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Utah's Emerging Constitutional Weapon—The Open Courts Provision: *Condemarin v.* *University Hospital*

I. INTRODUCTION

Tort reform legislation has come under attack in recent years under equal protection, due process and special legislation provisions of state constitutions.¹ The open courts provision of many state constitutions has also served as a basis for challenging legislation which limits liability for personal injuries.² In 1985, the Utah Supreme Court held in *Berry ex rel. Berry v. Beech Aircraft*³ that the Utah open courts provision limits the legislature's ability to abrogate rights of recovery for personal injuries.⁴ Article I, section 11 of the Utah Constitution has been labeled the open courts provision based on its guarantee that "[a]ll courts shall be open, and every person, for an injury done to him . . . shall have a remedy by due course of law."⁵

The first major Utah case since *Berry* to use the open courts provision to strike down tort reform legislation is *Condemarin v. University Hospital*.⁶ Through the 1978 amendments to the Utah Governmental Immunity Act,⁷ the Utah Legislature responded to the insurance crisis, in the context of sovereign immunity, by setting strict recovery limits for both economic and noneconomic damages in negligence actions against any "governmentally-owned hospital" or "government health care facility."⁸

1. See *Lucas v. United States*, 757 S.W.2d 687, 689 (Tex. 1988)(citing decisions from Florida, Illinois, New Hampshire, North Dakota, Ohio, California, Indiana, Louisiana, Nebraska, Idaho and Texas).

2. *Id.*

3. 717 P.2d 670 (Utah 1985).

4. *Id.* at 674-81.

5. The open courts provision states in its entirety that:

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, § 11.

6. 775 P.2d 348 (Utah 1989).

7. UTAH CODE ANN. §§ 63-30-1 to -38 (1986 & Supp. 1988).

8. *Id.* at §§ 63-30-3 and -34.

In so doing, the legislature abrogated a remedy under a common law cause of action for severely injured victims against government-owned health care facilities.⁹

The Utah Supreme Court faced the troublesome issue in *Condemarin* of the appropriate constitutional mode of analysis and standard of review for determining the validity of the recovery cap.¹⁰ What ultimately emerged from the court's equal protection and due process rhetoric was an analysis rooted in the Utah Constitution's open courts provision. The court's reliance on the open courts provision, in *Condemarin* and in two subsequent decisions,¹¹ forecasts the future of other tort reform legislation in Utah, particularly the health care malpractice statute of repose.¹²

This casenote analyzes the decision in *Condemarin*. Part II summarizes the legal background of the Utah open courts provision. Part III introduces the facts and sets forth the *Condemarin* court's reasons for holding the recovery cap statute unconstitutional. Part IV analyzes the *Condemarin* decision and explains how the open courts provision applies in conjunction with equal protection analysis and explains why equal protection rather than due process is the more appropriate mode of analysis in this case. Part IV also discusses the implications of the court's holding on (1) the Utah malpractice recovery cap as applied to state and municipal hospitals other than the University Hospital, and (2) the decision's potential effect on the health care malpractice statute of repose. This note concludes that the outcome of the *Condemarin* opinion rests on its application of the open courts provision, not on the court's decisions to apply equal protection or due process analysis.

9. Although governmental immunity existed under the common law, health care "facilities and [employee negligence] . . . were not protected by immunity at common law or under the original version of the Utah Governmental Immunity Act." *Condemarin v. University Hosp.*, 775 P.2d 348, 350 (Utah 1989)(citations omitted).

10. Other states which have confronted the constitutionality of recovery caps in their medical malpractice acts, using a traditional equal protection or due process analysis under their state constitutions, have come down on both sides of the issue. See *Lucas v. United States*, 757 S.W.2d 687, 689 (Tex. 1988).

11. The Utah architects and builders statute of repose has been held unconstitutional. *Horton v. Goldminer's Daughter*, 785 P.2d 1087 (Utah 1989); *Sun Valley Water Beds v. Herm Hughes & Son, Inc.*, 782 P.2d 188 (Utah 1989).

