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Guest Statutes: Another Fault with No-Fault

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GUEST STATUTES: ANOTHER FAULT WITH NO-FAULT

The concept of no-fault automobile insurance has provoked an extraordinary amount of heated discussion in the past decade.[1] Several commentators have suggested that the intensity of emotional reaction to no-fault is not matched by a corresponding depth of knowledge on the subject.[2] Few discussions have considered the impact of no-fault on the present automobile reparations system in terms of no-fault's effect on specific legal doctrines. This comment proposes to examine one such traditional doctrine, the automobile guest passenger law, in light of existing state no-fault plans.

At first glance, guest laws and no-fault insurance seem to embody similar philosophies. The former are designed to restrict the applicability of fault standards by immunizing a segment of the motoring public from the legal consequences of negligence. The latter rejects, in generally pejorative terms,[3] the validity of a fault-centered reparations system.

Despite these surface similarities, guest laws and no-fault insurance are basically incompatible in two key respects. First, all no-fault plans contemplate a certain measure of co-existence with a tort liability system. By excluding severely injured guests from the complementary benefits of the tort system, guest laws frustrate society's avowed goal of providing to "each person who is injured in a motor vehicle accident . . . prompt and adequate benefits to compensate and restore each victim . . ."[4] Second, state no-fault laws are designed so that a guest passenger is covered by the no-fault insurance policy of the vehicle owner. Permitting an insured guest to collect from his "host's" insurer contradicts the policy behind guest laws. To simultaneously utilize the guest law to prohibit the guest from collecting full compensation in tort from a negligent host

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1. Most recently, attention has focused on apparently unsuccessful attempts by the 94th Congress to pass a national standards no-fault law. S. 354 was voted back to committee—and almost certain death—on March 31, 1976. H.R. 9650 also appears doomed. A concise history of federal no-fault legislation is presented in S. REP. No. 283, 94th Cong., 1st Sess. 17 (1975).

2. P. PRETZEL, UNINSURED MOTORISTS 183 (1972); M. WOODROOF, J. FONSECA & A. SQUILLANTE, AUTOMOBILE INSURANCE AND NO-FAULT LAW §§ 13.01-.02 (1974).

3. In March of 1971, the Department of Transportation published MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES, a comprehensive investigation of the existing compensation system for automobile accident losses. The DOT conclusion was unequivocal:

> In summary, the existing system ill serves the accident victim, the insuring public and society. It is inefficient, overly costly, incomplete and slow. It allocates benefits poorly, discourages rehabilitation and overburdens the courts and the legal system. *Id.* at 100.

4. S. REP. No. 283, 94th Cong., 1st Sess. 1 (1975).

produces an internal inconsistency which is difficult for victims to comprehend.

Fuller examination of the conflicts between no-fault insurance plans and guest laws must be preceded by some identification of the two concepts.[5]

I. GUEST LAWS

While guest laws have suffered severe blows in the past three years, accounts of their demise must still be regarded as somewhat exaggerated. The onslaught began when California "took the bit in its teeth"[6] in 1973. In the landmark decision of *Brown v. Merlo*,[7] the Supreme Court of California struck down California's guest statute as a violation of equal protection clauses in the state and federal constitutions. In light of *Brown*'s impact on guest law litigation, the opinion deserves some scrutiny.

The court's conclusion in *Brown* was that the classifications imposed by the guest law did not bear a reasonable relation to the statute's purposes. California's guest law typified most statutes of its kind in precluding recovery by a nonpaying automobile passenger against the owner or operator of the car where injury resulted from the latter's ordinary negligence.[8] According to the court, the two purposes for this statutory bar were those traditionally offered as justifications for its existence; *i.e.*, protection of driver hospitality and prevention of collusive lawsuits against the host's insurer.[9] *Brown* held that the prevalence of liability insurance today under-

5. More detailed examinations of each concept can be found in the following sources: Lascher, *Hard Laws Make Bad Cases—Lots of Them*, 9 SANTA CLARA LAW. 1 (1968); Tipton, *Florida's Automobile Guest Statute*, 11 U. FLA. L. REV. 287 (1958); Comment, *Review of the Past, Preview of the Future: The Viability of Automobile Guest Statutes*, 42 U. CIN. L. REV. 709 (1973); Note, *The Present Status of Automobile Guest Statutes*, 59 CORNELL L. REV. 659 (1974). R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965); Blum & Kalven, *Public Law Perspectives on a Private Law Problem*, 31 U. CHI. L. REV. 641 (1964); Bombaugh, *The Department of Transportation's Auto Insurance Study and Auto Accident Compensation Reform*, 71 COLUM. L. REV. 207 (1971); STATE OF NEW YORK INSURANCE DEPARTMENT, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT? (1970); Hart, *National No-Fault Auto Insurance: The People Need It Now*, 21 CATH. U. L. REV. 259 (1972).

6. Keasling v. Thompson, 217 N.W.2d 687, 696 (Iowa 1974).

7. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

8. CAL. VEHICLE CODE § 17158 (West 1971). The statute was subsequently amended to apply only to vehicle owners riding as passengers. This version was also found unconstitutional in Schwalbe v. Jones, 14 Cal. 3d 1, 534 P.2d 73, 120 Cal. Rptr. 585 (1975). The dissenting opinion of Judge Sullivan in *Schwalbe*, 14 Cal. 3d at 1 n.2, 534 P.2d at 80-81, 120 Cal. Rptr. at 592-93 expressed his disavowance of constitutional analysis used in *Brown*. *Schwable* was vacated at 16 Cal. 3d 514, 546 P.2d 1033, 128 Cal. Rptr. 321. Justice Sullivan's dissent is now the holding of the court. On rehearing the law was held constitutional.

