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Utah Governmental Immunity Act and Government Hospitals: *Condemarin v. University Hospital*

I. INTRODUCTION

Among the most valuable rights afforded to Utah citizens under the Utah Constitution is the guarantee of "uniform operation" of "[a]ll laws,"¹ where "every person . . . shall have remedy by due course of law" for injuries suffered.² These important rights can be diminished or abrogated by governmental immunities. However, governmental immunity statutes which appear overly burdensome are subject to judicial review to determine whether the means used to obtain the given objective are justified. The Utah Supreme Court recently was asked to put this ends/means analysis to the test in evaluating the fairness of the Utah Governmental Immunity Act³ (the "Utah Act") as it applies to government-owned hospitals and health care facilities in *Condemarin v. University Hospital*.⁴ The Utah Act holds government-sponsored hospitals and health care facilities immune from liability for personal injury beyond \$250,000.⁵

This note analyzes the *Condemarin* decision in light of the changing legal attitudes toward governmental immunity, specifically for hospitals and health care providers. First, the note briefly reviews the background of the Utah Act. Next, the note evaluates the different approaches submitted by the separate opinions of the Utah Supreme Court justices in *Condemarin*. Third, trends on the issue of government immunity for government-owned hospitals and health care facilities are discussed. Finally, the note concludes that while the majority arrived at the proper outcome in *Condemarin*, it provided too little guidance on how the Utah Act will be interpreted in the future with regard to state-funded hospitals and health care facilities other than University Hospital in Salt Lake City, Utah.

1. UTAH CONST. art. I, § 24.

2. UTAH CONST. art. I, § 11.

3. UTAH CODE ANN. § 63-30-1 to -38 (1986 & Supp. 1989).

4. 775 P.2d 348 (Utah 1989).

5. UTAH CODE ANN. § 63-30-34(1) (1986 & Supp. 1989). Prior to 1983, the damages recovery cap was \$100,000, which is the figure applied in this specific action. *Condemarin*, 775 P.2d at 348 n.1.

II. UTAH GOVERNMENTAL IMMUNITY ACT

Sovereign immunity generally provides governmental entities with special protection from tort liability, except in cases where the federal, state or local government has consented to be sued.⁶ The doctrine dates back to the eighteenth century, having its roots in the simple philosophy that "the king can do no wrong." The state feared "an infinity of actions" if it allowed itself to be sued.⁷ This special protection found its way into American and Utah common law by providing immunity for acts performed as governmental functions.⁸

The doctrine of governmental immunity is not new to the state of Utah. In 1966, the Utah Legislature codified governmental immunity, excepting all governmental entities for injuries resulting from "the exercise and discharge of a governmental function."⁹ As Utah law evolved in this area, the Utah Supreme Court developed several tests dealing with the statutorily vague term "governmental function," and determined in *Greenhalgh v. Payson City*¹⁰ that the operation of a hospital was not a governmental function.¹¹ Two years later, *Cornwall v. Larsen*¹² further limited the application of the Utah Act to the governmental entity itself, refusing to expand the scope of protection to the individual governmental employees.¹³

In apparent reaction to these decisions, the Utah Legislature amended the Utah Act in 1978 to effectively reverse both the *Greenhalgh* and *Cornwall* decisions by specifically extending immunity to government hospitals and health care facilities,¹⁴ and granting personal

6. BLACK'S LAW DICTIONARY 626 (5th ed. 1979).

7. *AYALA v. Philadelphia Bd. of Pub. Educ.*, 453 Pa. 584, 600, 305 A.2d 877, 885 (1973) (quoting *Russell v. Men of Devon*, 2 T.R. 667, 672, 100 Eng. Rep. 359, 362 (1788)).

8. See *Ramirez v. Ogden City*, 3 Utah 2d 102, 279 P.2d 463 (1955).

9. UTAH CODE ANN. § 63-30-3 (1966 amend.).

10. 530 P.2d 799 (Utah 1975).

11. *Id.* at 801-02. The court reached its conclusion based upon a multiple-pronged analysis which considered "whether the activity is . . . generally regarded as a public responsibility . . . [;] whether there is any special pecuniary benefit to the City; and also, whether it is of such a nature as to be in competition with free enterprise." *Id.* at 801 (footnote omitted). The court also addressed the value of "encouraging a high standard of care" for governmental health care providers. *Id.*

12. 571 P.2d 925 (Utah 1977).

13. *Id.* at 927. See also *Madsen v. State*, 583 P.2d 92 (Utah 1978).

14. UTAH CODE ANN. § 63-30-3 (1986 & Supp. 1989). It states:

Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

Id. (emphasis added).

immunity for their employees.¹⁵ In *Condemarin*, Justice Durham criticized the Utah Act as a statute singling out "government-owned health care facilities, out of all the hundreds of government entities," for "retained" immunity for non-governmental functions.¹⁶

Notwithstanding the 1978 amendment, the court, in two subsequent non-hospital immunity decisions, seemed to imply that a government hospital should not be eligible for governmental immunity. First, in *Standiford v. Salt Lake City Corporation*,¹⁷ the court determined that a public golf course was not a governmental function under the "essential to the core of governmental activity" test,¹⁸ because the Utah Act authorizes the purchase of liability insurance to protect against injuries caused while involved in non-essential government activities.¹⁹ The court explained the effect of its decision in *Standiford* was to broaden liability for governmental acts.²⁰ A year later, the court further expanded general governmental liability in *Johnson v. Salt Lake City Corporation*,²¹ where it held that "[t]he first part of the *Standiford* test . . . does not refer to what government *may* do, but to what government alone *must* do."²² As in *Standiford*, the court reasoned that the insurance provisions provided within the Utah Act allow government entities to "sensibly budget to include insurance premiums for tort claims arising out of the operation of [the entity]."²³

While it may seem questionable that the operation of a hospital would qualify under *Johnson* as something "government alone must do,"²⁴ when faced with a government hospital defendant in *Frank v.*

15. UTAH CODE ANN. § 63-30-4(4) (1986 & Supp. 1989).

16. *Condemarin*, 775 P.2d at 350 (footnote omitted) (emphasis in original). Justice Durham did not believe governmental immunity was actually "retained" by government-owned hospitals under the 1978 amendment to the Utah Act since this protection was not available "at common law or under the original version of the Utah Act." *Id.* But see *id.* at 383 (Hall, C.J., dissenting) (expressing the view that the plaintiffs would have had no rights to property or remedies under the general doctrine of sovereign immunity "as it existed at the time the [state] constitution was adopted" and that the plaintiffs would therefore have no claim to a "full and unlimited tort recovery" under the open courts provision of the Utah Constitution).