12. UTAH CODE ANN. § 78-14-4(1) (1987).

II. BACKGROUND

When Utah adopted its constitution in 1896, it incorporated contemporary common law, but "neither the due process clause nor the open courts provision constitutionalizes the common law or otherwise freezes the law governing private rights and remedies as of the time of statehood."¹³ The Utah Supreme Court has always recognized that a citizen does not have a vested right in a common law cause of action,¹⁴ and therefore, the legislature may restrict or abrogate a common law right of action by statute;¹⁵ however, such enactments must pass state constitutional muster.¹⁶

In *Berry ex rel. Berry v. Beech Aircraft*,¹⁷ the Utah Supreme Court held the Utah products liability statute of repose unconstitutional. The court articulated a precise two-part test for determining whether a statute restricting or abrogating a common law cause of action violates the open courts provision: (1) does the scheme "provide[] an injured person an effective and reasonable alternative remedy"?;¹⁸ and (2) if no alternative remedy is provided, does there exist "a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective?"¹⁹ The *Berry* court also explained that Utah's due process clause and open courts provision are historically related and have a similar constitutional function.²⁰ Both restrict the

13. *Berry ex rel. Berry v. Beech Aircraft*, 717 P.2d 670, 676 (Utah 1985) (citation omitted).

14. *Id.* at 675.

15. *Id.* at 676.

16. *Id.* at 676 n.3.

17. 717 P.2d 670 (Utah 1985).

18. *Id.* at 680.

19. *Id.*

20. *Id.* Based on the history of open courts provisions, many other courts have interpreted open courts provisions narrowly, as not conferring any "important" or "fundamental" right. See generally, *Meech v. Hillhaven W., Inc.*, 776 P.2d 488 (Mont. 1989). See also Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35, 67 (1986).

While the *Berry* court recognized that the Utah open courts provision, like those of other states, has its genesis in the Magna Carta and Sir Edward Coke's Gloss on Chapter 29 of the 1297 Magna Carta, the court's passing historical comment ignores the more serious implications pointed out by other courts and scholars that history suggests that open courts provisions were never intended to have any bearing on legislative power. Rather, these provisions represented a uniquely judicial guarantee aimed at remedying judicial favoritism, excessive filing fees, or other discriminatory procedural mechanisms denying access to the courts. See *Lucas v. United States*, 757 S.W.2d 687, 714-15 (Tex.

power of the legislature and the courts, and both must be balanced with other important, and occasionally competing, constitutional interests.²¹

Three subsequent cases have further developed the open courts doctrine. *Condemarin*, decided in May 1989, was the first case to use the two-part open courts analysis of *Berry* to invalidate a legislative enactment. Five months later the court held that the Utah architects and builders statute of repose also violated the open courts provision in *Sun Valley Water Beds, Inc. v. Herm Hughes & Son, Inc.*²² and *Horton v. Goldminer's Daughter*.²³ These two cases also followed the two-part test laid down in *Berry* and applied in *Condemarin*.²⁴

III. *Condemarin v. University Hospital*

A. *The Facts*

Plaintiff Crelia Condemarin was suffering from complications in her pregnancy. She was transferred from a private hos-

1988)(citing various authorities).

21. Justice Maughan foreshadowed the current substantive interpretation of the open courts provision in his dissent in *Thomas v. Union Pac. R.R.*, 548 P.2d 621, 624 (Utah 1976)(Maughan, J., concurring and dissenting). The court in *Thomas*, through strained logic, avoided holding the Utah Guest Statute unconstitutional, leaving the matter to the legislature. *Id.* at 623. However, Justice Maughan reasoned that "[t]he guest statute was unconstitutional the day it was enacted, it has been since, it is now, and it will continue to be so long as Article 1, Section 11, . . . reads as it does" *Id.* at 624 (Maughan, J. concurring and dissenting).

22. 782 P.2d 188 (Utah 1989).

23. 785 P.2d 1087 (Utah 1989).

24. These decisions addressed the applicability of the open courts provision in situations where a statute has worked to abrogate a cause of action to a discrete group of persons. As in *Condemarin*, the court addressed similar concerns of equal protection, due process, and limiting liability in the face of an insurance crisis. Since both *Horton* and *Sun Valley* addressed statutes of repose, *Berry* was much clearer precedent than it was for the challenged recovery cap in *Condemarin*.

