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Torts—Automobiles—Host-Guest Statute—Nondriving Owners Denied the Protection of the Host-Guest Statute—Hansel v. Ford Motor Co., 3 Wn. App. 151, 473 P.2d 219 (1970)

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TORTS—AUTOMOBILES—HOST-GUEST STATUTE—NONDRIVING OWNERS DENIED THE PROTECTION OF THE HOST-GUEST STATUTE—*Hansel v. Ford Motor Co.*, 3 Wn. App. 151, 473 P.2d 219 (1970).

As defendant Moss's daughter was driving downhill in an automobile owned by Moss for use in the family's construction business, the brakes failed suddenly and the car ran into a telephone pole. Plaintiffs, riding as guests of the daughter, sustained severe injuries. The resulting suit was brought against Ford Motor Company (the manufacturer of the automobile), Moss's mechanic (who had relined the brakes several weeks prior to the accident), and Moss. Moss denied negligence and asserted the Washington Guest Statute[1] as a further bar to liability. At the conclusion of plaintiffs' case the defendants moved for dismissal on the grounds that plaintiffs' evidence failed to make out a prima facie case. The trial court granted the motion as to each defendant except Ford,[2] but subsequently held the dismissal erroneous and entered an order granting a new trial. On appeal, Moss challenged the sufficiency of the evidence and again asserted the host-guest statute as a defense. Affirming, the Washington Court of Appeals *held:* the host-guest statute does not bar recovery against a *nondriving* owner for injuries received by passengers while riding as guests of the owner's minor child. *Hansel v. Ford Motor Co.*, 3 Wn. App. 151, 473 P.2d 219 (1970).

The decision of the Court of Appeals in *Hansel* is the product of two competing considerations: applicable Washington law, on one hand, and the public policies affected by guest statutes in contemporary society, on the other. It is the thesis of this note that by failing to distinguish between these separate questions the court has invaded the

1. WASH. REV. CODE § 46.08.080 (1961) provides as follows:
No person transported by the owner or operator of a motor vehicle as an invited guest or licensee, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injuries, death or loss, in case of accident, unless the accident was intentional on the part of the owner or operator, or the result of said owner's or operator's gross negligence or intoxication, and unless the proof of the cause of action is corroborated by competent evidence or testimony independent of, or in addition to, the testimony of the parties to the action: *Provided*, That this section shall not relieve any owner or operator of a motor vehicle from liability while it is being demonstrated to a prospective purchaser.

2. The claim against Ford was based upon negligence and breach of warranty. A jury verdict was eventually returned in favor of Ford but was not at issue in this appeal.

legislative province and introduced undue confusion into Washington law.

I. THE HOST-GUEST ACT IN WASHINGTON

Prior to the enactment of the Washington Guest Statute in 1933[3] the Washington Supreme Court had required that gross negligence by the host be shown before the guest could recover.[4] The 1933 Act barred recovery by an injured guest in all cases other than those in which the guest was intentionally injured by the host, thereby placing a more complete limitation on liability.[5] The statute was amended in 1957[6] also to allow a guest to recover when the injuries resulted from the "owner's or operator's gross negligence or intoxication."[7]

In the many host-guest cases reaching the Washington Supreme Court the defendant has generally been the driver. The statute clearly applies to the operator of the vehicle, against whom recovery depends upon a determination of whether the injured plaintiff was an invited guest or licensee who did not pay for the transportation and whether the driver's conduct fell within the statutory exceptions: intentional accident, gross negligence or intoxication. It is clear that the plaintiffs in *Hansel* were invited, that they had not paid for the transportation, and that the driver was neither grossly negligent nor intoxicated. Thus, the court faced a quite different issue:[8]

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3. Ch. 18, [1933] Wash. Sess. Laws 145.