17. 605 P.2d 1230 (Utah 1980).

18. "[T]he test for determining governmental immunity is whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental activity." *Id.* at 1236-37.

19. *Id.* at 1237.

20. *Id.*

21. 629 P.2d 432 (Utah 1981).

22. *Id.* at 434 (emphasis in original).

23. *Standiford*, 605 P.2d at 1237.

24. *Id.* A 1985 formal opinion from the office of the Utah Attorney General demonstrated that services offered by University Hospital were not services uniquely provided by governmental entities. OP. ATT'Y GEN. NO. 85-002 (Oct. 21, 1985) (A planned association between University Hospital and Primary Children's Hospital would violate anti-trust laws as University Hospital

State,²⁵ contrary to its earlier decision in *Greenhalgh* and as a direct result of the 1978 amendment, the court held that the operation of University Hospital was a "governmental function."²⁶ In so doing, the court held itself bound by the statute as amended by the Utah Legislature.²⁷ Had the court applied the same standard in *Frank* as set forth in *Standiford*, decided six months earlier, it is uncertain whether the court would have been able to reach the same conclusion.²⁸ Because government hospitals compete directly with hospitals in the private sector, such a function is arguably not something "government alone must do."²⁹

The driving force behind the Utah Act, as amended in 1978, was the fear that the public treasury might be severely overburdened by paying out large malpractice claims.³⁰ However, Justice Durham argued that its practical effect is to give governmental health care entities and their individual physicians an advantage over those operating in the private sector, since it is currently unnecessary for the government entities to budget for malpractice insurance.³¹ This advantage is more apparent in cities where both private and public hospitals compete. Justice Stewart noted that although community hospitals in rural areas may need special protection to exist and provide citizens with their only immediate health care alternative,³² the court also has the challenge of balancing the need for making health care available to citizens with protecting injured patients' rights of recovery for tort claims.

III. *Condemarin v. University Hospital*

The issue in *Condemarin* was whether the Utah Act is a reasona-

operates one of three "level 3" newborn intensive care units in Salt Lake County which *currently compete with each other on equal footing*.).

25. 613 P.2d 517 (Utah 1980).

26. *Id.* The court noted further that while *Greenhalgh* held the operation of a municipal hospital was a proprietary act not covered by governmental immunity, the 1978 Act clearly demonstrated the Utah Legislature's intent to protect such activities as governmental functions in the future. *Id.* at 519.

27. *Id.*

28. The court's test in *Standiford* simply had one exception, which had been clearly set forth under the Utah Act as government-owned hospitals and health care facilities. *Id.*

29. *Johnson*, 629 P.2d at 434.

30. *Condemarin*, 775 P.2d at 361.

31. *Id.* at 364. *See also* *Hunter v. North Mason High School*, 85 Wash. 2d 810, 539 P.2d 845 (1975). The Washington Supreme Court suggested that a general waiver of government immunity serves the purpose of "plac[ing] the government on an equal footing with private parties defendant. . . . [T]he only function the special treatment given governmental bodies seems to perform is the simple protection of the government from liability for its wrongdoing." *Id.* at 818-19, 539 P.2d at 850.

32. *Condemarin*, 775 P.2d at 372 (Stewart, J., separate opinion).

ble means of protecting the public treasury³³ when, as a result of its damages recovery limitation, severely injured plaintiffs who would have full tort recovery rights against private hospitals are denied full recovery in government-owned hospitals.³⁴ The means used to resolve this problem was an issue of debate which greatly divided the Utah Supreme Court.

A. Facts

The plaintiffs are the parents of an infant child. As a result of apparent negligent acts of physicians and employees of University Hospital in Salt Lake City, Utah, the child will suffer as a severely retarded and handicapped person for the rest of his life.³⁵ The plaintiff mother, while in labor, was rushed to University Hospital following several hours of labor and a suspected rupture of the membranes while at Cottonwood Hospital, a privately-owned and operated facility in Salt Lake City.³⁶ An emergency caesarean section was performed and the child was found to be "severely asphyxiated" at birth.³⁷ The expected out-of-pocket damages alone could not have been remedied within the statutory limitation applied.³⁸

B. Analysis

The majority in *Condemarin*, Justices Durham, Zimmerman and Stewart, held that the Utah Act was "unconstitutional as applied to University Hospital."³⁹ While Justices Durham and Zimmerman favored striking the Utah Act as unconstitutional,⁴⁰ Justice Stewart limited the effect of the court's decision to University Hospital.⁴¹ By holding the Utah Act unconstitutional strictly as applied to University Hospital, the majority left the issues of due process and equal protection with respect to damage limitations for government-owned hospitals

33. *Id.* at 361.

34. *Id.* at 352.

35. *Id.* at 349.

36. *Id.* at 348.

37. *Id.* This "resulted in 'severe neurologic damage,' including impairments of hearing, sight, and ability to be fed, as well as seizure disorder and spasticity." *Id.*

38. *Id.* at 349. "It is likely that the cost of medical and custodial care related to the severe neurologic disorder of Leonel Condemarin in its various aspects will greatly exceed the sum of \$100,000." *Id.*

39. *Id.* at 366 (This holding was specifically limited to UTAH CODE ANN. § 63-30-34, the damage limitation section of the Utah Act.).

40. *Id.* at 366 (Durham, J.); *id.* at 368 (Zimmerman, J., concurring in Part).

41. *Id.* at 374 (Stewart, J., separate opinion). He writes: "Whether [the damages recovery cap of § 63-30-34] may be constitutional as applied to municipal hospitals and other health care facilities is a question I leave for another day." *Id.*

largely unsettled. The Utah Supreme Court justices were divided in deciding this issue based primarily upon their individual assessments of the significance of the rights exercised, whether those rights triggered an equal protection or due process analysis and which level of scrutiny should be involved.