Other Utah cases interpreting the open courts provision include *Cruz v. Wright*, 765 P.2d 869 (Utah 1988)(legislature's abrogation of right to loss of consortium through Married Woman's Act was constitutional); *In re Estate of Chasel*, 725 P.2d 1345, 1349 n.5 (Utah 1986)(citing *Weyant v. Utah Savings & Trust Co.*, 54 Utah 181, 204-05, 182 P. 189, 198-99 (1919))(if administrator of estate commits fraud, those injured are allowed under open courts provision to bring an equity action after the time for appeal has expired); *Madsen v. Borthick*, 658 P.2d 627, 629 (Utah 1983)(principle of sovereign immunity existed at common law and is constitutional under open courts provision which does not create a new remedy or cause of action); *Wycalis v. Guardian Title*, 780 P.2d 821, 825 (Utah Ct. App. 1989)(quoting *Butler v. Sports Haven Int'l*, 563 P.2d 1245, 1246 (Utah 1977)(on motion for summary judgment, open court provision "suggests that doubt or uncertainty as to questions of negligence . . . should be resolved in favor of granting a trial"))).

pital to University Hospital where plaintiff Leonel Condemarin was born. During an emergency cesarean section, Leonel suffered severe neurological damage which doctors testified would result in severe and permanent retardation. The plaintiffs' injuries will undoubtedly far exceed the \$100,000 recovery limit imposed by the governmental immunity recovery statute. The plaintiffs brought suit against University Hospital and against the treating health care personnel, all of whom were employees of University Hospital.

The plaintiffs moved for summary judgment to strike provisions of the Utah Governmental Immunity Act which limited the amount of damages recoverable from University Hospital and which immunized the staff doctors and employees from suit. The district court denied the motion, and the Utah Supreme Court heard the case on interlocutory appeal.²⁵

B. *The Condemarin Court's Reasoning*

A plurality of the court, consisting of Justices Durham, Zimmerman, and Stewart, held that the recovery cap limitations in the Utah Governmental Immunity Act were unconstitutional. However, these three justices used different modes of analysis to arrive at this conclusion. Justices Durham and Zimmerman, in separate opinions, explicitly rejected an equal protection analysis and subscribed to a substantive due process analysis, supplemented by the requirements of the open courts provision under *Berry*. Justice Stewart emphatically rejected the substantive due process approach and applied a heightened scrutiny form of equal protection analysis. He also alluded to the open courts requirement of *Berry* in holding that government employees were justifiably immune from suit.²⁶ The two dissenters applied rational basis equal protection analysis and would have found the act constitutional.

In the exhaustive plurality opinion, Justice Durham traced

25. *Condemarin v. University Hosp.*, 775 P.2d 348 (Utah 1989).

26. *Id.* at 375 (Stewart, J., concurring). In arguing that employees of government-owned hospitals were justifiably immune from suit, Justice Stewart relied on *Payne v. Myers*, 743 P.2d 186 (Utah 1987) to support his position that because plaintiffs could have full recovery against the hospital, the "reasonable alternative remedy" requirement of *Berry* was met. *Payne*, 743 P.2d at 190. Therefore, he argued that the less stringent rational basis form of equal protection analysis should apply to the statute granting immunity from suit to employees of governmental health care facilities. *Condemarin*, 775 P.2d at 375 (Stewart, J., concurring).

the historical developments of sovereign immunity and the Utah Governmental Immunity Act and then analyzed these interests under Utah's equal protection clause. After extensively examining decisions from other states, Justice Durham reasoned that equal protection analysis was inappropriate because it is wholly outcome determinative.²⁷ She opted to analyze the challenged statute under a substantive due process and open courts analysis. Under the first step of the open courts provision analysis outlined in the *Berry* test, Justice Durham concluded that the statute failed to provide an adequate alternative remedy.²⁸ Under the second prong, she reasoned that neither the defendants nor the Attorney General²⁹ had provided sufficient evidence of an insurance crisis (the "clear social or economic evil" required under *Berry*) that would justify the harsh effect of the statute.³⁰ Justice Durham further argued under due process analysis that since the statute required only those victims whose injuries exceed the recovery cap to protect the public treasury, the statute was arbitrary and unreasonable. She would have held Utah Code Ann. section 63-30-3, which extends immunity to government-owned hospitals and health care facilities, unconstitutional as well.³¹