4. Saxe v. Terry, 140 Wash. 503, 250 P. 27 (1926). This requirement has "its genesis in the law of bailments where it is the rule that a gratuitous bailee is without liability unless grossly negligent." Nist v. Tudor, 67 Wn.2d 322, 324, 407 P.2d 798, 800 (1965). *See* 41 WASH. L. REV. 591 (1966).

5. It is clear that the passage of the Washington Guest Statute, as well as similar statutes in other states, was the result "of persistent and effective lobbying on the part of liability insurance companies." W. PROSSER, LAW OF TORTS 190-91 (3d ed. 1964).

6. Ch. 132, [1957] Wash. Sess. Laws 484.

7. A possible fourth basis, in addition to intentional injury, gross negligence and intoxication, for a cause of action under the statute was recently added by the Washington Supreme Court—wanton misconduct. Sorenson v. McDonald, 78 Wash. Dec. 2d 93, 470 P.2d 206 (1970).

Prior to the *Sorenson* decision the court had decided that wanton misconduct could not be a basis for recovery. Osborn v. Chapman, 62 Wn.2d 495, 384 P.2d 117 (1963). The *Sorenson* court said that wanton misconduct lay somewhere between gross negligence and intentional tort, and held that since both gross negligence and intentional tort would suffice to remove the statutory bar, then so must wanton misconduct.

8. *Hansel*, 3 Wn. App. at 154, 473 P.2d at 221.

> [W]hether or not the nondriving owner of an automobile may interpose the host-guest statute as a bar to liability when he is sought to be held liable for the negligent tort of his nondriving agent.

The *Hansel* court viewed the problem as one of statutory construction. Declaring the operative verb in the host-guest statute to be "transport," and relying on the *Black's Law Dictionary* definition of that word,[9] the court held that the statute only applies to owners or operators who "carry or convey." A nondriving owner, the court reasoned, does not "carry or convey" and therefore does not "transport" within the meaning of the statute. In attributing such importance to the word "transport," the court stated that its construction was supported by the statutory exceptions[10] and by the Washington Supreme Court's decision in *Upchurch v. Hubbard*.[11]

Although a plain reading of the statutory language might furnish some support for the court's interpretation, the title of the 1933 Act engenders some doubt as to the legislature's purpose: "An act releasing *owners* of motor vehicles from responsibility for injuries to passengers therein."[12] It would appear from its title that the statute was designed to protect all owners, whether they were "transporting" or not. When the statute was amended in 1957, however, the title was

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9. BLACK'S LAW DICTIONARY 1670 (4th ed. 1951).

10. Recovery is permitted under the statute if the "accident" is intentional or is the result of gross negligence or intoxication. WASH. REV. CODE § 46.08.080 (1961). Since the court thought that these exceptions could not logically apply to a nondriving owner, it concluded that the statute itself could not be so applied:

> The owner or operator is excepted from the statutory immunity when he causes an accident intentionally or when it is the result of his gross negligence or intoxication. We fail to see how a nondriving owner of an automobile can intentionally cause an accident. Nor would the owner's gross negligence or intoxication at home or elsewhere bring him within the immunity. The statute is clearly concerned with the driver of a motor vehicle, whether he be the owner or just an operator.

Hansel, 3 Wn. App. at 155-56, 473 P.2d at 222 (footnote acknowledging that an "intentional accident" is a contradiction in terms omitted). Assuming that the nondriving owner does not entertain a criminal intent, the court is probably correct that he could not personally cause the statutory exceptions to come into play. But to require that each statutory clause apply to each person governed by the statute may be just the sort of distortion of legislative intent which the court in *Hansel* was ostensibly seeking to avoid.

11. 29 Wn.2d 559, 188 P.2d 82 (1947). The relevance of *Upchurch* to the principal case is questionable, however, due to its different factual setting. The owner of the vehicle in that case was not involved in the suit. Liability rested upon whether the host-guest act was applicable where the transportation was unlawful. The court held that it was not.

