SCHWALBE v. JONES: THE OWNER-PASSENGER STATUTE HELD CONSTITUTIONAL—WHAT EVER HAPPENED TO *BROWN v. MERLO*?

> Everyone [in California] is responsible . . . for any injury occasioned to another by his want of ordinary care or skill in the management of his property or person . . . .[1]

Automobile owners beware: You are not protected by this duty of ordinary care and skill. The next time you allow a friend to drive, remember that his only responsibility toward you as a passenger is to refrain from willful misconduct or intoxication.

INTRODUCTION

California Vehicle Code § 17158[2] requires an automobile owner who is injured while riding as a passenger in his own car to prove as a condition to any recovery that his injuries resulted from the driver's intoxication or willful misconduct. In *Schwalbe v. Jones*,[3] decided on March 12, 1976, the California Supreme Court upheld the constitutionality of this statute and denied an owner-passenger the right to recover from a negligent driver. Only three years earlier, in *Brown v. Merlo*,[4] the same court had unanimously declared the automobile guest statute unconstitutional, at least as applied to the nonowner-passenger. The *Schwalbe* decision not only undercuts *Brown* but also is inconsistent with previous developments in California tort law.

This Comment will demonstrate that no rationale exists to support differential treatment of an owner-passenger and a non-

1. CAL. CIV. CODE § 1714 (West 1973).
2. CAL. VEH. CODE § 17158 (West Supp. 1976) provides:
> No person riding in or occupying a vehicle owned by him and driven by another person with his permission 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 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.

[This statute is hereinafter referred to as the owner-passenger statute.]
3. 16 Cal. 3d 514, 546 P.2d 1033, 128 Cal. Rptr. 321 (1976).
4. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

owner-passenger. An analysis of the *Schwalbe* decision will underscore the inconsistency of its rationale. If *Schwalbe* had been decided on its facts, the court could have avoided entirely the issue of the owner-passenger statute's constitutionality. In addition, the rationale suggested by the majority does not support the legislative purposes of the Vehicle Code financial responsibility[5] and civil liability[6] provisions. Finally, *Schwalbe* must be viewed within the context of California tort law, which is based on the fault principle and on the policy of fair compensation to injured plaintiffs. However, to understand the impact of *Schwalbe*, an examination of the guest statute's background and of *Brown* is required.

BACKGROUND

Guest Statutes

The first guest statutes were enacted in 1927[7] during a transitional period in American history in which the automobile had become the prevalent mode of transportation.[8] Courts have interpreted the purpose of guest statutes as twofold. First, guest statutes purportedly protect generous hosts who offer their hospitality to nonpaying guests;[9] second, they prevent collusion be-

5. CAL. VEH. CODE §§ 16000-480 (West Supp. 1976).

6. *Id.* §§ 17150-154.

7. Connecticut, 1927 Conn. Pub. Acts, ch. 328, § 1 (repealed 1937), and Iowa, 1937 Iowa Acts, ch. 134, § 512, were the first states to pass guest statutes.

8. At common law the driver was held to a reasonable standard of care in the operation of his automobile. There was no discrimination against the gratuitous guest's recovery for injuries resulting from the host's negligence. The guest statutes were passed in the late 1920's and early 1930's at a time when the automobile was gaining increased popularity as a form of transportation. At that time automobile liability insurance was almost non-existent. However, the automobile had not become the necessity that it is today. *See* Tipton, *Florida's Automobile Guest Statute*, 11 U. FLA. L. REV. 287, 288 (1958); Note, *The Present Status of Automobile Guest Statutes*, 59 CORNELL L. REV. 659, 660-63 (1974).

9. *See, e.g.*, Maloy v. Taylor, 86 Ariz. 356, 360, 346 P.2d 1086, 1089 (1961); Colombo v. Sech, 52 Del. 575, 577, 163 A.2d 270, 272 (1961); Davidson v. Pugh, 1 Ill. App. 670, 675, 274 N.E.2d 205, 208 (1971); Anderson v. City of Council Bluffs, 195 N.W.2d 373, 375 (Iowa 1972); Rainsbarger v. Shepard, 254 Iowa 486, 492, 118 N.W.2d 41, 42 (1962); Horst v. Holtzen, 249 Iowa 958, 962, 90 N.W.2d 41, 43 (1958); Steenson v. Robinson, 236 Or. 414, 423-24, 389 P.2d 27, 29 (1964).

In California, *see, e.g.*, Martinez v. Southern Pac. Co., 45 Cal. 2d 244, 253,

tween the driver and the passenger.[10] These statutes usually require a duty of minimum care by the driver toward his nonpaying guest.[11] Generally, absent compensation[12] from the passenger, the driver need refrain only from reckless, wanton, or willful misconduct.[13]

California adopted its first guest statute in 1929.[14] Although amended in 1931,[15] the statute remained unclear about whether

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288 P.2d 868, 872 (1955); Kruzie v. Sanders, 23 Cal. 2d 237, 242, 143 P.2d 704, 706 (1943); Sand v. Mahnan, 248 Cal. App. 2d 679, 683, 56 Cal. Rptr. 691, 696 (1967); Stephan v. Proctor, 235 Cal. App. 2d 228, 230, 45 Cal. Rptr. 124, 125 (1965); Bowman v. Collins, 181 Cal. App. 2d 807, 814, 5 Cal. Rptr. 776, 780 (1965).

10. *See, e.g.*, Truitt v. Gains, 199 F. Supp. 143 (D. Del. 1961); Rodgers v. Lawrence, 227 Ark. 117, 121, 296 S.W.2d 899, 902 (1956); Naphtali v. Lafazan, 7 Misc. 2d 1057, 1068, 165 N.Y.S.2d 395, 406 (1957); Birmelin v. Gist, 162 Ohio St. 98, 108, 120 N.E.2d 711, 717 (1954).

In California, *see, e.g.*, Stephan v. Proctor, 235 Cal. App. 2d 228, 230, 45 Cal. Rptr. 124, 125 (1965); Sand v. Mahnan, 248 Cal. App. 2d 679, 683, 56 Cal. Rptr. 691, 695 (1967). According to some commentators, this purpose was heavily emphasized by insurance company lobbyists. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 34, at 187 (4th ed. 1971) [hereinafter cited as PROSSER]; Georgetta, *The Major Issues in a Guest Case*, 1954 INS. L.J. 583, 583; White, *The Liability of an Automobile Driver to a Non-paying Passenger*, 20 VA. L. REV. 326, 332-33 (1934).

As one commentator succinctly noted: "Of course in seeking such statutes the insurance companies usually were represented by well-organized, well-financed and effective lobbyists, while the unorganized and unknown injured persons of the future had no lobbies or agents at all." Tipton, *Florida's Automobile Guest Statute*, 11 U. FLA. L. REV. 287, 288 (1958).

11. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 16.15, at 950-51 (1956); PROSSER, *supra* note 10, at § 60, at 382-85. A person who is a passenger for the mutual benefit of himself and the owner is not a guest. *E.g.*, Hertz Rental Co. v. Pitts, 174 So. 2d 437, 439 (Fla. 1965); Tillman v. McLeod, 124 So. 2d 135, 136 (Fla. 1962); Reeves v. Beckman, 256 Iowa 263, 267, 127 N.W.2d 95, 97 (1964). However, the benefit conferred must be sufficiently real and tangible. Remote or inconsequential benefits are not sufficient. *E.g.*, Brown v. Killinger, 146 So. 2d 124, 128 (Fla. 1962); Tillman v. Mcleod, 124 So. 2d 135, 136-37 (Fla. 1962).

12. Some statutes use the term *payment* instead of *compensation*. *E.g.*, OHIO REV. CODE ANN. § 4515.02 (Baldwin 1976). Some courts construe *payment* as referring only to the exchange of tangible property such as money, whereas *compensation* is a broader term which encompasses the rendering of personal services, Georgetta, *The Major Issues in a Guest Case*, 1954 INS. L.J. 583, 585.

13. There is an apparent trend to interpret words such as *reckless* and *wanton* as setting forth objective standards of fault that are different in kind, not just degree, from negligence. V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 10.3, at 182 (1974).

14. Act of Aug. 14, 1929, ch. 787, § 1, 1929 Cal. Stats. 1580 (repealed 1973).

15. Act of Aug. 14, 1931 ch. 812, § 1, 1931 Cal. Stats. 1693. The statute was amended by eliminating gross negligence as a basis for liability, making it necessary that a guest prove willful misconduct on the part of the driver. The test for willful misconduct is that the driver must have actual knowledge of the danger involved in doing or failing to do the act, coupled

an owner could be a "guest." In 1961 the owner-passenger portion was appended to the guest statute[16] to settle the issue of the owner's status while riding as a passenger in his own car. This amendment provided that an owner riding as a passenger in his own automobile was barred from recovery for injuries caused by the driver, absent proof of willful misconduct or intoxication on the part of the driver.[17]

Throughout their undistinguished history, guest statutes have been attacked by commentators[18] and challenged in the courts.[19]

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with a failure to attempt to avert the injury. *See* Howard v. Howard, 132 Cal. App. 124, 22 P.2d 279 (1933), in which the issue of the amendment's effect was raised for the first time.

16. The California guest statute previously provided:

> No person riding in or occupying a vehicle owned by him and driven by another person 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.

Act of July 12, 1961, ch. 1600, § 1, 1961 Cal. Stats. 3428 (repealed 1973).

17. Act of July 12, 1961, ch. 1600, § 1, 1961 Cal. Stats. 3429 (current version at CAL. VEH. CODE § 17158 (West Supp. 1976)). The 1961 amendment included as guests owners who gave compensation. *See* Patton v. La Bree, 60 Cal. 2d 606, 387 P.2d 398, 35 Cal. Rptr. 622 (1963). By furnishing the automobile, the owner is almost automatically furnishing compensation by contributing the rental value of the automobile to the cost of the ride. Lorch v. Eglin, 369 Pa. 314, 319, 85 A.2d 841, 843 (1952). *See also* Degenstein v. Ehrman, 145 N.W.2d 493 (N.D. 1966); Parker v. Leavitt, 201 Va. 919, 114 S.E.2d 732 (1960).

