Nebraska Law Review

Volume 53 | Issue 2 Article 5

1974

Rationality of Guest Statute Classifications Questioned: *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973)

Timothy J. McDermott
University of Nebraska College of Law, timothy.mcdermott@akerman.com

Casenote

Rationality of Guest Statute Classifications Questioned

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

I. INTRODUCTION

Brown v. Merlo[1] presented the typical guest statute situation. The plaintiff guest was riding in a jeep operated by the defendant on a public highway. The jeep crossed the center line of the highway and crashed into an embankment on the opposite side of the road. As a result, the plaintiff incurred physical injuries and brought suit, alleging both negligence and wilful misconduct on the part of the defendant driver. Defendant sought a summary judgment on the negligence element, claiming that the California guest statute clearly exonerated a driver for ordinary negligence to his guest.[2] The plaintiff responded that the guest statute was an unconstitutional denial of equal protection. The trial court granted the defendant's motion, from which the plaintiff appealed.

In a unanimous decision, the California Supreme Court held that the classifications created by the guest statute bore no rational relation to either of the statute's two traditionally espoused purposes of promoting a host's hospitality and preventing collusive lawsuits. Hence, as applied to a negligently injured guest, the statute violated the equal protection guarantees of both the California and United States Constitutions.[3]

---

1. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).
2. Ch. 1600, § 1, [1961] Cal. Laws Reg. Sess. 3428-29, *as amended*, CAL. VEHICLE CODE § 17158 (West Supp. 1974) 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 wilful misconduct of the driver.
3. 8 Cal. 3d at 859, 506 P.2d at 214-15, 106 Cal. Rptr. at 390-91.

Guest statutes have long been the target of scathing criticism by a host of commentators who have generally urged their abrogation.[4] Nonetheless, guest statutes are still in existence in 25 states.[5] The significance of the *Brown* decision is that it marks the first instance in which equal protection guarantees have been successfully employed to judicially abrogate a guest statute.[6] The purpose of this note is to analyze the court's rationale and to determine what implications *Brown* may have on the constitutionality of the Nebraska guest statute.

Set against the background of California law, the court concluded that its guest statute created three classifications. First, the statute discriminated between the automobile guest and other guests, specifically, social guests on a landowner's property. Second, it discriminated between automobile passengers (paying riders) and automobile guests (non-paying riders) in the driver's car. Third, the statute discriminated between different subclasses of automobile guests, such as auto guests injured on a highway and auto guests injured on a private road.[7]

Since these three classifications involved no fundamental right or suspect classification, the court found that the traditional equal protection standard of review was applicable.[8] In defining

4. Gibson, *Let's Abolish Guest Passenger Legislation*, 35 MAN. B.N. 274 (1964); Lascher, *Hard Laws Make Bad Cases—Lots of Them*, 9 SANTA CLARA LAW. 1 (1968); Weinstein, *Should We Kill the Guest Passenger Act?*, 33 DET. LAW. 185 (1965); Comment, *The Ohio Guest Statute*, 22 OHIO ST. L.J. 629 (1961).
5. For a state-by-state compilation of these guest statutes, *see* Comment, *Judicial Nullification of Guest Statutes*, 41 SO. CAL. L. REV. 884 (1968).
6. In Silver v. Silver, 280 U.S. 117 (1929), the Court upheld a Connecticut guest statute against an equal protection attack. However, the *Brown* court found that case not to be controlling for three reasons. First, unlike the statute construed in *Silver*, the California statute created three classification schemes instead of only one. Second, *Silver* was not set against the background of almost universal liability insurance. Third, *Silver* was not set against the background of Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), where social guests on one's land were given the protection of ordinary care. 8 Cal. 3d at 863-64 n.4, 506 P.2d at 217-18, 106 Cal. Rptr. at 393-94. Also, in the post-*Brown* decision of Tisko v. Harrison, 500 S.W.2d 565 (Tex. Civ. App. 1973), an equal protection attack similar to the one employed in *Brown* was unsuccessfully attempted upon the Texas guest statute.