12. Ch. 18, [1933] Wash. Sess. Laws 145 (emphasis added).

deleted.[13] But if the general policy behind guest statutes is to be accomplished it seems that the deletion is of little consequence. That policy is[14]

> [T]o rid courts of litigation arising out of automobile accidents in which close relatives and associates sue others and engage in what is in reality a collusive suit for the ultimate spoliation of an insurance company.

Since the owner is the one most likely to be insured,[15] he must be afforded the protection of the statute; collusion between a non-driving owner and a guest is just as possible, and just as undesireable, as collusion between a driving owner and his guest.[16] Yet perhaps the most persuasive evidence that the legislature intended no distinction between a driving and a non-driving owner is simply that otherwise there is no need for the word "owner" in the statute — "operator" would suffice.[17]

Unable to convince the court that the legislature had intended the host-guest act to apply to non-driving owners, the defendants next urged the court to follow the negligent entrustment cases in other jurisdictions. As an example of the majority rule[18] defendants cited

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13. *See* Ch. 132, [1957] Wash. Sess. Laws 484. *See also* text accompanying note 6, *supra*.

14. Walker v. Adamson, 17 Cal. App. 428, 431, 62 P.2d 199, 201 (1936). *Accord,* Taylor v. Taug, 17 Wn.2d 533, 136 P.2d 176 (1943). Other reasons for guest statutes have been suggested, however, including "fairness:"

> [T]he guest is an ingrate if, willing to accept the accommodation of the ride, he is unwilling to take his chances with his host. . . .

Comment, *The Washington Automobile Guest Statute,* 12 WASH. L. REV. 138 (1937). *See also* Comment, *Judicial Nullification of Guest Statutes,* 41 S. CAL. L. REV. 884, 885 (1968).

15. This is especially true given the state financial responsibility laws which generally require insurance as proof of such responsibility. *See, e.g.,* CAL. VEHICLE CODE § 16450 *et seq.* (West 1960).

16. *See* Annot., 91 A.L.R.2d 323, 327 (1963).

17. The question confronting the court in the principal case was one of first impression in Washington. But, beginning with Shea v. Olson, 185 Wash. 143, 53 P.2d 615 (1936), the Washington Supreme Court has consistently referred to owners *and* operators in discussing the guest statute. In that case the court observed:

> When the legislature enacted the 1933 statute, it did so with full knowledge of the gross negligence rule and its effect. Obviously, the legislature concluded to limit still further the liability of owners *and* operators of motor vehicles to invited guests.

Id. at 150, 53 P.2d at 618 (emphasis added).

18. *See* Annot., 91 A.L.R.2d 323 (1963).

Forgus v. Hodnet,[19] where the Texas Court of Civil Appeals held that the Texas Guest Statute (phrased similar to Washington's) could be interposed by a defendant nondriving owner as a bar to his liability in a suit brought by the parent of a child injured while riding as a guest of defendant's son. The *Hansel* court questioned the applicability of the negligent entrustment cases, however. If those cases were relevant to the principal case at all, the court was "persuaded by the rationale advanced by the courts of Alabama and California;"[20] that is, that the host-guest statute does not protect a nondriving owner who entrusts his car to another.

It would seem that the court's doubt as to the relevance of the entrustment cases was well-founded. Negligence in entrustment is simply one theory by which a parent is held liable for the automotive accident of his child.[21] It was a question of fact which had not yet been decided by the trial court. The issue on appeal in *Hansel* was not a factual one but a legal one: was the guest statute *available* as a defense (should negligent entrustment or agency ultimately be proved) to a nondriving owner whose negligence has not been fully litigated? By rejecting the Texas rule and following that of Alabama and California, the Court of Appeals was simply reiterating its holding—that nondriving owners cannot assert the guest act as a defense. Nevertheless, the court should have clarified the relationship of entrustment to the case at hand.

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19. 401 S.W.2d 104 (Tex. Civ. App. 1966), *application for writ of error denied* 405 S.W.2d 337 (1966). *See* Brief for Appellant at 10, Hansel v. Ford Motor Co., 3 Wn. App. 151, 473 P.2d 219 (1970).