18. *E.g.*, PROSSER, *supra* note 10, at § 34, at 186-87; Gibson, *Guest Passenger Discrimination*, 6 ALBERTA L. REV. 211 (1968); Lascher, *Hard Laws Make Bad Cases—Lots of Them (The California Guest Statute)*, 9 SANTA CLARA L. REV. 1 (1968); Morgan, *The Case Against the Guest Statute*, 7 WM. & MARY L. REV. 321 (1966); Mundt, *The South Dakota Automobile Guest Statute*, 2 S.D. L. REV. 70 (1957); Pedrick, *Taken for a Ride: The Automobile Guest and Assumption of Risk*, 22 LA. L. REV. 90 (1961); Tipton, *Florida's Automobile Guest Statute*, 11 U. FLA. L. REV. 287 (1958); White, *The Liability of an Automobile-Driver to a Nonpaying Passenger*, 20 VA. L. REV. 326; Note, *Problems of Recovery under the Iowa Guest Statute*, 47 IOWA L. REV. 1049 (1962); Comment, *The Illinois Guest Statute: An Analysis & Reappraisal*, 54 NW. U. L. REV. 263 (1959).

19. *E.g.*, Vogts v. Guerrette, 142 Colo. 527, 351 P.2d 851 (1960) (challenged on grounds that special privileges and immunities had been granted to a small class of people); Hazzard v. Alexander, 36 Del. 212, 173 A. 517 (1934) (challenged on grounds that a vested right is infringed); Delaney

However, until *Brown* no court had been bold enough to hold a guest statute unconstitutional.[20] The *Brown* court, dealing only with a nonowner guest under the guest statute, left unresolved the question of the owner-passenger statute's constitutionality.[21]

The Rationale of Brown v. Merlo

The court in *Brown* adopted a novel approach[22] in holding that

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v. Badame, 49 Ill. 2d 168, 274 N.E.2d 353 (1971) (challenged on grounds of denial of due process); Westover v. Schaffer, 205 Kan. 62, 468 P.2d 251 (1970); and Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347 (1932) (on grounds of denial of a remedy at law for injuries received); Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 581 (1931) (on grounds of denial of due process and insufficiency of title).

20. The constitutionality of the California guest statute was first discussed in Forsman v. Colton, 136 Cal. App. 97, 28 P.2d 429 (1933). There the court said in dictum that the statute was constitutional. In Patton v. La Bree, 60 Cal. 2d 606, 387 P.2d 398, 35 Cal. Rptr. 622 (1963), the constitutionality issue was raised; however, the issue of the case revolved around the 1961 owner-passenger provision, which was held constitutional. In Ferreria v. Barham, 230 Cal. App. 2d 128, 40 Cal. Rptr. 739 (1964), the court conceded that *Forsman* may have been defective in its holding that the guest statute was constitutional. Nevertheless, the *Ferreria* court held that *Forsman* was correct in light of *Patton*, which had refused to accent an argument that the statute was unconstitutional. Finally, in Stephan v. Proctor, 235 Cal. App. 2d 228, 45 Cal. Rptr. 124 (1965), the court cited *Ferreria* as demonstration of the guest statute's constitutionality.

21. 8 Cal. 3d at 862 n.3, 506 P.2d at 217 n.3, 106 Cal. Rptr. at 393 n.3.

22. Although the equal protection clause of the fourteenth amendment does not require absolute equality, state action may not impose special burdens on selected groups except in pursuit of a legitimate state purpose. Rinaldi v. Yeager, 384 U.S. 305, 309 (1966). Recently, constitutional scrutiny of a statutory classification under the equal protection clause has been based in general on one of two standards. (1) A strict scrutiny test is used when the classification involves either a suspect class or a fundamental right. Suspect classes include those based on illegitimacy (Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972)); race (McLaughlin v. Florida, 379 U.S. 184 (1964)); alienage (Graham v. Richardson, 403 U.S. 365 (1970)); and sex (Frontiero v. Richardson, 411 U.S. 677 (1972)). Fundamental rights include voting (Dunn v. Blumstein, 405 U.S. 330 (1972)) and interstate travel (Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972)). When strict scrutiny is employed, the state must show that its classification scheme is necessary to promote a compelling state interest. (2) When interests involved are not fundamental and the classifications are not suspect, the Supreme Court has traditionally deferred to the state's prerogative and upheld state action under a rational basis test. This test is whether the classification is rationally related to a legitimate state purpose. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); North Dakota Bd. Pharmacy v. Snyder Drug Stores, 414 U.S. 156 (1973); Lindsey v. Normet, 405 U.S. 56 (1972); McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical Co., 348 U.S. 483 (1955). The state is presumed to have acted within its constitutional power.

Before *Brown* the California Supreme Court had utilized the two-tier analysis in reviewing classifications. *E.g.*, Serrano v. Priest, 5 Cal. 3d 584,

the California guest statute violated the equal protection clause of the California[23] and United States[24] Constitutions. The *Brown* court reasoned that the classification of automobile guest did not bear a substantial and rational relationship to the guest statute's purpose.[25] After noting the purpose of the guest statute, the court considered whether the statute's classification either included individuals irrelevant to the statutory purpose or excluded those relevant to that purpose.[26]

In *Brown,* the court found no reasonable ground for a distinction between automobile guests and other guests. The court directly assailed the dual purpose of the guest statute. First, no rational basis was found for removing a guest's protection from negligently inflicted injuries because of the host's generosity.[27] The validity of characterizing the basis of the injured guest's lawsuit as ingratitude has been eliminated by the development of automobile insurance coverage.[28] Although a guest does not sue the host's insurance company directly, the insurance company ultimately pays the judgment against the host. In addition, the promotion of hospitality does not rationally justify reduced protection for the class of automobile guests,[29] especially when other types of

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487 P.2d 1241, 96 Cal. Rptr. 601 (1971); *In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970); Westbrook v. Mihaly, 2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970). Although the *Brown* court did not apply strict scrutiny, it did require more than just a rational relationship between the classification and the legislative purpose.

23. CAL. CONST. art. 1, § 11 states: "All laws of general nature shall have uniform operation."

24. U.S. CONST. amend. XIV provides in part: "No state shall make or enforce any law which shall . . . deprive any person . . . within its jurisdiction the equal protection of the laws."

25. 8 Cal. 3d at 882, 506 P.2d at 231, 106 Cal. Rptr. at 407.

26. This approach determines whether the classification scheme promotes the actual legislative purpose. The United States Supreme Court has moved toward this approach in some cases. *E.g.,* James v. Strange, 407 U.S. 128 (1972) (recoupment of indigent defendant's defense costs); Jackson v. Indiana, 406 U.S. 715 (1972) (commitment of incompetent criminal defendants); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 645 (1972) (disadvantaged illegitimates); Stanley v. Illinois, 405 U.S. 645 (1972) (gender classification); Eisenstadt v. Baird, 505 U.S. 438 (1972) (restrictions on the distribution of contraceptives).

27. 8 Cal. 3d at 866-67, 506 P.2d at 220, 106 Cal. Rptr. at 396.

28. *Id.* at 867-68, 506 P.2d at 221, 106 Cal. Rptr. at 397.

29. *Id.* at 869, 506 P.2d at 222, 106 Cal. Rptr. at 398.

guests in California are afforded protection against unreasonable conduct.[30]

Second, the *Brown* court examined the collusion-prevention purpose to determine whether this purpose justified excluding all suits against a negligent host. Guest statute supporters had maintained that the injured guest and defendant driver could make an agreement that the defendant would testify that he was negligent. According to such a fraudulent scheme, the injured guest and defendant would then split the proceeds awarded to the guest, usually at the defendant's car insurer's expense. However, the *Brown* court focused on previous judicial decisions which had ignored collusion-based arguments and had granted recovery to injured plaintiffs.[31] From this review, the court reasoned that eliminating a cause of action by an entire class of people because an undefined portion of that class may file fraudulent claims was unreasonable. Moreover, the passenger and driver can escape the guest statute's bar by collusive testimony concerning whether the passenger provided any compensation for the ride.[32] The court concluded that the classification of automobile guest included honest individuals irrelevant to the statute's collusion-prevention purpose.

Finally, the court in *Brown* condemned the guest statute for the many loopholes which result from treating certain automobile guests differently from others. The court noted three statutory criteria which affect the treatment of automobile guests. For a guest to come under the statute, the injuries must occur "during the ride," "in any vehicle," and "upon the highway." The court concluded that none of these criteria bears any relationship to the legislative purposes behind the guest statute,[33] for the distinctions neither protect generous hosts nor prevent collusive schemes.

Brown was the first decision in the United States to hold a guest statute unconstitutional. Many other jurisdictions have followed

30. *See* Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), which held that the occupier of land owes an invitee onto his land a duty of reasonable care. *See also* Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951), and Silva v. Providence Hosp., 14 Cal. 2d 762, 97 P.2d 798 (1939), in which the court held that the charitable organizations involved were liable for their negligent conduct regardless of the fact that they did not charge for their services.

31. *See* Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (rejecting parental immunity); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962) (rejecting inter-spousal immunity); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955) (rejecting intra-family immunity).

32. 8 Cal. 3d at 875-76, 506 P.2d at 226-27, 106 Cal. Rptr. at 402-03.

33. *Id.* at 879-80, 506 P.2d at 229-30, 106 Cal. Rptr. at 405-06.

Brown's rationale.[34] These jurisdictions, too, have become convinced that "the time [has] come to bulldoze under the whole garden of the Guest Act and use it to mulch a new era of law and reason."[35]

Subsequent to *Brown*, the California legislature revoked the guest portion of Vehicle Code section 17158.[36] However, the owner-passenger portion of Vehicle Code section 17158 was reenacted.[37]

SCHWALBE V. JONES

The Background

Patricia Schwalbe Jones and Thomas Jones decided to tow her inoperable Renault to Saratoga, California, in order to give the car to a friend. Patricia and Thomas tied the Renault to Patricia's Triumph with a nylon towline, and she decided to ride in the towed car as a passenger and let a friend, Albert Pohl, steer the Renault. Thomas drove the Triumph. The two cars were on the freeway when the towed Renault swerved violently and the towline broke. The Renault went off the freeway and overturned. Its driver escaped unharmed, but Patricia was fatally injured.

