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GUEST STATUTES AND THE COMMON LAW CATEGORIES: AN INSEPARABLE DUALITY?

I. Introduction

Automobile guest statutes were enacted in the 1920's and 1930's and, until recently, were commonplace in the majority of American jurisdictions.[1] Generally, these statutes classify automobile passengers as paying passengers or guest passengers. The paying passenger injured by the host driver's conduct may maintain an action upon a showing of ordinary negligence. The guest, however, can recover only by showing willful or wanton misconduct by the host.[2]

Prior to guest statutes, automobile guests were classified as licensees, and the host driver was required to exercise ordinary care not to unreasonably increase the risks necessarily involved in automobile travel.[3] Guest statutes maintained their invitee-licensee heritage by using the passenger's status as the determinative factor in the host's liability for his guest's injuries. However, in passing their guest statutes, legislatures extended further protection to the host, making him liable for only willful or wanton misconduct. The host no longer had to exercise ordinary care not to unreasonably increase the risks of an automobile trip; he had only to refrain from willfully or wantonly injuring his guest. Thus, guest statutes classifications became merely the common law category of licensee with additional protection extended to the host. Moreover, there has been judicial acknowledgement that the preservation of host hospitality is a common consideration that underlies both guest statutes and the common law categories.

Except for those statutory schemes which purported to insulate the host from all liability,[4] the classifications in guest statutes have been upheld as meeting constitutional equal protection requirements.[5] In 1973, however, the

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1 Note, *Present Status of Automobile Guest Statutes*, 59 CORNELL L. REV. 659 (1974) [hereinafter cited as *Present Status*].

2 Two typical guest statutes are as follows:

> 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 injury or death proximately resulted from the intoxication of willful misconduct of the driver.

CAL. VEHICLE CODE § 17158 (West 1973).

> The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, resulting from the operation of said motor vehicle, while such guest is being transported without payment therefor in or upon said motor vehicle, unless such injuries or death are caused by the willful or wanton misconduct of such operator, owner, or person responsible for the operation of said motor vehicle.

OHIO REV. CODE ANN. tit. 45, § 4515.02 (Page 1953).

3 *See, e.g.,* Beard v. Klusmeier, 158 Ky. 153, 164 S.W. 319 (1914). *See generally* Annot., 20 A.L.R. 1014 (1922).

4 Coleman v. Rhodes, 35 Del. 20, 159 A. 649 (1932); Stewart v. Houk, 127 Ore. 589, 271 P. 998 (1928).

5 Silver v. Silver, 108 Conn. 371, 143 A. 240 (1928), *aff'd*, 280 U.S. 117 (1929).

California supreme court, in *Brown v. Merlo*,[6] found its guest statute unconstitutional. The *Brown* holding was based upon a determination that the "preservation of the host's hospitality" justification for guest statutes does not serve a legitimate state interest, since it results in status determining liability.[7] The categorization inherent in guest statutes, like any other categorization that discriminates in the legal protection accorded to a particular class, must serve a legitimate state interest if it is to comply with equal protection guarantees.[8] Since California had already rejected the viability of status-determined liability in *Rowland v. Christian*,[9] the guest statutes' classification, without an underlying legitimate state interest, was held arbitrary and thus violative of the equal protection clauses of the California and United States Constitutions.

Subsequent to *Brown*, some 13 states have ruled on the constitutionality of their respective guest statutes. Decisions from these jurisdictions have turned upon an acceptance or rejection of *Brown*'s basic rationale: rejection of status as a valid means of determining host liability.[10] When the California supreme court rejected the "status" concept in its 1968 *Rowland* decision, it ruled that the traditional common law categories of invitee-licensee[11] were arbitrary because of their reliance upon status to determine liability.[12] An analysis of *Brown* and subsequent decisions demonstrates that, absent the "status" rationale of *Rowland*, there exists an insufficient basis for finding guest statutes unconstitutional. Additionally, a rejection of either the common law categories or the guest statutes logically requires an abolition of the other, since both predicate liability on status.

II. Traditional Justifications for Preserving Guest Statutes' Discriminatory Categorization

The discriminatory treatment accorded automobile guests, inherent in guest statutes, must further a legitimate state interest if it is to be constitutional.[13] Traditionally, the courts have espoused a dual rationale in support of the inherent classifications of guest statutes: (1) the preservation of the hospitality of the host driver, and (2) the prevention of collusive suits.[14] Since the nature of collusive suits is irrelevant to the question of whether a rejection of the common law categories necessarily must follow from a rejection of the hospitality rationale, it will not be discussed here; commentary on the viability of this inde-

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6 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

7 8 Cal. 3d at 865-66, 506 P.2d at 219-20, 106 Cal. Rptr. at 395-96.

8 "As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest furthered by the differential treatment." Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

9 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

10 Primes v. Tyler, 43 Ohio St. 2d 195, 203, 331 N.E.2d 723, 729 (1975).

11 These traditional categories are explained in 62 AM. JUR. 2d *Premises Liability* §§ 39, 51, 62, 74 (1972).

12 69 Cal. 2d 108, 199, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968).

