

1996

Joseph Ralph Warren v. John Melville : Brief of Appellant

Utah Court of Appeals

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R. Phil Ivie; David N. Mortensen; Ivie & Young; Attorneys for Appellee.

Gary Pendleton; Attorney for Appellant.

Recommended Citation

Brief of Appellant, *Warren v. Melville*, No. 960361 (Utah Court of Appeals, 1996).

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IN THE UTAH COURT OF APPEALS

JOSEPH RALPH WARREN,)

Plaintiff and Appellant,)

vs.)

Case No. 960361-CA

JOHN MELVILLE,)

Defendant and Appellee.)

Priority No. 15

BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF DISMISSAL
ENTERED IN THE FIFTH JUDICIAL DISTRICT COURT,
IN AND FOR WASHINGTON COUNTY, JAMES L. SHUMATE PRESIDING

Gary W. Pendleton (2564)
150 North 200 East, Suite 202
St. George, Utah 84770
Tel: (801) 628-4411

Attorney for Plaintiff/Appellant

R. Phil Ivie
Jeffrey C. Petross
David N. Mortensen
IVIE & YOUNG
48 North University Ave.
P. O. Box 657
Provo, Utah 84603
Ph: (801) 375-3000

Attorneys for Defendant/Appellee

FILED
Utah Court of Appeals
SEP 11 1996
Marilyn M. Branch
Clerk of the Court

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IN THE UTAH COURT OF APPEALS

JOSEPH RALPH WARREN,)

Plaintiff and Appellant,)

vs.)

Case No. 960361-CA

JOHN MELVILLE,)

Defendant and Appellee.)

Priority No. 15

BRIEF OF APPELLANT

APPELLATE JURISDICTION

Jurisdiction to hear this appeal is conferred upon the court of appeals by provision of Utah Const. Art. VIII, §5 and Utah Code Ann. §78-2a-3(2)(k).

NATURE OF THE CASE

Plaintiff initiated a suit for general damages arising out of injuries sustained in an automobile accident. The Fifth Judicial District Court, the Honorable James L. Shumate presiding, dismissed the action on defendant's motion for summary judgment on the grounds that plaintiff's claim did not satisfy the threshold requirements of Utah Code Ann. §31A-22-309(1). Plaintiff appeals contending that the statute denies plaintiff constitutionally protected remedies, equal protection, and due process of law.

STATEMENT OF ISSUE

Does the statutory threshold of the Utah no-fault automobile insurance law¹ violate sections 7, 11, and 24 of Article I of the Utah Constitution? This issue was clearly preserved in the district court (R 0041-0101).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The texts of the following are reproduced in the addendum: Magna Carta of King John, 1215; Statute of Mag. Cart. cap. 29, 1297; Utah Const. Art. I, §§7, 11, and 24; and Utah Code Ann. §31A-22-309(1).

STATEMENT OF THE CASE

Plaintiff was injured in the course of his employment when the automobile he was driving was struck broadside by an automobile driven by defendant. He was transported by ambulance to Dixie Regional Medical Center where he was treated and later released. (R 0001-0002, 0033-0036).

As a consequence of his injuries, plaintiff lost seven days' work and underwent physical therapy for over four months. He incurred medical expenses in the amount of \$2,583.56 which were paid by his employer's workers' compensation insurance carrier. The carrier also paid plaintiff \$152.15 as compensation for his \$810.51 loss in earnings. (R 0033-0036).

Plaintiff sued defendant for general damages. Plaintiff conceded that his medical expenses would not exceed \$3,000. He alleged no dismemberment, disfigurement, or permanent disability (R 0001-0002).

¹All statutory references herein are to the Utah Code Annotated. The provisions of chapter 22, Title 31A and chapter 12a, Title 41 will sometimes be collectively referred to as "the no-fault statutes."

Defendant moved for summary judgment contending that plaintiff could not maintain a cause of action because his claim did not satisfy the threshold requirements of section 31A-22-309(1) (R 0030-0032). The district court granted defendant's motion and dismissed plaintiff's complaint (R 0153-0154).

SUMMARY OF ARGUMENT

The right to recover damages for personal injury caused by another's negligence was recognized at the common law in existence when the Utah Constitution was framed. This and other common law remedies that were available at that time establish a level of "substantive protection" which must be extended to the citizens of this state against injuries to one's person, property, and reputation suffered as a consequence of the wrongful act or omission of another.

Absent the need to eliminate a "clear economic or social evil," these rights cannot be abrogated unless a substantially equal substitute remedy is provided. The no-fault statutes provide no such remedy. Moreover, the socio-economic problems that are addressed by the no-fault statutes cannot be reasonably characterized as "evils." The abrogation of the common-law remedy for personal injury is an unreasonable means of attempting to achieve the goals identified in the legislation.

Finally, the no-fault statutes violate principles of equal protection by arbitrarily shifting the burden of attempting to reduce automobile insurance premiums to those who suffer sub-threshold personal injuries. A statutory classification which abolishes some remedies for personal injury and preserves others is subject to "heightened scrutiny" because the rights involved are constitutionally protected.

ARGUMENT

POINT I

UTAH'S NO-FAULT STATUTES EXTINGUISH COMMON-LAW REMEDIES FOR SOME PERSONAL INJURIES.

At common law a person has a duty to use reasonable care to avoid injuring other persons. See Malan v. Lewis, 693 P.2d 661, 673 (Utah 1984). The common law provides one who suffered personal injury as the result of another's negligence a remedy in money damages. The remedy includes compensation for pecuniary losses; pain, discomfort, and suffering, both physical and mental; and disruption of the ordinary affairs of life. See Judd v. Rowley's Cherry Hill Orchards, 611 P.2d 1216 (Utah 1980).

By provision of part III, chapter 22, Title 31A, and part III, chapter 12a, Title 41, Utah Code Annotated, 1953 as amended, a person who has or is required to have direct benefit coverage under a policy of automobile liability insurance may not maintain a common-law cause of action for general damages for personal injury sustained in an automobile accident unless a statutorily defined threshold is satisfied. Section 31A-22-309(1) effectively extinguishes all claims for any such injuries unless one of the following occurs as a consequence thereof: (a) death; (b) dismemberment; (c) permanent disability or impairment; (d) permanent disfigurement; or (e) the individual incurs medical expenses in excess of \$3,000.

POINT II

LEGISLATIVE POWER TO ABROGATE TRADITIONAL REMEDIES IS SUBJECT TO LIMITATION.

A.

HISTORICAL BACKGROUND

To a large extent the development of the English common law has been a process of identifying, and declaring the legal enforceability of, rights and remedies which were recognized under "the custom of the realm." The common law was neither edict nor political mandate. It was an incident of the culture, a reflection of the "collective conscience," rather than a product of political dynamics within the culture.² "Springing from the very nature of the people themselves, and developed in their own experience, it was obviously the body of laws best adapted to their needs. . . ." Cooley, Constitutional Limitations (6th ed.) 32.

"Originally the purpose of general statutes was mainly to declare and reaffirm . . . common-law principles . . . that king and subject alike might understand and observe them." Id. at 33-34. Such was the purpose of "the first great statute," exacted sword in hand as "the confession of the king" who in that day held the legislative power: the king by "Divine Right" confessing our "native and original liberties" by the execution of a document now known as Magna Carta. See id. at 34.

At least as early as the mid-seventeenth century, there was substantial support for the proposition that Magna Carta was a confirmation of the common law. See A. Pallister, Magna Carta, The Heritage of Liberty (Oxford 1971) 9-11. Sir Edward Coke

²The phrase "collective conscience" comes from Griswold v. Connecticut, 381 U.S. 479, 493 (1965)(Goldberg, J., concurring), where it is used to indicate a deep-rooted public consensus regarding the fundamental nature of a principle or an individual right.

contended that in executing Magna Carta the Crown had conceded the prerogative to abrogate common-law principles. Other legal scholars resisted the notion that vulgar custom could become the measure of the power of the monarchy which was itself "the only legally constituted and divinely ordained authority in society." Id. at 24. Law did not exist in the absence of superior authority to command obedience. See id. at 24-25.

In the parliament of 1628, Lord Coke, who had previously served as Chief Justice of Common Pleas and King's Bench and was then a member of the Country opposition, together with other members of parliament drafted a petition asking Charles I not to levy taxes without consent of parliament, not to imprison his subjects without due cause being shown, not to billet soldiers in private homes, and not to put civilians under martial law. This would later become known as the Petition of Right. Coke's legal premise was the so-called Maxim: "The Common-Law hath admeasured the King's prerogative." See id. at 9-10. This was nothing short of an assertion that the common law had attained constitutional stature. See id. at 9-11, 20-23.