Patricia's parents brought a wrongful death action against Thomas, alleging negligence and willful misconduct. The trial court granted the defendant's motion for nonsuit on the negligence count at the end of the plaintiff's case on the ground that the owner-passenger statute precluded recovery. Subsequently, the

34. *E.g.*, Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1326 (1974); Henry v. Bauder, 213 Kan. 751, 518 P.2d 326 (1974); Manistee Bank & Trust Co. v. McGowan, 394 Mich. 655, 232 N.W.2d 636 (1975); Laakonen v. Eighth Judicial Dist. Court, 91 Nev. 506, 538 P.2d 574 (1975); McGeehan v. Bunch, 88 N. Mex. 308, 540 P.2d 238 (1975); Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974); Primes v. Tyler, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975). *Contra*, White v. Hughs, 257 Ark. 627, 915 S.W.2d 70 (1975); Richardson v. Hansen, 186 Colo. 346, 527 P.2d 536 (1974); Justive v. Gatchelli, 325 A.2d 97 (Del. 1974); Keasling v. Thompson, 217 N.W.2d 687 (Iowa 1974); Duerst v. Limbocker, 269 Or. 252, 525 P.2d 99 (1974); Tisko v. Harrison, 500 S.W.2d 565 (Tex. Civ. App. 1973); Cannon v. Oviatt, 520 P.2d 883 (Utah 1974).

35. Lascher, *Hard Laws Make Bad Cases—Lots of Them (The California Guest Statute)*, 9 SANTA CLARA L. REV. 1, 3 (1968).

36. The legislature also revoked the guest portion of the airplane guest statute. Act of Apr. 8, 1953, ch. 151, § 1, 1953 Cal. Stats. 934 (current version at CAL. PUB. UTIL. CODE § 21404 (West Supp. 1976)) and repealed the entire motorboat guest statute (Act of July 19, 1961, ch. 2132, § 3, 1960 Cal. Stats. 4398 (repealed Act of Sept. 25, 1973, ch. 803, § 1, 1973 Cal. Stats. 1425).

37. CAL. VEH. CODE § 17158 (West Supp. 1976).

jury returned a verdict in favor of the defendant on the willful misconduct count. The plaintiffs appealed the judgement, claiming that the owner-passenger statute was unconstitutional.[38]

On April 16, 1975, in a 4-3 decision,[39] the California Supreme Court reversed and remanded *Schwalbe*, holding the owner-passenger statute unconstitutional.[40] The court reasoned that the mere fact of ownership may no more deprive one of a negligence claim than may the status of an automobile guest.[41] Moreover, the owner-passenger provision did not reasonably relate to either of the legislative goals, which the court defined as promoting hospitality and preventing collusion.[42] On rehearing,[43] however, the

38. The first District Court of Appeal, Division Three, first heard the appeal. Schwalbe v. Jones (opinion omitted), 110 Cal. Rptr. 563 (Nov. 9, 1973). The court in a short opinion relied on Patton v. La Bree, 60 Cal. 2d 606, 387 P.2d 398, 35 Cal. Rptr. 622 (1963), which held the 1961 owner-passenger provision constitutional. The narrow issue in *Patton*, however, was whether denying recovery to an owner riding as a passenger who gave compensation is discrimination against the owner since a nonowner-guest who gives compensation may recover.

39. Justice Tobriner wrote the majority opinion in which Justices McComb, Mosk, and Burke concurred. Justice Burke was a retired associate justice of the California Supreme Court sitting under assignment by the chairman of the Judicial Council. Justice Sullivan wrote the dissenting opinion in which Chief Justice Wright and Justice Clark concurred. When the case was reheard, the majority consisted of Chief Justice Wright, Justices Sullivan, Clark, McComb, and Richardson (the latter had recently been appointed to the court). Justices Tobriner and Mosk dissented.

40. 14 Cal. 3d 148 (opinion omitted), 534 P.2d 73, 120 Cal. Rptr. 585 (Apr. 16, 1975).

41. The court stated in a footnote that because the accident occurred in 1967, the technically applicable version of section 17158 was the one in effect when *Brown* was decided. However, the court said that it would apply the current statute, for the language of the former version is essentially the same as that of the present. *Id.*, 534 P.2d at 74 n.3, 120 Cal. Rptr. at 586 n.3.

42. *Id.*, 534 P.2d at 74, 120 Cal. Rptr. 586. The court reasoned that the hospitality purpose was inapplicable because eliminating claims by the owner-passenger may deter rather than encourage hospitality. The car owner often may be less, not more, inclined to invite another to drive. *Id.*, 534 P.2d at 75, 120 Cal. Rptr. at 587. Furthermore, the court reasoned that the collusion-prevention purpose failed because no more danger of collusion existed between an owner-occupant and driver than between a nonowner-occupant and driver, *id.*, 534 P.2d at 75, 120 Cal. Rptr. at 587.

The defendant, however, distinguished the owner-passenger statute from the guest statute in three ways. (1) The owner-passenger's ability to control and direct the driver is greater. (2) The owner-passenger provision was designed to protect the uninsured guest driver for exclusionary clauses in auto liability insurance policies exclude the policy holder from recovery on his own policy. (3) Finally, the owner-passenger statute was designed to encourage the owners' use of due care in selecting those to whom they will entrust their vehicles. *Id.*, 534 P.2d at 76-77, 120 Cal. Rptr. at 588-89.

43. *Id., petition for rehearing granted*, S.F. No. 23072, Cal. Sup. Ct. (June 11, 1975).

court reversed its earlier decision and found the owner-passenger statute constitutional, thus denying recovery to Patricia Schwalbe Jones' parents.

The Schwalbe *Holding*

Justice Sullivan, who wrote the majority opinion in *Schwalbe,* first distinguished *Brown* by rejecting the equal protection analysis used in that case as "diluting the traditional standard of equal protection analysis [—a dilution which] would result in the substitution of judicial policy determination for established constitutional principle."[44] Rather, the *Schwalbe* court applied a more traditional approach and analyzed whether the classification bears a rational relationship to any legitimate state purpose.[45] Justice Sullivan further distinguished *Brown* by reasoning that different legislative purposes sustain the owner-passenger statute than supported the original guest statute. This reasoning refuted the dissenters' contention that the hospitality and collusion rationales did not support the owner-passenger statute in light of *Brown.*[46]

Justice Sullivan found two distinctions between owner-passengers and nonowner-passengers. First, the reenacting of the owner-passenger statute after the *Brown* decision occurred with Insurance Code section 11580.1[47] in mind, which allows insurance companies to exclude "the named insured" from recovering on his own liability insurance policy.[48] Sullivan concluded that the owner-pas-

44. 16 Cal. 3d at 518-19 n.2, 546 P.2d at 1035 n.2, 128 Cal. Rptr. at 323-24 n.2.

45. *Id.* at 518, 546 P.2d at 1038, 128 Cal. Rptr. at 323.

46. *Id.* at 532, 546 P.2d 1045, 128 Cal. Rptr. at 333. The dissenting opinion, written by Justice Tobriner, is similar to the majority opinion in the first hearing of *Schwalbe. See* note 42 *supra.*

47. 16 Cal. 3d at 520, 546 P.2d at 1037-38, 128 Cal. Rptr. at 325.

48. California decisions indicate that an automobile liability policy will be construed to protect an additional insured (a driver driving with the owner's permission) against a claim for injuries by a named insured (owner-passenger) unless such protection is expressly and unambiguously excluded. *See, e.g.,* Atlantic Nat'l Ins. Co. v. Armstrong, 65 Cal. 2d 100, 416 P.2d 801, 52 Cal. Rptr. 569 (1966); Bachman v. Independent Indem. Co., 214 Cal. 529, 6 P.2d 943 (1931); P.E. O'Hair & Co. v. Allstate Ins. Co., 267 Cal. App. 2d 195, 72 Cal. Rptr. 690 (1968). A good example of this construction is State Farm Mut. Auto. Ins. Co. v. Jacober, 10 Cal. 3d 193, 514 P.2d 953, 110 Cal. Rptr. 1 (1973). This case dealt with three different situations in which the owner of an automobile, while riding as a passenger in his

senger statute was reenacted to protect the nonowner driver. He reasoned that because the owner was precluded from recovery under his own policy, the owner would seek redress against the driver.[49] Furthermore, the owner may not recover on his liability policy for injuries sustained as a result of his negligent driving. Consequently, to allow the owner to recover from the driver while the owner is riding as a passenger would be unfair, for the owner is able to choose and supervise the driver.[50] Justice Sullivan's second distinction between owner-passengers and nonowner-passengers concerned the former's greater ability to control the driver.[51]

Insurance Code Section 11580.1 as a Rationale

Two pivotal concerns in Justice Sullivan's reasoning were the amendment to Insurance Code section 11580.1[52] and the legislature's intent to protect the nonowner-driver. The owner-passenger statute does not further this purpose and raises the question of whether the legislature had Insurance Code section 11580.1 in mind

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own car, was either injured or killed in an accident caused by the drivers' negligence. All policies involved excluded the named insured from recovery for injuries sustained. However, the policies were "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of (a) bodily injury sustained by other persons." The court held that the owner-passengers were covered because as passengers they were "other persons." The court reasoned that the exclusionary clause may reasonably be interpreted as referring only to injuries sustained by the party facing liability for an alleged misuse of the vehicle—the party who seeks a legal defense. *Id.* at 203, 514 P.2d at 959, 110 Cal. Rptr. at 7. *But see* Farmers Ins. Exch. v. Geyer, 247 Cal. App. 2d 625, 55 Cal. Rptr. 861 (1967). *See also* Farmers Ins. Exch. v. Frederick, 244 Cal. App. 2d 776, 53 Cal. Rptr. 457 (1966).

49. 16 Cal. 3d at 522, 546 P.2d at 1038, 128 Cal. Rptr. at 326.

50. *Id.*

51. Justice Sullivan relied on Patton v. La Bree, 60 Cal. 2d 606, 387 P.2d 398, 35 Cal. Rptr. 622 (1963), for this distinction. In *Patton* the court focused on the greater ability of the owner-passenger to control and direct his driver. Furthermore, the court reasoned, the legislature may have taken into account the different relationship between a nonowner and owner-passenger and the driver, *id.* at 609, 387 P.2d at 400, 35 Cal. Rptr. at 624.