9. 8 Cal. 3d at 866-78, 506 P.2d at 220-28, 106 Cal. Rptr. at 396-404.

mined any rational relationship between the prevention of negligence suits and the protection of hospitality. The court stated, in plain language, there is simply no notion of "ingratitude" in suing your host's *insurer*.[10]

Brown rejected collusion as a valid purpose for the elimination of tort recovery for guests because, by barring the great majority of authentic claims along with fraudulent suits, the statute was unconstitutionally overbroad.[11] And, because California had previously abolished the traditional tort doctrine that a person's status determines the duty of care owed to him,[12] distinctions between paying passengers and guest passengers constituted an anomaly within the general tort law which *Brown* used as additional evidence of the guest statute's invalidity.

The court also found the statutory scheme "irrational" as a practical matter: judicial evasion of the guest statute in cases where its application would have produced inequitable results had resulted in an inconsistent case law pattern which made recovery under the statute "largely fortuitous."[13] As a result of its extensive analysis, the court refused to find controlling the 1929 decision of *Silver v. Silver*,[14] in which the United States Supreme Court upheld the constitutionality of Connecticut's guest statute (since repealed). A major reason for this rejection was the belief that *Silver* might have reached a different result had it been "set against the background of . . . almost universal liability insurance. . . ."[15]

Since the *Brown* decision, Idaho, Kansas, North Dakota, Ohio, Michigan, Nevada and New Mexico, have judicially declared their guest statutes unconstitutional.[16] In five other states, guest laws were repealed by the legislature.[17] However, Texas, Utah, Delaware, Iowa, Oregon, Colorado, Nebraska, South Dakota, Arkansas, Alabama, and Indiana have declined to follow *Brown* and have upheld their guest laws against recent constitutional attacks.[18] At

10. *Id.* at 868, 506 P. 2d at 221, 106 Cal. Rptr. at 397.
11. *Id.* at 872-78, 506 P.2d at 224-28, 106 Cal. Rptr. at 400-04.
12. Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).
13. 8 Cal. 3d at 878, 506 P.2d at 228, 106 Cal. Rptr. at 404.
14. 280 U.S. 117 (1929).
15. 8 Cal. 3d at 863 n.4, 506 P.2d at 218, 106 Cal. Rptr. at 394.
16. Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974); Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974); Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974); Primes v. Tyler, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975); Manistee Bank & Trust Co. v. McGowan, 394 Mich. 655, 232 N.W.2d 636 (1975); McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975); Laakonen v. Eighth Judicial District, 538 P.2d 574 (Nev. 1975).
17. Massachusetts, (1973); Virginia, (1974); Washington, (1974); Colorado, (1975); Montana, (1975).
18. Tisko v. Harrison, 500 S.W.2d 565 (Tex. Civ. App. 1973); Cannon v. Oviatt, 520

the present time, fourteen states have laws which forbid guest passenger recovery on ordinary negligence grounds.[19]

That eleven state statutes have withstood recent constitutional attack testifies to the sharp division on the issue of whether *liability* insurance has removed the justification for guest laws.[20] Although a number of jurisdictions which have recently considered guest statute challenges were operational at the time of decision under no-fault insurance laws, few discussed the impact of *no-fault* insurance on the guest doctrine. As support for the retention of the guest statute, the Supreme Court of Utah referred to the Utah No-Fault Insurance Act as a legislative compromise between the conflicting interests of guests and hosts: "[T]he guest receives limited compensation for injuries, while hospitality is encouraged by not exposing the host to unlimited liability and staggering insurance rates."[21] In *Laakonen v. Eighth Judicial District Court*,[22] Judge Batjer's concurrence in the invalidation of the guest statute was based solely on the belief that the Nevada no-fault law, in combination with the guest statute, operated to produce a subclass of guests unconstitutionally barred from recovering full compensation for their injuries.[23] To understand the basis of this belief, which parallels the concerns

P.2d 883 (Utah 1974), *appeal dismissed*, 419 U.S. 810 (1974), *rehearing denied*, 419 U.S. 1060 (1974); Justice v. Gatchell, 325 A.2d 97 (Del. 1974); Keasling v. Thompson, 217 N.W.2d 687 (Iowa 1974); Duerst v. Limbocker, 525 P.2d 99 (Ore. 1974); Botsch v. Reisdorff, 193 Neb. 165, 226 N.W.2d 121 (1975); Behrns v. Burke, 229 N.W.2d 86 (S.D. 1975); White v. Hughes, 257 Ark. 627, 519 S.W. 2d 70 (1975), *appeal dismissed*, 423 U.S. 805 (1975); Richardson v. Hansen, 527 P.2d 536 (Colo. 1974) (Colorado guest statute subsequently repealed). Beasley v. Bozeman, 294 Ala. 288, 315 So. 2d 570 (1975); Sidle v. Majors, 341 N.E.2d 763 (Ind. 1976).