13 *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 92 (1972).

14 *See, e.g.*, Primes v. Tyler, 43 Ohio St. 2d 195, 197, 331 N.E.2d 723, 725 (1975). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 34, at 180 (4th ed. 1971); Note, *Guest Statutes: Have Recent Cases Brought Them to the End of the Road?*, 49 NOTRE DAME LAWYER 446, 448-49 (1973).

pendent rationale is available elsewhere.[15]

The hospitality rationale reflects a state interest in protecting the automobile driver from negligence liability to a party to whom he has extended gratuitous service.[16] By extending this statutory protection to the host, the state seeks to ensure and encourage host hospitality.[17] Furthermore, this rationale fosters the state's belief that one who receives a gratuitous ride has no right to hold his benefactor liable for simple negligence.[18] The underlying reason for this policy is that since the guest extends no consideration for his ride, he should not complain if he is injured during the gratuitous ride.

In today's society, it may seem questionable that the preservation of hospitality could be the legislative reason for enacting a statute. This attitude is more easily understood, however, when it is recalled that most of the guest statutes were enacted during the Great Depression,[19] when many people could not afford their own cars and relied on others for transportation. It was thought that lawsuits by injured automobile guests would discourage the extension of such hospitable rides, and thus deprive people who could not afford cars the "health and pleasure derived from their use."[20] Additionally, the multitude of hitchhikers heightened the concern over ungrateful guest suits.[21] The legislatures apparently believed that suits by hitchhikers offended society's sense of justice and fair play. Thus, along with the general concern over ungrateful guest suits, fear of hitchhikers' suits became a primary justification for guest statutes. That there has been a paucity of such suits is evidenced by Dean Prosser's statement that he "once found a hitchhiker case but has mislaid it."[22] In spite of the above considerations, the hospitality rationale was rejected in *Brown v. Merlo.*

III. Rejection of the Hospitality Rationale—*Brown v. Merlo*

In *Brown,* the California supreme court found that the hospitality rationale no longer constituted a legitimate state interest, because it resulted in status determining liability.[23] Lacking an underlying legitimate state interest, guest statute classifications were held arbitrary and violative of the guest's equal protection guarantees.[24] Three arguments were advanced by the court in support of this position: (1) the gratuitous nature of the guest's ride does not strip him of the basic protection guaranteed all citizens by California law; (2) the prev-

15 *See, e.g.,* Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); *Present Status, supra* note 1.

16 *See* 8 Am. Jur. 2d *Automobile & Highway Traffic* § 471 (1972). *See also* Prosser, *supra* note 14, § 34, at 187.

17 *See* 8 Cal. 3d 855, 864, 506 P.2d 212, 218, 106 Cal. Rptr. 388, 394 (1973).

18 Prosser, *supra* note 14, § 34, at 187.

19 The first guest statute was enacted in 1927, the last in 1939. *See* Tipton, *Florida's Automobile Guest Statute,* 11 U. Fla. L. Rev. 287 (1958); *Present Status, supra* note 1.

20 Comment, *Torts: Automobiles: Duty of Driver to Guest: Statutes Releasing Owner or Driver from Liability for Negligence Toward Guest,* 18 Calif. L. Rev. 184 (1930) (footnote omitted).

21 *See generally* Dobbs v. Sugioka, 117 Colo. 218, 220, 185 P.2d 784, 785 (1947); Gifford v. Dice, 269 Mich. 293, 295, 257 N.W. 830, 830-31 (1934).

22 Prosser, *supra* note 14, § 34, at 187 n.8.

23 8 Cal. 3d at 865-66, 506 P.2d at 219-20, 106 Cal. Rptr. at 395-96.

24 *See* text accompanying note 7 *supra.*

alence of liability insurance dictates that the hospitality rationale no longer serves a legitimate state interest; and (3) status cannot determine liability. As will be demonstrated, the court effectively relied only on the third argument; the first argument was merely a subargument of the third, and the second argument was only a buttress to the third.

A. *The Gratuitous Nature of the Guest's Ride Does Not Strip Him of the Basic Protection Guaranteed All Citizens by California Law*

Initially, the *Brown* court found that the gratuitous nature of the guest's ride was an insufficient basis upon which to strip the guest of the basic protection of California law. The court modified the concept that a paying passenger is entitled to more protection than a guest passenger. Proponents of the state's guest statute supported their position by analogizing to the higher degree of care owed by a common carrier to his passengers.[25] The *Brown* court agreed that the state could distinguish between the duties owed a paying passenger and those owed a guest, provided that the distinction did not deprive the guest of the basic protection available to all citizens. Thus, the court admitted that the state may extend additional protection to a paying passenger, as is extended in the common carrier context, provided that this extra protection is accompanied by a guarantee of a minimum level of protection to the guest.[26]

Section 1714 of the California Civil Code establishes the minimum level of protection owed to all California citizens.[27] Enacted in 1872, it provides that every person must use ordinary care in the management of his property or person.[28] Under the then existing guest statute, guests were judicially excepted from the coverage of § 1714, and were required to make out a case of willful, wanton conduct. The *Brown* court viewed this restriction on a guest's potential negligence suit to be tantamount to forcing guests to pay for the level of protection which § 1714 provides all other California citizens without obligation.[29] The court found this "price tag" approach invalid because its basic premise denied equal protection of the law, in this case § 1714, to automobile guests.

