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Torts: Setback for the Newer Equal Protection

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Schwalbe v. Jones. The California Supreme Court upheld section 17158 of the California Vehicle Code, which bars an owner-passenger of an automobile from suing the driver of his vehicle for personal injury or death proximately resulting from the driver's simple negligence. In rejecting the plaintiffs' contention that the statute's distinction between owner-passengers and non-owner-passengers violates the equal protection clauses of the state and federal constitutions, the court has curbed further expansion of the equal protection doctrine presaged by its earlier decision in Brown v. Merlo. Justice Tobriner, who authored the Brown opinion, invalidating the California "guest" statute, strongly dissented in Schwalbe. This Note will focus on the differences between the majority and the dissent and the implications

2. No person riding in or occupying a vehicle owned by him and driven by another person with his permission has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the driver on account of personal injury to or death of the owner during the ride, unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver.
3. CAL. CONSTIT. art. I, § 11, provides: "All laws of a general nature shall have a uniform operation." Id. art. I, § 21, provides:
   No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.
4. U.S. CONSTIT. amend. XIV, § 1, provides:
   All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
5. At the time of the Brown decision, Vehicle Code section 17158 provided in relevant part:
   No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride . . . has any right of action for civil damages against the driver on account of personal injury to or the death of the . . . guest during the ride, unless the plaintiff in any such action establishes the injury or death proximately resulted from the intoxication or willful misconduct of the driver.

Ch. 1600, § 1, 1961 Cal. Stats. 3429 (current version at CAL. VEH. CODE § 17158 (West Supp. 1976)).
of this disagreement for the future of the equal protection doctrine and tort law in this state.

I. Background of the Equal Protection Controversy

Prior to 1973, a provision of Vehicle Code section 17158 denied automobile guests who had not given compensation for the ride a cause of action for injuries sustained as a result of the negligence of their host-drivers. Brown invalidated this provision on equal protection grounds. Writing for a unanimous court, Justice Tobriner found that the “guest” statute improperly differentiated between automobile guests and other guests, between automobile guests and paying automobile passengers, and between different subclasses of automobile guests. Although purporting to use the traditional “rational basis” equal protection standard and explicitly rejecting the higher standard of strict scrutiny, the court in fact required more than a rational relation between the classification found in the statute and the purpose the statute was designed to serve.

As the first case to invalidate the much-maligned guest statute, Brown prompted a flood of similar litigation in other states and a volume of response by legal commentators, many of whom found it to be a significant step toward the creation of a new equal protection standard or even the realization of Professor Gunther’s “newer” equal protection standard.

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6. Id.
7. 8 Cal. 3d at 863, 506 P.2d at 217, 106 Cal. Rptr. at 393.
8. See text accompanying notes 23-27 infra.
The new standard would require a *substantial* relationship between articulated purpose and means, focusing on the means used to accomplish the legislative purpose rather than the desirability of that purpose; its effect would be to raise the level of judicial scrutiny over legislative actions. The legislature quickly responded to *Brown* by deleting the "guest" section of the statute, but reenacting the provision that barred injured owner-passengers from recovering for the negligence of their drivers.\(^3\)

II. Facts

In 1967 Patricia Schwalbe Jones owned two automobiles, a Triumph and an inoperable Renault. Mrs. Jones decided to tow the Renault to a friend by tying it to a trailer hitch on the Triumph. Her husband, the defendant, drove the tow car and Patricia rode in the Renault with a friend behind the wheel. While the cars were moving along the freeway, the Renault began to swerve violently and the tow line broke. The car went off the freeway killing Mrs. Jones. Patricia's parents brought an action against their daughter's husband, alleging both negligence and willful misconduct. Plaintiffs lost on both counts. The defendant obtained a nonsuit on the ground that section 17158 precluded recovery for negligence, and the jury did not find willful misconduct.\(^4\)

The litigation reached the California Supreme Court in 1975. In the first opinion on the case, Justice Tobriner, speaking for a bare majority of the court, invalidated the statute.\(^5\) Adopting the approach used in *Brown v. Merlo*, he found that there was lacking a fair and substantial relation between the purpose of the statute and the means used to accomplish that purpose. Justice Sullivan, speaking also for Justices Wright and Clark, vigorously dissented. Shortly thereafter, a rehearing was granted and the court reversed itself. Justice Sullivan,

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\(^{14}\) 16 Cal. 3d at 517, 546 P.2d at 1034-35, 128 Cal. Rptr. at 322-23.

having converted Justices McComb and Burke to his cause, now spoke for the majority in upholding the statute.