52. This section was added in 1970. Act of July 3, 1970, ch. 300, § 4, 1970 Cal. Stats. 573. The applicable part provides:

> (c) In addition to any exclusion as provided in paragraph (3) of subdivision (b), the insurance afforded by any such policy of automobile liability insurance to which subdivision (a) applies may, by appropriate policy provision, be made inapplicable to any or all the following:
>
> . . . .
>
> (5) Liability for bodily injury to an insured.

when it reenacted the owner-passenger statute. The owner-passenger statute's protection does not coincide with the exclusions permitted by Insurance Code section 11580.1. Rather, it provides protection for the driver only when the owner is "riding in or occupying" the vehicle and when injuries occur "during the ride." Similarly, the statute extends only to situations in which the owner is the injured party.[53] On the one hand, the driver owes any non-owner-passenger a duty of reasonable care. On the other hand, section 11580.1 of the Insurance Code permits automobile liability insurance policies to exclude liability coverage for bodily injury to an insured. However, the insured who may be excluded is not only the owner or a named insured, but also "any insured under the policy."[54]

It is not unusual for the "named insured" to include the principal insured, his spouse, and any relatives residing in the same household.[55] Furthermore, the exclusion may extend to a son or daughter who has "bodily presence,"[56] and possibly also to the agent of the insured.[57] In situations in which the owner allows his spouse, children, or even agent to use the car, the driver is without the protection the owner-passenger statute was intended to provide. In other words, even though a spouse or a child is excluded from the owner's and their own insurance liability policy, they may recover from a negligent driver who is no longer protected by the owner-passenger statute.

The owner-passenger statute, therefore, fails to include those individuals who are necessary to fulfill the purpose of the stat-

53. CAL. VEH. CODE § 17158 (West Supp. 1976).
54. CAL. INS. CODE § 11580.1(c) (West Supp. 1976).
55. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Jacober, 10 Cal. 3d 193, 207, 514 P.2d 953, 963, 110 Cal. Rptr. 1, 10 (1973) (the named insured, his spouse, and any relatives residing in the same household); Farmers Ins. Exch. v. Brown, 252 Cal. App. 2d 120, 121, 60 Cal. Rptr. 1, 2 (1967) (the named insured and his spouse); Farmers Ins. Exch. v. Frederick, 244 Cal. App. 2d 776, 779, 53 Cal. Rptr. 457, 459 (1966) (the named insured and his relatives).
56. *See, e.g.*, State Farm Mut. Auto Ins. Co. v. Elkins, 52 Cal. App. 3d 534, 539, 125 Cal. Rptr. 139, 142 (1975). Insured's 19-year-old daughter occasionally spent the night in her family home, spoke with one of her parents everyday, ran errands for her parents, and borrowed the family car. She was regarded as a family member and thus within the terms of the policy.
57. *See* Otter v. General Ins. Co., 4 Cal. App. 3d 940, 951, 109 Cal. Rptr. 831, 838 (1973).

ute. As noted earlier, this necessary-individual test was used in *Brown*.[58] By not including the other individuals necessary to effectuate the statute's purpose, the legislature unreasonably singled out owner-passengers from other automobile passengers.

Owner's Ability to Select and Control the Driver as a Rationale

Because Justice Sullivan's reliance on Insurance Code section 11580.1 apparently fails, his holding must rest on the distinction that an owner-passenger has a greater ability than a nonowner-passenger to choose, direct, and control the driver. Justice Sullivan used as a rationale for his opinion *Patton v. La Bree*,[59] which had upheld the constitutionality of the 1961 amendment. He then maintained that *Patton* explains the underlying basis for the amendment,[60] which gave owner-passengers the same status as nonowner automobile guests. Justice Sullivan explained that the language in the 1961 amendment was identical to that in the 1973 reenactment and that therefore *Patton* should also control the interpretation of the 1973 reenactment. Regardless of whether the reliance on the identical language of the two statutes is sound, the 1961 amendment should control because the accident in *Schwalbe* took place in 1967, before the reenactment of the owner-passenger statute. Consequently the *Patton* rationale, if correct, should control.

The *Patton* court reasoned that the relationship between the driver and the owner-passenger is different because the owner has the ability to choose, direct, and control his driver.[61] Justice Sullivan interpreted *Patton* to mean that the legislature believed it was unfair to allow an owner-passenger to recover when he had the power to manage and supervise the driver.[62]

However, reliance on the ability to direct and control as an inherent attribute of ownership is questionable. Does this attribute apply only to "ownership?"[63] Although the owner-passenger statute denies protection to the owner, it does not withhold protection

58. *See* text accompanying note 22 *supra*.
59. 60 Cal. 2d 606, 387 P.2d 398, 35 Cal. Rptr. 622 (1963).
60. *See* note 52 *supra*.
61. 60 Cal. 2d at 609, 387 P.2d at 400, 35 Cal. Rptr. at 624, *as cited in* Schwalbe v. Jones, 16 Cal. 3d 514, 519, 546 P.2d 1033, 1036, 128 Cal. Rptr. 321, 324 (1976).
62. 16 Cal. 3d at 520, 546 P.2d at 1036, 128 Cal. Rptr. at 324.
63. *See, e.g.*, Graf v. Harvey, 79 Cal. App. 2d 64, 179 P.2d 348 (1947), in which a son had bought a car and was legal holder. The father was given possession of the car while the son was in the armed forces. Although the father used and possessed the car, he was not the owner for liability purposes.

from any other person who has possession of the car and is able to select and direct the driver. For example, in *Whitehill v. Strickland*,[64] a husband allowed his wife to use his car. The wife in turn allowed a friend to drive. The court held that although the car was used for family purposes, the wife was not the owner and therefore was not barred from recovery when she was injured as a result of the driver's negligence.[65]

Today many people lease rather than buy cars. In such a situation a leaseholder has possession and control of the vehicle for an extended period of time and has the ability to direct and control the driver. Nevertheless, under the owner-passenger statute the leaseholder would not be precluded from recovery because he does not *own* the car.[66]

An owner may, for a number of reasons, allow his car to be used by another. In some cases the permittee may have possession of the car with the ability to supervise and control the driver. For instance, an automobile sales company may permit a prospective buyer to take out a car to test drive. If the customer allows his spouse to drive the car, the customer will be in a position to direct and control the spouse.[67] Similarly, an individual may rent a car which may be used for a long trip in which the driving is shared by different drivers. The individual who rented the car has the same opportunity as an owner to select, direct, and control drivers.[68]

Additionally, the ability to direct and control a driver may actually be insignificant or even nonexistent. As the dissent pointed out in *Schwalbe*, modern high-speed freeways and complicated highways impair any ability to control a driver. In fact, interference

64. 256 Cal. App. 2d 841, 64 Cal. Rptr. 584 (1967).

65. The case was brought by the husband as a wrongful death action.

66. *See generally* Metz v. Universal Underwriters, Inc., 10 Cal. 3d 45, 513 P.2d 922, 109 Cal. Rptr. 698 (1973). *Cf.* Klein v. Leatherman, 270 Cal. App. 2d 792, 76 Cal. Rptr. 190 (1969), in which the lessee agreed to pay as compensation a sum substantially equivalent to the value of the leased truck with the option to buy. The court held that the lease was actually a conditional contract and that therefore the lessee was in fact an owner.

67. *See, e.g.*, Engstrom v. Auburn Auto Sales Corp., 11 Cal. 2d 64, 77 P.2d 1059 (1938). The owner was a sales agency, and the operator was a prospective purchaser who conceded that at his request he had been given permission to use the car for purposes of demonstrating it to members of his family prior to a decision about purchasing a similar model.

68. *See, e.g.*, Financial Indem. Co. v. Hertz Corp., 226 Cal. App. 2d 689, 38 Cal. Rptr. 249 (1964).

may aggravate the situation or may cause an accident.[69] Finally, Justice Sullivan overlooked the fact that an owner-passenger may be physically handicapped, unlicensed, or unknowledgeable about driving. In any of these situations, the owner-passenger would be unable to direct or control the driver.

Justice Sullivan's disregard of these logical inconsistencies renders untenable his distinction between the owner-passenger's and nonowner-passenger's ability to direct and control the driver. Even cursory attention to the considerations outlined above indicates that the ability to direct and control a driver cannot be equated with the issue of whether the passenger owns the car.

Strict Application of the Owner-Passenger Statute

The court in *Schwalbe* has expanded the contours of the owner-passenger statute. Most California courts have required that the guest statute be strictly construed,[70] primarily because otherwise the common law right to redress for injuries wrongfully inflicted is lessened. The guest statute should be allowed as a defense only if the case clearly appears to be within the confines of the statute.[71] In accord with the treatment previously given the guest statute, the owner-passenger statute should be strictly interpreted, for the latter was derived from the former and is likewise contrary to the common law right of redress.

Previously, California courts had narrowly applied the requirements of the old guest statute.[72] In *Boyd v. Cress*,[73] for example, a driver pulled his car to the side of the road, and his passenger got out. The passenger had left the door open, and the car suddenly rolled. The open door knocked the passenger down, causing her injuries. The California Supreme Court held that the passenger was not a guest.[74] The court reasoned that the case was not within

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69. 16 Cal. 3d at 534, 546 P.2d at 1047, 128 Cal. Rptr. at 335 (dissenting opinion).

70. *E.g.*, O'Donnell v. Mullaney, 66 Cal. 2d 994, 997, 429 P.2d 160, 162, 59 Cal. Rptr. 840, 842 (1967); Prager v. Israel, 15 Cal. 2d 89, 93, 98 P.2d 729, 731 (1940); Rocha v. Hulen, 6 Cal. App. 2d 245, 254, 44 P.2d 478, 483 (1935).

71. *See, e.g.*, Baldwin v. Hill, 315 F.2d 738 (6th Cir. 1963); Truitt v. Gains, 199 F. Supp. 143 (D. Del. 1961); Hoffman v. Davis, 239 Ark. 99, 387 S.W.2d 338 (1965); Berne v. Peterson, 113 So. 2d 718, 720 (Fla. 1959); Davidson v. Pugh, 1 Ill. App. 670, 274 N.E.2d 205 (1971).

72. *See* note 14 *supra*.

73. 46 Cal. 2d 164, 293 P.2d 37 (1956).