   Two other courts, however, have recently embraced the *Brown* rationale in finding automobile guest statutes unconstitutional. Henry v. Bauder, — Kan. —, — P.2d — (1974); Putney v. Piper, Law No. 2798 (Polk Co., Iowa, filed Aug. 1, 1973).
7. 8 Cal. 3d at 863, 506 P.2d at 217, 106 Cal. Rptr. at 393.
8. Had the statute involved a suspect classification or had it encroached

that traditional standard, the court equated the California standard with what it determined to be the current federal standard. It ruled that, under both standards, the statutory classification must bear a real and substantial rational relation to the actual purposes of the legislative act, and that it is not enough that there is some conceivable reason or purpose that might support the discriminatory treatment.[9]

The court correctly found the purposes of the guest statute to be two-fold.[10] First, the act is designed to protect and promote hospitality by insulating generous drivers from lawsuits for negligence instituted by ungrateful guests who have benefitted from a free ride. Second, the statute helps prevent collusive lawsuits. The rationale is that since most automobile guests are close friends or relatives of the driver, and since the driver is usually covered by insurance, there is a natural tendency for the two parties to act in collusion and fabricate negligence claims in order to receive compensation. By requiring the guest to prove some form of aggravated negligence or wilful misconduct on the driver's part, the risk of collusion is greatly diminished. The court tested the rationality of the three classification schemes engendered by the statute in light of the statute's two purposes.

II. PROTECTION OF HOSPITALITY PURPOSE

A. Social Guest On Land vs. Auto Guest

Under the California decision of *Rowland v. Christian*,[11] a social guest on a host's land is owed a duty of ordinary care by his gen-

---

upon a fundamental interest, then the more demanding "strict scrutiny" equal protection standard of review would have been applicable. Under that standard, the proponent of the statute has the burden of showing that the disparity in treatment flowing from the classification is necessary to promote a "compelling" state interest. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

9. 8 Cal. 3d at 861, 506 P.2d at 216, 106 Cal. Rptr. at 392. *See also* footnote 7 in the court's opinion in which the court succinctly summarized its approach:

> Although by straining our imagination, we could possibly derive a theoretically 'conceivable,' but totally unrealistic, state purpose that might support this classification scheme, we do not believe our constitutional adjudicatory function should be governed by such a highly fictional approach to statutory purpose.

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

10. For a general discussion of these two traditional purposes underlying the guest statutes, see 2 F. HARPER & F. JAMES, LAW OF TORTS § 16.15 at 961 (1956); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 34 at 187 (4th ed. 1971).

11. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). In *Rowland*,

erous and hospitable host. However, under the California guest statute, a guest in an automobile is owed a duty of less than ordinary care by his generous host.[12] The court reasoned that if the purpose of the guest statute is to protect and promote hospitality in society by insulating a generous host from liability for ordinary negligent injury incurred by a recipient of that generosity, then the statutory scheme lacked any rationality since *both* of these guests are the recipients of a host's generous hospitality. Only the auto guest, however, is stripped of protection against ordinary negligence. The court concluded that since these two classes of guests are similarly situated with respect to the purpose of the guest act, yet are denied like treatment, they were being denied equal protection of the law.[13]

The court's conclusion of irrationality in the auto guest-property guest classification can be questioned. The conclusion is premised on the debatable assumption that these two recipients of hospitality are indeed "similarly situated" with respect to the statute's purpose of protecting and promoting hospitality. It is possible that the legislature believes that the socially valued element of hospitality is much more open to attack in the automobile situation than in the property situation and thus merits this greater degree of legislative protection. For example, the legislature may reasonably have concluded that the financial consequences to a host of a lawsuit against him by his guest are much more significant in the automobile context, because the degree of physical injury arising out of an automobile accident is generally much greater. In addition, such a lawsuit could tend to inhibit the extension of hospitality. Thus, in singling out the automobile guest situation for special regulation, the legislature may not have been acting arbitrarily. Instead, it may have been attempting to regulate the area in which "chilling" lawsuits are felt most sharply. Equal protection does not require a state to regulate an evil by uniformly regulating all the classes in which that evil is felt. Rather, it is enough that the statute regulates the specific class in which the evil is felt most sharply.[14] In the host-guest situation,

---

the California Supreme Court abolished the long-standing common-law distinctions of care owed by landowners to business invitees, licensees-guests and trespassers, and imposed a duty on landowners of ordinary care for the protection of *all* persons whose presence on the land might reasonably be anticipated.