III. The Rationality Standard

The crux of the dispute between Justice Tobriner and the majority is what relationship the equal protection clause requires between the purpose of a challenged statute and the means used to accomplish that purpose. In Brown v. Merlo Justice Tobriner appears initially to employ the traditional formulation: "A statute may single out a class for distinctive treatment only if such classification bears a rational relation to the purposes of the legislation." Yet elsewhere in the opinion he seems to require a "substantial and rational relation," a "sufficient basis," a "sufficient or rational basis," or a "fair and substantial relation." Commentators heralded these latter characterizations as the adoption of a "new" equal protection standard; Brown's holding suggests that this view is correct.

In Brown Justice Tobriner analyzed the challenged legislation in terms of the hospitality rationale traditionally offered by commentators on tort law. He found the argument that guest statutes promote hospitality unconvincing because it is the automobile owner's insurance company and not the driver who gains protection under the statute: "In plain language, there is simply no notion of 'ingratitude' in suing your host's insurer." Yet a minimum rational relationship does exist between the purpose of promoting hospitality and the bar against an owner-passenger's negligence claim. Although California law requires insurance or its equivalent for all drivers, as many as 15 percent of California drivers carried no insurance at the time Brown was decided and so must bear

16. 8 Cal. 3d at 861, 506 P.2d at 216, 106 Cal. Rptr. at 392.
17. Id. at 882, 506 P.2d at 224, 106 Cal. Rptr. at 407.
18. Id. at 872, 506 P.2d at 224, 106 Cal. Rptr. at 400.
19. Id. at 864, 506 P.2d at 218, 106 Cal. Rptr. at 394.
20. Id. at 861, 506 P.2d at 216, 106 Cal. Rptr. at 392.
22. Later, in Schwalbe, Justice Tobriner argued that the various characterizations of the equal protection standard all stood for the same principle. 16 Cal. 3d at 526-528, 546 P.2d at 1041-42, 128 Cal. Rptr. at 329-30 (Tobriner, J., dissenting). This argument is unconvincing. Not only are there differences in theory between his formulations and the traditional standard, but the standard used may very well dictate the results of the case. See text accompanying note 52 infra.
24. 8 Cal. 3d at 868, 506 P.2d at 221, 106 Cal. Rptr. at 397 (emphasis in original).
the loss directly. Moreover, the low minimum statutory insurance requirements mean that personal injury judgments will often result in out-of-pocket costs even for the insured driver. Even if he is fully insured, the defendant in a personal injury suit may well suffer enough inconvenience and discomfort to make him wary of letting others use his car in the future. If the court is only to require some minimal relation between the statute and the purpose of preventing ingratitude and thus encouraging hospitality, the foregoing considerations plainly supply it. Only by requiring some stronger relationship between purpose and effect could Justice Tobriner have reached his conclusion.

In *Schwalbe* Justice Sullivan expressed his distaste for the “new” equal protection standard and rejected the suggestion that *Brown* even created it:

> We are aware, of course, that this court in *Brown v. Merlo* . . . used language which indicated some departure from the traditional equal protection standard. . . .

> We are persuaded that to elevate the aforesaid language into doctrinal concept . . . would result in the substitution of judicial policy determination for established constitutional principle. 28 His opinion instead professes to adhere to the traditional standard of review, requiring only some rational relation between a conceivable purpose of the statute and the distinctions it adopts. The majority, however, deviates from this standard of minimum rationality and instead proceeds to evaluate the fairness of the challenged statute.