Justice Zimmerman concurred in Justice Durham's due process analysis and elaborated his views on due process by adding that *Condemarin* was "a logical successor to *Berry*."³² He pointed out that because of the important nature of the plaintiffs' right to a remedy for their injuries, article I, section 11 of the Utah Constitution required that the court use "careful scrutiny." He argued further that because the statute substantially infringed on the plaintiffs' specially protected interests, "the burden of demonstrating the constitutionality of the statute shifts to its proponents."³³

In concurrence, Justice Stewart saw no reason to use a due

27. "Under equal protection, the selection of the standard of review virtually determines the outcome, and selection of the standard of review depends in turn on a rather rigid system of classifications of the individual rights in question." *Condemarin*, 775 P.2d at 358.

28. *Condemarin*, 775 P.2d at 358-60.

29. The State Attorney General was a statutory party pursuant to UTAH CODE ANN. § 78-33-11 (1987). See Brief of the Attorney General, cover page.

30. *Condemarin*, 775 P.2d at 358-60.

31. *Id.* at 364.

32. *Id.* at 366 (Zimmerman, J., concurring in part).

33. *Id.* at 368.

process analysis.³⁴ He applied a heightened scrutiny analysis under the Utah equal protection clause and concluded that the defendants had failed to prove the constitutionality of the statute which they relied on for immunity. Justice Stewart limited the plurality holding by concluding that only the damage limitation cap was unconstitutional—and only as applied to University Hospital.³⁵ In total, three justices, including the dissenters, espoused equal protection analysis.³⁶ Two justices advocated substantive due process. The three justices in the plurality relied on open courts analysis, each with a slightly different emphasis.

IV. ANALYSIS

A. *Various Modes of Constitutional Analysis*

1. *Due process and equal protection distinctions*

To understand the function of the open courts provision in the *Condemarin* court's analysis, an examination of the differences between equal protection³⁷ and due process analysis is helpful. In adopting due process as an analytical tool, Justice Durham observed that the test under the Utah equal protection clause strongly resembles a means-end review under substantive due process analysis.³⁸ Both test the relationship between the infringement of constitutionally guaranteed rights and the legislative purpose of the enactment.³⁹ Such an approach ignores, however, the differences between these two similar but distinct modes of constitutional analysis.

Substantive due process analysis generally applies where a challenged law affects all persons equally as to their ability to exercise a particular right. Application of an equal protection analysis, however, requires that the challenged law make distinc-

34. *Id.* at 369 (Stewart, J., concurring).

35. Justice Stewart's argument relied heavily on the fact that only 3.5% of the University Hospital's \$80 million annual operating budget came from legislative appropriations. He found the recovery cap to be "an intrusion on a constitutional right that is not justified by whatever marginal enhancement of the legislative purpose flows from the statute." *Id.* at 374.

36. Chief Justice Hall in his dissent favored application of the federal equal protection rational basis standard and found that the statute's objectives were reasonable. Justice Howe concurred in the dissent. *Condemarin*, 775 P.2d at 375 (Hall, C.J., dissenting).

37. The Utah equal protection clause provides that "[a]ll laws of a general nature shall have uniform operation." UTAH CONST. art. I, § 24.

38. *Condemarin*, 775 P.2d at 356.

39. *Id.* at 356 (quoting *Nebbia v. New York*, 291 U.S. 502, 537 (1934)).

tions between those who may and those who may not exercise a right.⁴⁰ It is the *classification* that makes equal protection analysis particularly appropriate. Equal protection rights guarantee that laws which the legislature implements will operate uniformly among the citizens.⁴¹ Equal protection prevents the legislature from enacting discriminatory laws without at least a reasonable basis for the discrimination. In a case involving fundamental rights, a court will use strict scrutiny to ensure that a compelling state interest is present to justify the discrimination.⁴² Where suspect classifications or important substantive rights are in question, courts use a middle-tier heightened scrutiny as the appropriate standard of review.⁴³

The practical effect of laws which violate either due process or equal protection, if the laws are allowed to operate, may be that the citizen is denied a cause of action for securing a just remedy. *Condemarin* involved the sort of statutory classifications that result from limiting remedies, thereby abrogating a cause of action for some victims and not for others.⁴⁴ The recovery cap in this case discriminated against plaintiffs by forming, among others, the following classifications: (1) plaintiffs with minor injuries who could recover full economic and some non-economic damages, (2) plaintiffs with injuries equalling the statutory limit who could recover full economic but no non-economic damages and (3) plaintiffs with severe injuries who could recover only part of their economic and no non-economic damages.⁴⁵ The classifications created by the statute therefore make an equal protection analysis appropriate. Furthermore, the abrogation of a common law cause of action, which the court has held to be an important if not fundamental right,⁴⁶ justifies a heightened form of scrutiny in the equal protection analysis.⁴⁷

40. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 329 (3d ed. 1986).