1. *Justice Durham*

Justice Durham held the Utah Act unconstitutional, using a balancing test under both an equal protection and due process analysis,⁴² despite the fact that the plaintiff appealed only on grounds of equal protection.⁴³ She stated that the recovery limitation under the Utah Act was an unreasonable burden for the public to bear, because it infringed upon "important constitutional rights,"⁴⁴ namely, the right to full recovery for personal injuries⁴⁵ and the right to a jury trial.⁴⁶ Justice Durham was in favor of striking the Utah Act as unconstitutional and providing the legislature another opportunity to work out the presumed constitutional infirmities.⁴⁷

a. *Equal protection.* Justice Durham relied on the Utah Supreme Court's decision in *Malan v. Lewis*,⁴⁸ in which the Utah Guest Statute was held unconstitutional as violating equal protection by discriminating against those receiving serious injuries in car accidents.⁴⁹ In *Malan*, the court utilized a middle tier balancing test. It held that although it presumed "the Legislature acted on a reasonable basis, that presumption does not require us to accept *any conceivable reason* for the legislation."⁵⁰ Justice Durham believed the court should use such a balanc-

42. *Id.* at 352. Under an *equal protection* analysis, "a two-part test is necessary 'First, a law must apply equally to all persons within a class. Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute.'" *Id.* (quoting *Malan v. Lewis*, 693 P.2d 661, 670 (Utah 1984)). Under a *due process* analysis, "'every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law'. . . . [T]he clear implication of this language is 'that an individual [may] not be arbitrarily deprived of effective remedies designed to protect basic individual rights.'" *Id.* at 357 (quoting *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 675 (Utah 1985)).

43. *Id.* at 356.

44. *Id.* at 363.

45. *Id.* at 360. She referred to this as "an important substantive right." *Id.* (citing *Hunter v. North Mason High School*, 85 Wash. 2d 810, 814, 539 P.2d 845, 848 (1975)).

46. *Id.* at 365 (citing *International Harvester Credit Corp. v. Pioneer Tractor & Implement*, 626 P.2d 418, 421 (Utah 1981)) ("[T]he right of jury trial in civil cases is guaranteed by article I, section 10 of the Utah Constitution.").

47. *Id.* at 364.

48. 693 P.2d 661 (Utah 1984).

49. *Id.* at 671.

50. *Malan*, 693 P.2d at 671 n.14 (emphasis added).

ing test in the present case because the rights involved were "substantial" and "important."⁵¹ In further support of this middle tier approach, Justice Durham cited the New Hampshire Supreme Court's decision in *Carson v. Maurer*,⁵² which also identified the right to recover for damages caused by negligence as an "important substantive right."⁵³ She reasoned that since the rights to full recovery for malpractice injuries were available against government-owned hospitals under common law, that the equal protection issue at hand merits a "heightened standard" of review.⁵⁴

b. Due process analysis. Because Justice Durham saw that the traditional rational basis approach would fail to take into account "the seriousness of the abrogation of personal rights accomplished by the Act," she suggested that "a more straightforward balancing process is required."⁵⁵ In a search for more flexibility, she departed from her equal protection analysis and relied on due process.⁵⁶ In so doing, she referred to the court's two-part test in *Berry v. Beech Aircraft Corporation*,⁵⁷ which first examines whether the law provides an injured person an effective and reasonable alternative remedy, and then, if no substitute remedy is made available, the taking of the remedy can "be justified only if there is a clear social or economic evil to be eliminated" and the means of elimination are not arbitrary.⁵⁸ She stated that "because of the constitutional status of the right to a remedy for damage to one's person under article I, section 11" (hereinafter the "open courts provision"), scrutiny beyond a rational basis test is thus required.⁵⁹

51. *Condemarin*, 775 P.2d at 361.

52. 120 N.H. 925, 424 A.2d 825 (1980).

53. *Condemarin*, 775 P.2d at 354 (quoting *Carson v. Maurer*, 120 N.H. 925, 931, 424 A.2d 825, 830 (1980)). "'Not only is the right to be compensated for injuries closely related to fundamental rights, but additionally, it does not logically fit into the 'commercial' rights description which is characteristic of the rational basis standard of judicial review.'" *Id.* (quoting Note, *Target Defendants and Tort Law Reform: A Perspective on Medical Malpractice and Municipal Liability*, 11 VT. L. REV. 535, 546 (1986) (citations omitted)). In reviewing a Montana governmental immunity statute, the Montana Supreme Court has held that the right to remedy for injuries under the state constitution is *fundamental*, requiring the application of strict scrutiny. *Id.* at 359 n.8 (citing *White v. State*, 203 Mont. 363, 661 P.2d 1272 (1983)); *See also Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976).

54. *Condemarin*, 775 P.2d at 356. *See supra* note 16.

55. *Id.*

56. *Id.* at 358.

57. 717 P.2d 670 (Utah 1985).

58. *Condemarin*, 775 P.2d at 355-56 (quoting *Berry v. Beech Aircraft Corp.*, 717 P.2d at 680). The alternative remedy required under the first prong must be one which is "substantially equal in value or benefit to the remedy abrogated in providing essentially comparable substantive protection . . . although the form of the substitute remedy may be different." *Id.* at 357-58.

59. *Id.* at 358.

[T]he functional difference between the rational basis test and the intermediate test is

This "right to a remedy" is applied to those injured patients who incur damages at the hands of government health care providers beyond that provided for in the recovery cap.⁶⁰ In further support of her due process approach, Justice Durham asserted that the plaintiffs were denied their fundamental right of a trial by jury under the Utah Constitution based on the damages limitation under the Utah Act, although she was the only justice to make such an argument.⁶¹

2. Justice Zimmerman

In his concurring opinion, Justice Zimmerman joined Justice Durham solely on her due process analysis, referring to *Condemarin* as "a logical successor to *Berry*."⁶² Despite the fact that the plaintiff did not directly raise the issue of due process, Justice Zimmerman credited the plaintiffs with positioning their issues in terms of due process by arguing the Utah Act infringes on rights protected by the open courts provision under the Utah Constitution, triggering the *Berry* analysis.⁶³ Like Justice Durham, Justice Zimmerman held that the Utah Legislature was not given unlimited power under the Utah Constitution.⁶⁴ Justice Zimmerman sought to avoid the rigid nature of the equal protection classification tests which, although neat in application, do not take into account "the realities that a legislature must face in attempting to deal with perceived social and economic problems."⁶⁵

Justice Zimmerman opted to write separately to elaborate his view on the due process issues involved and believed that the equal protection analysis proposed by Justice Durham was unnecessary and diffi-

the degree to which the legislative judgment reflected in the statute will be examined. The *practical difference* is that under the rational basis test the statute will surely be found constitutional while the opposite result is likely if the intermediate test is applied.'