The court noted that the purpose of the challenged statute was essentially the same as that of an earlier version, challenged and upheld in *Patton v. La Bree.* In *Patton* the disputed provision allowed all paying passengers except paying owner-passengers a right of action against the driver. The *Patton* court gave effect to the distinction on the theory that the legislature may have rationally concluded that an owner generally has the right to direct and control the driver while a nonowner does not. The plaintiffs in *Schwalbe* sought to distinguish *Patton* by countering that the right to control meant the ability to control. They argued that such ability was illusory, since under modern traffic conditions accidents occur with such suddenness that a passenger’s verbal warnings often are ineffective, and attempts at

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26. 8 Cal. 3d at 868 n.10, 506 P.2d at 221 n.10, 106 Cal. Rptr. at 397 n.10.
27. California has minimum statutory requirements of only $15,000 for bodily injury or death to one person, $30,000 for bodily injury or death to two or more persons, and $5,000 for property damage. CAL. VEH. CODE § 16056 (West Supp. 1976).
28. 16 Cal. 3d at 518 n.2, 546 P.2d at 1035 n.2, 128 Cal. Rptr. at 323 n.2.
30. The former section 17158 is set out in note 5 supra.
31. 60 Cal. 2d at 609, 387 P.2d at 400, 35 Cal. Rptr. at 624.
physical interference may increase the chances of an accident. The majority rejected the plaintiffs' contention in a footnote, arguing that "[a]dmonitions by an owner relative to speed and careful conduct are bound to be heeded to a greater extent than similar admonitions by one who does not own the vehicle . . . ." The court chose, however, not to base its decision on this argument.

Yet if the majority is correct and if one purpose of the legislation is to promote safe driving, a statutory provision requiring owner-passengers to bear the risk of their driver's negligence would encourage careful selection of drivers and close supervision by owners. The legislature's interest in safer driving and its recognition of an owner's greater ability to control the operation of an automobile would thus justify the distinction between owner-passengers and guests under the traditional rational basis test of equal protection. The majority, however, did not adopt this traditional analysis; rather, it justified the distinction between owner-passengers and guest-passengers simply by demonstrating that owner-passengers can be considered to be more like owner-drivers than like other guests and similarly should be denied recovery for the negligent operation of their automobiles.

This attempt to place owner-passengers in the same category as owner-drivers appears somewhat tortuous. The court first argues that the case law and the Insurance Code permit automobile liability insurance policies to exclude the named insured or members of his family from coverage; and that the Insurance Code also prohibits recovery by an owner for his own negligence under the uninsured motorist provisions of his own policy. The court continues by explaining that the legislature reenacted Vehicle Code section 17158 in 1973 knowing that an owner-passenger injured through the negligence of the driver could not recover from his own insurer and would seek his recovery from the insurance or personal assets of the driver. The court then concludes that this result is "simply not fair"; if an owner cannot recover for his

32. 16 Cal. 3d at 519, 546 P.2d at 1036, 128 Cal. Rptr. at 324.
33. Id. at 519 n.3, 546 P.2d at 1036 n.3, 128 Cal. Rptr. at 324 n.3.
34. Id. at 522, 546 P.2d at 1038, 128 Cal. Rptr. at 326.
37. Id. § 11580.2 (West Supp. 1975).
38. 16 Cal. 3d at 522, 546 P.2d at 1038, 128 Cal. Rptr. at 326. The court does not explain why the legislature's intentions in 1973 are relevant to an accident that occurred in 1967.
own negligence, why should he be in any better position when he allows another to drive and rides as a passenger, retaining some power of supervision?  

For the court to determine whether this classification is "fair" is not properly a part of traditional equal protection analysis. The "rational relation" test, properly used, should eliminate the need for a court to weigh substantive interests. Under traditional equal protection doctrine, the court does not reexamine the interests behind a statute, deferring rather to the decisionmaking processes of the legislature. A determination of the fairness of a classification, however, requires the court to balance the interests involved, since fairness is only understood as a reasonable accommodation of competing interests. Balancing substantive interests is properly the task of the legislature. Justice Sullivan's use of the fairness concept seriously undermines his professed adherence to traditional equal protection analysis.