41. The Utah Supreme Court held in *Malan v. Lewis*, 693 P.2d 661 (1984), that to pass state equal protection analysis (1) the law must apply equally to all persons within the class and (2) "the statutory classifications and the different treatment given the classes must be based on differences that have reasonable tendency to further the objectives of the statute." *Id.* at 670.

42. See J. NOWAK, R. ROTUNDA & J. YOUNG, *supra*, note 40 at 329.

43. See *Condemarin*, 775 P.2d at 354-56.

44. See *Condemarin*, 775 P.2d at 353.

45. *Id.*

46. See *id.* at 354-56 (citing cases from other state supreme courts which have applied middle-tier scrutiny under equal protection analysis in similar contexts).

47. In his equal protection analysis in *Condemarin*, Justice Stewart explained that "[t]he appropriate standard, in my view, has more bite than the minimum scrutiny stan-

Due process analysis, on the other hand, is inappropriate here because the statute does not completely deny a remedy to all persons it affects—as was the case in *Berry*. Rather, the statute creates arbitrary classifications by allowing some plaintiffs a full recovery while limiting other plaintiffs' recovery.

2. *Why the court used due process analysis*

The *Condemarin* plurality opinion reiterated the court's reasoning in *Berry* that the due process and open courts provisions of the Utah Constitution, while not identical, are overlapping.⁴⁸ *Condemarin* defines the rights protected by the open courts provision not as *fundamental* but nonetheless *important*—more important than mere *commercial* rights.⁴⁹ While not entirely duplicative, both the due process clause and the open courts provision guarantee those rights which the courts must protect in spite of legislative or judicial attempts to extinguish them.⁵⁰ While due process and open courts have apparent functional similarities, Justice Stewart used the open courts provision just as effectively in his equal protection analysis.⁵¹

The apparent reason for the court's confusion is the language in *Berry* which links the open courts provisions with due process analysis. However, the factual setting of *Condemarin* reveals that the open courts provision will also readily operate in an equal protection analysis when suspect classifications result from abrogation of a common law cause of action. *Condemarin* would have been more appropriately decided under equal protection analysis with the open courts provision operating to require a heightened form of scrutiny.

dard [T]he statute that creates the classification must in fact reasonably and substantially further the legislative purpose." *Id.* at 373 (Stewart, J., concurring) (citations omitted).

48. *Condemarin*, 775 P.2d at 357 (quoting *Berry ex rel. Berry v. Beech Aircraft*, 717 P.2d 670, 675 (Utah 1985)). The Utah due process provision states that "[n]o person shall be deprived of life, liberty or property, without due process of law." UTAH CONST. art. I, § 7.

49. See *Condemarin*, 775 P.2d at 354 (citing *Carson v. Maurer*, 120 N.H. 925, 931, 424 A.2d 825, 830 (1980)).

50. See *Sun Valley Water Beds v. Herm Hughes & Son, Inc.*, 782 P.2d 188 (Utah 1989).

51. *Condemarin*, 775 P.2d at 369 (Stewart, J., concurring).

3. *The open courts provision: a buttress for due process and equal protection*

The *Berry* court explained that "[t]o a degree, the open courts provision is an extension of the due process clause. Indeed, the open courts provision and the due process clause also have an overlapping function, to some extent, with respect to the abrogation of causes of action."⁵² To a like extent, the open courts provision can operate as an extension of the equal protection clause where a legislative enactment results in a statutory classification which denies a plaintiff access to the courts.⁵³ There was no reason for the court to prefer due process over equal protection based on the assumption that the open courts analysis is inseparable from due process analysis.⁵⁴ Either mode of constitutional analysis is a viable tool under the present rubric of open courts analysis.