B. *The Prevalence of Liability Insurance Undercuts Viability of the Hospitality Rationale*

The second argument of *Brown,* premised on the prevalence of automobile

25 8 Cal. 3d at 866, 506 P.2d at 220, 106 Cal. Rptr. at 396.

26 *Id.*

27 Rowland v. Christian, 69 Cal. 2d 108, 111-12, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968).

28 Responsibility for willful acts, negligence, etc.

> Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief.

CAL. CIVIL CODE § 1714 (West 1973).

29 8 Cal. 3d at 866, 506 P.2d at 220, 106 Cal. Rptr. at 396.

liability insurance among today's drivers,[30] maintained that such insurance undercuts the viability of the hospitality rationale. Liability insurance coverage was not as extensive during the 1920's and 1930's, and[31] the character of liability insurance now undercuts the hospitality rationale, since the aggrieved guest sues the insurer rather than the driver. The court argued that it is irrational for a driver to feel a rejection of his hospitality when it is his insurer who is sued. Because liability insurance renders the hospitality rationale no longer viable, the guest statute classifications are not supported by a legitimate state interest.

C. *Status Cannot Be Determinative of Liability*

Because of the guest statute's effect of determining the liability of the host by the status of the passenger, the *Brown* court rejected the hospitality rationale as an insufficient justification for denying the guest equal protection. *Rowland v. Christian* had previously rejected status-determined liability as arbitrary.[32] The *Brown* court stated that, by employing a concept that had previously been declared arbitrary, the guest statute was itself arbitrary. Moreover, because the effect of guest statute classifications arbitrarily bases host liability on the status of the passenger, the court found the hospitality rationale to be an insufficient justification for denying the guest equal protection.[33]

The *Brown* court relied exclusively upon *Rowland* in finding that there was no rational basis for discouraging guest suits.[34] *Rowland* had rejected the common law categories of invitee and licensee and thus had implicitly embraced the notion that the status of the injured party should not be determinative of host liability. In analogizing from this general concept to the guest statute, the court cited *Rowland.*

> It is unreasonable to single out automobile guests and to expose them to greater dangers from negligence than paying passengers; in automobiles as on private property, "reasonable people do not ordinarily vary their conduct depending on such matters."[35]

Because automobile drivers likewise do not vary their conduct on the basis of the guest's legal status, the court declared status not to be determinative of the driver's liability. Citing *Rowland* and other "status" rejecting decisions,[36] the court stated:

> *Rowland, Malloy* and *Silva* teach that "however laudable" the motives of a hospitable host or generous charity, it is irrational to reward that generosity

30 8 Cal. 3d at 868, 506 P.2d at 221, 106 Cal. Rptr. at 397.
31 8 Cal. 3d at 868 n.9, 506 P.2d at 106 n.9, Cal. Rptr. at 397 n.9.
32 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).
33 8 Cal. 3d at 869, 506 P.2d at 222, 106 Cal. Rptr. at 398.
34 *Id.*
35 8 Cal. 3d at 870, 506 P.2d at 222-23, 106 Cal. Rptr. at 298-9, *citing* 69 Cal. 2d at 118, 443 P.2d at 508.
36 Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951); Silva v. Providence Hosp., 14 Cal. 2d 762, 97 P.2d 798 (1939). Both cases deal with California's rejection of charitable immunities.

> by subjecting beneficiaries to a greater risk of uncompensated injury than is faced by other individuals; under this principle, the guest statute's classification scheme is clearly unreasonable.[37]

The *Brown* court relied on this central theme throughout its opinion. This theme of a duty of ordinary care, as broadened by *Rowland,* means that protection is to be accorded all citizens regardless of their technical legal status. Accordingly, the court rejected the California guest statute as not serving a legitimate state interest because of its arbitrary effect of predicating liability on status. Without a legitimate state interest, the classifications of the guest statute are violative of the equal protection guarantees of the guest.

D. *A Critique of the* Brown *Arguments*

In reviewing the *Brown* court's three arguments, it is apparent that the court was actually relying on only two arguments: (1) the invalidity of status as a means of determining an actor's liability, and (2) the widespread availability of liability insurance.