IV. The Judicial and Legislative Branches: Role Accommodation

Underlying much of the dispute between the majority and dissent over the proper equal protection standard is a fundamental disagreement about the relationship between the legislative and judicial branches. Justice Sullivan, despite his willingness to assess the fairness of legislative acts, quoted his earlier opinion to express a pronounced aversion to judicial overview of legislative decisions:

"The . . . basic and conventional standard for reviewing economic and social welfare legislation in which there is a 'discrimination' or differentiation of treatment between classes or individuals . . . manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government . . . ."  

This view grants legislation a presumption of constitutionality and places a heavy burden on the party challenging the statute to show that the legislative judgment is irrational.

Justice Tobriner's dissent, on the other hand, confidently presupposes an active judiciary evaluating legislative choices. Although he engages in a lengthy examination of the statutory history to show that this vestige of the guest statute should not be given effect because the original guest statute no longer exists, he does not address the legislature's express reenactment of the disputed statute after Brown invali-

39.  Id.
40.  Id. at 517-18, 546 P.2d at 1035, 128 Cal. Rptr. at 323 (quoting D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 16, 520 P.2d 10, 21, 112 Cal. Rptr. 786, 797 (1974)).
41.  16 Cal. 3d at 517-18, 546 P.2d at 1035, 128 Cal. Rptr. at 323.
dated it. He asserts that an owner-passenger has no ability to control the driver of his car, thus giving no weight to a legislative decision that arguably was to the contrary. He masks his distaste for the statute behind an assessment of its rationality while actually judging the wisdom of the legislative action. He finds the statute “peculiar” and the classification a “total anomaly.” Although he does not directly address the issue of the legislative and judicial relationship, his determination to overrule the statute in Schwalbe implies that the court has the right to find that the legislative choice was wrong.

To the extent that Justice Tobriner’s approach adopts the “substantial and rational relation” test, it demonstrates the inherently value-laden nature of the “newer” equal protection. Although Professor Gunther states that the substantial relationship test should evaluate only the means used to accomplish the purpose and not the propriety of the purpose itself, the distinction is practically impossible to make. Any evaluation of the means employed requires an evaluation of the burdens that the choice of means imposes on the discriminated class. In making that evaluation, a court necessarily decides whether the burdens or inequities are justified by what the legislation accomplishes; consequently, it treats the legislative choice with little deference.

The majority and dissenting opinions also suggest differing conceptions of the proper role of the courts and the legislature in the development of tort law. In a long series of cases the California Supreme Court has changed the face of tort law to reflect contemporary social values. Starting with Muskopf v. Corning Hospital District, which abolished sovereign immunity for negligence actions, and culminating in Li v. Yellow Cab Co., which imposed a system of com-

42. Id. at 525, 546 P.2d at 1041, 128 Cal. Rptr. at 329.
43. Id. at 537, 546 P.2d at 1049, 128 Cal. Rptr. at 337.
44. Gunther, supra note 12, at 21.
45. It is surely significant that, with only a few exceptions—like Morey v. Doud, 354 U.S. 457 (1957), subsequently overruled in City of New Orleans v. Dukes, 96 S. Ct. 311 (1976), and Royster Guano Co. v. Virginia, 253 U.S. 412 (1920)—the Supreme Court decisions that have used the lower-tier standard to strike down legislation have involved classifications believed to be of questionable propriety (e.g., sex, illegitimacy, indigency) or interests commonly felt to be substantial (e.g., privacy, rights of the accused in a criminal proceeding). E.g., Weinberger v. Weisefeld, 420 U.S. 636 (1975); James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).
47. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).
parative negligence, the court has created a comprehensive and consistent body of tort law predicated on liability for negligence. Justice Sullivan joined in most of these decisions and wrote for the court in *Li*. Although his support of judicial activism in *Li* seems to contradict his call for judicial restraint in *Schwalbe*, this apparent contradiction is easily reconciled. *Li* and other cases announcing significant changes in tort law purported to be revisions of the common law that did not require judicial rejection of a legislative choice of liability.  