Charles granted the petition but only because he needed parliamentary approval of the funding of his war against Spain. Beginning in 1629, he would undertake a policy of personal rule. Parliament would not meet again until 1640 and civil war would follow almost immediately thereafter. The Petition of Right would take its place in the history of the English constitutional tradition and be received, like Magna Carta, with ambivalence which may be attributed in part to its ignominious genesis and in part to the fact that Magna Carta and the Petition of Right are acknowledgments of the king's sovereignty, representing nothing more than concessions he has made to his subjects. See The Federalist No. 84, p. 464 (M. Chadwick ed. 1987)(A. Hamilton).

Some legal writers contend that Coke had suggested that Magna Carta also

placed limitations upon parliament's power to alter or abolish the common law. In 1610, Coke wrote his famous dictum in *Dr. Bonham's Case*:

And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.

8 Co.Rep. 113 b, 77 Eng. Rep. 646 (K.B. 1610). Other scholars have concluded that Coke was actually an advocate of "parliamentary sovereignty." See Pallister at 46 n. 4 (accompanying text). It is probably more accurate to say that Coke regarded parliament as the protector of the common law against royal despotism. See id. at 48. In Coke's day, the apparent threat to the rights of Englishmen was the ambition of the Stuarts, not parliament.

In the late seventeenth century, Cokean stress on parliament's duty as the protector of the common law found an ally in John Locke. See id. at 48-49. Locke was an English philosopher in the natural law tradition. Under his social compact theory, government is a fiduciary established for the protection of "life, liberty and estate." In the implied compact with his government, the citizen has a reciprocal duty of loyalty so long as the government keeps its part of the bargain. The people extend the power to govern and retain the right to withdraw it. Although the differences between Locke's social compact and Cokean theory were fundamental, both hampered development of the doctrine of parliamentary sovereignty. Id.

From the earliest colonial days, British colonists in America claimed the benefit and protection of the common law. In a contest with the home government, the ability to demonstrate that the common law conferred the rights which they claimed became "a source of immense moral power." See Cooley at 34-35. They wanted to be treated as Englishmen, to be "the inheritors of the Common Law, the Common Law as Coke and the

older jurists understood it." See J.Wu, Natural Law and Our Common Law, 23 Fordham L.Rev. 13, 38-39 (1954).

The Americans would eventually throw off the government and abandon the monarchy and the parliamentary system, but we would keep "the best birth-right the Subject hath" -- the common law tradition. European nobility would describe America as an asylum where the inmates were in charge. We, on the other hand, would conduct ourselves as though we had laid claim upon the inheritance of the firstborn.

In America, "WE, THE PEOPLE" are the sovereign. We "ordain and establish" the constitutions by which we delegate "sovereignty" to the state and federal governments in such measure as we establish. See The Federalist No. 84, p. 464 (M. Chadwick ed. 1987)(A. Hamilton). These governments exist at the sufferance of the people, in whom "[a]ll political power is inherent. . . ." Utah Const. Art. I, §2.

Under our federalist system, the federal sovereign is a government of "enumerated powers." It is not the prerogative of Congress to establish general property or tort law. See U.S. Const. Art. I, §8 and Amend. 10. Moreover, to the extent there is a "federal common law,"³ it does not undertake to define interpersonal rights and remedies. See generally, 32 Am Jur 2d, Federal Practice and Procedure §§310-319. It is state law which embraces the common-law principles, usages, and rules of action which in themselves are sufficient to the government and security of persons and property. To the extent the American and the English systems of government are comparable, the parallel is one existing between the British Parliament and the state legislature. Congress has no counterpart in the

³In the strictest sense, there is no federal common law. In the absence of congressional legislation, there is no body of federal law other than the Constitution. Even in those areas which fall within the "enumerated powers" of the federal government, the state law, common and statutory, will govern unless supplemented or preempted by an act of Congress. See 32 Am Jur 2d, Federal Practice and Procedure §303.

English system. See 16 Am Jur 2d, Constitutional Law §10.

Ironically, American constitutional law has become so "federalized" that we have come to think of the limitations placed upon government by the Fifth and Fourteenth Amendments as the measure of the power of the various state legislatures. See generally, Schuman, The Right to a Remedy, 65 Temple L.Rev. 1197 (1992); Note, State Constitutional Remedy Provisions, 62 Wash.L.Rev. 203, 208-11 (1989); Note, The Constitutionality of Statutes of Repose: Federalism Reigns, 38 Vand.L.Rev. 627 (1985). The validity of state legislative enactments has come to be judged almost exclusively in terms of federal due process and federal equal protection. The Cokean doctrine of limitation upon the sovereign's power modify or abolish common-law rights and remedies no longer plays a significant part in modern American state constitutional law. Indeed, the right to "defend" our "rights" in the legislative process has become the swallow political legacy of a rich legal heritage. The tyranny of the majority -- and worse, of special interest -- has become the hallmark of our democratic republic.⁴

B.

DUE PROCESS OF LAW

Federal "Substantive Due Process." What we now commonly refer to as "substantive due process" was the progeny (or a vestige, depending on one's point of view) of the natural law tradition. See 16 Am Jur 2d, Constitutional Law §442. See also, Corwin, The Debt of

⁴While the framers of the federal constitution appreciated the fact that it was important "not only to guard society against the oppression of its rulers, but to guard one part of society against the injustice of the other part," they assumed that the fractionalization of the society under the proposed federation would virtually eliminate "danger from interested combinations of the majority." The Federalist No. 51, p. 283 (M. Chadwick ed. 1987)(J. Madison). Indeed, "popular sovereignty" can be as intolerable as any other form of despotism when one is a stranger to any part of the political power.

American Constitutional Law to Natural Law Concepts, 25 Notre Dame L.Rev. 258 (1950).

Government, whatever its form, does not create individual rights any more than does the physician give life. "Rights" which are created can as easily be extinguished. Fundamental rights are inalienable. Neither the government nor any branch thereof can establish a law which impairs the free exercise of conscience, abrogates the right to acquire and control property, or denies any citizen the protection of his person. Such is the philosophy of the natural law.

The language of the Declaration of Independence is overflowing with natural law and social compact concepts. However, it would soon become apparent that the recognition of law which is higher than the will of the popular sovereign was an impractical, if not impossible, undertaking in a tripartite democratic republic. Right and wrong, good and evil, virtue and vice are defined by our customs, traditions, religious tenets, personal ethics, biases, and even prejudices. Who, in our constitutional system of separated powers, is to be arbiter of our "collective conscience"?

[S]ome speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under [a constitutional scheme allocating powers without explicit limitations], any Court of Justice would possess power to declare it so. . . . [I]t has been the policy of all the American states, which have, individually, framed their state constitutions since the revolution, and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. . . . If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

Calder v. Bull, 3 Dall. 386, 398-99 (1798) (Iredell, J.). This would be only the beginning of the debate in the United States Supreme Court.

Those who sought express limitations upon legislative authority contended that they had found them in the due process clauses of the Fifth and Fourteenth Amendments. See Grant, The Natural Law Background of Due Process, 31 Col.L.Rev. 56 (1931). Lord Coke had drawn a parallel between the phrase "due process of law" and Magna Carta's "law of the land" which language, according to Coke, was an invocation of the common law tradition. E.g. Jensen v. Union Pac. Ry. Co., 6 Utah 253, 255-56, 21 P. 994, 995 (1889). Federal and state courts used the Fifth and Fourteenth Amendments to strike down statutes on federal substantive due process grounds long before federal procedural due process became the standard in state court criminal proceedings.

However, federal substantive due process lost the support of the federal judiciary during the Great Depression. Nebbia v. New York, 291 U.S. 502, 532 (1934), taught us that, under the federal constitution, there was nothing "sacrosanct about the price one may charge for what he makes or sells." The same thing could have been said of most of the "rights" which we as Americans, in our shared delusion, assume to be within the embrace of some federal constitutional protection.⁵

In Barron v. Baltimore, 7 Pet. 243 (1833), Chief Justice Marshall noted:

The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its

⁵The United States Supreme Court's relatively recent revival of federal substantive due process in the interest of defining the "collective conscience" on issues of privacy and personal autonomy has again fueled the debate over this "undisciplined" doctrine of judicial review. See In re J.P., 648 P.2d 1364, 1375 (Utah 1982).

judgment dictated.

Id. at 247. And yet, when the state legislature's judgment does not comport with our own perception of the "collective conscience," we scour the federal constitution like disinherited children seeking support for the proposition that it places limitations upon the Legislature's prerogative to define substantive law. "We search in vain. . . ." Id. at 249.

State Substantive "Due Process." Our state constitution was drawn as the charter of a sovereign possessing general police power. It is the product of an era filled with notions of "natural justice" and the "higher law" as well as Cokean integration of the common law into Magna Carta which persisted long after governmental powers were allocated by written constitutions.

Less than six years before the Utah Constitution was drafted, the Utah Supreme Court decided Jensen v. Union Pac. Ry. Co., supra. In that case plaintiff brought an action against defendant railway company for the value of two horses killed on defendant's tracks. Although the jury made a special finding that the defendant was guilty of no negligence, the trial court entered judgment in favor of the plaintiff in accordance with a statute which imposed absolute liability upon a railway company for the loss of livestock injured or killed "by running an engine."