19. Alabama, ALA. CODE tit. 36, § 95 (1958); Arkansas, ARK. STAT. ANN. §§ 75-913 to -915 (1947); Delaware, DEL. CODE ANN. tit. 21, § 6101 (1974); Illinois, ILL. ANN. STAT. ch. 95 ½, § 10-201 (Smith-Hurd 1971) (amended 1972 to apply only where guest is hitchhiker); Indiana, IND. ANN. STAT. §§ 9-3-3-1, -2 (Burns 1973); Iowa, IOWA CODE ANN. § 321.494 (1966); Nebraska, NEB. REV. STAT. § 39-6191 (Supp. 1976); Oregon, ORE. REV. STAT. § 30.115 (1975); South Carolina, S.C. CODE ANN. § 46-801 (1962); South Dakota, S.D. COMPILED LAWS ANN. §§ 32-34-1, -2 (1976); Texas, TEX. REV. CIV. STAT. ANN. art. 670 1b (1969) (amended 1973 to apply only to guests related to the owner or operator within the second degree of consanguinity or affinity); Utah, UTAH CODE ANN. §§ 41-9-1, -2 (1953); Wyoming, WYO. STAT. ANN. § 31-233 (1957). Georgia has a court-created guest law, *see* Caskey v. Underwood, 89 Ga. App. 418, 79 S.E.2d 558 (1953).

20. For example, Professors Keeton and O'Connell state that "cases of uninsured drivers are by no means rare." They reason that even if 85 percent of all registered autos are covered by liability insurance, 15 percent are uninsured, a not insignificant number given the approximately 73 million registered vehicles. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 65-66 (1965).

21. Cannon v. Oviatt, 520 P.2d 883, 888 (Utah 1974). *See also* Hale v. Taylor, 192 Neb. 298, 220 N.W.2d 378, 383 (1974) 2d 378, 383 (1974) (McCown, dissenting).

22. 538 P.2d 574 (Nev. 1975).

23. *Id.* at 579-80.

outlined previously in this comment, it is necessary to interject an abbreviated description of no-fault insurance.

II. No-Fault Insurance

A number of authorities have expressed the view that pinpointing fault is either irrelevant or impossible in many automobile injury cases.[24] Few have done so as succinctly as this anonymous poet:

> He was right, dead right
> As he sped along
> But he's just as dead
> As if he'd been wrong.[25]

No-fault insurance speaks to this feeling by attempting to compensate the majority of those injured in motor vehicle accidents for most of their economic loss without reference to, or requiring proof of, another's fault in causing the injury. The system of injury compensation in existence where no-fault laws have not yet been enacted combines tort concepts with liability insurance and direct benefits. It is largely third-party in nature; that is, the insurer pays benefits to an injured party on behalf of its insured, because of the insured's tort liability to those injured. No-fault insurance plans are generally first-party systems. The insurer pays benefits directly to injured persons because of its contractual duty to do so.[26] Under most state plans, however, direct first-party compensation to the covered victim is limited to a certain amount which cannot fully recompense seriously injured persons. Therefore, those individuals with either medical expenses above a statutory "threshold," or with certain specifically delineated serious injuries,[27] are permitted to sue the alleged wrongdoer under traditional tort concepts. Recoveries in these instances are not limited, and may be brought for general as well as actual damages. If the threshold of medical expense or serious injury is not crossed, the at-fault individual is generally immune

24. *See, e.g.*, Pinnick v. Cleary, 360 Mass. 1, 23 n.17, 271 N.E.2d 592, 606 (1972). *But cf.* Blum & Kalven, *Public Law Perspectives on a Private Law Problem*, 31 U. Chi. L. Rev. 641 (1964).

25. Burma Shave (1938), *quoted by* Davies, *In Defense of No-Fault*, 21 Cath. U. L. Rev. 486, 487 (1972).

26. It should be apparent from this description that health and collision insurance, which were in use long before the term no-fault was coined, are a species of first-party no-fault coverage. For statistics on the prevalence of such coverage, *see* Eldred, *Is No-Fault the Only Answer for the Uncompensated Motorist?*, 41 Ins. Counsel J. 185 (1974); Ring, *The Fault with No-Fault*, 49 N.D. Law. 796 (1974).

27. *E.g.*, fractures, loss of a member, permanent disability, or permanent disfigurement.

from tort liability, provided he has obtained no-fault coverage or equivalent security.[28]

Present no-fault laws vary, chiefly in threshold amounts, but most can be fitted into this framework. To that extent, it is fair to say that no-fault, as we know it, came into existence in 1965.[29] In that year, Professors Robert Keeton and Jeffrey O'Connell suggested this structure.[30] The book combined arguments for the new system with a statutory model suitable for legislative implementation. Five years later, Massachusetts drew heavily on the Keeton-O'Connell plan in enacting the first state no-fault law.[31] The Massachusetts plan is a form of what one commentator has termed "partial" no-fault insurance: the law restricts tort liability by means of the threshold concept discussed above, but it does not abolish tort recovery altogether.[32] Currently, fifteen states have enacted partial no-fault insurance laws.[33] Another eight jurisdictions have enacted what the same commentator labels "pseudo" no-fault laws, which provide for either compulsory or optional no-fault benefits but do not restrict tort liability in any way.[34] Among the twenty-four no-

28. As a general rule, the tort exemption is rescinded where the accident occurs through an individual's intentional misconduct. Under some plans, intoxication, criminal activity, or intentional conversion of an automobile may also remove immunity. *See* I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE, §§ 4.01-.05 (1975).

29. Other important contributions to the no-fault movement are briefly described in M. WOODROOF & J. SQUILLANTE, AUTOMOBILE LIABILITY 29-36 (1972).

30. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).

31. MASS. GEN. LAWS. ANN. ch. 90, § 34A-O, *as amended*, (Supp. 1975).

32. For a more detailed discussion of the Massachusetts plan, see Kenney & McCarthy, *"No-Fault" in Massachusetts, Chapter 670, Acts of 1970 - A Synopsis and Analysis*, 55 MASS. L. Q. 23 (1970).