Justice Tobriner's more active judicial approach, however, would substitute for legislative choice his own determination—and that of nearly all commentators on tort law—that the guest and owner-passenger statutes are unwise. If his *Brown* opinion for the court and his vacated majority opinion in *Schwalbe* can be read expansively, he appears to believe that the courts should not countenance legislative interference with a universal system of liability for negligence.

In rejecting these views, the *Schwalbe* majority suggests that the judicial duty to reform tort law does not extend to areas in which the legislature has spoken, particularly when the legislature has spoken on the subject only recently. More importantly, *Schwalbe* supports the legislature's right to adopt tort policies that do not require liability for negligence.

V. The Impact of Schwalbe

To an undefined extent, then, *Schwalbe* represents a withdrawal from the "newer" equal protection suggested by *Brown v. Merlo*. Yet except for a footnote disapproving *Brown*’s "fair and substantial" standard, 51 the *Schwalbe* opinion ignores the *Brown* holding. The failure to distinguish *Brown* probably reflects the futility of that task; nevertheless, the failure to overrule it may indicate that the *Brown* test will be exhumed when the appropriate occasion arises.

To the extent that *Schwalbe*’s failure to overrule *Brown* represents the continuing availability of two equal protection standards, litigants will face the constant uncertainty of having to anticipate which standard the court will elect to apply in a given case. This uncertainty is consequential, since the standard employed in fact often dictates the outcome of the case. Where only a minimal rational relationship is

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50. See note 23 supra.
51. See text accompanying note 28 supra.
required, the requisite rational basis is rarely undiscoverable. Where a higher standard is employed, fewer statutes will survive an equal protection challenge to the lines they have drawn. The cases on which Justice Tobriner relies in his dissenting opinion are illustrative: they reveal a substantial correlation between the standard employed and the court’s willingness to uphold the challenged statute, thus indicating that the majority of the court in a given case will support the standard that will produce the preferred result.

Schwalbe also has an uncertain impact on tort law. If the court should continue to defer to legislative decisions to excuse or limit liability, then proposed reforms in tort law, such as no-fault auto insurance and a medical malpractice system not predicated on negligence, would withstand attacks on equal protection grounds. If, however, the newer equal protection standard prevails or if Schwalbe does not lead to a general deference to legislative choices of liability, legislative actions creating innovative tort systems that conflict with the judicial preference for liability coextensive with negligence may not be sustained. Schwalbe’s full impact on tort law will depend on future developments.

Conclusion

Schwalbe v. Jones represents a retreat, although perhaps not a permanent one, from the judicially active “fair and substantial relation” test of equal protection suggested by Brown v. Merlo. It also represents a decision to allow the legislative branch considerable latitude in the field of tort law. Yet neither the reasoning of the majority nor the dissent is analytically persuasive; moreover, neither adds significantly to a fuller understanding of what Professor Gunther has accurately described as “the most chaotic, least thoughtfully considered, and least adequately justified area of constitutional law.”

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52. Justice Tobriner cites eight United States Supreme Court decisions to support his argument: Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971); Rinaldi v. Yeager, 384 U.S. 305 (1966); McGowan v. Maryland, 366 U.S. 420 (1961); Morey v. Doud, 354 U.S. 457 (1957); Railway Express v. New York, 336 U.S. 106 (1949); Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911). Those that use language requiring a “fair and substantial” relation strike down the disputed legislation; those that use the language of “mere” rationality or its equivalent, with the single exception of Morey v. Doud, uphold the statute in question.


54. See, e.g., Comment, Recent Medical Malpractice Legislation—A First Check-up, 50 TUL. L. REV. 655 (1976).