After quoting the due process clause of the Fifth Amendment, the territorial supreme court briefly discussed the parallel Coke had drawn between the phrase, "due process of law," and Magna Carta's "liberty clause" which the court described as, "[f]or more than 600 years[.]. . . the sheer-anchor of the liberty of the English-speaking people." 6 Utah at 255, 21 P. at 995. In so doing, the court laid its premise for the following conclusion:

When the Charter was signed by the King of England it must be borne in mind that there was then existing the common law of that country,

which prescribed regular and consistent forms and methods of judicial procedure for the administration of distributive justice, and it is in the light of this common law that the quotation is to be interpreted.

Id. at 256, 21 P. at 995.

The court conceded that the legislature may properly exercise the police power by requiring a railway company to fence its tracks and may impose penalties for failure to comply. See id. at 257, 21 P. at 995. Nevertheless, the court rejected the statutory redistribution of interpersonal rights and duties as violative of the due process clause, noting that in departing from the common law, the statute operated so as "to take from the defendant company the right of way over its track, and confer it upon the cattle and horses." Id.

Jensen is actually a federal substantive due process case. Not only was it based on federal law, it was decided before statehood. Whatever the validity of any criticism of that decision, the fact remains that it was in harmony with legal thought of the era in which our state constitution was debated and adopted. With that constitution would come substantive rights of constitutional stature. However, the full significance of Article I, section 11 of the Utah Constitution would not become apparent until long after the courts had abandoned federal substantive due process.

In March 1895, the delegates to the Utah Constitutional Convention assemble in Salt Lake City. While the Convention is debating the necessity of including a constitutional provision "granting" the state the power of eminent domain and the efficacy of a proposed provision "authorizing" the taking of private property for certain private uses, Mr. Charles S. Varian addresses his fellow delegates at length. Mr. Varian lays his premise by authoritatively demonstrating that the power of eminent domain is an "incident of

sovereignty" and "requires no constitutional recognition." Official Report of Proceedings and Debates of the Convention: 1895 at 641-42. He then delivers an oration on the fundamental nature of individual property rights.

It is possible . . . that the whole people in constitutional convention assembled might enact an act of confiscation, which that would be, if compensation was not provided; but we must also admit that it would be so foreign to the entire temper and disposition of the people of the United States, that it could not be maintained; public sentiment would not maintain it, and it is at least questionable at this time whether the courts themselves would not override the constitutional enactment, upon the ground that it was contrary to all natural law and an interference with vested rights that the present age would not permit.

. . . .

Why, the very object of this government, the primary object, is the protection of life, liberty, and property. Property stands upon the same plane with life and liberty. It is simply, as it is affirmed in the opening statement of this very preamble and declaration of rights, a reaffirmation of what has always been in this country and in England since the days of magna charta. . . . [A] constitution is not beginning of government. Government existed before the constitution. It is not the origin of all these rights, or privileges if you please, that are affirmed and declared in it and are protected in it or by it.

Id. at 642-43.

Sections 7 and 11, Article I of the Utah Constitution, as approved by the Convention and as they remain today, declare:

No person shall be deprived of life, liberty, or property, without due process of law.

All courts shall be open, and every person, for an injury done to him in his person, property, or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel any civil cause to which he is a party.

The language of these sections "has come to us with the approval of the ages."

Official Report at 305. It has its roots in the Magna Carta of King John. See Addendum.

The 1297 confirmation of magna carta provides the textual framework of Lord Coke's

Second Institute in which we find the following in the gloss of chapter 29:

Nulli negabimus, aut differemus, &c.] These words have been excellently expounded by latter Acts of Parliament, that by no means common right, or Common law would be disturbed, or delayed, no, though it be commanded under the Great seale, or Privie seale, order, writ, letters, message, or commandment whatsoever, either from the king, or any other, and that the Justices shall proceede, as if no such Writs, letters, order, message, or other commandment were come to them.

That the Common lawes of the Realme would by no means be delayed, for the law is the surest sanctuary, that a man can take, and the strongest fortresse to protect the weakest of all;

. . . .

Justitiam vel rectum.] We shall not sell deny, or delay, Justice and right, neither the end, which is Justice, nor the means, whereby we may attain to the end, and that is the law.

. . . .

It is called Right, because it is the best birth-right the Subject hath, for thereby his goods, lands, wife, children, his body, life, honor, and estimation are protected from injury, and wrong.

Coke, Second Institute at 56 (textual Latin deleted).

There is no provision in the federal constitution which can be considered a counterpart of section 11. Many state constitutions include similar sections, but most of them have been treated as though they were dunnage. However, Utah's judiciary has always recognized the fact that section 11 has a purpose and dimension which is not fully embraced within the concepts of procedural due process and equal protection.

In 1915, the Utah Supreme Court was required to construe Article I, section 11, apparently for the first time. In Brown v. Wightman, 47 Utah 31, 151 P. 366 (1915), the plaintiff had been shot and maliciously wounded by an assailant who immediately thereafter

turned the weapon on himself. The district court dismissed plaintiff's action against the estate because at common law the cause of action abated upon the death of the tort-feasor. While recognizing that rule was a harsh one, the court held that section 11 did not mandate any remedy which was not available at common law.

The courts have, however, always considered and treated those provisions, not as creating new rights, or as giving new remedies where none otherwise are given, but as placing a limitation upon the Legislature to prevent that branch of the state government from closing the doors of the courts against any person who has a legal right which is enforceable in accordance with some known remedy.

Id. at 34.

On the same day Brown v. Wightman was decided, the supreme court also handed down Lewis v. Pingree Nat'l Bank, 47 Utah 35, 151 P. 558 (1915), which, without citing a specific section, included the following dictum: "Under our Constitution, a right of action exists for any injury or damage to private property, and neither the Legislature nor the municipalities can interfere with that right. . . ." Id. at 53.

In 1968, Congress authorized the department of transportation to conduct a survey of the constitutionality, under the various state constitutions, of a no-fault automobile insurance plan which had been proposed by the American Insurance Association. Part of that survey appears as a note entitled "No-Fault Automobile Insurance in Utah -- State Constitutional Issues," published at 1970 Utah L.Rev. 248.

The Note discusses numerous sections of the state constitution at length. When the author turns his attention to Article I, section 11, he states: "On its face, this constitutional clause would appear to invalidate the AIA plan because the plan denies an injured party a right of action for pain and suffering. . . ." Id. at 266. Then citing Brown v. Wightman, supra, as authority, the Note concludes: "If a cause of action does not exist at

law for pain and suffering, . . . this section of the Utah constitution neither creates a cause of action for such injuries nor prevents a bar to suit in these situations." Id. After less than one page of discussion, the author dismisses section 11 as any constitutional impediment to the AIA plan, concluding that the Legislature could effectively abrogate any legal remedy for personal injuries which have not already been suffered.

Once an injury is suffered as the result of another's wrong, the injured party possesses a chose in action -- a property right which cannot be arbitrarily extinguished. In substance and effect, the author of the Note suggests that the right to legal protection of one's person can be extinguished until such time as that right is converted into a property interest, which apparently enjoys greater stature than does the right to the protection of one's person. The Utah No-Fault Automobile Insurance Act was enacted in 1973 and became effective January 1, 1974.

In 1984, section 11 was applied in striking down a statute which had purported to abolish a common-law cause of action. In Malan v. Lewis, supra, the Utah Supreme Court held the Utah Automobile Guest Statute unconstitutional as a denial of equal protection in violation of Article I, section 24 of the Utah Constitution. Section 11's role in the analysis was that of giving constitutional stature to the rights which had been abrogated by the guest statute and thereby to heighten the level of judicial scrutiny applied under a state equal protection analysis. Malan v. Lewis is discussed further under "State Equal Protection," infra.

In Berry v. Beech Aircraft, 717 P.2d 670 (Utah 1985), the Utah Supreme Court, in reviewing the constitutionality of Utah's product liability statute of repose, finally gave Article I, section 11 "its due." The court concluded that

the framers of the Constitution intended that an individual could not

be arbitrarily deprived of effective remedies designed to protect basic individual rights. A constitutional guarantee of access to the courthouse was not intended by the founders as an empty gesture; individuals are also entitled to a remedy by "due course of law" for injuries to "person, property, or reputation."

Id. at 675.

Berry went on to say that the open courts provision is not primarily concerned with the preservation of particular remedies but rather with "the availability of legal remedies for vindicating the great interest that individuals in a civilized society have in the integrity of their persons, property, and reputations." Id. at 677 n. 4. Although section 11 does not "freeze" the law governing private rights and remedies as of the time of statehood, the common-law rights and remedies of that era provide "at least a measure of the kinds of legal rights" the framers had in mind for the protection of one's person, property, and reputation. See id. at 676 n. 3. Section 11 is more than a philosophical statement. See id. at 676. It is a state constitutional mandate embracing an identifiable body of fundamental law.