12. *See* note 2 *supra.*
13. 8 Cal. 3d at 865-66, 506 P.2d at 219-20, 106 Cal. Rptr. at 395-96.
14. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Railway Express Agency v. New York, 336 U.S. 106 (1949). Indeed, this principle was employed by the Court to uphold a Connecticut

the legislature may have concluded that it is the auto class, in particular, in which the evil of "chilling," ungrateful lawsuits is felt most sharply.

Moreover, in finding that the guest statute created a disparity in protection between social guests on one's land and guests in one's automobile, the court employed some rather self-serving reasoning. When the legislature enacted the guest statute, the social guest on one's land was receiving a similar, less-than-ordinary standard of care from his host. It was only after the California Supreme Court subsequently changed its common-law host-guest rule in the property situation that inequality arose between these two types of guests.[15] Thus, it can be argued that the *court* and not the guest statute created the current unequal treatment afforded these two types of guests.

B. Auto Passengers vs. Auto Guests

The court next concluded that the disparity of care afforded the auto guest, as opposed to the paying auto passenger, lacked any rational justification.[16] This conclusion was predicated on three points.

First, the court held the guest statute is premised, in part, on the theory that "you get what you pay for." Since the guest, unlike the passenger, does not pay the driver anything for the ride, he has no right to expect ordinary care. The court concluded that such a principle is unconstitutionally irrational because no principle in the legal system dictates that one must pay a fee before he can demand protection from negligent injury. To bolster this contention, the court pointed to the liability that currently arises in what it termed "concrete analogous situations." For example, the court cited the fact that a driver owes a duty of ordinary care to a pedestrian, yet the pedestrian has not paid the driver at all. In this analysis, however, the court failed to recognize that the lesser standard of care given a non-paying auto guest under the guest statute is premised largely upon the fact that in return for this lesser protection, the auto guest is receiving a *benefit* in the form of a free ride. The pedestrian, on the other hand, is receiving no such benefit from the driver. His relationship with the driver therefore does not constitute an "analogous situation."

---

guest statute against an equal protection attack in Silver v. Silver, 280 U.S. 117 (1929).

15. *See* note 11 and accompanying text *supra*.
16. 8 Cal. 3d at 866, 506 P.2d at 220, 106 Cal. Rptr. at 390.

Second, the court found that the passenger-guest distinction is predicated upon the notion that a guest's suit against his generous host constitutes the epitome of "ingratitude," because the host-driver must personally pay for the costs of the injury incurred by the free-loading guest. Hence, this ingratitude ought to be condemned and eliminated by denying the guest a cause of action for mere negligence. However, while a guest's lawsuit and judgment against his host-driver's pocketbook may have once engendered ingratitude, the *Brown* court found that this is not the case today due to the wide presence of automobile liability insurance. Put simply, it is the host's *insurer* that feels the financial sting of the judgment and not the host himself. Consequently, the court reasoned that the lesser degree of care afforded the guest no longer bears any rational relation to this statutory purpose of the protection of hospitality and the elimination of ingratitude.

In arriving at this conclusion, the court failed to consider that, in many cases, the personal injury judgment will exceed the driver's insurance limits. This excess judgment is due primarily to today's large personal injury judgments and the fact that minimum statutory insurance amounts are typically quite low.[17] There is a definite possibility for "ingratitude" in the excess-judgment situation, which the court simply failed to consider in its analysis of the statute's rationality. Furthermore, the court's conclusion is based on the assumption that ingratitude relates solely to the financial aspects of the lawsuit; that is, the issue of who must pay for the guest's injuries. No mention is made of the possible ingratitude which may flow from a host having to tolerate the discomfort and inconvenience of a lawsuit against him. In short, the legislature may well have found that the "ingratitude" element goes far beyond the mere financial aspect of the suit. The legislature's determination in this area should have been given deference by the court. It is the legislature and not the court which is best equipped to evaluate how automobile drivers behave in response to a lawsuit against them by their auto guest.[18]

Third, the court concluded that prior decisions in California tort law readily establish the principle that, however important or

17. For example California has minimum statutory requirements of only $15,000/$20,000/$5,000. CAL. VEHICLE CODE § 16451 (West 1968). Nebraska statutory requirements are even lower at $10,000/$20,000/$5,000. NEB. REV. STAT. § 60-509 (Reissue 1968).