Id. at 359 (quoting Richards, *Statutes Limiting Medical Malpractice Damages*, 32 FED'N INS. COUNS. Q. 247, 256-57 (1982)) (emphasis added).

60. *Id.* at 361.

61. *Id.* at 365 (citing UTAH CONST. art. I, § 10). "[T]he Utah state constitutional right to jury trial on the question of civil damages is absolute [and] the absurdly low amount contained in the recovery limits statutes infringes egregiously on that right." *Id.* at 366.

62. *Id.* at 366 (Zimmerman, J., concurring in Part). Justice Zimmerman wrote to expand his views on the due process issue and expressed no opinion as to other points discussed by Justice Durham. *Id.*

63. *Id.* at 367 n.1. "*Berry* teaches that it is precisely due process concepts, rather than those of equal protection, that are involved when rights protected by article I, section 11 are claimed to have been abridged." *Id.* (citing *Berry v. Beech Aircraft Corp.*, 717 P.2d at 675-81); see also *supra* note 57.

64. *Condemarin*, 775 P.2d at 368 ("there must be some limits on the legislature, that some interests of the people deserve special protection in the maelstrom of interest group politics that is the legislative process").

65. *Id.*

cult to apply.⁶⁶ He thus held that depriving injured individuals the right to recover actual damages, present and future, because of the tortious conduct of another, is a right which substantially infringes upon the right of recovery interests protected under the open courts provision.⁶⁷ However, Justice Zimmerman left the door open for damage recovery caps on recovery for general damages in the future.⁶⁸ His concern with the Utah Act as it currently reads is that it limits actual out-of-pocket expenditures for present and future damages.⁶⁹

3. *Justice Stewart*

Justice Stewart, in a separate opinion, wrote that he was content with the court's equal protection approach in *Malan*,⁷⁰ which he authored, and opposed any suggestions by Justices Durham or Zimmerman that due process was at issue "since it has not been raised."⁷¹ He adamantly stated that the plaintiff raised only two issues, both of which fell under equal protection, and went so far as to suggest that Justices Durham and Zimmerman were exercising "substantive due process," which actions lead to the "illegitimate exercise of judicial power in the realm of legislative power."⁷²

While Justice Stewart was not at ease with the due process analysis suggested by Justices Durham and Zimmerman, neither could he follow the rational basis standard of equal protection as set forth by

66. *Id.* at 366.

67. *Id.* at 368-69. The defendant's position that the Utah Act was necessarily based on a malpractice insurance crisis and the need to protect the public treasury was referred to as "extraordinarily weak" by Justice Zimmerman. *Id.*

68. *Id.* at 369. He writes:

[W]hen the people are deprived of a right to recover actual out-of-pocket expenditures that have been or will be incurred because of the tortious conduct of another, the infringement upon the right to recover for harm to the person is far more severe and requires far more justification than when general damages for pain and suffering or punitive damages are restricted.

Id.

69. *Id.*

70. *Id.* at 373 (Stewart, J., separate opinion). "The statutory classifications must be reasonable . . . and the statute that creates the classification must in fact reasonably and substantially further the legislative purpose." *Id.* (quoting *Malan v. Lewis*, 693 P.2d at 672-73).

71. *Id.*

72. *Id.* "Justice Zimmerman fails to recognize that it is essentially equality before the law that equal protection principles further, and not the rationality of legislative ends and means as such." *Id.* In rebuttal, Justice Zimmerman wrote:

Justice Stewart is at pains to renounce any suggestion of "substantive due process". . . . If there is any doubt that equal protection concepts can be and are used to produce the same results on essentially the same grounds as a more straight-forward due process analysis, those doubts should be dispelled by comparing Justice Stewart's separate opinion with mine.

Id. at 367 n.1 (Zimmerman, J., concurring in Part) (citations omitted).

Chief Justice Hall and Justice Howe in the dissent.⁷³ His basic disagreement with the dissent was that he believed, as did Justices Durham and Zimmerman, that the open courts provision was at issue and, as such, the higher standard of review as set forth in *Malan* should be followed.⁷⁴ This analysis allows the court to be more flexible in its equal protection inquiry, the strictness of the approach "vary[ing] with the nature of the right or interest discriminated against."⁷⁵ Justice Stewart wrote that the right to full recovery under the open courts provision was "an important right that ought not to be discriminatorily abrogated or diminished unless there is a strong countervailing public interest."⁷⁶ The exercise of the strict scrutiny standard endorsed by the dissent, according to Justice Stewart, "would hobble legislative power in an unreasonable fashion in an area where strong competing interests have to be accommodated by legislative policy making."⁷⁷

In keeping with the flexibility built into the higher standard of *Malan*, Justice Stewart developed a hybrid "practically self-supporting" and competition test, taking into account the degree of public funding for a government-owned hospital and whether it directly competes with other private hospitals.⁷⁸ He noted that University Hospital received only 3.5% of its operating budget from the legislature, making it "practically self supporting."⁷⁹ In addition, University Hospital competes directly with other hospitals that do not have the benefit of a limitation on tort recovery, and the patient pays for hospital services rendered in either instance.⁸⁰ Because the defendants were unable to demonstrate that personal injury awards in Utah have been unduly large or were on the rise, the three-pronged analysis used by Justice Stewart⁸¹ led him to conclude that University Hospital should not be treated, as it was in *Frank*, as acting in a governmental function under the Utah Act.⁸² However, he did not allow his analysis to reach beyond the present case, because of his belief that "some community hospitals

73. *Id.* at 373 (Stewart, J., separate opinion).