Section 1714 was certainly not a prerequisite to *Brown*'s findings. This statute is merely a codification of the general common law standards of social responsibility.[38] Prior to *Rowland,* § 1714 was applied in the same manner as the common law, including the admittance of the judicial "status" exceptions, such as invitee-licensee and charitable immunities. The *Rowland* decision extended § 1714 protection of ordinary care to the categories of invitee-licensee. This same result would have ensued, however, had there been no § 1714 codification of the common law responsibilities. Thus, when the *Brown* court cited § 1714 in support of its initial argument, the court was actually citing the precedent-breaking *Rowland* decision, which had made the general common law protection of ordinary care available to invitees-licensees. Without *Rowland* and its rejection of status-determined liability, the general protection of § 1714 would not have applied to the common law categories and thus not to automobile guests. *Rowland,* in applying § 1714 to invitee-licensees, made available to other status-based categories this common law protection. Therefore, because the *Brown* court's § 1714 argument could not have been asserted without the prior decision in *Rowland,* the court's first and third arguments logically depended on the same concept—*Rowland*'s rejection of status-determined liability.

Further examination of the *Brown* decision indicates that the court used the liability insurance argument as merely a buttress; by itself, it fails to provide the clear basis that is required to overcome the presumption of constitutionality

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37 8 Cal. 3d at 870-71, 506 P.2d at 223, 106 Cal. Rptr. at 399.

38 The law applies the objective test of what a reasonable man's responsibilities would be upon the facts at issue, to determine if the party charged with negligence is legally negligent. The reasonable man, as envisaged by the law, is "a man of ordinary care and skill." PROSSER, *supra* note 14, § 32, at 150. Therefore, to avoid negligence in maintaining property or person, one must meet the reasonable man standard, i.e., ordinary care under the circumstances. Additionally, "[n]egligence has also been defined as want of ordinary care; absence of ordinary care; lack of ordinary care . . . ." 65 C.J.S. *Negligence* § 1(2) (1966). *See generally* 57 Am. Jur. 2d *Negligence* § 1 (1972).

cloaking legislative enactments.[39] The pervasiveness of liability insurance is not a recent phenomenon. Approximately the same percentage of drivers were covered by liability insurance in 1960 as were covered in 1973, when *Brown* was decided.[40] Despite the existence of a statistical basis which the liability insurance argument could be founded upon, no American court had rejected the hospitality rationale prior to *Brown*.[41] If liability insurance was independently sufficient to reject the hospitality rationale, presumably it would have been employed long before *Brown*. This hestitation on the part of the courts renders suspect any judicial pronouncement that liability insurance currently supplies the clear basis upon which to overturn guest statutes.

Furthermore, the liability insurance argument has been criticized as not completely abrogating the hospitality rationale. In *Duerst v. Limbocker*,[42] the Oregon supreme court attacked the liability insurance rationale. Referring to liability insurance generally, the court noted that insurance did not account for those instances in which the host is uninsured or the insurance policy is insufficient to cover the amount of the judgement. Additionally, the court noted that the insurance argument questionably presupposed that a host does not feel his hospitality rejected when he suffers no direct monetary loss.[43] Liability insurance does not prevent the ingratitude that a host would experience when faced with the discomfort and inconvenience of a lawsuit. It seems apparent, then, that California did not feel safe in rejecting the hospitality rationale based upon this argument alone.

Since *Brown* relied primarily on the reasoning of *Rowland*, an acceptance of *Brown* likewise requires an acceptance of *Rowland*. More specifically, to reject a guest statute because of the *Brown* position demands the further rejection of status-determined liability and the common law categories of invitee and licensee. This conclusion is strengthened by an examination of guest statute cases—especially those cases refusing to follow the *Brown-Rowland* rationale—from other jurisdictions.

IV. The Progeny of *Brown*

A. *Cases Accepting the* Brown *Rationale*[44]

In *Henry v. Bauder*,[45] the Kansas supreme court relied substantially on

39 *Cf.* Klein v. National Pressure Cooker Co., 31 Del. Ch. 459, 64 A.2d 529 (Del. Ch. 1949).
40 In 1960, 62,000 of 73,000 cars in the U.S. had automobile insurance. BEST'S INSURANCE REP., FIRE AND CASUALTY x (1961). This indicates that 85 percent of the cars on the road were covered by liability insurance. *Brown v. Merlo* cites 1972 figures which indicate that nearly 85 percent of automobile drivers carry liability insurance. 8 Cal. 3d at 868, 506 P.2d at 222, 106 Cal. Rptr. at 397.
41 *Present Status, supra* note 1, at 660.
42 —— Ore. ——, 525 P.2d 99 (1974).
43 *Id.*
44 Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974); Manistee Bank & Trust Co. v. McGowan, —— Mich. ——, 232 N.W.2d 636 (1975); Johnson v. Hassett, 217 N.W.2d 771 (N.D. Sup. Ct. 1974).
45 213 Kan. 751, 518 P.2d 362 (1974).

Brown in rejecting the Kansas guest statute. Even though the *Henry* decision did not expressly accept the holdings of *Brown* and *Rowland,* this inference is permissible from the court's language.

