of care than those who do not. The court recognized that this principle had been accepted as applicable to common carriers, but found it inapplicable to guests in private automobiles. Emphasizing the lack of any legal principle which "dictates that one must pay for the right of protection from negligently inflicted injury," the court concluded:

> [T]he classification fails not because it draws some distinction between paying and nonpaying guests, but because it penalizes nonpaying guests by depriving them completely of protection from ordinary negligence. . . . No matter how laudable the State's interest in promoting hospitality, it is irrational to reward generosity by allowing the host to abandon ordinary care and by denying to nonpaying guests the common law remedy for negligently inflicted injury.[43]

Furthermore, the court found that the statute treated nonpaying guests in the host's car differently from guests in other cars. The

39. 404 U.S. 71 (1971).
40. *Id.* at 75-6, quoted in McGeehan, 88 N.M. at 310, 540 P.2d at 240.
41. The *Reed* Court cites as authority for this standard *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).
42. *See* State v. Thompson, 57 N.M. 459, 260 P.2d 370 (1930).
43. McGeehan, 88 N.M. at 311, 540 P.2d at 241.

court could find no rational basis for allowing the host to be less vigilant for his own guest than he was for similarly-situated guests in another person's vehicle.[44]

The second rationale supporting the promotion of hospitality is the assumption that it is the "epitome of ingratitude" to sue one's host for negligence.[45] As previously discussed the court found that whatever relationship may have existed in the past between the classifications drawn by the statute and protection against ingratitude had been altered by the widespread availability of liability insurance. The court went even a step further to question whether protection against ingratitude was ever a permissible state interest.[46]

The court acknowledged the legitimacy of the state's interest in preventing collusive lawsuits. It reasoned, however, that compensation is not the element which distinguishes collusive from noncollusive actions. The court pointed out that the classification for nonpaying guests was overinclusive in including many persons who may have legitimate causes of action and persons like hitch-hikers who have no relationship with the host driver. The court found it arbitrary to do away with lawsuits for a certain class of persons merely because some among them may institute fraudulent suits. The classification was found to be underinclusive because many paying guests may have a close relationship with the driver and thus have an equal opportunity to collude on the issue of negligence. Furthermore, since those who might collude on negligence can just as easily collude on whether compensation was paid, the statute did little to prevent collusion.[47]

It is clear that the court has applied an equal protection analysis which combines the features of strict and minimal scrutiny as it announced at the outset of the opinion. The analysis is similar to the model described by Gunther in that it has invalidated a statute without resorting to strict scrutiny.[48] The court's demonstration of the lack of impact on insurance rates, the underinclusiveness and overinclusiveness of the classifications, and the lack of relationship between collusion and compensation are all compatible with the model's focus on a realistic appraisal of the actual effects of legisla-

44. *Id.* The California court in *Brown*, 8 Cal. 3d at 867, 506 P.2d at 220, 106 Cal. Rptr. at 396, used this same example to illustrate the different treatment afforded similarly situated persons. Both courts ignore the fact that since the purpose of the statute is to foster the hospitality of the host driver, nonpaying guests who avail themselves of that hospitality can easily be distinguished from pedestrians and passengers in other cars who have not.

45. McGeehan, 88 N.M. at 311-2, 540 P.2d at 241-2.

46. *Id.* at 312, 540 P.2d at 242.

47. *Id.* at 312-3, 540 P.2d at 242-3.

48. *Gunther's Model, supra* note 27, at 18.

tive means. The court's discussion of how liability insurance has altered the rationality of protecting the host driver from ingratitude is also consistent with Gunther's model.

In general, however, the court's discussion of the hospitality rationale incorporates many of the value-laden conclusions which Gunther's model would avoid.[49] Not only does the court question the wisdom of the state's protection against ingratitude, the focus of the opinion is clearly more on the irrationality of the classification itself than it is on the relationship between the classification and the purpose it was intended to advance.[50]

In this respect the court's analysis is similar to what Justice Marshall has labeled a "reasoned" approach to equal protection. According to Justice Marshall the United States Supreme Court has used this approach to apply a "spectrum of standards" varying the degree of scrutiny on the basis of the "constitutional and societal importance of the interests adversely affected and the recognized invidiousness of the basis on which the particular classification is drawn."[51] Unlike Gunther's model, Justice Marshall's approach necessarily entails an evaluation of legislative ends because it would have the court balance the interest adversely affected by the classification against the state's interest in achieving the goals of the statute.[52]

The *McGeehan* court has in fact balanced these interests and concluded that no matter how laudable the state's interest in promoting hospitality, it cannot outweigh the right of nonpaying guests to have

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49. *Id.* at 21.

50. McGeehan, 88 N.M. at 311, 540 P.2d at 241.

51. San Antonio Ind. School Dist., 411 U.S. at 98-99 (dissenting opinion). It is interesting to note that both Justice Marshall and Gunther relied on many of the same cases decided in the 1971 term for support of their respective models. One author has suggested that the courts in *Brown*, Johnson v. Hassett, Henry v. Buader and Thompson v. Hagan, although citing to Gunther's model, were actually applying the approach defined by Justice Marshall. *Constitutionality of Guest Statutes, supra* note 5, at 120-1.