74. *Id.* at 370. ("[I]t is plain that *Malan* applies a higher standard of review than the minimal standard that the Chief Justice applies.").

75. *Id.* at 372 (citing *Malan v. Lewis*, 693 P.2d 661, 674 n.17).

76. *Id.* at 373 (citation omitted).

77. *Id.*

78. *Id.* at 374.

79. *Id.*

80. *Id.*

81. *Three-Pronged Analysis*: The Court should look to what degree the public hospital: (1) receives private funding; (2) competes directly with private hospitals; and (3) charges for identical services as provided by private hospitals. *Id.*

82. *Id.* at 373-74. "There is no reason to conclude that the University Hospital would have any more difficulty in assuming these costs [providing insurance to cover full legal liability] than other major hospitals in Salt Lake City and its environs." *Id.* at 374.

might . . . be a governmental function.”⁸³

Justice Stewart’s conclusion provides some guidelines for evaluating the Utah Act. Specifically, the Utah Act is unconstitutional as applied to hospitals receiving public funding of less than 3.5%. Unfortunately, the issue remains unresolved as to where the line may be drawn between 3.5% and 100% public funding.

4. *Dissenting opinion*

Chief Justice Hall and Justice Howe adopted a rational basis standard of review under an equal protection approach in which they favored “allowing every reasonable presumption in favor of constitutionality.”⁸⁴ Their approach was based on the principle of separation of powers, placing the burden on the plaintiff to “prove abuse of legislative discretion beyond a reasonable doubt.”⁸⁵ They agreed with Justice Stewart that since the open courts provision or the due process clause issues were not challenged by the plaintiff, the court should not attempt to force a due process balancing analysis to resolve the issue.⁸⁶ Chief Justice Hall defends his approach, which was challenged by Justice Durham as one which “would virtually insure that the legislative action will be found constitutional under the [equal protection] rational basis standard,”⁸⁷ by relying primarily on federal constitutional law.⁸⁸

Justice Hall did not recognize the rights of the plaintiffs as rising to the level of the severely injured passenger’s right to recovery in *Malan*, stating that under the given circumstances in *Condemarin*, “any level of intermediate review is . . . inappropriate in this case.”⁸⁹ While deciding to not recognize the heightened standard of review for equal protection in *Malan* and arguing for the federal equal protection standard of review, Justice Hall seemed to be in conflict with the court’s holding in *Mountain Fuel Supply v. Salt Lake City Corporation*,⁹⁰ where it held:

State courts . . . have a long tradition . . . of being far less willing to

83. *Id.* at 372.

84. *Id.* at 377 (Hall, C.J., dissenting) (footnote omitted).

85. *Id.* (footnote omitted).

86. *Id.* at 378. Chief Justice Hall states that Justice Durham’s opinion “fashions and imposes a due process analysis in order to challenge the subject legislation. In doing so, it ignores established principles of judicial review to reach a desired result.” *Id.*

87. *Id.* at 357.

88. *Id.* at 378 (Hall, C.J., dissenting). He believes the rigid rational basis standard does not insure a finding that the legislation is constitutional, as suggested by Justice Durham. *Id.* (citing *Ryszkiewicz v. City of New Britain*, 193 Conn. 589, 479 A.2d 793 (1984)).

89. *Id.* at 384.

90. 752 P.2d 884 (Utah 1988).

find that legislative classifications underlying economic regulations are reasonable As a result, to pass state constitutional muster, a legislative measure must often meet a higher *de facto* standard of reasonableness than would be imposed by the federal courts.⁹¹

This higher standard, together with the suggested higher equal protection standard in *Malan*, suggests that perhaps the rational basis standard sponsored by the dissent may not be appropriate.

In *Malan*, the court reasoned that the Utah Guest Statute could not have served its stated purpose of promoting hospitality because, for one thing, "most drivers know nothing about the Guest Statute." Likewise, passengers not knowing the risks they are taking by accepting a ride, do not realize they are giving up rights against the driver of the car in the event of an accident.⁹² Under Chief Justice Hall's argument in *Condemarin*, he might well have upheld the Utah Guest Statute in *Malan*, where the court reasoned that the statute could not be justified based on the legislative fear of fraud and collusion on insurance companies.⁹³

There are some similarities between the facts in *Malan* and *Condemarin*. Both deal with statutes which discriminate against those seriously injured by tortious conduct.⁹⁴ Just as the passengers were unaware they were giving up their rights under the Utah Guest Statute, the plaintiffs in *Condemarin* were unaware that they were giving up important rights of recovery by transferring from a private to a governmental-owned hospital. Because the defendants were unable to establish support showing a malpractice insurance crisis, or demonstrate an inability of government-owned hospitals to purchase liability insurance to justify the Utah Act, it seems that had Chief Justice Hall and Justice Howe followed *Malan*, they would have joined the majority at least as far as Justice Stewart did.

IV. TRENDS IN OTHER STATES

The *Condemarin* decision demonstrates the difficulty courts have with the constitutional issues surrounding governmental immunity as applied to health care. The primary challenge in many instances is in-

91. *Id.* at 889 (citations omitted) (emphasis added).

92. *Malan*, 693 P.2d at 673. "[A driver's] hospitality in offering a ride is based on considerations that have nothing to do with the existence of the Guest Statute. Even if the Guest Statute encouraged drivers to offer rides, it would also discourage guests from accepting rides." *Id.*

93. *Id.* at 674.

94. *Id.* at 664 (Passengers paying for rides under the Utah Guest Statute preserved the right to full recovery, while non-paying passengers were completely barred from recovery unless intoxication or willful misconduct of the driver could be shown.).

interpreting "governmental function" within statutes. Any underlying constitutional issues will surface once the statutory or judiciary interpretation has been made.