33. Colorado, COLO. REV. STAT. ANN. §§ 10-4-701 to -723 (1973); Connecticut, CONN. GEN. STAT. ANN. §§ 38-319 to -351(a) (Supp. 1976); Florida, FLA. STAT. ANN. §§ 627.730 to -741 (West 1972); Georgia, GA. CODE ANN. §§ 56-3401b to -3413b (Supp. 1976); Hawaii, HAWAII REV. STAT. §§ 294-1 to -16 (Supp. 1975); Kansas, KAN. STAT. ANN. §§ 40-3101 to -3121 (Supp. 1975); Kentucky, 1974 Ky. Acts 752, ch. 385; Massachusetts, MASS. GEN. LAWS ANN. ch. 90, §§ 34A-O, *as amended*, (Supp. 1975); Minnesota, MINN. STAT. ANN. §§ 65B.41-.70 (Supp. 1976); Nevada, NEV. REV. STAT. §§ 698.010-.510 (1975); New Jersey, N.J. STAT. ANN. §§ 39:6A-1 to -20 (1973); New York, N.Y. INSUR. LAW. §§ 670-77 (McKinney Supp. 1975-76); North Dakota, N.D. CENT. CODE §§ 26-41-01 to -19 (Supp. 1975); Pennsylvania, PA. STAT. ANN. tit. 40, §§ 1009.101 to .701 (Purdon Supp. 1975-76); Utah, UTAH CODE ANN. §§ 31-41-1 to -22, *as amended* (Supp. 1975).

In its 1976 term, the Florida legislature passed amendments repealing the current no-fault provisions allowing pain and suffering suits of medical expenses exceeding $1000. Under the amendments, suits are allowed only for permanent injury or for serious non-permanent injury significantly hampering normal activity for ninety days after the accident and leaving demonstrable effects at the end of that time. 1976 FLA. SESS. LAW SERV. 756-57, ch. 76-266, *amending* FLA. STAT. ANN. § 627.737 (1972). Illinois' partial no-fault law was declared unconstitutional in Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

34. Arkansas (optional), ARK. STAT. ANN. §§ 66-4014 to 4021 (Supp. 1975); Delaware,

fault jurisdictions, Michigan comes the closest to having a "pure" no-fault plan.[35] Tort liability for accidents involving insured vehicles is abolished, except for intentionally caused injury, general damages resulting from specific severe injuries, and actual damages in excess of policy limits. Correspondingly, the law provides for unlimited direct compensation for all reasonable medical expenses and a high level of benefits for other categories of economic loss.

For the purposes of this discussion, one of the most significant aspects of state no-fault laws is the fact that permissive occupants of the insured vehicle are generally covered by the vehicle owner's insurance. However, some state laws exclude a passenger from the owner's coverage if the passenger carries or is required to carry his own no-fault insurance, or is a member of a household which carries or is required to carry no-fault insurance.[36] Others specify that primary coverage is that of the insured vehicle, and allow inter-insurer subrogation to correct any duplication.[37] The other significant element of existing no-fault laws is their dependency on tort recovery to completely compensate the severely injured accident victim. With the exception of Michigan, New Jersey, and Pennsylvania, in most states, mandatory no-fault minimums are too low to do more than begin to cover major accident expenses.[38] Table I provides a

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DEL. CODE ANN. tit. 21, § 2118 (Supp. 1975); Maryland, MD. ANN. CODE art. 48A, §§ 538-47 (Supp. 1975); Oregon, ORE. REV. STAT. §§ 743.786 to .792 (1975); South Carolina, S.C. CODE ANN. §§ 46-750.101 to .154 (Supp. 1975); South Dakota (optional); 1971 S.D. SESS. LAWS 325, ch. 270; Texas (optional), TEX. INS. CODE art. 5.06-3 (Vernon Supp. 1974-75); Virginia (optional), VA. CODE ANN. §§ 38.1-380.1 to .2 (Supp. 1975). Nine no-fault acts have withstood constitutional challenges: Massachusetts, Pinnick v. Cleary, 271 N.E.2d 592 (Mass. 1971); Florida, Lasky v. State Farm Insurance Co., 296 S.2d 9 (Fla. 1974) (specific-injury thresholds declared unconstitutional); Kansas, Manzanares v. Bell, 214 Kan. 589, 522 P.2d 1291 (1974); 2d 1291 (1974); Michigan, Shavers v. Kelly, 65 Mich. App. 355, 237 N.W.2d 325 (1975); Advisory Opinion re Constitutionality of 1972 PA 294, 389 Mich. 441, 208 N.W.2d 469 (1973) (property damages provision held unconstitutional in *Shavers*); Connecticut, Gentile v. Altermatt, CCH AUTO. L. RPTR. ¶ 8904 (Aug. 5, 1975), *appeal dismissed*, 96 S.Ct. 763 (1976); Pennsylvania, Singer v. Sheppard, 347 A.2d 897, CCH AUTO. L. RPTR. ¶ 8766 (1975); Kentucky, Fann v. McGuffey, CCH AUTO L. RPTR. ¶ 8779 (June 27, 1975); New York, Montgomery v. Daniels, 38 N.Y.2d 41, 340 N.E.2d 444, 378 N.Y.S.2d 1 (1975). *See also* Opinion of the Justices, 304 A.2d 881 (N.H. 1973) (holding constitutional a no-fault bill which the legislature subsequently failed to enact); and 1973 OP. N.M. ATT'Y GEN. 73-33 (March 28, 1973), (advising the Governor that New Mexico no-fault legislation was unconstitutional).