74. *See also* Harrison v. Gamatero, 52 Cal. App. 2d 178, 125 P.2d 904 (1942), in which defendant-driver double-parked, and plaintiff-passenger crossed the street to mail a letter. The plaintiff was hit by another car

the guest statute because the plaintiff-passenger was neither in nor upon the car and because the injury did not occur during the ride.[75] In reasoning consistent with *Boyd*, the supreme court in *Smith v. Pope*[76] held that a passenger who had one foot on the ground and one foot on the vehicle's running board had not been "in any vehicle" as the guest statute required. In *O'Donnell v. Mullaney*,[77] the California Supreme Court strictly construed the "on the highway" requirement of the original guest statute. The court held that an injured passenger was not barred by the guest statute when the injury occurred on a private road. The *O'Donnell* court also recognized that the relationship between the driver and the passenger of a motor vehicle may change during the course of a single trip.[78]

What becomes evident from cases like *Boyd*, *Smith*, and *O'Donnell*[79] is the failure by the courts to apply the rationales for and purposes of the guest statute. In gray-area situations in which the facts do not fall within the letter of the guest statute, the courts simply applied the strict letter of the guest statute instead of determining whether ingratitude or collusion existed. The courts appeared more concerned with relieving the harshness of the guest statute.[80]

Following such precedents, the *Schwalbe* court should have rejected the defendant's claim that the owner-passenger statute precluded the plaintiffs' cause of action. The statute applies to an owner "riding in or occupying a vehicle owned by him *and* driven by another person."[81] The conjunction *and* implies that the owner

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as she crossed the street, returning to defendant's car. The court held that the plaintiff was not a guest because she was not in the car at the time of the accident.

75. 46 Cal. 2d at 167-68, 293 P.2d at 39. The court further reasoned that if the legislature had intended to include as guests those individuals in the plaintiff's situation, the legislature would have used such language as, "during such ride," or "in any vehicle." *Id.* at 168, 293 P.2d at 39.

76. 53 Cal. App. 2d 43, 127 P.2d 292 (1943).

77. 66 Cal. 2d 994, 429 P.2d 160, 59 Cal. Rptr. 840 (1967).

78. *Id.* at 998, 429 P.2d at 431, 59 Cal. Rptr. at 842.

79. *See* note 74 *supra*.

80. One writer has described these decisions as a judicial nullification of the guest statute. Comment, *Guest Statutes—Judicial Nullification*, 41 So. CAL. L. REV. 884 (1968). *But see* Brown v. Merlo, 8 Cal. 3d 855, 880 n.20, 506 P.2d 212, 220 n.20, 106 Cal. Rptr. 388, 406 n.20 (1968).

81. CAL. VEH. CODE § 17158 (West Supp. 1976) (emphasis added).

must be riding in a vehicle that is being driven by another.[82] Certainly Justice Sullivan's rationale for the owner-passenger statute requires that the owner-passenger ride in the same vehicle as the driver. Otherwise, how would the owner direct and control the driver? Indeed, *Schwalbe* should stand on better ground for non-application of the owner-passenger statute than do those cases in which the guest statute was strictly applied.

In guest statute cases the danger of ingratitude and collusion is not lessened by the fact that the vehicle is on a private road rather than a public highway;[83] neither is it lessened when the passenger leaves the car for a few minutes to mail a letter and is injured by a passing car as a result of the driver's negligent parking.[84] Yet in these situations and others[85] the court has rejected the guest statute defense. In *Schwalbe*, however, no opportunity existed for the owner-passenger to direct and control her driver because she was in a different car at the time of the accident.[86] Even if collusion was seen as a rationale for the owner-passenger statute, in *Schwalbe* the owner-passenger died, and collusion after the accident could not rationally have been claimed to be present.

Also in *Schwalbe*, there was no need to protect the driver's insurance company from the owner-passenger's suit—protection which Justice Sullivan saw as a purpose for the owner-passenger statute. The owner and driver in *Schwalbe* were married, and a driver's automobile liability policy usually excludes recovery on the policy to an insured.[87] The policy usually includes as an insured the policy holder's spouse.[88] The driver's insurance company would not have had to pay the owner-passenger's recovery had she won because under the husband's policy she was excluded.[89] Thus, the

82. The word *and* is used in logic as a sentential or propositional connective that produces a compound proposition true only if both compounds are true. *See* BLACK'S LAW DICTIONARY 112 (4th ed. 1968). When the California Supreme Court first heard *Schwalbe v. Jones*, the court stated in a footnote that the plaintiff did not put into issue the fact that the decedent was towed, thus conceding that the towed and towing cars constituted one vehicle. 14 Cal. 3d 448 (opinion omitted), 534 P.2d at 75 n.4, 120 Cal. Rptr. at 587 n.4.

83. *See* note 77 *supra.*

84. *See* Harrison v. Gamatero, 52 Cal. App. 2d 178, 125 P.2d 904 (1942).

85. *See* case cited note 74 *supra.*

86. 16 Cal. 3d at 517, 546 P.2d at 1034, 128 Cal. Rptr. at 322.

87. *See generally id.* at 521, 546 P.2d at 1037, 128 Cal. Rptr. at 325 and cases cited therein.

88. *See* cases cited note 55 *supra.*

89. *See* California State Auto. Ass'n Inter-Ins. Bureau v. Warwick, 17 Cal. 3d 190, 550 P.2d 1051, 130 Cal. Rptr. 520 (1976), in which the California Supreme Court held that the insurer was not required to indemnify the hus-

Schwalbe court was presented with a distinctive factual situation which easily could have allowed the court to dispose of the case on its facts. The court, however, ignored the usual inclination of courts to decide difficult cases on their facts.

AN ALTERNATIVE RATIONALE

The majority in *Schwalbe* failed to recognize an alternative and perhaps more logical explanation for the owner-passenger statute. Had it done so, and had it also considered the underlying purposes of the financial responsibility and civil liability provisions of the Vehicle Code, the court could have come to a different decision.

The Owner-Passenger Statute

The owner-passenger provision was originally added to the guest statute in 1961 to solve "one of the knotty little problems involving petty and otherwise inconsequential points of law: Can an owner of the car be a guest in it when someone else is driving?"[90] The issue is neither unique to California[91] nor resolved completely today.[92] Most jurisdictions have held that an owner is not a guest in his own car.[93]

Prior to the 1961 amendment to the guest statute, the view in California on the status of an owner-passenger was unsettled. In

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band for injuries suffered by his wife while she was riding as a passenger in the insured's vehicle. Under the terms of the husband's policy, the husband and wife were both "an insured" and therefore excluded.

90. PROSSER, *supra* note 10, at § 34, at 187.

91. *See* Annot., 65 A.L.R.2d 312 (1959).

92. *E.g.*, Summers v. Summers, 40 Ill. 2d 338, 239 N.E.2d 795 (1968), which held that an owner-passenger is not a guest within the meaning of the Illinois guest statute. The owner-passenger's status is not changed by the fact the owner permitted the guest to drive.

93. *E.g.*, Baldwin v. Hill, 215 F.2d 738 (6th Cir. 1963); Gledhill v. Connecticut Co., 121 Conn. 102, 183 A. 379 (1936); Peterson v. Winn, 84 Idaho 523, 373 P.2d 925 (1962); Naphtali v. Lafazan, 7 Misc. 2d 1057, 165 N.Y.S.2d 395 (1957), *affirmed*, 8 App. Div. 2d 22, 186 N.Y.S.2d 1010 (1959); Henline v. Wilson, 111 Ohio App. 515, 174 N.E.2d 122 (1960); Lorch v. Eglin, 369 Pa. 314, 85 A.2d 841 (1952); Parker v. Leavitt, 201 Va. 919, 114 S.E.2d 732 (1960). The rationale underlying these decisions is that the host relationship is dependent in large measure upon the host's furnishing hospitality to the guest. Because the owner-passenger is the one extending the hospitality—furnishing the mode of transportation—to the driver, the owner-passenger is the host, and the driver, the guest.

Ray v. Hanisch,[94] the court stated that the mere fact the owner was riding in her own car while it was driven by another did not render her a guest.[95] Yet, the court held as a matter of law that the arrangement between the parties did not constitute giving compensation and that therefore the plaintiff was a guest and could not recover.[96] Three years later, in *Ahlgren v. Ahlgren*,[97] the California Supreme Court held that the owner-passenger was not a guest under the guest statute.[98] The court reasoned that the owner has a right to become an occupant of his own car anytime he wants and has the privilege of inviting his passengers. The nonowner has neither of these prerogatives.

Within the context of the semantic morass created by cases such as *Ray* and *Ahlgren*, the guest statute was amended to accord the owner-passenger the same status attributed to nonowner-passengers.[99] Now, because the guest statute has been ruled unconstitutional,[100] the classification of owner-passenger no longer meets the legislative purpose of equating owner- and nonowner-passengers. Rather, owner-passengers are singled out for discriminatory treatment.

There is no apparent indication of the legislature's motive in reenacting the owner-passenger statute. Legislative history is scarce.[101] However, the legislature frequently repeals parts of

94. 147 Cal. App. 2d 742, 306 P.2d 30 (1957).

95. *Id.* at 748, 306 P.2d at 34.

96. *Id.* at 748-50, 306 P.2d at 34-35. The complaint contained two different counts. The first alleged that the defendant-driver negligently drove the automobile into a ditch, injuring the plaintiff-owner. In the second count the plaintiff stated that she had given compensation for the ride by sharing expenses. The defendant filed a general demurrer. The court held that the second count did not state a cause of action. The court then reasoned that because the second count pleaded facts upon which the plaintiff relied, the first count had to be considered in connection with the facts averred in the second count and with the facts agreed to. Therefore the first count had to stand or fall with the second count and was thus subject to demurrer.

97. 185 Cal. App. 2d 216, 8 Cal. Rptr. 218 (1960). The plaintiff-owner and defendant-driver had been to an office party. The owner requested the defendant to take him home because the defendant was sober and the owner had been drinking.

98. *Id.* at 224-25, 8 Cal. Rptr. at 224.

99. *See* note 14 *supra*.