Berry gave us a two-part analysis. First, legislation that abolishes a cause of action, which has traditionally provided vindication of the individual's interest in the integrity of his "person, property, or reputation," will survive judicial scrutiny under section 11 "if there is a clear social or economic evil to be eliminated and the elimination of an existing legal right is not an arbitrary or unreasonable means for achieving the objective." Id. at 680. Plaintiff would characterize the socio-economic conditions which would legitimize this type of legislative action as "great conflagrations and calamities."⁶

⁶Consider the following insight from the Utah Constitutional Convention which, although presented by way of debate on a property rights issue, provides a valid allegory of the principles underlying the "clear social or economic evil" part of the Berry analysis.

Second, a traditional cause or remedy can be abolished even if there is no necessity of addressing "a clear social or economic evil," provided the legislation establishes an effective and reasonable substitute remedy. See id.

The benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated in providing essentially comparable substantive protection to one's person, property, or reputation, although the form of the substitute remedy be different.

Id.

Plaintiff would characterize legislation of this nature as "political tinkering." It gives society the flexibility, even where traditional rights and remedies are involved, to repair, adjust, or experiment with our system of distributive justice based upon nothing more than political considerations. The legislative decision to abolish a traditional remedy need not be justified or even rationalized so long as the legislation provides a substitute remedy "substantially equal in value or other benefit."

In substance and effect, the open courts provision establishes a minimum level of "substantive protection" which the law of this state, absent "great conflagrations and calamities," must extend to the individual for the vindication of injury to his person, property, and reputation. This standard is established by reference to the common law remedies

It is impossible for any American citizen to admit for a moment that the power lies anywhere in a legislative body or in the people themselves to invade the ownership of private property to the extent that it may be taken, even for public use, without compensation; and of course that principle is always accompanied with another, that in cases of supreme necessity, when the laws are silent, when the necessities of the entire community require different action, it is not applicable then. As an instance it may be illustrated in cases of great conflagrations and calamities of that kind, which have overtaken and may be expected to overtake large communities; when a great fire eats away and destroys cities, the government may step in on such occasions and may arrest the progress of the flames, or attempt to do so, by destroying private property, for the benefit of the public, and unless there is a statute providing for it, no man is liable and no compensation need be made. But, we are not dealing with exceptional cases, we are dealing with the general principles. . . .

Official Report at 642 (by Mr. Varian).

which were recognized when the Utah Constitution was framed.

Berry places Utah among those states which hold that the open courts clauses give common-law rights and remedies constitutional stature. See generally, Note, Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts, 63 Neb. L.Rev. 150, 170-78 (1983). Like Berry, decisions from these jurisdictions indicate that the protection provided does not require recognition of particular remedies. But, unlike our supreme court, the courts in some of these jurisdictions have held that the constitutional mandate is satisfied by the provision of a "reasonable substitute." See Gentile v. Altermatt, 169 Conn. 267, 363 A.2d 1 (1976); Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974). Other courts indicate that the substitute remedy must provide "adequate quid pro quo." See e.g., Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982). Moreover, some opinions declare that the quid pro quo analysis includes the benefit of prompt recovery under one's own policy and the potential benefit of one's own tort immunity. See Gentile, 363 A.2d at 15; Lasky, 296 So. 2d at 15.

Berry makes it clear that the Utah Supreme Court's choice of the language describing the substitute remedy as "substantially equal in value or other benefit" was made advisedly, purposefully, and with a great sense of the obligation of seeing that this constitutional mandate is implemented. Reviewing the approaches which other states having similar open courts provisions had developed, the supreme court made the following observations:

In our view, the cases holding products liability statutes of repose constitutional under state open courts or remedies provisions have all but read these constitutional provisions out of their respective constitutions, at least as far as they provide substantive, as opposed to procedural, protections. . . . [Some courts have] relied on the general principle that one of the functions of the legislative power is "to remedy defects in the common law as they developed, and to adapt to

the change of time and circumstance" . . . [and have] also relied heavily on the usual deference that courts accord legislative enactments by way of a presumption of constitutionality. . . . We are simply not at liberty to eviscerate a mandatory provision of our Declaration of Rights by limiting our analysis to those principles alone. That kind of analysis would result in the legislative power prevailing in every case, and would deprive the constitutional rights embraced in section 11 of any meaningful content or force. If we are free to refuse to give substance and meaning to section 11 because it stands in tension with the power of the Legislature to adjust conflicting interests and values in society, we could as well masculate every provision of the Declaration of Rights by the same method of analysis. We decline to do that.

1717 P.2d at 678-79.

Section 11 is a common-law legacy of constitutional dimension. The judiciary has an important role in seeing that the substantive rights afforded by the common law are not lost to short-sighted political considerations or the pressure of special interests. Condemarin, 775 P.2d 348, 366-69 (Utah 1989) (Zimmerman, J., concurring in part).

In In re J.P., 648 P.2d 1364 (Utah 1982), the Utah Supreme Court formulated an Article I, sections 7 and 25 approach to judicial scrutiny which avoided a Roe-v-Wade-style revival of federal substantive due process.

Unlike substantive due process cases like Roe v. Wade, which rely on a "right of privacy" not mentioned in the Constitution to establish other rights unknown at common law, the parental liberty right at issue in this case is fundamental to the existence of the institution of the family, which is "deeply rooted in this Nation's history and tradition," and in the "history and culture of Western civilization." This rooting in history and the common law validates and limits the due process protection afforded parental rights in contrast to substantive due process innovations undisciplined by any but abstract formulae.

648 P.2d at 1375 (emphasis added, citations omitted). Clearly, the Utah Supreme Court did not want In re J.P. to be seen as signaling a return to the glory days of substantive due process.

Later, when Berry characterized section 11 as an extension of the due process

2clause, 717 P.2d at 679, the supreme court took great care to demonstrate that the "substantive protection" provided by the Article I, sections 7 and 11 approach is disciplined by common-law principles which in themselves are sufficient to the government and security of persons and property.

C.

EQUAL PROTECTION

Federal Equal Protection. The Fourteenth Amendment is a mandate which the federal constitution impress upon the individual states. Ratified in 1868, it was designed to rid the individual states of the vestiges of black slavery. Its breadth has not been extended much through its application.

A statute which creates a "suspect" classification or affects a "fundamental" right will be subject to judicial review under a "strict scrutiny" standard and will survive only if the classification is shown to advance a "compelling state interest." See Harper v. Bd. of Elections, 383 U.S. 663 (1966); Griffin v. Illinois, 351 U.S. 12 (1956). If the classification is not "suspect" and does not involve a "fundamental" right, judicial review will usually be made under a "rational basis" standard and the statutory classification will survive "if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961) (emphasis added).

As a practical matter, judicial review under the "rational basis" standard provides no review at all. See Condemarin, 775 P.2d at 358 (Durham, J., lead opinion); *id.* at 367 (Zimmerman, J., concurring in part). Where constitutionally protected rights are involved, review on such a superficial level is no more acceptable to a conscientious judiciary than is the judicial intrusion into the realm of legislative power which was once accomplished

in the name of federal substantive due process.

State Equal Protection. Article I, section 24 of the Utah Constitution states: "All laws of a general nature shall have uniform operation." This is Utah's equal protection mandate.

In Malan v. Lewis, *supra*, the Utah Automobile Guest Statute was held unconstitutional under section 24. The statute had been upheld just ten years earlier in Cannon v. Oviatt, 520 P.2d 883 (1974). The critical difference between Malan and Cannon was the level of the judicial scrutiny applied. Malan, 693 P.2d at 668 n. 12. The Malan court was unwilling to apply a "reasonable [rational] basis" standard in reviewing legislation which impaired rights entitled to protection under section 11. *See id.* at 674 n. 17. The guest statute had been on the books for 50 years.

Before Malan, the Utah Supreme Court had not made any real distinction between federal equal protection and state equal protection. Malan did not identify the level of judicial scrutiny to be applied. The opinion simply stated that there was "no reason to adopt either the federal strict scrutiny test or the so-called intermediate or heightened scrutiny test."⁷ Malan did not outline a section 24 analysis as Berry would later do for section 11. The opinion had effectively demonstrated that the statute was "so shot-through with exceptions as to be incapable of reasonably furthering the statutory objectives." 693 P.2d at 672.

The need of further refining the Utah equal protection analysis applicable in cases involving section 11 rights became apparent in Condemarin v. University Hospital, *supra*. That case was decided by a "holding" which represented the consensus, and indeed

⁷One commentator has noted: "Precisely because these classification schemes use federal terminology such as 'fundamental rights' and 'levels of scrutiny,' each is a Procrustean bed into which remedy jurisprudence cannot be forced without distortion." *See Schuman* at 1204.

the only consensus, of three justices who based their conclusions on different grounds. Justices Durham, Zimmerman, and Stewart wrote separate opinions each of which, to some extent evidenced frustration in attempting to provide legitimate judicial oversight of the legislative process. See 775 P.2d at 369 (Stewart, J.)(substantive due process analysis illegitimate); id. at 358-60 (Durham, J.); id. at 367 (Zimmerman, J.)(federal equal protection analysis inadequate).