20. *Hansel*, 3 Wn. App. at 156, 473 P.2d at 227. The cases relied on are Penton v. Favors, 262 Ala. 262, 78 So. 2d 278 (1955), and Nault v. Smith, 194 Cal. App. 2d 257, 14 Cal. Rptr. 889 (1961). It is interesting to note that the guest statutes of California and Alabama do not contain language which would allow the establishment of a "transportation" requirement. CAL. VEHICLE CODE § 17158 (West 1960); ALA. CODE tit. 36, § 95 (1958). Such a requirement makes it much easier to deny statutory immunity in negligent intrustment cases. On negligent entrustment, *see generally* Perdue, *Negligent Entrustment of Automobiles*, 6 HOUSTON L. REV. 129 (1968); 20 Sw. L.J. 202 (1966).

21. *See, e.g.*, Warren v. Norguard, 103 Wash. 284, 286-87, 174 P. 7, 8 (1918). Therein it was stated:

> A parent is not liable for the torts of his child, even when driving an automobile belonging to the parent, solely on the ground of relationship, but liability, if any exists, must rest in the relation of agency or service.

Accord, Buss v. Wachsmith, 190 Wash. 673, 70 P.2d 417 (1937); Coffman v. McFadden, 68 Wn.2d 954, 958, 416 P.2d 99, 101 (1966). *See generally* 16 NOTRE DAME LAWYER 394 (1941); 36 WASH. L REV. 327, 329 (1961). *But cf.* WASH. REV. CODE § 4.24.190 (1967). This statute makes the parents liable in an amount of up to $1000 for the wilful or malicious destruction of property by their minor child if living with them.

The *Hansel* court's disposition of the question of legislative intent was questionable, and its handling of the entrustment issue was incomplete. But beyond these difficulties lies a fundamental gap in its reasoning. The court stated that it found the argument in favor of immunity for an owner "persuasive as it applies to a person transported by either the owner or his servant or agent."[22] Yet the court apparently overlooked a principle of agency established long ago by the Washington Supreme Court — the "family car doctrine."[23] Under that doctrine:[24]

> [An owner] who furnishes an automobile for the customary conveyance of the members of his family, makes their conveyance by that vehicle his affair, that is, his business, and any one driving the vehicle for that purpose with his consent, express or implied, whether a member of his family or another, is his agent.

Since the doctrine is simply an application of the rules of agency,[25] the court in *Hansel,* by its own reasoning, should have assessed the impact of the doctrine on the principal case.[26] If its requirements were satisfied, the family car doctrine would have made defendant's daughter his agent; in legal effect, it would have been as if Moss himself had been driving. Then, any negligence of Moss's mechanic (who was also his agent under the doctrine of respondeat superior) would

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22. *Hansel,* 3 Wn. App. at 155, 473 P.2d at 222.
23. *See* Birch v. Abercrombie, 74 Wash. 486, 133 P. 1020 (1913).
24. *Id.* at 493, 133 P. at 1023.
25. *See* note 21, *supra.*
26. The possibility of applying the "family car doctrine" in this manner was not presented to the court. *See* Brief for Appellant, Hansel v. Ford Motor Co., 3 Wn. App. 151, 473 P.2d 219 (1970). The problem of an appellate court's failure to consider an established line of authority is not new in Washington. *See, e.g.,* 41 WASH. L. REV. 585, 590 (1966):

> This raises a question of the proper role of the judiciary: should the court sit solely as an arbitrator in an adversary proceeding, or should the court conduct an independent investigation into the state of the law? Certainly, the parties are in no position to complain if the court does no more than read what is cited in the briefs. Society, however, demands more. In a system which places considerable importance on stare decisis, the preferable procedure is for the adversary arguments to serve as an introduction and outline for the court's research. The court should not be limited to the information presented in the appellate briefs, lest the law be *needlessly* confused and unpredictable.