> We further are impressed by the conclusion in *Brown* that the guest statute's purpose of fostering hospitality cannot rationally justify the lowering of protection for certain types of automobile passengers. That opinion discusses the matter in much depth and we refer the reader to that opinion.[46]

The Kansas court cited with approval the pertinent portions of *Brown* which relied specifically upon *Rowland*.[47]

Furthermore, the inference that the language in *Henry* indicated an acceptance of *Brown* has received judicial endorsement by the Ohio supreme court. The Ohio court, in reviewing previous guest statute cases, drew the following conclusion from *Henry*:

> The Supreme Court of Kansas, in a 4-3 decision adopted the basic rationale and conclusion of *Merlo,* and held the Kansas Guest Statute violative of federal and state equal protection guarantees.[48]

It appears, then, that Kansas has adopted *Brown*'s reliance on *Rowland,* and that consequently status-determined liability is open to general attack in Kansas. This rejection of status required the Kansas court to similarly reject its common law categories, since they also base liability on status. If such a basis is arbitrary under a guest statute, then neither can the common law categories serve a legitimate state interest.

In a recent Michigan case, *Manistee Bank & Trust Co. v. McGowan,*[49] the Michigan supreme court found the Michigan guest statute unconstitutional. Although there was no specific endorsement of *Brown,* parts of *Manistee* are strikingly similar to its language. The opinion evidences the same policy choice found in *Brown* and *Rowland,* which is that a man's life is not worth less because he accepts a gratuitous ride.[50] More importantly, the dissent in *Manistee* focused on the inapplicability of *Brown* to Michigan law,[51] which at least indicates that the dissent viewed the majority's decision as an endorsement of *Brown.*

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46 213 Kan. at 759, 518 P.2d at 370.

47 *See* text accompanying note 34 *supra.*

48 Primes v. Tyler, 43 Ohio St. 2d 195, 204, 331 N.E.2d 723, 729 (1975) (footnote omitted).

49 —— Mich. ——, 232 N.W.2d 636 (1975).

50 "The friends of the driver, his family . . . must suffer injury at his hands without recompense, solaced only by the thought that, after all, the skull was cracked by a friendly hand. . . . Why? Because the relationship between them was one of trust and friendship. No money had changed hands. If, however not the neighbor himself is carried to town, but rather his livestock to the slaughterhouse, many modern courts will permit full recovery for injury to the unfortunate animal through failure to use reasonable care for its safety. Is this one answer of an enlightened people to the hallowed question: *'How much then is a man better than a sheep?'* " —— Mich. at ——, 232 N.W.2d at 646, *quoting* Stevens v. Stevens, 355 Mich. 363, 370-71, 94 N.W. 2d 858, 862 (1959).

51 —— Mich. ——, ——, 232 N.W.2d 636, 647 (Coleman, J., dissenting).

B. *Cases Rejecting the* Brown *Rationale*

The cases that have refused to follow *Brown*[52] demonstrate even more emphatically that an acceptance of *Brown* compels an acceptance of *Rowland.* In *Cannon v. Oviatt,*[53] the Utah supreme court upheld the constitutionality of the Utah guest statute and specifically declined to follow *Brown.* In discussing the connection between rejection of a guest statute and rejection of the invitee-licensee distinction, the court found that they were mutually dependent.

> *Brown v. Merlo* is a logical consequence in that jurisdiction stemming from their prior determination to abandon the traditional tort doctrine that the status of a person determined the duty owed to him. In this jurisdiction the distinction between "invitees" or "business visitors" and "licensees" or 'social guest" has been preserved. . . . Thus, in this jurisdiction an automobile guest has not been isolated from all other guests and recipients of generosity and alone denied a duty of due care by his host.[54]

The Iowa supreme court, in *Keasling v. Thompson,*[55] characterized *Brown's* reasoning as unsound, absent a statute similar to § 1714 of the California Civil Code.[56] As noted, § 1714 extends the basic duty of ordinary care to all citizens. Prior to *Rowland,* this duty was limited by various judicial exceptions, most notably the common law categories of invitee-licensee. Section 1714 is merely a codification of the general common law duty of care owed to all citizens, and therefore when the Iowa court declared § 1714 a prerequisite for the abolition of status-determined liability, it was actually declaring that the California courts' construction of this common law duty is required. Therefore, it seems apparent that when the Iowa court referred to § 1714 as the foundation of *Brown's* reasoning, it was referring to the California courts' application of § 1714 subsequent to *Rowland*—an application of the duty of ordinary care unimpeded by judicial exceptions, specifically the common law categories.

The above-mentioned cases have focused upon *Brown* as the only important change in the law concerning the constitutionality of guest statutes. In short, if one accepts the *Brown-Rowland* rationale, status cannot be used to determine liability. Since the hospitality rationale results in status-determined liability, it is contrary to the public policy enunciated in *Rowland,* and cannot be said to serve a legitimate state interest. Without this underlying state interest, the guest statute classifications become arbitrary and thus violative of the equal protection

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52 White v. Hughes, —— Ark. ——, 519 S.W.2d 70 (1975); Richardson v. Hansen, —— Colo. ——, 527 P.2d 536 (1974); Justice v. Gatchell, 325 A.2d 97 (Del. Sup. Ct. 1974); Keasling v. Thompson, —— Iowa ——, 217 N.W.2d 687 (1974); Botsch v. Reisdorff, —— Neb. ——, 226 N.W.2d 121 (1975); Duerst v. Limbocker, —— Ore. ——, 525 P.2d 99 (1974); Tisko v. Harrison, 500 S.W.2d 565 (Tex. Civ. App. 1973); Cannon v. Oviatt, —— Utah ——, 520 P.2d 883 (1974).