35. MICH. COMP. LAWS. ANN. §§ 500.3101 to .3179 (Supp. 1976-77). The labels "partial," "pseudo," and "pure" are those used in P. PRETZEL, UNINSURED MOTORISTS 192-98 (1972).

36. *E.g.*, Connecticut.

37. *E.g.*, Colorado. A variation on this is exemplified by Massachusetts' and Hawaii's no-fault laws, which provide that primary no-fault insurance is that of the vehicle which the victim was occupying at the time of the accident, but state that no person can recover basic no-fault benefits from more than one insurer.

38. Keeton and O'Connell pose these questions: Can we afford to have no-fault benefits cover *all* out-of-pocket loss? Should we force on all victims the bargain of assured and rela-

listing of individual covered and coverage limits, under the twenty-four existing state no-fault plans.

III. The Significance of No-Fault/Guest Law Conflicts

Eight states currently operate under both no-fault insurance and a guest law. Five of these states—Arkansas, Oregon, South Carolina, South Dakota, and Texas—have pseudo no-fault laws. Delaware, Georgia, and Utah have partial no-fault laws which involve some restrictions on tort liability. Table II shows the extent of these restrictions.

The fact that only eight states suffer from the combined effects of no-fault insurance and guest laws arguably minimizes the problem. Passage of a national no-fault law, however, must be viewed as a likely prospect for the near future.[39] Unless the other six guest law states abolish their guest statutes in the interim, no-fault insurance and guest laws may co-exist in fourteen states, or almost a third of the country. Given the interstate character of automobile travel,[40] the issue of guest law conflict is a significant one in terms of uniform implementation of any national no-fault standards. As one report on guest laws, presented during 1971 Congressional hearings on a federal no-fault bill, stated:

> The present fragmented, "crazy-quilt" design of reparations rules under the fault system should [not] be perpetuated. . . . On the contrary, it is clear that State's [*sic*] reparations systems must contain a basic compatibility built around the theme of universal no-fault compensation of accident victims.[41]

IV. What Happens to the Guest Under No-Fault?

A. *Practical Consequences*

The basic principles of no-fault/guest law conflict can be stated as follows.

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tively full compensation for out-of-pocket loss at the price of abandoning all tort claims?; they answer them negatively. Keeton and O'Connell, *Alternative Paths Toward No-Fault Automobile Insurance*, 71 Colum. L. Rev. 241, 246-50 (1971).

39. The most recently defeated federal bill contained national no-fault standards which would have required uniform implementation within three years of a no-fault law similar to Michigan's. For a sophisticated analysis of the constitutionality of a federal no-fault insurance law, *see* Note, *Is Federalism Dead? A Constitutional Analysis of the Federal No-Fault Automobile Insurance Bill: S. 354*, 12 Harv. J. Legis. 668 (1975).

40. On the conflict of laws problem, see Kozyris, *No-Fault Automobile Insurance and the Conflict of Laws - Cutting the Gordian Knot Home-Style*, 1972 Duke L. J. 331, 390.

41. *Hearings on Bills Relating to No-Fault Motor Vehicle Insurance before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. 118 (1971).

In jurisdictions where guest laws exist, a guest passenger with minor injuries inflicted as a result of his host's negligence benefits significantly from the enactment of a typical no-fault insurance law.

When economic loss resulting from injuries is fully compensated by no-fault benefits, the fact that the injured guest is barred from suing a negligent host becomes immaterial. Guests and paying passengers with non-severe injuries or medical expenses below threshold units are both foreclosed from recovering for pain and suffering under no-fault laws, so the enactment of a no-fault law also serves to equalize recovery between guests and paying passengers with minor injuries.

In jurisdictions where guest laws exist, a guest passenger with major injuries inflicted as a result of his host's negligence does not significantly benefit from the enactment of a typical no-fault insurance law.[42]

The typical no-fault law, currently existing in fifteen states, is a partial no-fault plan based on the Keeton-O'Connell model. The Keeton-O'Connell framework, with its relatively low minimum coverage, was designed to preserve negligence claims "when the amounts involved are large enough to justify the cost of trying to assign fault and to value pain and suffering."[43] Because tort recovery is barred by the guest law, however, a guest passenger with major injuries cannot pursue a negligence claim, and will not be fully compensated in a no-fault/guest law state. Hence, the enactment of a typical no-fault insurance law does not erase the disparity in recovery between guest passengers with major injuries and paying passengers suffering the same degree of injury.

A typical car-pool situation can be used to illustrate the practical consequences stemming from the addition of guest-law protection to the factors which control the extent of financial recovery for automobile injury. The commonplace nature of the model demonstrates the significant position occupied by guest laws in the present compensation system.[44]

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42. Keeton and O'Connell concede that their plan is directed towards the "small claim:" economic loss of $10,000 or less. They contend that the severely injured nevertheless benefit from no-fault to the extent that its benefits are paid immediately and by virtue of the removal of small claims from presently congested court dockets. The latter benefit, of course, is meaningless to guests with negligence claims. R. KEETON & J. O'CONNELL, AFTER CARS CRASH: THE NEED FOR LEGAL AND INSURANCE REFORM 71-73 (1967).

43. *Id.* at 71-72.