Finally, in Lee v. Gaufin, 867 P.2d 572 (Utah 1993), the supreme court reached a consensus on an equal protection analysis which was sensitive to the "due process" protections guaranteed by sections 7 and 11.

[A] statutory classification that discriminates against a person's constitutionally protected right to a remedy for personal injury under Article I, section 11 is constitutional only if it (1) is reasonable, (2) has more than a speculative tendency to further the legislative objective and, in fact, actually and substantially furthers a valid legislative purpose, and (3) is reasonably necessary to further a legitimate legislative goal.

Id. at 582-83 (citations omitted).

POINT III

THE NO-FAULT STATUTES DO NOT PROVIDE A "SUBSTANTIALLY EQUAL" SUBSTITUTE REMEDY.

In the event the court should determine that the no-fault statutes provide a substitute remedy which is "substantially equal in value or other benefit" to the remedy which is abrogated thereby, the legislation will not be subject to further review on a "due process" level. Moreover, such a determination would apparently destroy any basis for applying "heightened scrutiny" under a state equal protection analysis because the persons within the class would enjoy substantive protection substantially equal to that enjoyed by those who do not fall within the statutory classification. The statutory classification established by the no-

fault threshold would still be subject to review but only under a "rational basis" standard which it would almost certainly survive.

Availability of Substitute Remedy. When the Utah segment of the department of transportation survey was published in 1970, the author of the Utah Law Review note did not take the position that the AIA no-fault plan provided an adequate substitute remedy. He simply concluded that

the AIA plan would not be required by the Utah due process clause to provide an adequate substitute remedy for those remedies eliminated by the plan or to make sure that any substitute remedy, which is provided for a previously existing remedy, is reasonable and just.

1970 Utah L.Rev. at 263. Moreover, the author acknowledged the disparity between the insurance benefits and the common-law remedy in the following comment:

The most serious equal protection problem will arise when, because of the increased cost of living, the fixed statutory recoveries become grossly disproportionate to those recoveries possible in tort in that they fail to compensate the average injured party for his actual losses.

Id. at 255 (emphasis added).

In Berry, supra, the Utah Supreme Court briefly mentions the Utah no-fault statutes as an example of legislation which provides a substitute remedy "for certain kinds of damages caused by personal injuries sustained in automobile accidents," noting that the act "provides an insurance remedy for special damages in lieu of a common law remedy." 717 P.2d at 677. Cf. Condemarin, 775 P.2d at 383 n. 54 (Hall, C.J., dissenting). Conspicuously absent is any mention of a substitute remedy for "general damages."

Section 41-12a-301 impresses an obligation upon everyone who registers an automobile in this state to maintain financial security. This is typically provided by purchasing a policy of automobile liability insurance that includes direct benefit, personal

injury protection (PIP) coverage. Any injured person for whom PIP coverage is provided, from whatever source, or who is legally required to have such coverage cannot maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident. See §31A-22-309(1).

Section 31A-22-307 outlines the mandatory PIP benefits which include medical expenses up to \$3000, lost earnings up to \$250 per week for up to 52 weeks, etc. These PIP benefits are paid to any covered person who is injured in an automobile accident without regard to fault because the right is based upon contract rather than tort principles. Accordingly, this part of an injured person's pecuniary losses can be paid without awaiting determination of liability or apportionment of fault.

Section 31A-22-308 outlines the distribution of the PIP coverage. Under subsections (1) and (2), the insured and members of his "household" are provided PIP coverage against injuries arising out of an automobile accident which incurs anywhere in the United States or Canada involving virtually any motor vehicle. From the prospective of the insured, this PIP coverage operates like a small policy of health and disability insurance.

Unlike subsections (1) and (2), which extend PIP coverage to a small group of identified individuals against injury from the motoring public, subsection (3) describes the beneficiaries of the coverage in terms which identify particular individuals at the instant they are injured. From the prospective of the insured, this coverage operates like liability insurance. If the insured has been exposed to potential liability as a result of an accident, involving the insured's automobile wherein any person has been injured (1) while occupying his automobile, or (2) while not occupying any motor vehicle, the insured is given at least partial "tort immunity" under §31A-22-309(1) because PIP benefits are instantaneously extended to such persons and they therefore have no cause of action for general damages

arising out of a sub-threshold injury. If the claim meets the threshold, the insured's liability is at least reduced by the PIP benefits which have been paid to that party.

If all persons owning a registered motor vehicle complied with the law, PIP coverage or some equivalent would be extended to virtually anyone and everyone who is injured in an automobile accident. Section 31A-22-308 provides secondary coverages which extend PIP benefits to those who might otherwise be uninsured as the result of someone else's failure to maintain mandatory insurance. The most significant category of persons who are left with no PIP coverage is the non-owner passenger of an uninsured motor vehicle who has no secondary coverage as a member of the household of an insured motorist. Persons within this category have the right to sue for general damages without reference to the statutory threshold. The owner of an uninsured vehicle is personally liable for the payments of the benefits provided under §31A-22-307.

As between PIP insurers, the distribution of the obligation to make direct payment of PIP benefits is made by statutory directives which have been established without reference to fault. See §31A-22-309(3) and -309(4). Indeed, if fault were any part of the formula, the "immediate" payment of the direct benefits would have to abide the determination of liability and the apportionment of fault because the "primary coverage" PIP insurer would be identified in the process.

The no-fault statutes do not provide a substitute for either the "general damages" remedy abolished by §31A-22-309(1) or the "special damages" remedy eliminated by the combined operation of §§31A-22-309(6) and 41-12a-304. PIP benefits are no remedy at all.

PIP coverage is mandatory health and disability insurance which provides protection for the entire public against a specific risk and is paid for by those persons who

contribute to the creation and extension of that risk by owning a registered automobile. It is purchased with money, not by the exchange of one's common-law right. The coverage that replaces the common-law remedy is purchased as much by the persons who have lost the common-law remedy as by those who have acquired "tort immunity".⁸ The costs of the no-fault system are distributed among the population as thoroughly as a state-imposed tax and the PIP benefits are as available to every qualifying person as are the benefits of any government service or "entitlement." Indeed, the social nature of this legislation is brought clearly into focus by the provisions of §31A-22-309(3) which reduces one's PIP benefits by the amount that party recovers under any workers' compensation or similar plan.

If such insurance indeed provides a "substitute remedy" for the purposes of the Berry analysis, the Legislature can constitutionally provide remedies for every legally cognizable injury to one's person, property, and reputation by merely requiring all "citizens" to purchase insurance against all such losses. One's "rights" would no longer be inherent in his membership in "the collective," he would purchase protection with the insurance premiums he would pay. The common law, which created an entire system of "principles, usages, and rights of action applicable to the government and security of persons and property," could be replaced with nothing but money and carefully drawn insurance contracts.

A system which purports to remedy wrongs where there is no wrong underestimates the social value of personal accountability. Every citizen "must expect to be held to the reasonable person standard of due care." Malan, 693 P.2d at 673. Cf.

⁸Consider Professor Keeton's observations concerning what he would consider to be the desirable demise of any remaining vestiges of the fault-based compensation system as insurers establish practices and procedures for the "wholesale" adjustment of claims for reimbursement. See Robert E. Keeton, Compensation Systems and Utah's No-Fault Statute, 1973 Utah L.Rev. 383, 392-93.

Condemarin, 775 P.2d at 364-65. (Durham, J., lead opinion) (discussing "deterrent" aspects of fault-based compensation systems). Moreover, in some cases the availability of a forum for public expression of one's anger, outrage, or grief is as important an aspect of a civil proceeding as is the recovery of monetary compensation.

Adequacy of Substitute Remedy. The proponents of no-fault legislation have never touted it as providing a substitute remedy for general damages. However, if the no-fault statutes are to be sustained because they provide a "substantially equal" remedy, the PIP benefits will have to include a substitute remedy for general as well as special damages, otherwise the minimum standard of "substantive protection" will be compromised. Berry, 717 P.2d at 680.

"General damages" is a "comprehensive term for elements of tort damages other than economic losses." See Keeton, supra, note 16, at 392. Such damages include those losses which "necessarily flow from the legal injury." See generally, McCormick on Damages (1935) 32-36. Such damages are the sum and substance of a cause of action for injury to one's person. Indeed, these damages have traditionally made up the lion's share of the personal injury claim. See generally, Judd v. Rowley's Cherry Hill Orchards, supra. A "remedy" which provides only partial reimbursement of one's pecuniary losses and no compensation for his general damages does not provide "substantive protection" comparable to that provided by the common law.