53 —— Utah ——, 520 P.2d 883 (1974).
The Utah court, in upholding the constitutionality of its guest statute, followed the earlier lead of Tisko v. Harrison, 500 S.W.2d 565 (Tex. Civ. App. 1973), which also thought endorsement of *Brown* to require the rejection of the traditional categories of invitee-licensee.

54 *Id.* at 886.

55 —— Iowa ——, 217 N.W.2d 687 (1974).

56 —— Iowa at ——, 217 N.W.2d at 692.

guarantees afforded to automobile guests. If, however, a court rejects the *Brown-Rowland* rationale, it can then sustain the hospitality rationale as constituting a legitimate state interest. If held to serve a legitimate state interest, the guest statute classifications are not violative of equal protection guarantees.

If a court accepts the *Brown-Rowland* rationale and rejects a status-based guest statute, it would then be required to reject other types of status-determined liability. At a minimum, acceptance of *Brown* and *Rowland* necessitates the abolition of the invitee-licensee categories. This conclusion is further supported by decisions of courts that rejected their state guest statute without accepting the *Brown-Rowland* rationale.

C. *Judicial Aberrations: Courts That Overturned Their Guest Statutes Independent of the* Brown-Rowland *Rationale*

In the series of cases that reconsidered guest statutes in the aftermath of *Brown,* only two states' courts refused to follow the example of *Brown* in rejecting the common law categories along with the concept of status-determined liability. Courts in Ohio and Idaho based their rejection of their guest statutes on a rationale not dependent on *Brown's*. In so doing, these courts[57] have created judicial contradictions which finally argue all the stronger for the *Brown* position that consistency demands the rejection of other status classifications.

1. Ohio—Rejection of a Guest Statute Based on the Liability Insurance Argument

In *Primes v. Tyler,*[58] the Ohio supreme court ruled the Ohio guest statute unconstitutional, yet the court refused, *Brown* notwithstanding, to discredit the hospitality rationale as a legitimate state interest.[59] The Ohio court relied upon the existence of liability insurance as the only justification for overturning its guest statute.[60] However, liability insurance by itself does not create the clear basis that is required to find a particular legislative enactment unconstitutional.[61] Additionally, prior Ohio case law severely undercuts the strength of the court's rationale.

In its 1967 decision, *Stillner v. Bahner,*[62] the Ohio supreme court had affirmed the viability of the hospitality rationale. The *Stillner* affirmation was issued despite the fact that liability insurance was equally as prevalent in 1967 as at the time of *Primes. Stillner* was decided seven years after an insurance report had stated that 85 percent of all cars had liability insurance.[63] *Brown*

57 Thompson v. Hagan, ——Idaho ——, 523 P.2d 1365 (1974); Primes v. Tyler, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).
58 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).
59 43 Ohio St. 2d at 204, 331 N.E.2d at 729.
60 "It has not been suggested herein that a driver would consider it an affront to hospitality, if his injured guest were to be compensated by the driver's insurer." 43 Ohio St.2d at 202, 331 N.E.2d at 728.
61 Klein v. National Pressure Cooker Co., 31 Del. Ch. 459, 64 A.2d 529 (Del. Ch. 1949).
62 10 Ohio St. 2d 216, 222, 227 N.E.2d 192, 196-97 (1967).
63 BEST'S INSURANCE REP., FIRE AND CASUALTY x (1961).

demonstrated that such a percentage is a sufficient statistical base from which to support the liability insurance argument. In its use of the liability insurance argument, *Brown* relied on nearly identical statistics, although they were drawn from 1972 rather than 1960.[64] If liability insurance actually does preempt the hospitality rationale, Ohio had a sufficient basis in 1967 to declare that rationale outdated. Instead, the court specifically reaffirmed the vitality of that justification.[65] The *Primes* court pointed to no significant change in the status of liability insurance between 1967 and 1975. This example of judicial uncertainty on the part of the Ohio supreme court, coupled with the criticisms of liability insurance, indicates that the liability insurance argument does not provide a sufficient basis from which to declare a legislative enactment unconstitutional.

The *Primes* court, in searching for an independent rationale for overturning the Ohio guest statute, indicated its belief that acceptance of *Brown* necessitated the additional rejection of the common law categories. *Primes* recognized that the adoption of the *Brown-Rowland* rationale as the basis for rejecting the Ohio guest statute would create a "constitutional curiosity"[66] should Ohio retain its traditional categories of invitee-licensee.[67]

The Ohio court could not logically have used *Brown* to discredit the legitimacy of the hospitality rationale as a state interest without rejecting status-determined liability in the common law categories as well. In an effort to maintain its common law categories, the court asserted an independent liability insurance argument in order to discredit the hospitality rationale.