44. Canadian statistics indicate that one-third of those killed or accidently injured by automobile accidents in that country are guest passengers. Gibson, *Guest Passenger Discrimination*, 6 ALBERTA L. REV. 211 (1968). United States statistics show that of all those injured in motor vehicle accidents in 1974, roughly 196,200 suffered permanent impairment

> Plaintiff and defendant drove to school together each weekday morning with a regular group of fellow students. Each week, a different member of the group drove his car and picked up the others. No payment was made to the person driving; even gasoline expenses were borne solely by the driver.
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> On the day of the collision, defendant picked up plaintiff. En route to the home of another member of the pool, defendant missed a turn at an intersection and collided with a telephone pole. Plaintiff suffered multiple lacerations including a bad facial cut which healed in a jagged scar, fractures of both legs, her right arm and her left ankle. One doctor assesses her post-accident condition as a thirty percent permanent disability. Plaintiff's medical expenses exceed $16,000. She lost approximately $3,000 in part-time income, as she was unable to work for about a year. Pain and suffering, including humiliation caused by the facial scar can be conservatively estimated at $50,000.
>
> Defendant's personal financial resources are negligible.[45]

Assuming that defendant carries liability insurance in whatever amount is made compulsory under state law; that defendant and plaintiff both carry the mandatory amount of no-fault coverage required by state law; and that defendant's driving was negligent, but not willful or wanton; Table III shows the compensation available to plaintiff in the eight no-fault/guest law states.

Although many state no-fault laws are tied to compulsory liability insurance provisions, Table III suggests how empty this promise of financial responsibility is for guests. Those individuals with sufficient resources[46] can, of course, avail themselves of opportunities to buy additional insurance coverage in order to assure adequate compensation for even catastrophic injuries. To make ability to afford extra premiums the determinant of adequate compensation, however, suggests the possibility of discrimination on the basis of

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or death. WORLD ALMANAC AND BOOK OF FACTS 962 (1976). Using these figures, the number of guests severely injured or killed in 1974 was at least 65,400. This number does not include those whose injuries resulted in large medical bills without permanent impairment.

45. The model was suggested by the court in Primes v. Tyler, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975); and Behrns v. Burke, 229 N.W.2d 86 (S.D. 1975). The plaintiff in *Behrns* suffered the injuries described but was unable to collect a penny from the defendant, her sister, since South Dakota upheld the guest statute. The fact pattern is such that plaintiff's injuries meet both monetary and specific-injury thresholds under most state no-fault laws. While logic suggests that this will often occur, for a discussion of where it does not *see* Lasky v. State Farm Insurance Co., 296 So. 2d 9, 25-26 (Fla. 1974) (Ervin, J., dissenting in part and concurring in part).

46. In Grace v. Howlett, 1972 INSUR. L. J. 59, 60, *aff'd*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972), an Illinois Circuit Court in Chicago cited statistics showing that 82.4 percent of low-income blacks in the city of Chicago were uninsured, where Illinois law did not make liability insurance compulsory.

wealth.[47] Abolition of guest statutes is the only sure method of placing severely injured guests on an equal footing with non-guests suffering similar injuries. Retention of the guest law in a state with no-fault insurance, as the concurring opinion in *Laakonen* realized, arbitrarily divides the class of guest passengers into two subclasses: those guests who are able to recover full compensation for their actual accident expenses, and those who are not. The number of unrecompensed guest victims obviously shrinks in proportion to the amount of direct coverage provided by the no-fault policy. But, since only six states—New Jersey, Michigan, New York, Colorado, Minnesota, and Pennsylvania—provide direct coverage above $15,000, any extended recuperation period imposes a serious financial burden for the guest in most no-fault states.

Moreover, state no-fault laws create a further subdivision between guests who fully recover actual expenses from their hosts' no-fault insurers, where the host bears any subsequent premium increase, and guests who fully recover actual expenses from their own no-fault insurers but carry the burden of raised premiums. Under some no-fault laws,[48] the guest recovers from the host's insurer if he is not covered by his own no-fault policy and is not required to have such coverage. Since no-fault laws require coverage only for automobile owners, guests who neither own automobiles (nor reside in households that do) comprise a distinct subclass of guests who may receive full compensation for the actual expenses of minor injuries from their hosts' insurers. A few Florida cases have carved out still another subdivision by permitting minor guests to recover from their hosts' insurers despite the fact that the minors were members of households which owned cars but had failed to procure required no-fault coverage.[49] Further stratifications are no doubt possible. Each subclassification makes more arbitrary the plight of the guest who must cope with both uncompensated expenses and sky-rocketing premiums.

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47. The United States Supreme Court has stated that wealth discrimination alone does not constitute a suspect classification, so as to expose legislation to strict constitutional scrutiny. However, where the class discriminated against as completely unable to pay for some desired benefit because of its impecunity and as a consequence sustained the absolute deprivation complained of it may be found to occasion de facto discrimination and will be invalidated on that ground. *See* San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 21-22 (1973).

48. *E.g.*, that of Arkansas, ARK. STAT. ANN. §§ 75-913 to -15 (1947).

49. Commercial Union Insurance Co. v. Williams, CCH AUTO. L. RPTR. ¶ 8728 (Fla. App. March 20, 1975); Farley v. Gateway Insurance Co., 302 So. 2d 177 (Fla. App. 1974); Gateway Insurance Co. v. Butler, 293 So. 2d 738 (Fla. App. 1974).