A. *Governmental Immunity for Hospitals*

In 1986, the Michigan Legislature resolved the issue of indemnification for government-owned hospitals in Michigan, which had previously caused years of division in the Michigan Supreme Court. For example, the Michigan Supreme Court held in *Parker v. City of Highland Park*,⁹⁵ that since a hospital was "essentially a business . . . , there is no rational ground upon which immunity for a government-operated hospital can rest."⁹⁶ The court developed the "essence of government" test in resolving the question of what is a "governmental function."⁹⁷ This test is similar to the *Standiford* test, requiring an activity to be "of such a peculiar nature that it can only be performed by government."⁹⁸ The Michigan court was faced with another opportunity to interpret "governmental function" under its governmental immunity act in *Ross v. Consumers Power Company*,⁹⁹ which defined "governmental functions" as "whenever its activities are *expressly* or *impliedly* mandated or authorized by constitution, statute, or other law."¹⁰⁰ The Michigan Legislature later codified the *Ross* definition of "governmental function."¹⁰¹ Based on the latter definition, the Michigan court then held in *Hyde v. University of Michigan Board of Regents*,¹⁰² that the University of Michigan Hospital, as a public general hospital, was engaged in a governmental function and therefore immune under the state's operating governmental immunity statute.¹⁰³ In *Hyde*, the court considered two additional tests: the proprietary test¹⁰⁴

95. 404 Mich. 183, 273 N.W.2d 413 (1978).

96. *Id.* at 195, 273 N.W.2d at 417 (footnotes omitted).

97. *Id.* at 194-95, 273 N.W.2d at 416-17.

98. *Id.* This test was essentially overruled by *Ross v. Consumers Power Co.*, 420 Mich. 567, 363 N.W.2d 641 (1984). See *Hyde v. University of Mich. Bd. of Regents*, 426 Mich. 223, 257, 393 N.W.2d 847, 862 (1986). Justice Ryan, in his dissent in *Parker*, endorsed a "common good of all" test, which examines whether government activities of patient care are in the public's best interest. 404 Mich. at 203, 273 N.W.2d at 421 (Ryan J., dissenting).

99. 420 Mich. 567, 363 N.W.2d 641 (1984).

100. *Hyde*, 426 Mich. at 243, 393 N.W.2d at 855 (quoting *Ross*, 420 Mich. at 620, 363 N.W.2d at 661) (emphasis added). *Hyde* notes that the "governmental functions" definition "is broad and encompasses most of the activities undertaken by governmental agencies." *Id.* (quoting *Ross*, 420 Mich. at 621, 363 N.W.2d at 661).

101. *Id.* at 245, 393 N.W.2d at 856 n.16.

102. 426 Mich. 223, 393 N.W.2d 847 (1986).

103. *Id.* at 243, 393 N.W.2d at 856 (emphasis added).

104. 426 Mich. at 260, 393 N.W.2d at 864 (The proprietary test considers whether "the primary purpose of the activity is to produce a pecuniary profit and that the activity is not nor-

and the competition test.¹⁰⁵

The same year the Michigan Supreme Court decided *Hyde*, the Michigan Legislature amended the Government Tort Liability Act¹⁰⁶ to specifically exclude the "operation of a hospital or county medical care facility [and its] agents or employees."¹⁰⁷ This amendment was no doubt a welcome relief, since the holdings of the Michigan courts on this issue had become so unpredictable. Thus, Justice Williams suggested that those "possibly affected . . . had better seek protection either through insurance or through legislative redefinition."¹⁰⁸

The Kansas Supreme Court held over twenty years ago that governmental immunity for hospitals and medical personnel is inappropriate in *Carroll v. Kittle*,¹⁰⁹ where the University of Kansas Medical Center was not allowed immunity.¹¹⁰ The court reasoned that patients in government-owned hospitals should be able to expect the same standard of care as at private hospitals.¹¹¹ However, it should be noted that the court, in so abolishing governmental immunity, recognized the legislature's power to resurrect the doctrine later by statute.¹¹²

As early as 1952, the State of Florida held in *Suwannee County Hospital v. Golden*,¹¹³ that a statute purporting to render a public, nonprofit hospital corporation organized by the state immune from liability for negligence and torts of its officers, agents, and employees, in-

mally supported by taxes or fees.").

105. *Id.* at 255, 393 N.W.2d at 861 (The competition test considers whether the hospital "actively competes with other health care providers for both resident and nonresident patients.").

106. MICH. COMP. LAWS ANN. § 691.1407(4) (West 1986) (MICH. STAT. ANN. § 3.996(107)(4) (Callaghan 1986), cited in *Hyde v. University of Mich. Bd. of Regents*, 426 Mich. at 277, 393 N.W.2d at 871 n.1 (Archer, J., dissenting)).

107. *Id.*

108. *Murray v. Beyer Memorial Hosp.*, 409 Mich. 217, 224, 293 N.W.2d 341, 343 (1980) (Williams, J., concurring).

109. 203 Kan. 841, 457 P.2d 21 (1969).

110. *Id.* The court held:

Our forefathers did not fight the Revolutionary War because they were of [the] opinion [that "the king can do no wrong"]. Their reasoning was quite to the contrary. It is difficult for us to believe that they would carry over into their common law a principle so opposed to their basic belief.

Id. at 846, 457 P.2d at 26 (citing *Wendler v. City of Great Bend*, 181 Kan. 753, 316 P.2d 265 (1957)).

111. *Id.* at 850, 457 P.2d at 29. The court stated:

[A] patient who pays for professional services ought to be entitled to the same protection and the same redress for wrongs as if the negligence had occurred in a privately owned and operated hospital. *If the government is to enter into businesses ordinarily reserved to the field of private enterprise, it should be held to the same responsibilities and liabilities.*

Id. (emphasis added).

112. *Id.* at 847, 457 P.2d at 27.

113. 56 So. 2d 911 (Fla. 1952).

cluding doctors and nurses, was unconstitutional.¹¹⁴ Since that holding, numerous other states have followed, some courts abolishing the doctrine as established by the judiciary and others striking legislative statutes.¹¹⁵

B. Governmental Immunity in General

1. Judicially established immunity

Modern trends demonstrate a movement towards the abolition of governmental immunity. The Arizona Supreme Court overturned the judicially established governmental immunity doctrine in *Stone v. Arizona Highway Commission*,¹¹⁶ thereby abolishing any kind of damage limitations whatsoever.¹¹⁷ The Pennsylvania Supreme Court abolished its judicial government immunity doctrine, calling it a rule of law that has been "long since devoid of any valid justification"¹¹⁸ by imposing the "entire burden of damage resulting from the wrongful acts of the government . . . upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be born without hardship upon any individual, and where it justly belongs."¹¹⁹ The Alabama Supreme Court likewise abolished its judicial government immunity doctrine in *Jackson v. City of Florence*.¹²⁰ However, the Alabama court recognized the leg-

114. *Id.* at 913 (implying that equal protection rights of patients are endangered).