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

101. The first time the bill (AB 1094) was proposed by its sponsor Assemblyman Z'berg, section 17158 was totally repealed (April 5, 1973). Subsequently the bill was amended in the Judiciary Committee and passed by the Assembly. The bill failed passage in the first senate committee hearing but passed in a second hearing. CA. LEGISLATURE, ASSEMBLY FINAL HISTORY 1973-1974, at 651.

statutes held unconstitutional and leaves standing those parts not within the court's holding.[102]

The Financial Responsibility and Civil Liability Provisions in the Vehicle Code

The majority in *Schwalbe* failed to note the purposes behind the legislative enactments found in the Vehicle Code's financial responsibility[103] and civil liability[104] provisions. Every California driver must maintain a statutory level of financial responsibility.[105] The legislative purpose behind this mandate is to protect users of the highway[106] by assuring that owners of motor vehicles have a certain financial responsibility to those injured by the vehicle operations.[107] Furthermore, the legislature assures liability insurance,

102. *E.g.*, Raffaelli v. Committee of Bar Examiners, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972). (The court held BUS. & PROF. CODE § 6060(a) (West 1974) unconstitutional, and the legislature repealed that section. Act of Dec. 22, 1972, ch. 1285, § 4.3, 1972 Cal. Stats. 2559 (current version at CAL. BUS. & PROF. CODE § 6060 (West Supp. 1976)). Randone v. Appellate Dep't, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971). (The court held CAL. CIV. PROC. CODE § 537 (West 1971) unconstitutional, and the legislature repealed the unconstitutional provision. Act of Sept. 27, 1974, ch. 1516, § 12, 1974 Cal. Stats. 3377 (current version at CAL. CIV. PROC. CODE § 537 (West Supp. 1976)). Blair v. Pitches, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1970). (The court held CAL. CIV. PROC. CODE §§ 509-21 (West 1954) unconstitutional, and the legislature repealed those provisions. Act of Sept. 17, 1973, ch. 526, § 1, 1973 Cal. State. 1013).

103. CAL. VEH. CODE §§ 16000-480 (West Supp. 1976).

104. *Id.* §§ 17150-154.

105. *Id.* § 16020 (West 1971). The forms are listed in CAL. VEH. CODE § 16021 (West Supp. 1976), which provides:

> Financial responsibility of the driver or owner is established if the driver or owner of the vehicle involved in an accident described in section 16000 is:
> (a) A self-insured under the provisions of this division.
> (b) An insured or obligee under a form of insurance or bond which complies with the requirements of this division.
> (c) The United States of America, this state, any municipality or subdivision thereof, or lawful agent thereof.
> (d) A depositor in compliance with subdivision (a) of section 16054.2.
> (e) In compliance with the requirements authorized by the department by any other manner which effectuates the purpose of this chapter.

106. *See, e.g.*, Inter-Insurance Exch. v. Ohio Cas. Ins. Co., 58 Cal. 2d 142, 154, 373 P.2d 640, 646, 23 Cal. Rptr. 592, 598 (1962); Continental Cas. Co. v. Phoenix Constr. Co., 46 Cal. 2d 423, 434, 296 P.2d 801, 808 (1956).

107. *See, e.g.*, Berrera v. State Farm Mut. Auto. Ins. Co., 71 Cal. 2d 659,

though at a high rate, for any automobile owner whose coverage has been cancelled by his insurance carrier.[108] Additionally, all automobile policies must include coverage for anyone who drives the owner's vehicle with the owner's permission.[109] These latter provisions "reflect the legislative purpose to broaden insurance coverage to protect those injured by the negligence of any person driving with the owner's consent."[110] Clearly by these enactments the legislature has shown its interest in protecting anyone injured by the negligent use of an automobile.

If the decedent in *Schwalbe* had been hit by a car while she was walking on the street, she could have recovered from the negligent driver. Why then should the decedent have been denied recovery because she was riding in her own car as a passenger? Justice Sullivan failed to support his argument that the legislature believed that allowing the owner-passenger to recover from the driver would be unfair. The purpose of the financial responsibility laws requiring all drivers to have insurance is to assure that all injuries caused by a negligent driver be compensated.

The Vehicle Code also sets out the responsibility between an agent-driver and principal-owner. Section 17150 of the Vehicle Code makes the owner of the automobile financially responsible for death or injury resulting from negligent conduct by anyone driving with the owner's permission. The legislative purpose of section 17150 was to protect innocent parties from the negligent use of automobiles. However, "this protection should be paramount to the rights of an [injured] owner who has permitted the use of his car by others."[111] As a further protection for the owner, section 17153 of the Vehicle Code allows the owner to be subrogated to all the rights of the person injured. Although the liability imposed by section 17150 upon the owner is primary and direct in so far

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670-71, 456 P.2d 674, 682-83, 79 Cal. Rptr. 106, 114-15 (1969), *citing* Wildman v. Government Employers' Ins. Co., 48 Cal. 2d 31, 39, 307 P.2d 359, 364 (1957).

108. CAL. INS. CODE § 11620 (West 1972). The assigned risk plan is accomplished by requiring all insurance companies writing liability policies to accept a share of the assigned risk.

109. CAL. VEH. CODE § 16451 (West 1971).

110. Glen Falls Ins. Co. v. Consolidated Freightways, 242 Cal. App. 2d 774, 782, 51 Cal. Rptr. 789, 795 (1966); Bohrn v. State Farm Mut. Auto. Ins. Co., 226 Cal. App. 2d 497, 504, 38 Cal. Rptr. 77, 81 (1964).

111. Mason v. Russel, 158 Cal. App. 2d 391, 393, 322 P.2d 486, 487 (1958), *citing* Burgess v. Cahill, 26 Cal. 2d 320, 323, 158 P.2d 393, 394 (1945). In *Mason* the court held that the plaintiff-car owner could recover from the negligent permittee-driver who had hit the plaintiff with his car while driving.

as the injured party is concerned, secondary liability is imposed between the owner and driver.[112] Indeed, the intent of sections 17150, 17151,[113] 17152,[114] and 17153 is clearly to place liability on the driver of the car.[115]

This responsibility between agent-driver and principal is the same when analyzed under general agency considerations. When an owner is riding as a passenger, the driver will in most cases be his agent.[116] Under general agency law an agent is liable for his own acts.[117] This liability is actionable regardless of whether the principal is liable or amenable to judicial action.[118] Although a principal is liable for negligent acts committed by his agent within the scope of the agent's authority,[119] the agent has a duty to use reasonable skill and diligence. Furthermore, an agent must indemnify his principal for any loss suffered by the principal as a result of the agent's negligence.[120] Therefore, though an owner-passenger may not recover on a liability policy for his own negligent acts, there is no reason the owner-passenger should not be able to recover from his negligent driver.

Schwalbe AND CALIFORNIA TORT POLICY

The injured owner-passenger's right to recovery is supported by

112. Heves v. Kershaw, 198 Cal. App. 2d 340, 344, 17 Cal. Rptr. 837, 839 (1961), *citing* Broome v. Kern Valley Packing Co., 6 Cal. App. 2d 256, 261, 44 P.2d 430, 432 (1935).

113. This statute protects the owner from being held liable for those damages intended to punish the driver—that is, punitive damages.

114. This statute requires that in any action against the owner for the negligence of the driver, the driver must be made a party defendant.

115. Heves v. Kershaw, 198 Cal. App. 2d 340, 344, 17 Cal. Rptr. 837, 839 (1961).

116. An agent is a person who has undertaken to act for another and to be controlled by the other in so acting. W. SEAVEY, AGENCY § 3, at 4 (1964).

117. CAL. CIV. CODE § 2343(3) (West 1954).

118. *E.g.*, James v. Marinship, 25 Cal. 2d 721, 742-43, 155 P.2d 329, 341 (1945); Bayuk v. Edson, 236 Cal. App. 2d 309, 320, 46 Cal. Rptr. 49, 56 (1965).

119. *E.g.*, Noble v. Sears, Roebuck & Co., 33 Cal. App. 3d 654, 663, 109 Cal. Rptr. 269, 275 (1973).

120. *E.g.*, Poile v. Stockton Merchants Ass'n, 176 Cal. App. 2d 100, 104, 1 Cal. Rptr. 284, 286 (1959); Leland v. Oliver, 82 Cal. App. 474, 479, 255 P. 775, 777 (1927).

California's liberal tort laws. The remainder of this Comment will discuss *Schwalbe* in light of the policy goals of California tort law.

California's system of tort law is guided by a policy goal of increasing the incidence of compensation for accidental injury.[121] This goal can best be accomplished by "loss spreading through the conduit of liability insurance."[122] Automobile liability insurance, for example, spreads risks among the entire class of automobile insurance buyers. The result of broadening liability is to increase the likelihood that people will buy insurance.[123] This result is consistent with the purpose of the financial responsibility laws.[124]

Nevertheless, California tort law is built on a fault-based foundation. Although other jurisdictions have adopted no-fault automobile compensation systems,[125] California has rejected them. *Li v. Yellow Cab Co.*[126] confirmed the California position that "in a system in which liability is based on fault, the extent of fault should govern the extent of liability."[127]

Schwalbe is incongruent with California's policy of increasing the incidence of compensation on a fault basis. Both of these elements will be independently considered with *Schwalbe.*

Increased Incidence of Compensation as a Policy Goal

Expanded judicial concepts of "reasonable care" and "duty" account for more frequent compensation awards. Both a statute[128] and judicial precedents[129] require that *all people* in California use ordinary care to protect others from being injured. In

121. Comment, *Judicial Activism in Tort Reform: The Guest Statute Exemplar and a Proposal for Comparative Negligence*, 21 U.C.L.A. L. REV. 1566, 1566 (1973).

122. Fleming, *Forward: Comparative Negligence at Last by Judicial Choice*, 64 CALIF. L. REV. 239, 242 (1976).

123. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944).

124. CAL. VEH. CODE §§ 16000-480 (West Supp. 1976).

125. For a list of those states which have both comparative negligence systems and no-fault coverage, see Fleming, *supra* note 122, at 240 n.3. Several commentators have proposed that California adopt a no-fault system for auto accidents. *E.g.*, Cohen, *Fault and The Auto Accident: The Lost Issue in California*, 12 U.C.L.A. L. REV. 164 (1964); Sulnick, *Tort Law: Political Perspective*, 7 LOYOLA L. REV. 410 (1974).

126. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

127. *Id.* at 811, 532 P.2d at 1231, 119 Cal. Rptr. at 863.

128. CAL. CIV. CODE § 1714 (West 1971).

129. *E.g.*, Kopfinger v. Grand Central Pub. Mkt., 60 Cal. 2d 852, 857, 389 P.2d 529, 532, 37 Cal. Rptr. 65, 68 (1964); Varus v. Barco Mfg. Co., 205 Cal. App. 2d 246, 261, 22 Cal. Rptr. 737, 746 (1962).

a landmark case, *Rowland v. Christian*,[130] the California Supreme Court declared Civil Code section 1714 the fundamental rule of negligence liability in California, even though the court could have decided the case in a number of ways without abandoning the old distinctions among entrants upon land.[131] Furthermore, later decisions have also explicitly or implicitly recognized section 1714 as the general principle for negligence liability in California.[132] As a result California has rejected the plaintiff's status as a bar to compensation for injury.