The American Insurance Association's attempt to compare no-fault automobile insurance and workers' compensation legislation is clearly flawed. See Note, 1970 Utah L.Rev. at 252-53. Workers' compensation legislation completely replaced the common-law system of "distributive justice." It has never been suggested that the workers' compensation benefits are or must be "substantially equal in value or other benefit" to the common-law

remedies. Workers' compensation legislation eliminated a universally recognized social and economic evil and was enacted in the interest of improving the welfare of the worker for whom relief at common law had proved to be inadequate, if not non-existent, and in the interest of "access[ing] the costs of injury and disease against the industry." Masich v. United States Smelting, Refining & Mining Co., 113 Utah 101, 125, 191 P.2d 612, 624 (1948). The only valid comparison between workers' compensation and no-fault legislation lies in the fact that they are both social legislation.

POINT IV

THE NO-FAULT STATUTES WILL NOT SURVIVE JUDICIAL SCRUTINY.

When the Utah No-Fault Automobile Insurance Act became law in January 1974, former section 31-41-2 (which has no comparable provision in chapter 22, Title 31A) identified the social and economic "evils" which were targeted by the legislation.

The intention of the legislature is hereby to possibly stabilize, if not effectuate certain savings in, the raising costs of automobile accident insurance and to effectuate a more efficient, equitable method of handling the greater bulk of the personal injury claims that arise out of automobile accidents, these being those not involving great amounts of damages.

Law of Utah 1973, ch. 53, §2.

Although the Legislature did not make any specific findings, some are arguably implicit in the above-quoted statement of legislative purpose. They are most liberally expressed in the following terms: (1) Automobile liability insurance rates are rising. (2) The cost of such insurance must at least be stabilized. (3) The existing system of compensation is inefficient. (4) The present method of handling claims in cases involving smaller amounts of damages is not cost-effective.

Having demonstrated that the right to a remedy for injury to one's person is protected under Article I, section 11 and that the no-fault statutes extinguish some of these common-law rights without providing a substantially equal substitute remedy, we now examine the legislation under the Lee v. Gaufin analysis and the second part of the Berry v. Beech Aircraft analysis. These two approaches significantly overlap one another. The following paragraph provides a visual comparison of the Utah due process and equal protection analyses and outlines the argument that will follow.

STATE{ DUE PROCESS } ANALYSIS
{ EQUAL PROTECTION }

1. Does the legislation eliminate "a clear social or economic evil"?
2. Is $\left\{ \begin{array}{l} \text{elimination of existing right an arbitrary or unreasonable} \\ \text{creation of classification a reasonably necessary} \end{array} \right\}$ means of $\left\{ \begin{array}{l} \text{achieving} \\ \text{furthering} \end{array} \right\}$ goal?
3. *Does classification actually and substantially further a valid purpose?*
4. *Is the statutory classification itself unreasonable?*

A.

STATE DUE PROCESS

THE BERRY V. BEECH AIRCRAFT ANALYSIS

Even where the Legislature has made findings supporting its action, the court will draw its own conclusions about the validity of the Legislature's assessment of social and economic conditions when the legislation has a substantive impact on constitutionally protected rights. See Lee, 867 P.2d at 580; Berry, 717 P.2d at 681-83. See also, Condemarin, 775 P.2d at 363 (Durham, J., lead opinion)("citizens are entitled to a showing in the courts"); id. at 368 (Zimmerman, J., concurring in part)(burden upon proponents of

legislation's validity where constitutionally protected rights of opponent are involved); Horton v. Goldminer's Daughter, 785 P.2d 1087, 1096 (Utah 1989)(Zimmerman, J., concurring). See generally, Note, Utah's Emerging Constitutional Weapon -- The Open Courts Provisions: Condemarin v. University Hospital, 1990 B.Y.U.L.Rev. 1107, 1116-18.

No matter how much deference is given the Legislature's "findings," the stated legislative purposes do not demonstrate the existence of "a clear social or economic evil." This is not because the proponents of the legislation were unaware of the need to present a strong case for reform. See Note, 1970 Utah L.Rev. at 252-53. The evidence simply did not exist. Indeed, some proponents of no-fault insurance apparently conceded that there was no automobile liability insurance "crisis" in 1970, arguing only that the legislation was necessary in order to avert one. See id.

"A crisis can be a truly marvelous mechanism for the withdrawal or suspension of established rights, and the acquisition and legitimation of new privileges." Condemarin, 775 P.2d at 362 (Durham, J., lead opinion)(quoting other sources). The "crisis rationale" is based upon a premise that the legal system does not work any more: if we are going to preserve our standard of living we have to realign our respective legal rights and obligations. In the context of liability insurance reform, the tactic is implemented by blaming the impending crisis on the established system of tort law. See id. at 362-63. Anyone who opposes reform must be discredited. Those who question the legitimacy of the "solutions" proposed by the insurance industry are motivated by greed rather than intellectual honesty, even if they are members of the insurance defense bar.⁹

⁹Note, 1970 Utah L.Rev. at 253 n. 33 (suggesting that the Defense Research Institute's criticism of AIA's efforts to compare no-fault legislation with workers' compensation was motivated by a desire to avoid being "deprive[d]" of "considerable legal fees").

The creation of the perception of impending crisis does not require the availability of relevant and material evidence. Sometimes the most compelling "evidence" is that which is designed to play to the gallery. In the political arena, one outrageous anecdote can be more effective than volumes of empirical data. As an example, when the statute of limitations for habeas petitions was shortened to three months, the proponents of the legislation relied on anecdotal "evidence" relating to highly publicized murder cases in which habeas petitions had repeatedly delayed the prisoner's execution. See Currier v. Holden, 862 P.2d 1357, 1366-67 (Utah App. 1993). In holding the three-month limitations period unconstitutional, the court of appeals noted:

Considering that the State presented no empirical or factual data to the effect that prior to enacting this statute, non-death row inmates' petitions created a problem, much less a "clear social evil," the overly broad impact of this statute is particularly disturbing.

Id. at 1367.

In the context of political debate, reference to an 18-year delay in the execution of a death sentence may have been very effective although it was completely immaterial to the issue of the reasonableness of establishing a three-month limitations period. One hot cup of McDonald's coffee can become conclusive evidence of a failed system of tort law. And the beauty of it all is that, on this level, one is never forced to deal with the merits of any particular cause, including those we use to make our point.

Let us now consider the legislative purposes identified in the original Utah No-Fault Automobile Insurance Act.

Expedite Payment of Certain Pecuniary Losses. The direct benefit coverage provisions of the no-fault statutes do expedite the payment of compensation for some economic losses. The inconvenience and, in some case, hardship that were associated with delaying all

compensation pending the resolution of all disputed issues arguably warranted legislative concern and action. However, these problems could not reasonably be characterized as clear socio-economic evils against which the Legislature could sacrifice traditional legal rights and remedies. Legislative solutions were not "urgently and overwhelmingly necessary."¹⁰ Moreover, the no-fault statutes needlessly abolish the common-law remedy. The unnecessary elimination of a constitutionally protected right is an unreasonable means of achieving any legislative goal.

The same socio-economic benefit has been achieved in add-on insurance jurisdictions without abolishing any traditional remedy. See Allstate Ins. Co. v. Ivie, 606 P.2d 1197, 1199, 1201-02 (Utah 1980). This is not to say that add-on insurance has no critics. Indeed, proponents of no-fault insurance have identified a fundamental flaw in a system which puts money in the injured party's hands without extinguishing his common-law remedies. See O'Connell, No-Fault Automobile Insurance: Back by Popular (Market) Demand? 26 San Diego L.Rev. 993 (1989).

Under the pure tort system, victims are often without funds to cover accruing medical expenses, lost wages, and other losses while their case is battled. So claimants often settle for relatively little rather than undergo the delay and uncertainty of final resolution of a tort claim. But, with a tort system bolstered by no-fault benefits (along with growing coverage for health care costs by private insurance as well as medicare and medicaid), victims are guaranteed resources which enable them to energetically pursue a tort claim (after hiring a lawyer at no initial cost on contingent basis). This leads to even higher costs for the tort claims that are left under no-fault laws.

Id. at 995. Apparently, some consider expediting the payment of compensation a socio-economic evil if traditional remedies are not eliminated. Injured persons may not be forced to settle for "relatively little," forcing automobile insurance premiums even higher.

¹⁰This phrase is from Justice Durham's due process analysis in Condemarin, 775 P.2d at 363.

Lower the Cost of Automobile Liability Insurance. The Legislature suggested that the enactment of the no-fault statutes would "possibly" advance the public interest by lowering or at least stabilizing the cost of automobile insurance. Clearly, this is not an "evil" such as will justify the abrogation of anyone's common-law right to compensation for personal injury.

Berry is a "balancing analysis." Condemarin, 775 P.2d at 358 (Durham, J., lead opinion). When the "benefits" to the public as compared "to the denial of rights protected by article I, section 11" strike an acceptable balance, the constitutionality of the legislation may be sustained. See id. However, "when the disability they seek to impose on individual rights is too great to be justified by the benefits accomplished or when the legislation is simply an arbitrary and impermissible shifting of collective burdens to individual citizens," id., the legislation will not survive judicial scrutiny. See also, Horton v. Goldminer's Daughter, 785 P.2d at 1096 (Zimmerman, J., concurring).