If the court was attempting an attack on the "family car doctrine" the opinion discloses neither a hint of such a purpose nor the reasons for such an attack. For a criticism of unreasoned opinions see Comment, *Judicial Nullification of Guest Statutes,* 41 S. CAL. L. REV. 884, 886 (1968). *See also,* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 26 (1960).

be attributed to Moss while in his fictional legal capacity as driver of the vehicle. Unless such attributed negligence was gross negligence, therefore, the guest statute would insulate Moss from liability.

The requirements of the family car doctrine were clearly set out in *Coffman v. McFadden:*[27]

> In order to fasten liability upon the parents for the negligence of the child, under the family car doctrine, the plaintiff must show that the parents owned, provided or maintained the automobile in question, and that it was for the general use, pleasure, and convenience of the family.

The first of these two requirements clearly was met in *Hansel*, for defendant parent owned the car. But the second requirement is somewhat more doubtful since the car was purchased by Moss for use in his business. However, the vehicle had been devoted to general family use during the year prior to the accident.[28] Thus it would appear that the second requirement was also met.[29]

Under applicable Washington law, therefore, Moss's daughter became his agent and the guest statute should have been available to Moss as a defense. Ironically, however, this result would be contrary to the rationale of the doctrine upon which the agency relationship should have been based. The family car doctrine is a judicial creation

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27. 68 Wn.2d 954, 958, 416 P.2d 99, 101-02 (1966). It should be observed that there is no requirement that the use of the vehicle have been for the general benefit of the family rather than for the personal benefit of the driver. This requirement is imposed in some jurisdictions. *See* 49 KY. L.J. 578 (1961).

28. Brief for Appellants at 4, Hansel v. Ford Motor Co., 3 Wn. App. 151, 273 P.2d 219 (1970). In Dillon v. Burnett, 197 Wash. 371, 375, 85 P.2d 656, 658 (1938), the court observed:

> [T]he mere fact that a car is purchased and used for business purposes does not prevent its coming within the "family car" doctrine, where it is also used for family pleasure.

The *Dillon* court quoted from X. HUDDY, AUTOMOBILE LAW § 125 (9th ed. 1932). *See* Hart v. Logan, 173 Wash. 598, 605, 24 P.2d 99, 102 (1933).

29. An argument that defendant Moss's daughter was not a member of the "family" seems absurd. But there is dicta in at least one Washington case suggesting that the driver must be a member of the collective body of persons living in the owner's household. Hart v. Hogan, 173 Wash. 598, 605, 24 P.2d 99, 102 (1933). *See* Plash v. Fass, 144 Minn. 44, 174 N.W. 438 (1919).

The definition of "family" seemingly adopted by the Washington Supreme Court is extremely broad, however. It includes anyone driving the family car with the owner's consent for a family purpose. Birch v. Abercrombie, 74 Wash. 486, 133 P. 1020 (1913); Allison v. Bartelt, 121 Wash. 418, 209 P. 863 (1922). It is assumed that defendant Moss's daughter in *Hansel* was living in his household, although the opportunity for argument with respect to this possible requirement remains.

— a legal fiction established to meet the problem of plaintiffs injured by judgment-proof children whose parents had allowed them to use the family car.[30] Because the torts of a child were not attributable to his parents merely because of the family relationship[31] some other basis to allow recovery against those financially able to satisfy a tort judgment was necessary. The family car doctrine was created to inculpate the one who supplied the car for a family purpose. But to apply the doctrine in *Hansel* would exculpate the owner by permitting him to set up the guest act as a defense. Thus, the policy supporting the doctrine would be frustrated by its application in the principal case.

The Court of Appeals clearly wanted to reach the result it did in *Hansel,* regardless of the legal confusion generated. Its decision is an accurate reflection of current judicial attitudes toward guest statutes.