B. *Shifting the Burden of Proof*

The practical significance of the court's application of the open courts provision in *Condemarin*—and as confirmed in more recent decisions⁵⁵—is that the burden of demonstrating the constitutionality of the challenged statute rests upon the party seeking to uphold the statute. This is because the *Berry* test requires a statute abrogating or limiting a cause of action to provide an alternative remedy or to demonstrate the existence of a clear economic or social evil.⁵⁶

Under typical due process analysis and equal protection rational basis analysis, the party challenging the statute must demonstrate its unreasonableness or arbitrariness in meeting the

52. *Berry ex rel. Berry v. Beech Aircraft*, 717 P.2d 670, 675 (Utah 1985).

53. Other states which have struck down recovery cap statutes have relied primarily on the equal protection clause of the state constitution with other provisions of the state constitution serving as "make weight arguments behind the equal protection analysis." Richards, *Statutes Limiting Medical Malpractice Damages*, 32 FED'N INS. COUNS. Q. 247, 259-60 (1982).

54. "Telescoping the due process, equal protection, and open courts analyses, as Justices Durham and Zimmerman do, blurs important analytical concepts intended to give different substance and effect to each constitutional provision and to the policies each is designed to serve." *Id.* at 369.

55. See *Horton v. Goldminer's Daughter*, 785 P.2d 1087 (Utah 1989) (Zimmerman, J. concurring). *Horton* articulates the court's responsibility to balance the societal interest in abrogating a cause of action with the injured party's interest in obtaining relief. *Id.* at 42 ("the two objectives must be balanced against each other to determine which should prevail").

56. *Berry ex rel. Berry v. Beech Aircraft*, 717 P.2d 670, 680 (Utah 1985).

legislative objective.⁵⁷ In fact, legislative enactments enjoy a presumption of constitutionality under due process and equal protection modes of analysis.⁵⁸ The dissent's review of decisions under these analyses shows the near impossibility of carrying that burden of proof.⁵⁹ However, the burden shifts when a court applies a heightened or strict scrutiny.

By shifting the burden of proof to the defendant, the open courts provision gives plaintiffs claiming denial of a remedy due to the operation of a statute a comfortable defensive position. While the defendant must prove either the existence of a clear social evil which the challenged statute eliminates or an adequate alternative remedy,⁶⁰ the plaintiff needs only to discredit the defendant's argument in favor of constitutionality. Indeed, when an abrogated right is at issue under an open courts challenge, a defense attorney's creative ingenuity is at a premium in explaining why one party should be favored over another.⁶¹

However, simply because the burden of proof shifts to the supporter of the statute, a challenge under the open courts provision will not always prevail. For example, in *Cruz v. Wright*,⁶² the court held that the open courts provision should not be read to preserve every common law cause of action that may have existed before the adoption of the Utah Constitution.⁶³ In *Cruz*, the plaintiff claimed that she was entitled to recovery for loss of consortium when her husband was injured. The court easily disposed of this claim by finding that the legislative enactment of the Married Woman's Acts was reasonably designed to place men and women on equal footing with respect to their ability to bring actions for their own injuries.⁶⁴

57. See Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CALIF. L. REV. 1049 (1979).

58. *Timpanogos Planning & Water Management Agency v. Cent. Utah Water Conservancy Dist.*, 690 P.2d 562, 564 (Utah 1984).

59. See *Condemarin v. University Hosp.*, 775 P.2d 348, 384-85 (Utah 1989) (Hall, C.J., dissenting).

60. See *supra* notes 8-20 and accompanying text.

61. For example, in *Sun Valley* the court easily dismissed the defendant's best arguments for upholding the constitutionality of the architects and builders statute of repose. *Sun Valley Water Beds, Inc. v. Herm Hughes & Son, Inc.*, 782 P.2d 188, 193-94 (Utah 1989).

62. 765 P.2d 869 (Utah 1988).

63. *Id.* at 871.