18. It is important to note that research fails to discover any empirical data available to determine whether a guest's lawsuit against his host does in fact create the feeling of "ingratitude" in the first place, and whether that feeling (if created) has been totally erased by the host's liability insurance protection.

laudable the existence of generosity may be in society, it is simply "irrational" to protect and encourage that generosity by allowing the donor to afford the recipient of his generosity a lower standard of care than that owed to all other persons.[19] Following this principle, the guest-passenger classification was deemed clearly unreasonable and violative of the equal protection guarantee.[20]

In its eagerness to topple the guest statute, the *Brown* court's rationale must be labelled for what it is, namely, a judicial attempt to abrogate a much disliked legislative act. It is apparent that there are two competing social considerations in this area, the encouragement of generosity in society and the interest in compensating injured persons. The legislature has given a preference for the former consideration at the expense of the latter. Certainly this preference may be deemed unwise, but it is definitely not "irrational" in any equal protection sense, even under the demanding rationality standard being applied by the California court. It is well established that unwise laws may nonetheless pass constitutional muster under the equal protection guarantees.[21]

C. Sub-Classes Of Auto Guests

The court also found that the guest statute expressly, and as applied in actual cases, creates different sub-classifications among auto guests. Specifically, the statutory language stipulates that those auto guests injured "during the ride" cannot recover. Yet, in actual cases, recovery has been allowed to an auto guest who

19. 8 Cal. 3d at 870-71, 506 P.2d at 223, 106 Cal. Rptr. at 399. The specific tort cases relied upon by the court were (1) Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), which eliminated the common-law degrees of care which a landowner owes persons upon his land, and (2) 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), which abolished the common-law charitable immunity rule.

    If this principle is "irrational," one can question the fate of the typical "good samaritan" statute which generally provides that any medically licensed person who gratuitously volunteers aid to an injured party is held only to the standard of good faith in the application of that aid. (The Nebraska statute, NEB. REV. STAT. § 25-1152 (Supp. 1972), goes even further in apparently supplying *any* gratuitous volunteer with an *absolute blanket* of immunity against civil liability.) The guest statute and the good samaritan statute are similar in that both were enacted to encourage certain gratuitous acts which society deems important, even at the expense of lowering the standard of care which that donee receives from his donor.

20. 8 Cal. 3d at 870-71, 506 P.2d at 223, 106 Cal. Rptr. at 399.

21. James v. Strange, 407 U.S. 128 (1972).

sustained injuries as a result of the driver's negligence while the ride was momentarily stopped by the necessity to check the car's tires.[22] The statute also stipulates that an auto guest injured "in any vehicle" cannot recover. Yet, an auto guest who was injured while having one foot on the ground and the other on the running board of a lurching car was allowed recovery.[23] Lastly, the statute specifies that an auto guest injured while the car is travelling "upon a highway" cannot recover for ordinary negligence; but if the injury occurs while the car is travelling upon a private road or private property, recovery is allowed.[24]

In viewing these statutory exceptions and the sub-classifications of auto guests which they create in actual cases, the court concluded that the disparity in treatment bore absolutely no relation to the purpose of protecting the host's hospitality. The court reasoned that since the hospitality of a host does not vary in these different situations so as to support this disparity in care, the scheme failed to meet minimum equal protection requirements.[25]

The court's analysis of this particular sub-scheme has merit in that the basic equal protection guarantee requires that similarly situated persons in respect to the purpose of a law be treated equally.[26] With respect to the protection of a host's hospitality, there does not appear to be any discernible difference between the situation where the auto guest is injured on the public highway, and where an injury is received while on a privately owned road. As a result, any disparity in treatment afforded these guests does lack a rational foundation.