II. GUEST STATUTES TODAY

While the *Hansel* court's reasoning in strictly construing the transportation requirement is at least questionable, it is hardly surprising that a modern court would restrict the application of a guest act. It has often been held in Washington that "[t]he host-guest statute is in derogation of the common law and, therefore, must be strictly construed."[32]

Twenty-six states other than Washington have guest statutes.[33]

30. *See* 16 NOTRE DAME LAWYER 394 (1941).
31. *See* note 21, *supra.*
32. Miller v. Treat, 57 Wn.2d 524, 531, 358 P.2d 143, 147 (1960).
33. Alabama, ALA. CODE tit. 36, § 95 (1958); Arkansas, ARK. STAT. ANN. §§ 75-913, 914, 915 (1947); California, CAL. VEHICLE CODE § 17158 (West 1960); Colorado, COLO. REV. STAT. ANN. § 13-9-1 (1963); Delaware, DEL. CODE ANN. tit. 21, § 6101 (1953); Florida, FLA. STAT. ANN. § 320.59 (1968); Idaho, IDAHO CODE ANN. § 49-1401, 1402 (1965); Illinois, ILL. REV. STAT. ch. 95½, § 9-201 (1967); Indiana, IND. ANN. STAT. § 47-1021 (1965); Iowa, IOWA CODE ANN. § 321.494 (1966); Kansas, KAN. STAT. ANN. § 8-122b (1964); Michigan, MICH. STAT. ANN. § 9.2101 (1968); Montana, MONT. REV. CODES ANN. § 32-1113 (1961); Nebraska, NEB. REV. STAT. § 39-740 (1968); Nevada, NEV. REV. STAT. § 41.180 (1968); New Mexico, N.M. STAT. ANN. § 64-24-1 (1953); North Dakota, N.D. CENT. CODE § 39-15-02, 03 (1960); Ohio, OHIO REV. CODE ANN. § 4515.02 (Page 1965); Oregon, ORE. REV. STAT. § 30.115 (1969); South Carolina, S.C. CODE ANN. § 46-801 (1962); South Dakota, S.D. COMP. LAWS ANN. § 32-34-1 (1967); Texas, TEX. REV. CIV. STAT. ANN. art. 6701b (1948); Utah, UTAH CODE ANN. § 41-9-1 (1970); Vermont, VT. STAT. ANN. tit. 23, § 1491 (1967); Virginia, VA. CODE ANN. § 8-646.1 (1950); Wyoming, WYO. STAT. ANN. § 31-233 (1957).
The statutes are accumulated and compared, with respect to the criteria for recovery, in Comment, *Judicial Nullification of Guest Statutes,* 41 S. CAL. L. REV. 884, 899-901

Thirteen of these[34] resemble Washington's in that they preclude recovery by passengers "transported by" the owner, operator, or, in one case, persons responsible for the operation of the vehicle.[35]

However, apparently no court in these thirteen jurisdictions has precluded a non-driving owner from asserting the host-guest act, as did the Court of Appeals in *Hansel*.[36] Yet the courts in many states with guest statutes have gone to great lengths in statutory interpretation to reduce their application. For example, the California Supreme Court limited the application of that state's guest act to accidents occuring on the public highways.[37] In addition, many courts have ex-

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(1968). A more complete comparison appears in Automobile Insurance Committee, *1960 Report — Automobile Guest Laws Today*, 27 INS. COUNSEL J. 223 (1960).

34. The thirteen states are: Arkansas, Colorado, Delaware, Florida, Kansas, Michigan, New Mexico, Oregon, South Carolina, South Dakota, Texas, Virginia and Wyoming. Arkansas has two guest statutes. One precludes recovery by a "person transported *as a guest*. . . ." ARK. STAT. ANN. § 75-913 (1947) (emphasis added). The other precludes recovery by a "person transported or proposed to be transported *by the owner or operator* . . ." and is similar to Washington's. ARK. STAT. ANN. § 75-915 (1947) (emphasis added).