115. *Flagiello v. Pennsylvania Hosp.*, 417 Pa. 486, 493-94, 208 A.2d 193, 197 (1965) (*Judicial doctrine* of governmental immunity for government hospitals was abolished based on the rationale that government must accept the same risks as private business when taking on a business enterprise.); *Sides v. Cabarrus Memorial Hosp.*, 287 N.C. 14, 24, 213 S.E.2d 297, 303 (1975) (A hospital is liable in tort for negligent acts committed by its employees.) ("[T]he doctrine of immunity as applied to governmental hospitals is being increasingly abandoned by state courts.") (emphasis added); *Chandler v. Hospital Auth. of Huntsville*, 500 So. 2d 1012 (Ala. 1986) (A statute providing immunity for government-owned hospitals "unconstitutionally deprived tortiously injured hospital building authority patients of [the remedies] available to tortiously injured patients of other public health facilities."). But see *Dunlap v. University of Ky. Student Health Servs. Clinic*, 716 S.W.2d 219 (Ky. 1986) (A statute which protects government hospitals to the extent that they are covered under the University of Kentucky Medical Center Malpractice Insurance Act was constitutional.).

116. 93 Ariz. 384, 381 P.2d 107 (1963).

117. *Id.* at 387, 381 P.2d at 109 ("[W]hen the reason for a certain rule no longer exists, the rule itself should be abandoned."); see also *Nelson v. Maine Turnpike Auth.*, 157 Me. 174, 170 A.2d 687 (1961) ("[S]overeign immunity from tort liability has served its usefulness and ought to be destroyed.").

118. *Ayala v. Philadelphia Bd. of Pub. Educ.*, 453 Pa. 584, 587, 305 A.2d 877, 878 (1973) (citations omitted) ("In so doing, we join the ever-increasing number of jurisdictions which have judicially abandoned this antiquated doctrine.").

119. *Id.* at 592-93, 305 A.2d at 881 (quoting *Barker v. City of Santa Fe*, 47 N.M. 85, 88, 136 P.2d 480, 482 (1943)).

120. 294 Ala. 592, 320 So. 2d 68 (1975). "Alabama joins a growing number of states in

islature's authority "to enter the entire field, and . . . to provide with proper legislation any limitations or protections it deems necessary."¹²¹

2. Statutory governmental immunity

State courts, as a general rule, have an easier time abolishing governmental immunity as a judicial doctrine than when it is codified by statute.¹²² Issues of separation of powers often arise, as they did in *Condemarin*,¹²³ when courts consider striking legislative acts, which allow damage limitations or otherwise provide immunity for certain governmental entities, on constitutional grounds.

Recently, the Washington Supreme Court held that the state's 1986 Tort Reform Act,¹²⁴ which limited non-economic damages recoverable by personal injuries or wrongful death actions, was a violation of its citizens' right to a trial by jury, preserved under its state constitution.¹²⁵ In striking the statute, the Washington court held that "[t]he Legislature[s] . . . power to shape litigation . . . has limits," which do not extend into a jury's right to "the determination of the amount of damages."¹²⁶ The court had earlier expressed its disdain for damage limitations in *Hunter v. North Mason High School*,¹²⁷ when it held:

[W]e cannot uphold nonclaim statutes simply because they serve to

abolishing governmental immunity as to various governmental units." *Id.* at 599, 320 So. 2d at 74 (citations omitted). Wyoming and Missouri likewise abolished governmental immunity prior to 1980. *Oroz v. Board of County Comm'rs*, 575 P.2d 1155 (Wyo. 1978) (abolished for all claims arising after July 1, 1979); *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. 1977) (abolished as to all claims arising on or after August 15, 1978).

121. *Id.* at 600, 320 So. 2d at 75. See also *Davies v. City of Bath*, 364 A.2d 1269, (Me. 1976). "Although we may question the efficacy of a policy that allows a municipality to determine the extent of its own liability, it is not our duty to judge the wisdom of legislative enactments." *Id.* at 1271 (quoting *Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Ass'n*, 320 A.2d 247, 257 (Me. 1974)).

122. The Pennsylvania Supreme Court held that when a "controverted rule is not the creation of the Legislature[,] [t]his [c]ourt fashioned it, and, what it put together, it can dismantle." *Flagiello v. Pennsylvania Hosp.*, 417 Pa. 486, 503, 208 A.2d 193, 202 (1965).

123. "This principle, that we necessarily avoid addressing and striking down statutes pursuant to constitutional grounds, especially those not urged by the parties, honors the doctrine of separation of powers . . . and exists notwithstanding . . . the personal desires of this court or its justice to determine policy or rectify perceived wrong." *Condemarin*, 775 P.2d at 377 (Hall, C.J., dissenting) (footnote omitted). See also *Campbell v. Pack*, 15 Utah 2d 161, 389 P.2d 464 (1964). "[I]t should be left entirely to the legislature to determine whether the immunity should be removed; and as to what agencies; when effective, and to what extent, if any, limitations should be prescribed." *Id.* at 465.

124. WASH. REV. CODE § 4.56.250 (1986) cited in *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711 (1989).

125. *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711 (1989) (The Act was established "as a response to rising insurance premiums for liability coverage.").

126. *Id.* at 651, 771 P.2d at 719.