64. *Id.* The common law allowed men to recover for loss of consortium because the wife was considered the husband's property. The Married Woman's Act dispelled this debasing notion and abolished the cause of action for loss of consortium, thus putting men and women on equal ground. *Id.*

In *Condemarin*, the shifting of the burden of proof was the key element.⁶⁵ Although the defendants argued that the issue of constitutionality was one of equal protection under a rational basis analysis, the court implicitly found that the plaintiffs' assertion of a cause of action under the open courts provision shifted the burden of proof.⁶⁶ The defendants did not attempt to meet the *Berry* test in the trial court, and the court denied the defendants' petition for rehearing.⁶⁷

C. *The Future for Government-Owned Hospitals and the Health Care Malpractice Statute of Repose*

The *Condemarin* decision, as buttressed by the decisions in *Horton* and *Sun Valley*, foreshadows the outcome of cases that may be brought under the open courts provision challenging the constitutionality of two distinct statutes: (1) the governmental immunity recovery statute as applied to other government-owned hospitals in addition to University Hospital, and more significantly, (2) the Utah Health Care Malpractice Act's statute of repose—as the next statute of repose, after the products liability and the architects and builders statutes of repose, likely to come under attack.

1. *Municipal and other state hospitals*

The *Condemarin* court's decision was limited to the constitutionality of the recovery cap as applied to University Hospital but did not decide the constitutionality of the statute as applied to municipal hospitals and other health care facilities.⁶⁸ For two reasons it is not likely that a majority of the court will strike down the limitation when applied to other government-owned hospitals. First, the two dissenting justices in *Condemarin* believed that the proper analysis for the recovery statute is a fed-

65. Both Justices Durham and Stewart noted that the Attorney General had failed to offer any evidence of a medical malpractice insurance crisis existing in Utah which would prove the reasonableness of the statute. *Condemarin v. University Hosp.*, 775 P.2d 348, 358, 374 (Utah 1989).

66. In their petition for rehearing, the defendants argued that they had not had the opportunity in the trial court or in the appellate briefs to adequately address the due process standard of review adopted by the plurality opinion. They requested that the court remand the case for evidentiary hearings since the shifted burden of proof required the defendants to prove the statute's rationality under the *Berry* test. Appellee University Hospital's Petition for Rehearing at 2-4.

67. *Condemarin*, 775 P.2d at 348.

68. *Id.* at 374.

eral equal protection rational basis approach.⁶⁹ Under a rational basis analysis, a plaintiff's attacks on the statute will likely fail to overcome the strong notions of sovereign immunity still remnant in the Utah Governmental Immunity Act. Time has proven that the presumption of constitutionality is not easily rebutted.⁷⁰

Second, in invalidating the statute as applied to University Hospital, Justice Stewart relied heavily on the fact that University Hospital receives only 3.5% of its annual operating budget from legislatively appropriated funds.⁷¹ For Justice Stewart this fact alone put University Hospital on level with privately operated hospitals and outweighed any of the defendant's arguments that University Hospital's unique character made the legislative objectives reasonable.⁷² Other state or municipal hospitals receiving a significant portion of their operating revenues from taxation are not likely to share the fate of University Hospital under the recovery cap statute. Given the positions of Justice Stewart and of the two dissenting justices, the court would likely uphold the recovery statute as applied to other state or municipal hospitals.

2. *The Health Care Malpractice Act's statute of repose*

The first indication that the Utah medical malpractice statute of repose may pose constitutional problems was evidenced in the Utah Supreme Court's decision in *Berry*.⁷³ In announcing the analytical framework for its two-part open courts test, the *Berry* court cited cases from other jurisdictions invalidating statutes of repose in products liability, architects and builders, and medical malpractice acts.⁷⁴ The Utah Supreme Court has now invalidated the statutes of repose in both products liability⁷⁵ and architects and builders legislation.⁷⁶ It is merely a matter of the issue being properly presented before the court invalidates the medical malpractice statute of repose.

69. See *id.* at 376-77 (Hall, C.J., dissenting).

70. *Id.*

71. *Id.* at 373-74 (Stewart, J., concurring).

72. *Id.*

73. *Berry ex rel. Berry v. Beech Aircraft*, 717 P.2d 670 (Utah 1985).

74. *Id.* at 677-78.

75. UTAH CODE ANN. § 78-15-3 (1987); *Berry*, 717 P.2d at 670.

76. UTAH CODE ANN. § 78-12-25.5 (1987); *Horton v. Goldminer's Daughter*, 785 P.2d 1087 (Utah 1989); *Sun Valley Water Beds v. Herm Hughes & Son, Inc.*, 782 P.2d 188 (Utah 1989).