Workers' compensation legislation is an example of balancing public benefit against individual detriment. See Masich, 113 Utah at 125, 191 P.2d at 624. It is doubtful that a constitutionally protected right could ever be balanced off against anything less than a true socio-economic evil: an actual crisis. Even if no-fault legislation had achieved this stated goal, the goal is not worthy of the loss of any personal right which could be considered constitutional in its dimension.

"Effectuate a More Efficient, Equitable Method." Notwithstanding the lip service which former §31-41-2 paid to the need to "effectuate a more efficient, equitable method of handling the greater bulk of the personal injury claims that arise out of automobile accidents," the elimination of general damages claims in sub-threshold cases was not based upon a determination that the common-law remedy has proven to be inadequate. The "evil"

which the no-fault statutes address is the constitutional right itself -- the right to "have remedy by due course of law" in the courts of this state -- or at least the perception that this right is being abused. See Jepson v. State, Dept. of Corrections, 846 P.2d 485, 488 (Utah App. 1993)(quoting Carter v. Cross, 373 So.2d 81, 83 (Fla. App. 1979), for the proposition that no-fault legislation has been "prompted in part by a desire to reduce [automobile accident] litigation" which observation was made in the context of a discussion of "compelling institutional need[s] in this day and age of congested court calendars"). Cf. Note, 1970 Utah L.Rev. at 261 (to the same effect).

Currier v. Holden, supra, involved the constitutionality of a statute which established an extraordinarily short period of limitations for filing petitions seeking post-conviction relief. Although prisoners had at least three months within which to file their petitions and notwithstanding the fact that the state was able to articulate six legitimate public interests which were promoted by establishing a short limitations period, 862 P.2d at 1366, the statute was held unconstitutional under Article I, section 11. This provision of the constitution declares the public policy of the state of Utah as it relates to the individual's right to access the judicial system. The Legislature cannot override that policy. See generally, 16 Am Jur 2d, Constitutional Law §245.

Without question, the advent and increased availability of liability insurance, together with the public's awareness thereof, has substantially increased the average jury verdict and, consequently, the settlement value of personal injury claims. The insurance industry would have the public and the Legislature believe that this "feeding frenzy" demonstrates that our system of tort law does not work anymore. See generally, Evans v. Doty, 824 P.2d 460, 466-67 (Utah App. 1991)(discussing the insurance industry's "tort reform" campaign and "propaganda" which is "designed to influence the public concerning

the 'evils' of large jury awards").

Our friends and neighbors "know" that personal injury lawsuits have nothing to do with justice and everything to do with greed. Even we, as members of the Bar and Bench, while recognizing that distributive justice mandates the availability of adequate legal remedies for injuries to one's person, have begun to embrace the idea that ready access to legal remedies has become part of a larger problem rather than a right worthy of protection. Accordingly, we begin to accept the idea that judicial resources can be allocated on the basis of the political appeal of certain types of causes and the political repugnance of others, without regard to the merits of the individual claim.

Both the Legislature and the courts enjoy significant roles in defining what it means to be a citizen of this society. Concededly, those roles are quite different. When the supreme court has been asked to consider the continuing viability of certain common-law remedies, it has refused to abolish any traditional cause (including causes which do not provide vindication for injury to one's "person, property, or reputation") simply because some litigants may abuse the common-law right of actions.

First, the very purpose of courts is to separate the just from the unjust causes; second, if the courts are to be closed against actions for . . . alienation of affections on the ground that some suits may be brought in bad faith, the same reason would close the door against litigants in all kinds of suits, for in every kind of litigation, some suits are brought in bad faith; the very purpose of courts is to defeat unjust prosecutions and to secure the rights of parties in just prosecutions. . . .

Nelson v. Jacobsen, 669 P.2d 1207, 1216 (Utah 1983)(quoting Wilder v. Reno, 43 F.Supp. 727, 729 (D.Pa. 1942)).

Even if the judicial system were on the verge of collapse, it would only be an indication of the inadequacy of the judicial resources, not the effectiveness of the existing legal remedies. The Legislature cannot, in the interest of minimizing the "evil" of citizen-

initiated litigation, extinguish the right to prosecute claims which are based upon a viable legal theory because the claims are arguably "less significant" than other claims based on the same legal theory. Nor can the Legislature distribute "scarce" judicial resources on the basis of purely political considerations and, in so doing, silence also in the courts those whose voices are never heard in the Legislature.

[T]he basic purpose of Article I, section 11 is to impose some limitation on that power for the benefit of those persons who are injured in their persons, property, or reputation since they are generally isolated in society, belong to no identifiable group, and rarely are able to rally the political process to their aid.

Berry, 717 P.2d. at 676. Cf. Condemarin, 775 P.2d at 367 (Zimmerman, J., concurring in part)(perfunctory judicial review inadequate protection against special interest legislation).

B.

STATE EQUAL PROTECTION

THE LEE V. GAUFIN ANALYSIS

We previously discussed the "due process" issues which relate to the stated goal of lowering the cost of automobile liability insurance. See Point IV-A, supra. We will now discuss an issue which, while having "due process" overtones, has been most clearly articulated in the Lee v. Gaufin equal protection analysis: "[A] statutory classification that discriminates against a person's constitutionally protected right to a remedy for personal injury . . . is constitutional only if it . . . actually and substantially furthers a valid legislative purpose. . . ." 867 P.2d at 582-83.

Furthering a Valid Legislative Purpose. Plaintiff had assumed that any available empirical data would indicate that the no-fault insurance scheme was "actually and substantially" reducing the cost of automobile insurance. However, government and industry surveys

indicate that the no-fault statutes have not reduced the cost of automobile liability insurance at all.

In 1985, the United States Department of Transportation reported that between 1976 and 1983, automobile insurance premiums rose 50% in those states that have not enacted no-fault legislation and rose an average of 54% to 126% in no-fault states, depending on the type of no-fault statute in force. See USDOT, "Compensating Auto Accident Victims," May 1985, at 4. The "pure premium" cost of a package of no-fault insurance in Utah for the year 1987 was 3.4% higher than the estimated "pure premium" cost of a comparable policy of standard automobile liability insurance in this state for the same year. See Brian A. Smith, Reexamining the Cost Benefit of No-Fault, Chartered Prop. & Casualty Underwriters J., March 1989, at 28.

Defendant suggests that the USDOT report demonstrates that no-fault insurance is achieving the objectives for which it was implemented. Although premiums are higher, insurance benefits paid out are an average of 79% greater in no-fault jurisdictions than they are in traditional liability jurisdictions. This is not an unexpected result when one considers the fact that no-fault insurance operates like health, disability, and liability insurance. All injured parties receive insurance benefits. This includes tort-feasors, guests of insured motorists (without regard to fault), etc. Plaintiff does not contend that the no-fault statutes have not been effective as social legislation. Whether or not this legislation has been effective on this level, it has not "actually and substantially further[ed]" the stated objective of lowering or stabilizing the cost of automobile liability insurance.

The constitutionality of the no-fault statutes cannot be salvaged by simply revising the articulated legislative goals to conform with those things which the legislation has actually achieved. In order to state such an objective, the Legislature would have to

acknowledge that no-fault insurance does not reduce the cost of automobile liability insurance. While it achieves worthwhile social goals, it does so by increasing the cost of such insurance. In actuality it socializes the field of sub-threshold personal injury claims. It substitutes the concept of commutative justice for the common-law concept of distributive justice and, in so doing, champions equality over merit, uniformity over individualism, and resolution over accountability.

If no constitutionally protected rights were involved, this would be a political decision. Because such rights are at stake, the decision is political only if the legislation is a reasonable response to an existing socio-economic evil or provides a substantially equal substitute remedy.

Reasonable Classification -- Formulation. Any classification based upon numerical succession is, in the strictest sense, arbitrary. Plaintiff concedes that this does not necessarily render such a classification "unreasonable" for equal protection purposes. As an example, any classification based upon age is to some extent arbitrary. No matter where the line is drawn to designate the legal distinction, there is, as a practical matter, little difference between who an individual is the day before he turns 21 and who he is the following day. Even if the state does not have a legitimate interest in prohibiting a 50-year-old from drinking alcoholic beverages, it does have an interest in prohibiting a 5-year-old. The line must be drawn somewhere. However, it does not follow that the line can be drawn anywhere.

Although plaintiff has never seen this argument advanced in support of the validity of the no-fault statutes, there is, in personal injury litigation, as in any other endeavor, a point at which the undertaking is no longer cost-effective. Some may argue that

the no-fault threshold draws a reasonable line based upon the cost-benefit ratio in the smaller vis-a-vis larger damages claims. One would think the market would make these adjustments, and indeed it does. Regardless of the latitude the Legislature may enjoy in the area of economic regulation, we are here concerned with regulating constitutionally protected rights out of existence. Even if a cost-effectiveness analysis somehow justifies state interference with these rights, let us consider how the Legislature established this watershed between personal injury cases.