III. PREVENTION OF COLLUSION PURPOSE

A. Auto Passengers vs. Auto Guests

The second proffered purpose behind denying a guest a cause of action in negligence against his driver is that of preventing collusive lawsuits between an insured driver and his guest rider. In denying a cause of action in negligence to *all* auto guests, the court determined that the statute was invidiously over-inclusive and thus violative of the equal protection guarantee.[27]

22. Boyd v. Cress, 46 Cal. 2d 164, 293 P.2d 37 (1956).
23. Prager v. Isreal, 15 Cal. 2d 89, 98 P.2d 729 (1940).
24. O'Donnell v. Mullaney, 66 Cal. 2d 994, 429 P.2d 160, 59 Cal. Rptr. 840 (1967).
25. 8 Cal. 3d at 878, 506 P.2d at 228-29, 106 Cal. Rptr. at 404-05.
26. *See* Reed v. Reed, 404 U.S. 71 (1971).
27. 8 Cal. 3d at 876, 506 P.2d at 227, 106 Cal. Rptr. at 403.

The gist of the court's reasoning was that the primary equal protection guarantee requires that similarly situated persons receive equal treatment. As a result, a regulatory statute which is grossly over-inclusive in its classification scheme violates this fundamental guarantee. The court concluded that this basic equal protection guarantee was being violated because the majority of auto guests are honest and are not acting in collusion, while only a "small segment" of those auto guests are dishonest and would act collusively. Hence, in treating all of these auto guests alike by denying all guests a cause of action in negligence, the statute violated the constitutional prohibition of overly-inclusive statutory schemes.

The court further held the statute irrational because it created a wholesale elimination of causes of action for auto guests when such a wholesale elimination was not needed. The court reasoned that the trier of fact is quite able to detect any collusion of fraud by a guest in the ordinary situation.[28]

The court's analysis can be criticized for two reasons. First, the court assumed that most auto guests are, in fact, not willing to act in collusion when placed in this situation. However, the court cites no authority for this basic premise, other than judicial surmise. Granted, there are *some* members of the auto guest class who are honest in this situation. The question is whether this group of honest members constitutes the *majority* of all auto guests, as the *Brown* court would believe, or whether it constitutes merely a small portion of all auto guests. This is a determination for which there is no empirical data. Obviously, this is the sort of determination which a court should defer to the experience and estimative judgment of the legislature. It is apparent that legislators believe the temptation or actual incidence of collusion and fraud by auto guests is extremely high and merits this wholsesale treatment, harsh as it may appear. Second, the legisture may also have determined that in automobile cases, the element of collusion is especially difficult to detect and, therefore, justifies a wholesale elimination of a negligence cause of action.[29] The court may feel that it is capable of detecting any collusion in

28. *Id.* at 877 n.18, 506 P.2d at 228, 106 Cal. Rptr. at 404.
29. In Tisko v. Harrison, 500 S.W.2d 565 (Tex. Civ. App. 1973), a lower Texas court refused to be persuaded by the *Brown* rationale proffered by the plaintiff and held the Texas guest statute to be non-violative of equal protection guarantees. The *Tisko* decision is based, in part, on the court's recognition that the collusion element is quite difficult or impossible to detect in the specific case and thus justifies a wholesale elimination of all causes of action in ordinary negligence for guests.

the specific case; indeed, it may be unwise for a legislature not to place this trust and responsibility in its judicial system. But such a decision is not irrational in any equal protection sense, and the court should respect the judgment of the legislative body in such a matter.

B. Sub-Classes Of Auto Guests

As in its "protection of hospitality" analysis, the court held the sub-classifications expressly created by the statute and as applied in actual cases bore no rational relation to the statute's purpose of preventing collusive lawsuits.[30] The court reasoned that the risk of fraud and collusion is not any greater where, for example, the guest's injury occurs on a highway than where it occurs on a private road. Likewise, the risk is no greater where the guest is injured while actually in the car than where the injury occurs while the guest is getting into the car or standing on the running board of the car.

The court's conclusion about the "in the car" distinction is sound, for the risk of collusion is no greater where the guest is injured after he is within the car than where the injury occurs while he is in the process of getting into that car. It is also difficult to distinguish the situation where the injury occurs "on a highway" from where the injury occurs on a private road. Common sense suggests that collusion could even occur more readily on a private road, where there are typically no other witnesses around to substantiate the guest's story.

IV. IMPLICATIONS IN NEBRASKA

There are no reported Nebraska decisions in which the Nebraska guest statute[31] has been attacked as violating the equal protection guarantee of either the Nebraska or the United States

30. 8 Cal. 3d at 878, 506 P.2d at 228-29, 106 Cal. Rptr. at 404-05.