52. *See generally* San Antonio Ind. School Dist., 411 U.S. at 98-110. A recent Supreme Court decision, Craig v. Boren, 97 S. Ct. 451, ____U.S. ____(1976), would indicate that the Court has taken an approach similar to that described by Justice Marshall, at least in cases involving classifications based on gender. Such classifications have not yet been recognized by the Supreme Court as suspect. In Craig v. Boren the Court examined an Oklahoma liquor statute which distinguished between males and females on the basis of age. The Court determined that "[t]o withstand constitutional challenge, previous cases established that classifications by gender must serve *important* governmental objectives and must be *substantially* related to achievement of those objectives." *Id.* at 457, ____ U.S. ____. By establishing that the state must show an important rather than a valid state purpose, the Court has in effect applied a stricter scrutiny than would have been applied under the traditional minimal scrutiny test. It has done so on the basis of the nature of the classification being drawn. Therefore, it would seem that the New Mexico Supreme Court, while not following precisely the test established by Gunther, has remained within the limits of the standard which the Supreme Court has ultimately applied in certain situations.

a remedy for ordinary negligence.[53] Gunther's new model for equal protection analysis provided the means by which the court could, in keeping with current federal standards, intervene to protect this interest. The fact that the court went beyond the scope of the model illustrates the degree of importance it placed on the principle that one should not have to pay for the right of protection against ordinary negligence.

## IMMUNITY FROM LIABILITY ON THE BASIS OF STATUS

In determining that the hospitality rationale did not justify the distinction between paying and nonpaying guests, the *McGeehan* court followed closely the analysis made by the California court in *Brown v. Merlo.*[54] The *McGeehan* court, however, omitted any discussion of one of the primary factors in the California court's rejection of the hospitality rationale.

The court in *Brown* considered the distinction made by the statute between automobile guests and guests in other situations as well as the distinction made between paying and nonpaying automobile guests. The court reasoned that equal protection analysis requires the court to go beyond an examination of the specific statute under attack in order to "judge the enactment's operation against the background of other legislative, administrative and judicial directives which govern the legal rights of similarly situated persons."[55] California has abolished the common law doctrine which distinguished the duty owed by landowners to persons on their property on the basis of their status as invitee, licensee or trespasser. Furthermore, California Civil Code section 1714 provides that "[e]very one is responsible . . . for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person." The court concluded on the basis of these factors that "[u]nder current California law, . . . recipients of hospitality may generally demand that their hosts exercise due care so as not to injure them."[56]

In order to demonstrate that the guest statute's purpose of fostering hospitality did not justify a lower standard of care for nonpaying automobile guests, the court restated the reasoning which had supported the abolition in California of common law doctrines which had provided a lower standard of care for other classes of persons.[57]

53. 88 N.M. at 311, 540 P.2d at 241.
54. 8 Cal. 3d at 864-72, 506 P.2d at 218-24, 106 Cal. Rptr. at 394-400.
55. *Id.* at 862, 506 P.2d at 217, 106 Cal. Rptr. at 393.
56. *Id.* at 865, 506 P.2d at 219, 106 Cal. Rptr. at 395.
57. One commentator has suggested that the application of "common law determina-

In striking down the invitee-licensee-trespasser categories in *Rowland v. Christian*,[58] the court had stressed the irrationality of those classifications in contemporary society. It found that "[a] man's life and limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose."[59] More importantly, the *Rowland* court concluded that "[r]easonable people do not ordinarily vary their conduct dependent upon such matters."[60]

California has also abolished the doctrine of charitable immunity. The premise of this doctrine, that the recipients of the generosity of charitable institutions cannot properly demand protection from ordinary negligence, is similar to that of automobile guest statutes.[61] In *Malloy v. Fong*[62] and *Silva v. Providence Hospital*[63] the court had rejected the rationality of promoting charity by denying its beneficiaries a right to protection from negligently inflicted injuries. The court had reasoned that persons who avail themselves of the services of such institutions cannot realistically be said to have consented to the institution's immunity from liability.[64]

The *Brown* court found the reasoning of these cases clearly applicable to the guest statute. In the court's view it demonstrated the irrationality of assuming "that if a recipient of generosity is permitted recovery for negligent injuries the cause of 'ingratitude' will be served or the cause of 'hospitality' will be plundered."[65] The *McGeehan* opinion incorporated these conclusions without enunciating the reasons behind them.

Furthermore, the *McGeehan* court could not demonstrate support for these conclusions in New Mexico law. In his dissent in *McGeehan* Justice Oman pointed out that the court's reliance on *Brown* was clearly misplaced. Not only does New Mexico retain many of the common law classifications rejected by the California courts, it has as

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tions of reasonableness to determine the rationality of statutory classification[s]" makes *Brown* an example of bad constitutional law. Nevertheless, the same author states that *Brown* represents sound tort policy. *Judicial Activism in Tort Reform, supra* note 30, at 1569, 1585.

58. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

59. *Id.* at 118, 443 P.2d at 568, 70 Cal. Rptr. at 104, quoted in *Brown*, 8 Cal. 3d at 870, 506 P.2d at 222, 106 Cal. Rptr. at 398.

60. 69 Cal. 2d at 118, 443 P.2d at 568, 70 Cal. Rptr. at 104, quoted in *Brown*, 8 Cal. 3d at 870, 506 P.2d at 222-3, 106 Cal. Rptr. at 398-9.

61. Brown, 8 Cal. 3d at 870, 506 P.2d at 223, 106 Cal. Rptr. at 399.

62. 37 Cal. 2d 356, 232 P.2d 241 (1951), *rehearing denied*, June 23, 1951.

63. 14 Cal. 2d 762, 97 P.2d 798 (1939), *rehearing denied*, Jan. 25, 1940.

64. Brown, 8 Cal. 3d at 870, 506 P.2d at 223, 106 Cal. Rptr. at 399.

65. *Id.* at 872, 406 P.2d at 224, 106 Cal. Rptr. at 400.

well an airplane guest statute[66] and a "Good Samaritan" Act[67] which protects from liability for ordinary negligence those who perform emergency care services without remuneration.[68]

The New Mexico court may certainly be criticized for its failure to support with adequate discussion the legal conclusions it draws, especially in light of the particular standard it chose to apply. However, the lack of such a presentation does not in itself negate the validity of the result. Under *Brown* it seems clear that withdrawing protection from ordinary negligence never substantially furthers a state's goal of fostering hospitality.[69] Therefore, the retention in New Mexico law of similarly based classifications is irrelevant. The classifications drawn by the statute are irrational because they do not meet the test of substantially furthering the state's goals and not because of the existence of any legal principle which dictates that one should not have to pay for the right of protection against ordinary negligence. Such a principle did not exist in New Mexico before the *McGeehan* decision.

In one respect, while *Brown v. Merlo* may be viewed as one of the last stages in a progressive eradication of common law and statutory status-based classifications in California, the *McGeehan* opinion may well represent the first step in a similar process in New Mexico. It has been suggested that in light of *Brown's* reliance on *Rowland v. Christian* and its rejection of status determining liability, those courts which have followed *Brown* will at the least be required to abolish their state's invitee-licensee-trespasser classifications.[70] This may prove true in New Mexico for there is no apparent reason why the court should find any more rational a classification based on criteria similar to compensation. In fact, since *McGeehan* was decided the court has abolished interspousal tort immunity from ordinary negli-

66. N.M. Stat. Ann. § 44-1-16 (Repl. 1966).

67. N.M. Stat. Ann. § 12-53-3 (Repl. 1968).

68. McGeehan, 88 N.M. at 307, 540 P.2d at 246. Justice Oman pointed out that New Mexico still retained the common law doctrine of intra-family tort immunity and the duty owed to invitees, licensees and trespassers. It should be noted that California at the time of the *Brown* decision had airplane and motor boat guest statutes. Although the court recognized that the law treated similarly automobile, airplane and motor boat guests, it was unable to see how these guests could reasonably be distinguished from guests in other situations. 8 Cal. 3d at 865 n. 5, 506 P.2d at 219 n. 5, 106 Cal. Rptr. at 395 n. 5.

69. This is the standard which Gunther's model establishes for measuring the rationality of classifications challenged on equal protection grounds. *Gunther's Model, supra* note 27, at 20.

70. Note, *Guest Statutes and the Common Law Categories: An Inseparable Duality?* 51 Notre Dame Law. at 476. *See also* Thompson v. Hagan, 96 Idaho at _____, 523 P.2d at 1374 (dissenting opinion).

gence[71] and the doctrine of sovereign immunity.[72] In both situations, without referring to the similar conclusions in the *McGeehan* opinion, the court found these doctrines unjustified by existing circumstances.

## CONCLUSION

The New Mexico Supreme Court's decision to invalidate the automobile guest statute may stand as a landmark case in the development of the law of New Mexico. In establishing the principle that one should not have to pay for the right to a remedy for negligently inflicted injury, the court has implied that other classifications similar to those drawn by the guest statute may be successfully challenged. The court's reliance on *Brown v. Merlo* makes the common law categories of invitees, licensees, and trespassers particularly vulnerable. It may also suggest that the New Mexico court is willing to take an activist stance in the area of tort reform similar to that which characterizes the California Supreme Court.

The court's rejection of the traditional rationality test in favor of a new model for equal protection analysis is also significant. The court has demonstrated that it will judge the reasonableness of statutory classifications in terms of changing circumstances. Furthermore, the court shows that it is willing to intervene in state action when legislative means do not substantially further legislative ends or where the rights adversely affected by the statute outweigh the state's interest in accomplishing its goals.

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71. Maestas v. Overton, 87 N.M. 213, 531 P.2d 947 (1975).
72. Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975), *rehearing denied*, Feb. 11, 1976.