B. *Underlying Irrationalities*

The preceding section indicated the practical inequities produced by confining a severely injured victim to state no-fault benefits, and barring him under guest laws from the supplemental tort recovery available to paying passengers. Of course, as the Utah Supreme Court in *Cannon v. Oviatt* pointed out, even severely injured guests are indisputably better off under a combination of no-fault insurance and guest laws than under guest laws alone. But what public policy is served by allowing guest laws to co-exist with no-fault laws? The traditional reasons for the existence of guest laws are vitiated by the enactment of no-fault laws.

Where no-fault insurance laws permit the guest to collect from his host's insurer, the theory of protecting driver hospitality no longer has validity as a justification for guest laws. The possibility that the host may be required to foot the bill for increased premiums resulting from compensation for the guest's injury destroys, to that extent, his insulation from responsibility for the guest's well-being. Where the guest collects from his own insurer, the rationale of protecting driver hospitality is equally unpersuasive. To permit recovery without regard to anyone's fault up to a certain point, and then implement a standard requiring the guest to show willful or wanton misconduct if he seeks further compensation, creates a system that bears no relation to the host's decision as to whether or not to offer a ride. To assume that a driver will, in effect, determine that his conduct is not likely to cause injuries beyond the no-fault threshold, and base hospitality decisions on that determination, is to suggest an impossibly precise delineation. As the court in *Brown* observed, "reasonable people do not ordinarily vary their conduct depending on such matters."[50] The hospitable impulse is not modified by considerations of the degree of injury likely to result from negligent operation of the vehicle; it is modified, if at all, only by considerations of whether or not *any* injury is possible. As far as the guest is concerned, it is illogical to allow recovery up to a certain amount—whether from his own insurer or his host's—and then to cut it off entirely unless gross misbehavior can be proved.[51]

Allowing guests with minor injuries to recover from their hosts'

50. 8 Cal. 3d at 870, 506 P.2d at 222-23, 106 Cal. Rptr. at 398-99, *quoting from* Rowland v. Christian, 69 Cal. 2d 108, 118, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968).

51. This point has been recognized by other commentators. *See*, Note, *The Present Status of Automobile Guest Statutes*, 59 CORNELL L. REV. 659, 684-86 (1974); Note, *The Future of the Automobile Guest Statute*, 45 TEMP. L. Q. 432, 444-47 (1972); Smith, *Duty Owed to Guest Occupants in Motor Vehicles*, 57 MASS. L. Q. 59, 61 (1972).

insurer suggests the specious nature of the collusion rationale once no-fault laws are enacted. It is just as feasible, and probably easier, to pad medical expenses as it is to collude on the question of negligence. In fact, instances of the former activity have been documented,[52] while those of the latter are rare.[53] Yet the fear of one type of fraud is considered sufficient reason to exclude severely injured guests from complete compensation, while fear of the other type has not prevented complete coverage of guests with less severe injuries.

Finally, if one of the purposes of the guest law is to foreclose vexatious litigation,[54] this purpose is adequately served by no-fault's tort restrictions and hence cannot justify continued existence of guest laws in no-fault jurisdictions.

V. CONCLUSION

To the extent that a no-fault plan is designed to operate in tandem with tort liability, and not in lieu of it, a guest law cuts down on the efficiency of the total reparations system. If this effect was justifiable in terms of sound public policy, the co-existence of guest statutes and no-fault insurance would be defensible. But, as has been indicated, no-fault's presence vitiates the traditional justifications for the existence of guest laws. The rise of no-fault should therefore, logically coincide with the guest law's fall.

General dissatisfaction with traditional methods of coping with highway carnage is reflected in the public's apparent desire for changes in the automobile "injury industry."[55] As one commentator has observed, "It may take several years of ambiguity, inconsistency, and unfairness before the individual state[s] . . . fully realize the extent of the conflict between the guest statute and the spirit of no-fault insurance."[56] But, until legal and insurance approaches are harmonized, efficient and comprehensive injury compensation will never be realized.

Terry Miller

52. 122 CONG. REC. 4627 (daily ed. Mar. 30, 1976) (remarks of Senator Durken during debate on S. 354).

53. *See* Gibson, *Guest Passenger Discrimination*, 6 ALBERTA L. REV. 211, 215-16 (1968); Lascher, *Hard Laws Make Bad Cases - Lots of Them*, 9 SANTA CLARA LAW. 1, 21 (1968).

54. *See* Silver v. Silver, 280 U.S. 117, 122-24 (1929).

55. M. WOODROOF, J. FONSECA & A. SQUILLANTE, AUTOMOBILE INSURANCE AND NO-FAULT LAW §§ 13.1-.20 (1974).

56. Note, *The Present Status of Automobile Guest Statutes*, 59 CORNELL L. REV. 659, 686 (1974).

TABLE 1

STATE	MEDICAL EXPENSES*	WAGE LOSS*	ARE GUEST PASSENGERS COVERED BY VEHICLE OWNER'S POLICY?
Arkansas (optional)	$2,000	70% up to $140 wkly for 52 wks	Yes, unless guests are covered by their own or another's no-fault insurance policy.
Colorado	$25,000	up to $125 wkly for 52 wks	Yes, primary coverage is that of vehicle owner.
Connecticut	$5,000 limit on all expenses		Yes, unless guests are the owners of vehicles for which no-fault is required.
Delaware	$10,000 limit on all expenses		Yes, interinsurer subrogation is allowed to correct duplication.
Florida	$5,000 limit on all expenses		Yes, unless guests are owners of vehicles subject to act or entitled to benefits from the insurer of a vehicle owner.
Georgia	$5,000 limit on all expenses		Yes, amount of basic benefits cannot exceed $5,000.
Hawaii	$15,000 limit on all expenses		Yes, primary coverage is that of vehicle owner — no person can recover no-fault benefits from more than one insurer as result of same accident.
Kansas	$2,000	up to $650 a month for 1 yr	Yes, interinsurer subrogation is allowed to correct duplication.
Kentucky (optional— if tort recovery limitation rejected, no-fault benefits are not payable)	$10,000 limit on all expenses		Yes, primary coverage is that of vehicle owner. If owner's insurer fails to pay, guest's insurer has right of reimbursement.
Maryland	$2,500 limit on all expenses		Yes, primary coverage is that of vehicle owner — no person can recover basic benefits from more than one insurer.
Massachusetts	$2,000 limit on all expenses		Yes, primary coverage is that of vehicle owner — no person can recover no-fault benefits from more than one insurer as result of same accident.