When the no-fault insurance act became law in January 1974, the PIP medical benefits were \$2,000 and the medical-expense threshold was \$500. See Laws of Utah 1973, ch. 53, §§6, 7. Effective July 1, 1986, the PIP medical benefit increased from \$2,000 to \$3,000 and the medical-expense threshold increased from \$500 to \$3,000 making it the highest such threshold in the United States with the exceptions of Hawaii and Minnesota.¹¹

If we were to assume that this 50% increase in PIP medical coverage was attributable to inflation¹² over the twelve years intervening the enactment of the statute and its amendment, no explanation has been advanced to justify the 500% increase in the medical-expense threshold.

The medical-expense threshold established in 1973 was supposed to be an attempt to establish a reasonable watershed between the "less significant" and the other

¹¹During the regular session in 1985, Senate Bill No. 232 recodified the entire insurance code, effective July 1, 1986. The bill was 789 pages in length. That bill renumbered and re-enacted the no-fault provisions and increased the PIP medical benefits to \$3,000 and the medical-expenses threshold to \$1,000. See Laws of Utah 1985, ch. 242, §27. During the 1986 legislative session and before the effective date of the above-mentioned recodification, Senate Bill No. 91 was enacted making amendments throughout the recodified insurance code. This bill was 574 pages in length. This bill raised the medical-expense threshold to \$3,000. See Laws of Utah 1986, ch. 204, §164.

¹²According to the U.S. Bureau of Labor Statistics, Monthly Labor Review and Handbook of Labor Statistics, periodic, the cost of medical care, on a national level, increased 188% between 1974 and 1986.

personal injury claims. Its validity was purportedly based on the premise that the threshold criteria were a reasonable, although imperfect, reflection of the severity of the personal injuries suffered. See Keeton, supra, at 384. If we assume the validity of this premise, the Legislature's recodification of the insurance code in 1985 and 1986 included fairly subtle amendments which have the potential of substantially increasing the number of claims barred and including within that augmented class claims involving injuries of four times the magnitude of the most serious injuries which fell below the threshold in 1974.¹³ This, as far as plaintiff can determine, occurred without any legislative debate or even discussion.

Having embarked upon this road, the Legislature apparently assumes that it can now arbitrarily set the threshold at any level without regard to the uniform operation mandate of Article I, section 24.

Reasonable Classification -- Operation. Finally, even if the level of the medical-expense threshold has been carefully selected based upon some valid criteria, the threshold is still arbitrary in its application and operation. And the legislative goal of establishing an "equitable method" of handling smaller injury claims has not been achieved.

Arbitrary Inclusion in Class. The difference between having a common-law cause of action and having no cause at all may be a function of nothing more than the distance from the site of the accident to the hospital if the injured party is transported by ambulance. It may be attributed to the cost of diagnostic measures which actually establish the absence of a suspected injury.

¹³Even if we use the actual national inflation figures and the same assumption regarding the proportionality of personal injury to medical expenses, the 1986 amendment abolished the common-law rights of action in cases involving personal injuries which were nearly twice the severity of the gravest injuries excluded by the threshold in 1974.

The determination of whether or not one's common-law tort remedy has been extinguished has little or no relationship to the extent of his overall economic losses or the extent to which such losses are not covered by PIP benefits.

Arbitrary Exclusion from Prosecuting Claim in Pending Litigation. If driver A does not satisfy the threshold, A cannot maintain a cause of action even by way of counterclaim in a suit filed by driver B, regardless of the merits of their respective claims. The validity of B's claim is determined in a proceeding wherein the fact and extent of A's injuries are immaterial. If C, A's passenger, sues A and B, A cannot sue B although A's and B's proportionate fault will be fully litigated in C's lawsuit.

Incongruence with Other Rules of Law. In Johnson v. Rogers, 763 P.2d 771 (Utah 1988), the Utah Supreme Court held that the father of an 8-year-old boy who witnessed his son's accidental death had a tort claim for negligent infliction of emotional distress. The boy was struck by an automobile as he and his father stood on the sidewalk waiting for a traffic light to change. The father was in the "zone of danger."

One of the defendant's argued that the plaintiff father could not maintain a suit for general damages because he had not satisfied the no-fault threshold of §31A-22-309(1). See Br. of Newspaper Agency Corporation at 39-43 (docket no. 20622). See also, Reply Br. at 15-17. Plaintiff had a cause of action for his son's wrongful death and PIP coverage for any physical injury which he may have suffered. The emotional distress claim apparently represented general damages only. The supreme court's decision contains not so much as an allusion to the no-fault statutes.

As far as counsel is aware, this is the only time a Utah appellate court has been asked to dismiss a claim based upon a failure to satisfy the no-fault threshold. Rather than doing so, the court unanimously agreed that Utah law now recognizes a "new"

negligence cause of action. And this, at the height of the most recent "tort reform" movement. See 763 P.2d at 783-84 (Durham, J., lead opinion).

In 1981, Utah enacted a dramshop law. It creates statutory causes of action for personal injury and property damage resulting from the intoxication of (for the sake of simplification) tavern patrons. See §§32A-14-101 et seq. The tavern owner's liability is derived from the liability of the intoxicated patron to this extent: a claimant suffers injuries "resulting from the intoxication" only if (and, apparently to the extent) the intoxicated patron's negligence exceeds that of the claimant. See Reeves v. Gentile, 813 P.2d 111 (Utah 1991). Once liability is established on that level, the tavern owner's liability is strict.

Most dramshop claims apparently arise in the context of an automobile accident. However, the dramshop act contains no threshold similar to the no-fault statutes. Although a person whose claim does not satisfy the no-fault threshold does not have a common-law cause of action against an intoxicated patron who injures them, he now arguably has a new statutory cause of action against a tavern owner created by the more recent legislation.

Plaintiff submits that even if the statute were somehow to survive scrutiny on every other level, it is apparent that the formulation of the classification was arbitrary and that the classification is unreasonable in its operation.

CONCLUSION

Plaintiff concludes with the following observations which include some insights of Dean Roscoe Pound and which summarize the concerns which plaintiff would express.

Perhaps the most important and difficult problem of jurisprudence is how to strike the golden mean between individual interests and social

interest, how to transcend both individualism and collectivism. . . . Dean Pound . . . recently uttered a warning. . . . "May we not have faith that [the common-law] tradition will have continued strength to resist the effects of economic unification of the world and losing sight of the individual in the general bigness of things, and the tendency of the service State to become omniscient and totalitarian, and so to secure to the English-speaking world the liberty which it has always claimed as its birthright." But in order to keep the Common-Law tradition, we have, as a first step, to pass through a spiritual renaissance and go back to the great tradition of Coke, of St. Thomas More, and of Bracton. Finally, we must have a clear grasp of the Scholastic idea of the common good, which lay at the basis of the Common Law from its very beginning.

The common good does not mean merely the collective good of the State. It includes that, but above all it embraces all the personal goods common to men as men. In order to minister to these goods, the law must recognize and protect the fundamental rights of the person. . . .

J. Wu at 45-46.

Plaintiff respectfully submits that the Utah no-fault statutes are unconstitutional as violative of sections 7, 11, and 24, of Article I, of the Utah Constitution, and that the judgment of the district court must be reversed.

DATED this 9 day ^{Sept.}~~August~~, 1996.

15/
Gary W. Pendleton
Attorney for Plaintiff and Appellant

MAILING CERTIFICATE

I do hereby certify that on this 9 day of August, 1996, I did personally mail two true and correct copies of the above and foregoing document to R. Phil Ivie, Jeffrey C. Petross and David N. Mortensen, IVIE & YOUNG, 48 North University Ave., P.O. Box 657, Provo, Utah 84603.

15/
Gary W. Pendleton

ADDENDUM

Magna Carta of King John, 1215.

[39] No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.

[40] To no one will we sell, to no one will we refuse or delay right or justice.

McKechnie, Magna Carta: A Commentary on the Great Charter of King John (2d ed. 1914) 375, 395.

Statute of Mag. Cart. cap. 29, 1297.

No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land. (2) We will sell to no man, we will not deny or defer to any man either Justice or Right.

Statutes at Large, ed. O. Ruffhead, revised. C. Runnington (1786-1800), i. I-10.

Utah Const. Art. I, Section 7.

No person shall be deprived of life, liberty or property, without due process of law.

Utah Const. Art. I, Section 11.

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Const. Art. I, Section 24.

All laws of a general nature shall have uniform operation.

Utah Code Ann. Section 31A-22-309(1).

(1) A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:

- (a) death;
- (b) dismemberment;
- (c) permanent disability or permanent impairment based upon objective findings;
- (d) permanent disfigurement; or
- (e) medical expenses to a person in excess of \$3,000.