The statutes do vary as to the criteria for recovery. For example, Delaware allows the guest to recover if the "accident was intentional on the part of . . . [the] owner or operator, or was caused by his wilful or wanton disregard of the rights of others." DEL. CODE ANN. tit. 21, § 6101 (1953). Michigan allows recovery if the accident was "caused by the gross negligence or wilful and wanton misconduct of the owner or operator." MICH. STAT. ANN. § 9.2101 (1968). Florida provides a third example, allowing recovery only if the injury "resulted from the gross and wanton negligence of the operator. . . ." FLA. STAT. ANN. § 320.59 (1968). *See also* note 33, *supra*.

35. Arkansas, ARK. STAT. ANN. § 75-915 (1947).

36. The courts of several states with guest statutes similar to Washington's have afforded the owner of the family car the protection of the guest statute. *See, e.g.*, Graham v. Shilling, 133 Colo. 5, 291 P.2d 396 (1955); McAllister v. Calhoun, 212 Ark. 17, 205 S.W.2d 40 (1947); Lewis v. Knott, 75 N.M. 422, 405 P.2d 662 (1965) (dictum); Snyder v. Jones, 392 S.W.2d 504 (Tex. Civ. App. 1965). The factual situation in *Snyder* was remarkably similar to that in *Hansel*. In *Snyder* the owner's daughter was driving the vehicle when an accident occurred due to defective brakes. What is surprising about this case is that the owner knew of the defect (unlike *Hansel*) but was still protected. The court ruled that the evidence was insufficient to show gross negligence of the part of the owner. The problem of concern here should be distinguished from cases invoking statutes which provide that an automobile owner is negligent, as a matter of law, when his child causes automobile accidents if the child is not of driving age. *See, e.g., In re* Bisone, 171 Kan. 631, 237 P.2d 404 (1951).

37. O'Donnell v. Mullaney, 66 Cal. 2d 994, 429 P.2d 160, 59 Cal. Rptr. 840 (1967), *noted in* 5 SAN DIEGO L. REV. 246 (1968). The California Guest Statute provides in part: "no person who as a guest accepts a ride in any vehicle upon a highway" shall recover anything from the driver. CAL. VEHICLE CODE § 17158 (West 1960).

The court in *O'Donnell* reasoned that "highway" in the statute means public roadway because it is so defined in the Vehicle Code. One author has noted that when the guest statute was incorporated into the Code, "public," which had preceded "highway," was deleted, thus it is possible that the legislature intended a broader application than the *O'Donnell* court used. Comment, *Judicial Nullification of Guest Statutes*, 41 S. CAL. L. REV. 884 (1968). Some interesting possible consequences of the *O'Donnell* decision are

pressed extreme dissatisfaction with their state's guest statute.[38]

Nor has the guest statute escaped the criticism of legal scholars. Attacks have been made on the constitutionality of the statute,[39] its effect on justice,[40] and the policy reasons advanced to support it.[41] With respect to the "fairness doctrine," under which there is no liability because the guest is viewed as an ingrate if he accepts a ride and is unwilling to take his chances with his host, the general feeling among contemporary scholars is that circumstances have changed so greatly since the adoption of the guest statutes that the doctrine is no longer appropriate.[42] Commentators suggest that the guest statute fails

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suggested in Lascher, *Hard Laws Make Bad Cases — Lots of Them (The California Guest Statute)*, 9 SANTA CLARA LAWYER 1 (1968) [hereinafter cited as Lascher]. An illustration used in Lascher is that of a husband and wife driving to the post office to mail a birthday card. *Id.* at 14. If the husband negligently operates the car in the driveway, causing injury to his wife, the guest statute will not apply and she can recover even if his conduct only amounts to simple negligence. However, if the accident were to occur shortly thereafter on a public street, the guest statute would apply and the wife could only recover if her husband was intoxicated or his action amounted to wilful misconduct.

38. The Michigan Supreme Court has expressed particular frustration with the guest statute:

> Rightly or wrongly, our law has prided itself that those who put their faith in another shall not suffer uncompensated harm through that other's falsity or lack of care.