31. NEB. REV. STAT. § 39-740 (Reissue 1968) sets forth the Nebraska guest statute:

> The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle. For the purpose of this section, the term guest is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor, but shall not be construed to apply to or include any such passenger in a motor vehicle being demonstrated to such passenger as a prospective purchaser.

Constitutions. Moreover, only one decision can be found in which its constitutionality has been challenged. That unsuccessful attack was based on the contention that the statute violated Article I, Section 13 of the Nebraska Constitution, which guarantees every person a remedy at law for all injuries done to him or her by another.[32]

The implications of *Brown* as to the constitutionality of the Nebraska guest statute appear quite minimal. First, and most importantly, it is quite apparent that the California court employed a very demanding traditional "rationality" standard of review under the equal protection clauses. The Nebraska court, on the other hand, has not imposed such a demanding rationality standard-ard upon the legislature.[33] Moreover, two of the classification schemes created by the California guest statute are essentially non-existent in Nebraska law. First, there is no disparity in treatment afforded the social guest on one's land, as opposed to the social guest in one's automobile. *Both* are denied a duty of ordinary care.[34] Second, unlike its California counterpart, the Nebraska guest statute does not create any sub-classes of auto guests. The statute does contain the "in such motor vehicle" language; but unlike the California situation, there has yet been no case in which this statutory language has been judicially construed to create a "sub-classification" in fact.[35]

---

32. In Rogers v. Brown, 129 Neb. 9, 260 N.W. 794 (1935), the plaintiff claimed, *inter alia*, that the guest statute, by its higher requirement of gross negligence, effectively took away any remedy which an injured guest had received at the hands of his host. The court held the guest act did not take away a guest's remedy, but "merely changed the degree of proof essential to a recovery for damages." 129 Neb. at 12, 260 N.W. at 796.
33. Especially in the area of economics and social welfare, which are the two areas that essentially underlie the guest statute, the Nebraska court has shown great deference toward legislative classifications and policy determinations in the area of equal protection. Thompson v. Board of Regents, 187 Neb. 252, 188 N.W.2d 840 (1971).
34. Under the Nebraska guest statute, a host-driver owes his guest passenger only the duty of not being grossly negligent. Similarly, the landowner host only owes a guest on his land the duty of not acting with wilful misconduct. Casey v. Addison, 190 Neb. 634, 211 N.W.2d 410 (1973). Hence, in both situations, the guest is afforded less than ordinary care.
35. It could be argued that applying the "general definitions" for the rules of the road set forth in NEB. REV. STAT. § 39-741 (Supp. 1972), the Nebraska guest statute does create the public property-private property classification. The rationale would be: The guest statute only applies to auto guests who are injured while riding in a "motor vehicle." Section 39-741 defines a motor vehicle as any self-propelled "vehicle." A "vehicle" is defined as every device, in, upon or by

The only classification which the Nebraska statute does create is that between automobile guests and automobile passengers. In analyzing this guest-passenger classification in light of the protection of hospitality purpose, it would seem that the insurance argument proffered in *Brown* is just as applicable in the Nebraska context. Hence, it is arguable that because of compulsory automobile insurance, there is no longer any notion of "ingratitude" in a guest's lawsuit against the host-driver's insurer. Similarly, concerning the prevention of collusion purpose, the overly-inclusive classification argument would be just as relevant as it was in *Brown*.

V. CONCLUSION

The result reached in *Brown* is commendable, because the guest statute should be repealed. The statute frustrates the growing trend in modern tort law to eliminate degrees of care and to provide compensation for accident victims. However, in its eagerness to see this result accomplished, the *Brown* court has severely stretched the "ratonality" standard of review under the equal protection guarantee in its analysis. As a result, the court has not only opened itself to fairly-levelled charges of judicial intervention in the legislative arena but has also imposed a demanding burden of rationality on the shoulders of the legislative body.

Timothy J. McDermott '75

---

which any person or property may be transported upon a "highway," and a "highway" is defined as the width between the boundary limits of every way *publicly* maintained when any part thereof is open to the *public* for purposes of vehicular travel.