Assuming arguendo that the liability insurance argument is viable, it is nonetheless apparent that *Primes* has created exactly the constitutional anomaly that it initially recognized and sought to avoid. This anomaly resulted from the court's admission in *Stillner* that the same considerations underlie both the guest statute and the common law categories. Describing the reasons behind the guest statute, the *Stillner* court stated:

> Passage of this statute was *undoubtedly motivated* in the General Assembly by considerations comparable to those which have led courts to hold that an occupier of real property will be protected against suits by his licensee for negligence in maintenance of his property.[68]

It is apparent then that, at least in 1967, Ohio maintained that similar considerations supported both the guest statute and the common law categories.

Additional support for this similarity is that, prior to the enactment of guest statutes, the common law categories were applied to the automobile guest context. The Wisconsin supreme court has also evidenced this application.

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64 8 Cal. 3d at 868, 506 P.2d at 221, 106 Cal. Rptr. at 397.
65 10 Ohio St. 2d at 222, 227 N.E.2d at 197.
66 43 Ohio St. 2d at 204, 331 N.E.2d at 729.
67 In Ohio's neighboring state, Michigan, the dissenting opinion in a case apposite with *Primes* noted the anomaly that is created when *Brown* is adopted without a rejection of the common law categories. Manistee Bank & Trust Co. v. McGowan, —— Mich. ——, 232 N.W.2d 636 (1975) (Coleman, J., dissenting).
68 10 Ohio St. 2d at 222, 227 N.E.2d at 197 (emphasis supplied).

> The doctrine of licensor and licensee applies also in the case where one invites another to ride with him in his conveyance, where the person invited to ride is a gratuitous passenger.[69]

If the common law categories were deemed applicable to the automobile guest suit prior to the enactment of guest statutes, it follows that the guest statute classifications are but a specific instance of the basic philosophy of the common law categories. Dean Prosser further supports this contention by asserting the general policy behind both categorizations to be the preservation of the host's hospitality.[70]

Reference to the above-quoted *Stillner* statement and *Primes'* rejection of the Ohio guest statute indicates that the Ohio court has created a constitutional anomaly. By both rejecting its guest statute and maintaining its common law categories, *Primes* treated two classifications based on similar considerations in a dissimilar fashion. To remain consistent with *Stillner,* the Ohio supreme court must reject the invitee-licensee categories along with its guest statute, or should overrule *Primes.* As it is doubtful that the court will reverse its rejection of the guest statutes, the only remedy to Ohio's judicially compromised position is the legislative rejection of the common law categories.

2. Idaho—A Second Rejection of a Guest Statute Independent of *Brown*

Although Idaho's route to constitutional anomaly was slightly more novel than Ohio's, it arrived at an equally compromising position. In finding its guest statute unconstitutional, the Idaho supreme court in *Thompson v. Hagan*[71] rejected the argument, made in justification of the Idaho guest statute, that such statutes were analogous to the common law categories and should thus not be rejected without an abolition of these categories as well. The court sought to distinguish the duties owed an automobile guest and the duties owed a licensee as follows:

> Under the guest statute the automobile host has a negative duty towards his guest of not causing an accident through gross negligence or intoxication. The land owner's duty towards a licensee is to avoid exposing him to unknown dangerous hazards or instrumentalities.[72]

This distinction is merely semantical, for the host's duty could just as well be stated positively in the guest statute context, and negatively in that of the licensee. In neither situation is the owner liable to the guest for the maintenance of his property; the guest, in accepting the gratuity, takes the condition of the property as it exists. Whether the injured party is a guest on the owner's land or in his automobile should not, therefore, be a substantive distinction. More

69 Greenfield v. Miller, 173 Wisc. 184, 187, 180 N.W. 834, 837 (1921); *see* Pigeon v. Lane, 80 Conn. 237, 67 A. 886 (1907) (sleigh); Beard v. Klusmeier, 158 Ky. 153, 164 S.W. 319 (1914) (automobile); Patnode v. Foote, 153 App. Div. 494, 138 N.Y.S. 221 (1912) (buggy).

70 PROSSER, *supra* note 14, §§ 34, 60, at 180, 321.

71 —— Idaho ——, 523 P.2d 1365 (1974).

72 ——Idaho at ——, 523 P.2d at 1369.

importantly, basing this difference in a property owner's duties to his guests on a polarity of language fails to distinguish between the policy reasons shared by both classifications. Preservation of the host's hospitality is at least one consideration the two classifications have in common.