Stevens v. Stevens, 355 Mich. 363, 94 N.W.2d 858, 862 (1959). *See also* Comment, *Judicial Nullification of Guest Statutes*, 41 S. CAL. L. REV. 884, 896-98 (1968).

39. The constitutionality of guest statutes under both the federal and state constitutions has frequently been considered. *See, e.g.*, Lascher, *supra* note 37. An attack on the guest statute based on the equal protection clause of the 14th amendment was rejected in Silver v. Silver, 280 U.S. 117 (1929). Professor Lascher argues that the guest statutes fail the test of reason and rationality required by the 14th amendment. Lascher, *supra* note 37, at 9-15.

40. *See, e.g.*, Comment, *The Case Against the Guest Statute*, 7 WM. & MARY L. REV. 321 (1966). Most frequently noted is the unjust distinction between the pedestrian and the passenger.

41. Dean Prosser has stated that:

> The typical guest act case is that of the driver who offers his friend a lift to the office or invites him out to dinner, negligently drives him into a collision, and fractures his skull — after which the driver and his insurance company take refuge in the statute, step out of the picture, and leave the guest to bear his own loss. If this is good social policy, it at least appears under a novel front.

W. PROSSER, LAW OF TORTS § 34, at 191 (3d ed. 1964) (footnote omitted).

42. At the time of the adoption of most guest statutes in the 1920's and 1930's, the automobile was not a necessity. It may have been true then that the guest was getting "something for nothing." *See* Gibson, *Let's Abolish Guest Passenger Legislation*, 35 MANITOBA B. NEWS 274 (1965). Today, however, providing or accepting rides is routine. Reciprocity means that the guest is not really getting a free ride. *Id.* at 275.

The fairness doctrine has been criticized for not accomplishing fairness to the driver at all. Since most states require proof of financial responsibility in the form of insur-

even to accomplish its objective of preventing collusive suits.[43] One author has noted that the justifications themselves are contradictory in that the first protects the driver (against ungrateful guests) while the second protects against him (his collusive suits).[44] Guest statutes are hopelessly out of date and ineffective, and it is inevitable that courts will restrict their application in some instances. The principal case is but one manifestation of this tendency.

That the *Hansel* court was willing to go to great lengths to avoid the application of the guest statute evidences the need for serious re-evaluation by the legislature. Leaving such a task to the courts can only lead to further confusion in an area of the law which requires certainty. It is possible that a repeal of the guest statute may result in a slightly higher incidence of collusive suits. However, the mere fact that some fraudulent claims may be made is little justification for denying recovery to an entire class of innocent victims.

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ance, the doctrine is more appropriately directed at fairness to the insurer. With respect to this justification, one commentator has appropriately suggested that:

> The only justification for altering general law should be to further the public good, not to compensate special interests for collateral wrongs.

Id. at 277. Higher insurance premiums might accomplish the same result. However, "there appears to be no correlation between the existence or nonexistence of a guest statute" and the level of insurance premiums or underwriting profits. Lascher, *supra* note 37, at 13.

43. One author suggests that the guest statutes have caused more suits and greater problems by spawning a multiplicity of cases construing the terms of the statute and "exaggerated and fraudulent claims being made by the guest passenger in order to come within" the statutory exceptions. Weinstein, *Should We Kill the Guest Passenger Act?*, 33 DETROIT LAWYER 185, 187 (1965). It is also suggested that, with today's sophisticated judges and juries "who can easily distinguish between a colluded case between the driver and the passenger, the danger of collusion or fraud against the insurance company is a relic of the past, in this area of the law." *Id.* at 189.

Another author proposes a questionable ground for attacking the guest statute, that it is as easy to lie about gross negligence as it is to lie about negligence. *See* Gibson, *supra* note 42. This may be true, but it seems unlikely if conduct which falls within the guest statute definition of gross negligence is also criminal.

44. Lascher, *supra* note 37, at 15.