In their move toward more frequently granting compensation to injured plaintiffs, courts have refused to succumb to arguments that collusion may result if recovery is granted to particular plaintiffs. Consequently, inter-spousal immunity,[133] intra-family immunity,[134] and parental immunity[135] have been rejected in favor of increasing the incidence of compensation. "The possibility that fraudulent assertions may prompt recovery in isolated cases does not justify wholesale rejection of an entire class of claims in which that potential arises."[136]

130. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). Previous distinctions had been drawn among trespassers, social invitees, and business invitees. Each classification required a different standard of care owed by land occupiers to the entrant onto the land.

131. For example, if the plaintiff in *Rowland* had proved that the crack in the bathroom faucet handle which caused the injury was a concealed trap, defendant would have been liable because she failed to warn the plaintiff. Alternatively, the court could have decided that the occupier owed a general duty of care to only certain people in the licensee category —the social guests—by including social guests in the invitee category or by forming a separate category for social guests. Ohio adopted the latter approach in Scheiber v. Lipton, 156 Ohio St. 308, 120 N.E.2d 453 (1951).

132. *E.g.*, Tarasoff v. Regents of the Univ. of Ca., 17 Cal. 3d 425, 434, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976) (holding that a psychologist has a duty to warn a third person whom a patient plans to kill when the patient discloses this plan to the psychologist); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (adopting comparative negligence); Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (holding the automobile guest statute unconstitutional); Mark v. Pacific Gas & Elec. Co., 7 Cal. 3d 170, 496 P.2d 1276, 101 Cal. Rptr. 908 (1972) (holding landlord liable for electrocution of decedent); Holliday v. Miles, Inc., 266 Cal. App. 2d 396, 72 Cal. Rptr. 96 (1968) (holding supplier of chattel liable for negligence which resulted in injury to user).

133. Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955).

134. Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962).

135. Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

136. Dillon v. Legg, 68 Cal. 2d 728, 736, 441 P.2d 912, 917-18, 69 Cal. Rptr. 72, 77-78 (1969).

Traditionally, the first step in finding liability was inquiry into whether the defendant owed the plaintiff a duty of care.[137] Limits were placed on liability according to the doctrine of *Palsgraf v. Long Island Railroad*,[138] which excludes recovery by those outside a foreseeable zone of danger.[139] Legal duty existed only if the court or legislature said a "duty" existed, and this determination did not depend solely on the foreseeability of harm.[140]

In *Dillon v. Legg*,[141] however, the California Supreme Court postulated "duty" within terms of foreseeability. For the case to go to the jury, the court must first decide what the ordinary person under such circumstances should have reasonably foreseen. Then in light of that duty the court will determine whether the accident and harm were reasonably foreseeable.[142] *Dillon* and *Rowland* relegated duty determination and its policy factors to a secondary role.[143] Therefore, in California the defendant now owes a duty of care to all people foreseeably endangered by his conduct in respect to all risks which make that conduct unreasonable.[144] The impact

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137. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 307, 379 P.2d 513, 520, 29 Cal. Rptr. 33, 40 (1963); Cohen v. Eleanor Coon Groman Mortuary, Inc., 231 Cal. App. 2d 1, 4, 41 Cal. Rptr. 481, 483 (1964); Stromber v. Yuba City, 225 Cal. App. 2d 286, 289, 37 Cal. Rptr. 240, 242 (1964); Richards v. Stanley, 43 Cal. 2d 60, 63, 271 P.2d 23, 25 (1954).

> [D]uty [is] . . . the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other, and to deal with particular conduct in terms of a legal standard of what is required to meet the obligation. . . . "[D]uty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff . . . .

PROSSER, *supra* note 10 § 53, at 324.

138. 248 N.Y. 339, 162 N.E. 99 (1928).

139. B.E. WITKEN, SUMMARY OF CALIFORNIA LAW, TORTS § 489, at 2750 (8th ed. 1974).

140. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 307, 379 P.2d 513, 521, 29 Cal. Rptr. 33, 41 (1963).

141. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1969), in which the court awarded damages to a mother for mental injuries suffered as a result of witnessing the defendant run her daughter down with his car.

142. *Id.* at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.

143. Adams v. Southern Pac. Transp. Co., 50 Cal. App. 3d 37, 45, 123 Cal. Rptr. 216, 221 (1975).

144. Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 399 525 P.2d 669, 680, 115 Cal. Rptr. 765, 776 (1974). *Compare* Biakanja v. Irving, 49 Cal. 2d 647, 650, 320 P.2d 16, 19 (1958), in which the court said:

> The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct, and the injury suffered, the

of *Dillon* was to offer a wider range of compensation to an injured plaintiff who is neither in contractual nor physical privity with the tortfeasor.[145] For example, a duty of care toward a third person has been imposed on a therapeutic psychologist whose patient revealed to him a desire to kill the third party.[146] Similarly, in an action for damages resulting from injuries negligently inflicted on her husband, plaintiff wife had a cause of action against the tortfeasor for loss of consortium. The risk of such a loss was sufficiently foreseeable to give rise to a duty of care toward her.[147] Furthermore, a direct duty was owed to the decedent by the employer of the tortfeasor who killed the decedent.[148]

Another approach taken by California courts in order to grant more frequent compensation to injured plaintiffs has been to apply what one commentator calls a "status approach"[149] to determine the defendant's duty toward the plaintiff. The approach looks squarely at the defendant, as opposed to the traditional view of examining the particular relationship between the plaintiff and defendant.[150] This approach seems to be more useful when the

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moral blame attached to the defendant's conduct and the policy of preventing future harm.

145. Adams v. Southern Pac. Transp. Co., 50 Cal. App. 3d 37, 42-43, 123 Cal. Rptr. 216, 219 (1975).

146. Tarasoff v. Regents of the Univ. of Ca., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

147. Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

148. Van Oosting v. Duber Indus. Security Inc., 129 Cal. Rptr. 173 (1976) (withdrawn from publication by order of the court). (The defendant employer had a legal duty toward the plaintiff who was killed by defendant's employee. The court held that such harm was foreseeable under the circumstances. The employer had allowed his employee, who was a security guard, to return to his place of employment five and one-half hours after the employee had finished his work. Although the employee was drunk, he was allowed to take his gun from his locker. He then returned to the bar where he had previously had an argument with the decedent and shot the decedent.).

149. Rintala, *Forward: Status Concepts in the Law of Torts*, 58 CALIF. L. REV. 80 (1969).

150. *See* Barrera v. State Farm Mut. Auto Ins. Co., 71 Cal. 2d 659, 456 P.2d 674, 79 Cal. Rptr. 106 (1969), in which the court focused on the character of the defendant. The court found that the defendant was involved in a commercial business (insurance company) with large public dealings and examined the expectation of the public and the type of service which the entity holds itself out as ready to offer. The duty of the insurance company passed primarily to the general public or more precisely to the class of third

defendant is a large commercial manufacturer or corporation. However, arguably having the status of "a driver" is determinative of liability. If this argument is accepted, the court would then determine whether the driver should, as an incident of engaging in driving, assume an obligation to exercise reasonable care to avoid creating risk of injury. The court would first look at the driver, who is required to have insurance, and determine his financial capacity to bear the costs of the injuries.[151] Second, the court would examine the public expectation with respect to how a prudent motorist should drive. Certainly the policies underlying the financial responsibility provisions of the Vehicle Code would favor this approach.[152]

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persons who will be injured through accidents involving the insured's automobile. The court found that the duty was independent from a singular duty enforced by the named insured. Similarly, in Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969), the California Supreme Court unanimously upheld an injured bystander's claim for damages caused by a defect in the user's car. The court rejected the concepts that privity must exist and that foreseeability of a defective product causing injury to one category of victims as compared to another must be found. *Id.* at 586, 451 P.2d at 88, 75 Cal. Rptr. at 656. The *Elmore* court relied on the policies set forth in Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), and Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964), which focused upon the role of the defendant manufacturer and/or retailer in the process culminating in injury to the plaintiff from the defective product as well as on the defendant's ability to absorb and spread the costs of the injuries.

151. CAL. EVID. CODE § 1155 (West 1966) provides: "Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing." But as one commentator points out:

> Under the pressure of the enactment of more and more stringent financial responsibility laws, the practice of securing insurance protection against liability is rapidly becoming almost universal . . . . When the rule against the disclosure of insurance originated doubtless the existence of such protection for defendants was exceptional. . . . But when we consider the ways in which the fact of insurance may be properly disclosed in evidence or suggested at the beginning of the trial upon the examination of jurors, and the fact that insurance has become usual rather than exceptional, it seems likely today that in nearly all cases the jury will either be informed of the fact of insurance or will consciously assume that the defendant is so protected.

C. MCCORMICK, EVIDENCE § 201, at 481 (2d ed. 1972) (footnote omitted).

152. However, some cases may indicate a policy objective to protect plaintiffs who are in an unequal bargaining position or who in fact have no opportunity to bargain. *E.g.*, Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969), in which the court stated: "Consumers and users, at least, have the opportunities to inspect for defects and to limit their purchases . . . whereas the bystander ordinarily has no such opportunity. In short, the bystander is in greater need of protection." *Id.* at 586, 451 P.2d at 89, 75 Cal. Rptr. at 657. If this is the rationale of

Schwalbe runs directly counter to the California trend favoring increased incidence of compensation for the injured plaintiff. By protecting the negligent driver, the owner-passenger statute ignores the trend toward risk-spreading through insurance. *Schwalbe* upheld a statute requiring only a slight duty of care by the driver toward his owner-passenger, when at the same time California courts have imposed a duty of care on defendants toward third parties who are in neither contractual nor physical privity. Most importantly, while California requires everyone to use reasonable care toward others, the owner-passenger statute allows a single class of people to refrain only from willful misconduct.

California's Fault-Based Tort System

California tort law is based on fault.[153] In *Li v. Yellow Cab Co.*,[154] the California Supreme Court adopted the theory of comparative negligence.[155] The court concluded that contributory negligence ought to be replaced by a more equitable rule which assesses liability in proportion to fault.[156] Of course, the logical corollary of a fault principle is a rule of comparative or proportional negligence.[157] Indeed, the most equitable result that a

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such cases, they would not support an argument for granting compensation to an owner-passenger because seemingly the owner-passenger is able to choose his driver. However, as noted earlier, once on the road the owner-passenger has little ability to control and direct how the driver actually drives and may be viewed as in a situation similar to that of a bystander.