Furthermore, the *Thompson* court, in rejecting its guest statute as unconstitutional, commended the *Brown* case as being an exhaustive analysis of the guest statute subject and recommended its adoption.[73]

Thus, *Thompson* contradicted itself when it followed *Brown* with its *Rowland* rationale and yet stated that the Idaho guest statute was not inexorably linked to the considerations of the invitee-licensee categories. With its recent affirmation of the categories of invitee-licensee,[74] it seems that the Idaho court has created the same constitutional inconsistency that the Ohio court is now faced with. By rejecting their guest statutes and yet retaining their common law categories, both the Idaho and Ohio courts chose to treat differently classes having fundamentally similar policy considerations. This position contains an internal contradiction; *Thompson* exemplified it by accepting *Brown*'s rationale as to guest statutes but not as to the common law categories. Every other court that has dealt with the problem—including the *Primes* court—has determined that an acceptance of *Brown* necessarily implies the rejection of the common law categories. These categories should be now abandoned in Idaho as well.

Primes and *Thompson*, notwithstanding their labored reasoning, actually serve to reinforce *Brown*'s reliance upon *Rowland*. Constitutional anomalies have been created by both courts in their attempt to maintain the common law categories. The remedy to these anomalies—final rejection of the common law categories—serves to provide further strength to the conclusion drawn in *Brown* that rejection of a guest statute requires a rejection of all status-determined liability. Whether or not *Primes* admits to following *Brown* is immaterial. The *Stillner* position, coupled with the questionable independent viability of liability insurance, establishes *Primes* as an effectual *Brown*. *Thompson*, by following *Brown* and yet declaring the continued viability of the invitee-licensee categories, has established an internal contradiction. This contradiction, when allied with the similar considerations of guest statutes and the common law categories, denies equal protection to the common law categories. Therefore, though *Thompson*'s approach was more novel than *Primes*', both cases reached the same result: the effectual ratification of *Brown*, but with the retention of anomaly-causing categories.

D. *Resolution*

What is the state of the law concerning guest statutes and the common law categories in the wake of *Brown*, *Thompson*, and *Primes*? *Brown* established the rejection of the host's status-determined liability to be the only means to declare guest statutes unconstitutional. *Brown*'s rejection of the California guest statute was merely the latest step in California's continuing rejection of the "status" con-

73 —— Idaho at ——, 523 P.2d at 1370.
74 Springer v. Pearson, —— Idaho ——, 531 P.2d 567 (1975).

cept in negligence law. The state had previously rejected both charitable immunities and the common law categories because of their effect of predicating liability upon status.

In the 40 years since the enactment of the first guest statute, only two arguments have been advanced to discredit the hospitality rationale as a legitimate state interest for the guest statutes' classifications: (1) the rejection of status-based liability, and (2) the effect of widespread liability insurance. *Brown* incorporated both arguments in its rejection of the California statute. All jurisdictions that have maintained their guest statutes notwithstanding *Brown*[75] have concluded that neither argument constituted the clear basis upon which such statutes could be rejected. Ohio and Idaho, however, have sought to reject their guest statutes without following *Brown*'s rejection of the "status" concept.

Despite past judicial hesitation to use liability insurance as a discrediting factor, it is possible that the Ohio supreme court may have been correct in declaring liability insurance to be the clear basis to reject its guest statute. Indeed, Ohio has the precedent of using the liability insurance argument to reject charitable immunities,[76] while California relied instead on a rejection of "status" when it overturned its charitable immunities law. Whether or not liability insurance is a viable argument with which to overturn a guest statute, the conclusion remains that its use does not alleviate the necessity of abrogating the common law categories after the rejection of a guest statute. As noted above, guest statutes are the offspring of the common law categories, and have been judicially acknowledged as being based on the same considerations as those of the common law categories. To declare these identical considerations invalid when found in guest statutes but valid when found in the invitee-licensee categories is clearly illogical. A jurisdiction that has found these considerations to be controlling in one context but not in the other owes it to the integrity of judicial reasoning to determine that they shall not be controlling in either. In Ohio and Idaho, where the common law categories are currently still recognized even though their guest statutes have been rejected, an equal protection attack upon the common law categories is possible; it is now apparent that such categories rely on an arbitrary rationale and are thus unconstitutional. Whether based on the idea of liability insurance, the rejection of status-determined liability, or on some other argument, the common policy considerations of guest statutes and common law categories should be treated with equal effect in both contexts.

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75 White v. Hughes, —— Ark. ——, 519 S.W.2d 70 (1975); Richardson v. Hansen, —— Colo. ——, 527 P.2d 536 (1974); Justice v. Gatchell, 325 A.2d 97 (Del. Sup. Ct. 1974); Keasling v. Thompson, —— Iowa ——, 217 N.W.2d 687 (1974); Botsch v. Reisdorff, —— Neb. ——, 226 N.W.2d 121 (1975); Duerst v. Limbocker, —— Ore. ——, 525 P.2d 99 (1974); Tisko v. Harrison, 500 S.W.2d 565 (Tex. Civ. App. 1973); Cannon v. Oviatt, —— Utah ——, 520 P.2d 883 (1974).

76 "It was chiefly recognition of the widespread availability of liability insurance which led this court to abrogate the doctrine of charitable immunity in Avellone v. St. John's Hospital. . . ." Primes v. Tyler, 43 Ohio St. 2d 195, 202, 331 N.E.2d 723, 728 (1975).