127. 85 Wash. 2d 810, 539 P.2d 845 (1975).

protect the public treasury. Absent that justification, there is no basis, substantial or even rational, on which their discrimination between governmental plaintiffs and others can be supported. They thus cannot stand under the equal protection clause of the Fourteenth Amendment to the United States Constitution.¹²⁸

A damage limitation statute in Virginia, limiting medical malpractice actions to \$1,000,000, was held unconstitutional as a violation of the plaintiff's right to a jury trial under the seventh amendment of the United States Constitution in *Boyd v. Bulala*.¹²⁹ In so doing, the federal district court held that "the legislature may [not] constrict the right to a jury trial."¹³⁰

The general rule for a court's power to strike down a statute was recited by the Kansas Supreme Court in *Kansas Malpractice Victims Coalition v. Bell*:¹³¹

Before a statute may be stricken down, it must clearly . . . violate[] the Constitution. Moreover, it is the court's duty to uphold the statute under attack, if possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done.¹³²

On this issue, Justice Stewart, in his separate opinion in *Condemarin*, referred again to *Malan* and stated, "the great latitude allowed the Legislature in making classifications under the minimal scrutiny standard is not appropriate when a constitutional right is discriminated against."¹³³ At least as applied to *Condemarin*, Justice Stewart agreed that the Utah Act could not withstand constitutional scrutiny.¹³⁴ However, striking the statute, as suggested by Justice Durham,¹³⁵ was a step beyond what Justice Stewart believed was necessary to resolve the issue before the court.¹³⁶ Rather than defending the Utah Act with the

128. *Id.* at 818-19, 539 P.2d at 850. "We follow a growing number of courts in holding that the arbitrary burden placed on state claimants by this type of statute cannot withstand constitutional scrutiny." *Id.* at 850-51.

129. 672 F. Supp. 915 (W.D. Va. 1987).

130. *Id.* at 921. The court explained that the history of the Seventh Amendment of the U.S. Constitution demonstrates that "the right to a civil jury trial was intended to serve as an important check upon the legislature and the judiciary." *Id.* at 919.

131. 243 Kan. 333, 757 P.2d 251 (1988).

132. *Id.* at 340, 757 P.2d at 256-57. *But see* Suwannee County Hosp. v. Golden, 56 So. 2d 911 (Fla. 1952). "An enterprise is not governmental in character simply because the government enters it or the Legislature declares it so. Whether it be governmental or proprietary depends on the nature of the business and the determination of the courts." *Id.* at 913.

133. *Condemarin*, 775 P.2d at 373 (Stewart, J., separate opinion) (citing *Malan v. Lewis*, 693 P.2d at 669 (Utah 1984)).

134. *Id.* at 375.

135. *Id.* at 364.

136. *Id.* at 374 (Stewart, J., separate opinion).

kind of zeal suggested above by the Kansas Supreme Court, Justice Zimmerman believed the court "should give the legislation and its justifications careful scrutiny to assure that redress of legally cognizable injuries is not unreasonably impaired."¹³⁷ Meanwhile, Justice Hall would have followed the admonition of the Kansas Supreme Court and left the entire matter in the hands of the legislature.¹³⁸

V. CONCLUSION

It is unfortunate that the justices were so divided as to the rights of the injured plaintiffs in *Condemarin*. The court's objective in adopting the *Standiford* test was to "allow more innocent victims injured by tortious conduct on the part of public entities access to the courts for redress."¹³⁹ While this objective is praiseworthy, the fact remains that patients suffering severe injuries in government-owned hospitals in Utah have few, if any, guarantees for a full recovery. Prior to assuming public office, former Utah Attorney General David L. Wilkinson believed the Utah Act as amended in 1978 was "unconstitutional on its face" for denying an injured person a remedy in violation of the open courts provision.¹⁴⁰ Had the plaintiffs in *Condemarin* not been transferred to the government-owned University Hospital and the negligence taken place at the private Cottonwood Hospital, they would have preserved the right to full recovery for any tort committed by Cottonwood Hospital and its employees. However, the transfer to University Hospital essentially stripped the plaintiffs of any recovery above the damages limitation. Therefore, while the plaintiff would have had a full remedy under the law in one instance, such remedy was denied in the second.¹⁴¹

While the result of the court's decision in *Condemarin* was equitable in light of the plaintiff's circumstances, the result gives little guidance to future plaintiffs injured in government-owned hospitals and health care centers. It should, however, put government-owned hospi-

137. *Id.* at 368 (Zimmerman, J., concurring) (suggesting the Utah Act be stricken).

138. *Id.* at 386 (Hall, J., dissenting) (citations omitted). "It is the legislature's function to structure statutory provisions capable of protecting the public interest by fairly and reasonably reimbursing victims while maintaining governmental services by realistically evaluating the financial burden to be placed on the taxpayers." *Id.*

139. *Standiford v. Salt Lake City Corp.*, 605 P.2d 1230, 1237 (Utah 1980).

140. Wilkinson, *The Utah Governmental Immunity Act as Amended by House Bill Number 14*, 6 UTAH B.J. 27, 32 (Fall-Winter 1978).

141. The unfairness of the Utah Act under the circumstances of *Condemarin* prompted Justice Durham to address the need for preserving a high standard of care in medicine, whether it be practiced by the government or in the private sector. *Condemarin*, 775 P.2d at 364. "[D]eterrence-related concerns . . . have traditionally been viewed as central to influencing the behavior of medical professionals." *Id.*

tals on notice that the damage caps and individual immunity they have enjoyed under the Utah Act for the past twelve years may be in jeopardy. The Utah court has demonstrated the difficulty in upholding a statute, such as UTAH CODE ANN. § 63-30-3, which specifically protects one sector of a service industry while allowing it to compete directly with the private sector.

The next plaintiff challenging the Utah Act under similar circumstances has much to consider. If, for example, a due process challenge would have been made based on the open courts provision, it is quite possible that the court may have come together under its *Berry* analysis, resulting in a decision providing more clarity to the issues presented in *Condemarin*. Whether the dissent would have been open to a due process approach under *Berry* is very unclear. In addition, although Justice Stewart did not favor such an approach in *Condemarin*,¹⁴² he may be more open to a due process analysis if the issue is raised unambiguously by the parties.

The constitutional rights potentially infringed upon under damage limitation statutes, such as the Utah Act, will likely continue to test state courts around the country. When these issues reach the Utah Supreme Court again, Justice Stewart may provide the swing vote if an equal protection argument surfaces, depending on the outcome of his hybrid "practically self-supporting" and competition test.¹⁴³

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142. *Condemarin*, 775 P.2d at 369 (Stewart, J., separate opinion).

143. *Id.* at 374.