Utah's Health Care Malpractice Act contains both a statute of limitations and a statute of repose which imposes a limit on the time for bringing an action.⁷⁷ The statute provides that

(1) No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, *but not to exceed four years* after the date of the alleged act, omission, neglect or occurrence⁷⁸

Under this provision, the statute of limitations for medical malpractice actions is two years from the time the injury is or should have been discovered. The final clause, however, is a statute of repose which puts an absolute ceiling of four years for bringing an action—even if the injury is not discoverable within four years from the time of the treatment giving rise to the injury.

The medical malpractice statute of repose issue was presented to the court as recently as 1987, but the court declined to address the issue since the plaintiff had not raised it in the trial court.⁷⁹ This is particularly important because in 1984 the Utah federal district court explained, in dicta, that the medical malpractice statute of repose did not violate the Utah open courts provision.⁸⁰ The district court explained that, although the malpractice statute of repose was not directly in issue, it nevertheless did not violate the open courts provision of the Utah constitution.⁸¹ However, the federal court provided no analysis of the open courts provision requirements in the context of the statute of repose. The district court's conclusory statement is likely to have little impact on the Utah Supreme Court when the court squarely addresses the issue of the constitution-

77. In general, a statute of limitations defines the time period after the occurrence of a plaintiff's injury in which a plaintiff must bring suit. A statute of repose differs from a statute of limitations in that it starts to run from the time of the defendant's conduct which gives rise to the plaintiff's subsequent injury. A statute of repose "potentially bar[s] the plaintiff's suit *before* the cause of action arises." Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 629 (1985) (emphasis in original).

78. UTAH CODE ANN. § 78-14-4(1) (1987) (emphasis added). The statute also makes exceptions to the limitations for foreign objects left in the body and for fraud by the health care provider. *Id.* at § 1(a)-(b). These exceptions will not be discussed herein.

79. *Sorensen v. Larsen*, 740 P.2d 1336, 1336 at n.1 (Utah 1987).

80. *Hargett v. Limberg*, 598 F. Supp. 152, 158 (D. Utah 1984), *rev'd on other grounds*, 801 F.2d 368 (10th Cir. 1986).

81. *Id.*

ality of the medical malpractice statute of repose—especially in view of the supreme court's 1989 decisions in *Horton* and *Sun Valley*.

Though the Utah Supreme Court has discussed the open courts provision and the medical malpractice statute of repose issue briefly in dicta in at least one other case,⁸² it has not yet made a direct ruling on the issue under an open courts challenge.⁸³ Driven by the impetus of the successive decisions in *Berry*, *Condemarin*, and most recently, *Horton* and *Sun Valley*, the court will most likely decide that the medical malpractice statute of repose is unconstitutional.

V. CONCLUSION

The conflicting approaches in the *Condemarin* plurality decision serve to illustrate how the open courts provision of the Utah constitution can operate in either a due process or equal protection context to determine the standard of review. Because the challenged statute in *Condemarin* raised open courts questions in a setting different from the statute of repose context in *Berry*, the court struggled in agreeing on the proper form of analysis. The practical significance of the court's growing recognition of open courts protections is that the burden of proof shifts to the proponent of the challenged statute under both due process and equal protection analysis. The court should continue to follow traditional applications of due process and equal protection analysis with the open courts protections functioning as a supplement to either form of analysis when a common law cause of action is abolished.

Condemarin's limited holding suggests that the governmental immunity recovery cap statute will withstand challenge when applied to other government-owned hospitals. But the emerging open courts concerns in *Condemarin*—and in *Sun Valley* and *Horton*—foreshadow the demise of Utah's health care malpractice statute of repose.

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82. See *Meyers v. McDonald*, 635 P.2d 84, 88 (Utah 1981) (Howe, J., concurring).

83. However, the medical malpractice statute of repose was held constitutional on equal protection grounds in *Allen v. Intermountain Health Care, Inc.*, 635 P.2d 30, 32 (Utah 1981). But the court expressly pointed out in its *Berry* decision that in *Allen* "[n]o issue was raised as to the constitutionality of the statute under [the open courts provision]." *Berry ex rel. Berry v. Beech Aircraft*, 717 P.2d 670, 683 (Utah 1985).