153. Prosser defines *fault* as

> [a] failure to live up to an ideal standard of conduct which may be beyond the knowledge or capacity of the individual and in acts which are normal and usual in the community and without moral reproach in its eyes. It will impose liability for good intentions and for innocent mistakes. . . . In the legal sense, "fault" has come to mean no more than a departure from the conduct required of a man by society for the protection of others and it is the public and social interest which determines what is required."

PROSSER, *supra* note 10, at § 4, at 18.

154. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

155. Comparative negligence is the apportionment of damages according to the fault of all parties involved. Under contributory negligence any unreasonable conduct by the plaintiff totally bars the plaintiff from recovering from the defendant. PROSSER, *supra* note 10, at § 67, at 433.

156. Li v. Yellow Cab Co., 13 Cal. 3d 804, 810, 532 P.2d 1226, 1230, 119 Cal. Rptr. 858, 862 (1975).

157. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 22.3, at 1207 (1956).

court can reach is the equation of liability with fault.[158] The court adopted a pure form of comparative negligence in preference to the modified form.[159] Under the pure form plaintiff's damages are reduced by the trier of fact in proportion to the amount of fault attributable to him. Under the modified form, if the plaintiff is found to be more than fifty percent at fault, the plaintiff is barred from recovery.[160] The pure form was adopted because the *Li* court believed that damages should be apportioned in accordance with fault regardless of whether the plaintiff is more than fifty percent at fault.[161]

The owner-passenger statute seriously hampers the general goal of a comparative negligence system to apportion damages on a fault basis. Moreover, the statute violates the level of reason and fairness *Li* sought to obtain,[162] for the owner-passenger statute does not equate liability with fault. Rather, the statute excuses the driver's negligence toward his passenger if the passenger also owns the car. One commentator has suggested that a comparative negligence system should be read as an implied repealer of guest statutes (owner-passenger statutes).[163] However, this theory has not been followed by any jurisdiction.[164]

158. *See* Hoffman v. Jones, 280 So. 2d 431, 436 (Fla. 1973). Besides California, Florida is the only jurisdiction to establish comparative negligence through the courts rather than by the legislature.

159. Only Mississippi, MISS. CODE ANN. § 11-7-15 (1972), New York, N.Y. CIV. PRAC. § 1411.1 (McKinney 1976), and Rhode Island, R.I. GEN. LAWS § 9-20-4 (Supp. 1974), have a pure form comparative negligence.

160. *See generally* PROSSER, *supra* note 10, at § 67, at 433-39; SCHWARTZ, *supra* note 13, at § 3.2, at 46.

161. 13 Cal. 3d at 827-28, 532 P.2d at 1242-43, 119 Cal. Rptr. at 874.

162. *See generally id.* at 811, 532 P.2d at 1231, 119 Cal. Rptr. at 863.

163. SCHWARTZ, *supra* note 13, at § 10.2, at 179. The following jurisdictions have both guest statutes and comparative negligence systems: Arkansas, ARK. REV. STAT. § 75-913-915 (1957); Colorado, COLO. REV. STAT. § 13-9-1 (1974); Nebraska, NEB. REV. STAT. § 3-129.01 (1970) (aircraft guest statute); Nevada, NEV. REV. STAT. § 41.190 (1975) (aircraft guest statute); North Dakota, N.D. CENT. CODE § 2-03-14 (1975) (aircraft guest statute), § 39-15-01-03 (1975) (motor vehicle guest statute); Oregon, 1961 OR. REV. STAT. §§ 30.115 & 30.130 (1975); South Dakota, S.D. COMPILED LAWS ANN. § 32-34-1 (1976) (motor vehicle guest statute), § 50-13-15 (1969) (aircraft guest statute); Texas, TEX. CIV. CODE ANN. tit. 116, §§ 6701(b) (Vernon 1977); Utah, UTAH CODE ANN. § 2-1-33 (1953) (aircraft guest statute), § 41-9-1 (1953) (motor vehicle guest statute); Washington, WASH. REV. CODE § 46.08.080 (1976); Wyoming, WYO. STAT. § 31-233 (1967) (motor vehicle guest statute).

164. *But see* Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974), where in a concurring opinion the court suggested that the enactment of a comparative negligence statute impliedly repealed the Idaho guest statute: "The question . . . is . . . whether the guest statute and comparative negligence are sufficiently inconsistent that it must be held that the guest statute has been superseded by enactment of comparative negligence." *Id.* at 26, 523 P.2d at 1372.

Implementation of comparative negligence raises practical problems in applying the owner-passenger statute's requirement that willful misconduct be proved, for plaintiff's contributory negligence is "no defense to an action based on a theory of willful misconduct."[165] The rationale for this concept was stated in *Williams v. Carr*:[166] "[C]ommentators as well as some courts have criticized the all-or-nothing aspects of the contributory negligence doctrine."[167] Furthermore, one effect of *Li* was the nullification of the "last clear chance" doctrine. That doctrine was developed as a "modification of the strict rule of contributory negligence"[168] and has been equated with gross and willful misconduct.[169] Seemingly, *Li* would stand for an abdication of the willful misconduct concept. Because the concept was developed to ease the sting of contributory negligence, the adoption of a comparative negligence system outdates willful misconduct. Regardless of whether either of the parties to the action acted willfully, the standard used by a jury should be a comparative one.[170]

THE IMPACT OF *Schwalbe*

In 1973, in *Brown v. Merlo*, the California Supreme Court held

165. Williams v. Carr, 68 Cal. 2d 579, 583, 440 P.2d 505, 509, 68 Cal. Rptr. 305, 309 (1968). *See* cases cited therein.

166. 68 Cal. 2d 579, 440 P.2d 505, 68 Cal. Rptr. 305 (1968).

167. *Id.* at 583, 440 P.2d at 509, 68 Cal. Rptr. at 309.

168. PROSSER, *supra* note 10, at § 66, at 427.

169. *See* Gibbard v. Cursan, 255 Mich. 311, 196 N.W. 398 (1923), in which the court stated:

> In a case where the defendant, who knows, or ought, by the exercise of ordinary care, to know, of the precedent negligence of the plaintiff by his subsequent negligence does plaintiff an injury. Strictly, this is the basis of recovery in all cases of gross negligence. *Such gross negligence is also sometimes called discovered negligence, subsequent negligence, discovered peril, last clear chance doctrine and the humanitarian rule. . . .*,

Id. at 316, 196 N.W. at 401 (emphasis added). *See* Morris, *Gross Negligence In Michigan—How Gross Is It?*, 16 WAYNE L. REV. 457, 462 (1970).

170. One court has noted the difficulty the jury might have when comparing willful misconduct in a comparative negligence system. Thompson v. Hagan, 96 Idaho 19, 26, 523 P.2d 1365, 1372 (1974) (concurring opinion). There it was pointed out that the jury would first have to decide whether the driver was guilty of willful misconduct; it would then have to compare the willful misconduct of the driver with the ordinary negligence of the guest-passenger and assign degrees of fault to each. Determination of willful misconduct by itself is difficult and confusing but when added to the comparison that must be made between willful misconduct on the one hand and ordinary negligence on the other, a meaningful allocation of fault becomes impossible.

the California guest statute unconstitutional. Only three years later, that same court in *Schwalbe v. Jones* upheld the constitutionality of the owner-passenger statute. This abrupt rejection of the *Brown* rationale may discourage the California Supreme Court from reversing *Schwalbe* for some time. One question is whether other jurisdictions which have not passed on the constitutionality of their particular guest statutes will be as quick to follow *Schwalbe* as some jurisdictions were to follow *Brown*.[171]

The owner-passenger statute penalizes those prudent owners of automobiles who, for reasons of safety, turn over the driving to another person.[172] In those cases in which an owner has been drinking and requests a sober friend to drive him home[173] or in which the owner and a friend share the driving, the owner-passenger becomes an endangered individual.[174] Furthermore, in cases in which the owner relinquishes the driving to an automobile serviceman or mechanic, the owner is unprotected against the driver's ordinary negligence.[175]

CONCLUSION

Schwalbe in effect erodes the reasonableness which *Brown* sought to implement and restores the outdated notion that an automobile confers a mystical status upon its occupants. The owner-passenger statute involved in *Schwalbe* suffers from the same inconsistencies as did the old guest statute and may be attacked on either constitutional or tort policy grounds. The California Supreme Court's precipitous turn against *Brown* may indicate that the owner-passenger statute will have to be legislatively revoked. However, if the legislature fails to act, the California Supreme Court may still void the statute; indeed, because the legislature is often

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171. *See* note 34 *supra*.

172. Many guest statute cases involve accidents in which the owner was driving and persisted in driving despite fatigue or intoxication. *E.g.*, Williams v. Carr, 68 Cal. 2d 579, 440 P.2d 505, 68 Cal. Rptr. 305 (1968); Ching Yee v. Dy Foon, 143 Cal. App. 2d 129, 299 P.2d 668 (1956); Halstead v. Paul, 129 Cal. App. 2d 339, 277 P.2d 43 (1954); Erickson v. Vogt, 27 Cal. App. 2d 77, 80 P.2d 533 (1938).

173. *E.g.*, Ahlgren v. Ahlgren, 185 Cal. App. 2d 216, 8 Cal. Rptr. 218 (1960).

174. *See, e.g.*, Fuller v. Greenup, 267 Cal. App. 2d 10, 72 Cal. Rptr. 531 (1968); Williamson v. Fitzgerald, 116 Cal. App. 19, 2 P.2d 201 (1931).

175. *E.g.*, Patton v. La Bree, 60 Cal. 2d 606, 387 P.2d 398, 35 Cal. Rptr. 622 (1963).

influenced by the powerful insurance lobbies, the court may be the more feasible forum for so doing.[176]

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176. Legislatures tend to react to pressures rather than to initiate action to avoid problems. However, no comprehensive public interest group exists to press for changes in tort law. Indeed, the legislature is rarely able to escape the pressures of insurance companies who tend to have their own idea on what tort law should be. In addition, when a legislature does enact a statute, it generally fails to cover the various problems that arise in enforcing the statute. *See generally* notes 121 & 122 *supra.*