* For the sake of simplicity, and to dovetail with the factual model only these two areas of no-fault recovery are illustrated. Replacement services and survivors' loss are also provided for under most plans.

STATE	MEDICAL EXPENSES*	WAGE LOSS*	ARE GUEST PASSENGERS COVERED BY VEHICLE OWNER'S POLICY?
Michigan	Unlimited	up to $1,000 a month	Yes, primary coverage is that of vehicle owner — limit upon the amount of no-fault benefits available is to be determined without regard to number of policies applicable to same accident.
Minnesota	$20,000	85% up to $200 wkly	Yes, but if guest has no-fault insurance, his own policy is primary.
Nevada	$10,000 limit on all expenses		Yes, but if guest has no-fault insurance, his own policy is primary.
New Jersey	Unlimited	up to $100 wkly for up to 1 yr	Yes, maximum recovery limits are those of one policy, but no definite provisions re duplication.
New York	$50,000 limit on all expenses		Yes, maximum recovery limits are those of one policy, but no definite provisions re duplication.
North Dakota	$15,000 limit on all expenses		Yes, primary coverage is that of vehicle owner.
Oregon	$5,000	70% up to $750 monthly	Yes, primary coverage is that of vehicle owner — not subject to reduction by other insurance benefits.
Pennsylvania	Unlimited	up to $15,000 maximum figured on basis of state's per-capita income	Yes, provided guest is not covered by his own or another insurance policy.
South Carolina	$1,000 limit on all expenses		Yes, primary coverage is that of vehicle owner, and no duplication is allowed.
South Dakota (optional)	$2,000	$60 wkly, starting 14 days after injury, up to 52 wks	Yes, no definite provisions re duplication.
Texas (optional)	$2,500 limit on all expenses		Yes, amount of basic benefits cannot be exceeded.

*For the sake of simplicity, and to dovetail with the factual model only these two areas of no-fault recovery are illustrated. Replacement services and survivors' loss are also provided for under most plans.

Utah	$2,000	85% up to $150 wkly for up to 52 wks	Yes, primary coverage is that of vehicle owner — no definite provisions re duplication.
Virginia (optional)	$2,000	$100 wkly for up to 52 wks	Yes, no specific priority provisions.

TABLE II

STATE	RESTRICTIONS ON TORT LIABILITY
Delaware	None, but if an accident victim seeks to recover general damages, he cannot submit as evidence the amount of no-fault benefits for which he was eligible.
Georgia	Tort liability for general damages is abrogated except where injury results in death, bone fracture, permanent injury or disfigurement, disability for at least ten days, or medical expenses in excess of $500. Tort liability for actual damages is abrogated unless maximum no-fault limits are exhausted.
Utah	No action for general damages can be maintained unless medical expenses exceed $500 or accident results in dismemberment or fracture, permanent disfigurement, permanent disability, or death.

TABLE III

STATE	ECONOMIC LOSS	PAIN & SUFFERING	NO-FAULT RECOVERY	WHAT NON-GUEST COULD RECOVER: JUDGMENT*	WHAT NON-GUEST COULD RECOVER: LIABILITY INSURANCE+
Arkansas[1] (optional)	$16,000 3,000 $19,000	$50,000	$ 2,000 Medical 2,100 Wages $ 4,100 Total	$69,000	If named insured rejects no-fault, not required
Delaware[2]	$19,000	$50,000	$10,000 Total	$69,000	$25,000
Georgia[3]	$19,000	$50,000	$ 5,000 Total	$69,000	$10,000
Oregon[4]	$19,000	$50,000	$ 5,000 Medical $ 2,100 Wages $ 7,100 Total	$69,000	Not compulsory. If it is issued, must include no-fault
South Carolina[1]	$19,000	$50,000	$ 1,000 Total	$69,000	$10,000
South Dakota (optional)	$19,000	$50,000	$ 2,000 Medical $ 3,000 Wages $ 5,000 Total	$69,000	Not compulsory
Texas[4] (optional)	$19,000	$50,000	$ 2,500 Total	$69,000	Not compulsory
Utah[3]	$19,000	$50,000	$ 2,000 Medical $ 2,550 Wages $ 4,550 Total	$69,000	$15,000

*This represents the potential recovery in tort, plus no-fault benefits unless otherwise indicated.

+This represents assured recovery.

[1]If accident victim who receives any first-party benefits later recovers in tort from at-fault person, insurer has right of reimbursement to that extent.

[2]Insured cannot plead or prove no-fault benefits as evidence in tort action. Insurer has right of subrogation to insured's rights, presumably including tort suit.

[3]Interinsurer subrogation allowed between victim's insurer and at-fault's insurer.

[4]Benefits paid for first-party coverage reduce amount of damages.