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Due Process Problems of Property Damage No-Fault Insurance

Stephen L. Jones
University of Michigan Law School

DUE PROCESS PROBLEMS OF PROPERTY DAMAGE NO-FAULT INSURANCE

Michigan, Florida, and Massachusetts have recently enacted automobile property damage no-fault legislation.[1] Similar to the concept of personal injury no-fault plans, the property damage legislation bars tort recovery for damage to vehicles involved in collisions and substitutes a system of insurance protection that would compensate the vehicle's owner for these losses without regard to fault.[2] There are, however, two essential differences between the property damage and personal injury proposals. First, because property damage claims have been minor as compared to those for personal injuries, the property damage proposals have permitted the vehicle owner to self-insure for the former losses by making his purchase of the no-fault insurance optional.[3] Second, as compared to personal injury losses, property damage can be quickly, accurately, and objectively computed.[4] These two distinctions between property damage and personal injury no-fault protection have caused the property damage plans to encounter constitutional difficulties which were avoided by the personal injury legislation.[5]

Generally, the constitutional attacks against both personal injury and property damage no-fault plans have been on two distinct grounds. The fundamental concept of no-fault protection, together with its consequent restrictions on tort recovery, has been challenged under the due process clause,[6] while the equal protection clause has been used to

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[1] FLA. STAT. ANN. § 627, 738 (1974); MASS. GEN. LAWS ANN. ch. 90, § 34-0 (Supp. 1974); MICH. COMP. LAWS ANN. § 500.3121 *et seq.* (Supp. 1974). Far more states have enacted personal injury no-fault legislation alone. *See* Gouldin, *Countrywide Overview of Automobile No-Fault Insurance*, 23 DEFENSE L.J. 443, 468-69 (1974), for a list of states that have enacted personal injury no-fault protection plans.

[2] Generally the statutes provide that the tort action is not barred if the injured party's loss is greater than a predetermined "threshold" amount. *See* note 8 and accompanying text *infra*.

[3] It is not clear whether the courts should distinguish between insurance that is optional and insurance that is "mandatory" when, in the latter case, there is a proviso that the insured may elect a deductible so large that he is, in effect, not covered by it. The courts appear to have made this distinction. *See* notes 44, 52-54 and accompanying text *infra*.

[4] Mehr & Eldred, *Should the Automobile Property Damage Liability Insurance System be Preserved?*, 48 NOTRE DAME LAW. 811, 816-20 (1973). This factor appears to be the reason why far more states have enacted personal injury no-fault coverage than have enacted property damage no-fault protection. It was the explicit reason for its omission from the original Keeton-O'Connell proposals. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 362-68 (1965). J. O'CONNELL, THE INJURY INDUSTRY 182-83 (1971).

[5] *See* parts I *B* and I *C infra*.

[6] Somewhat related to the due process attack have been the arguments that no-fault legislation denies the plaintiff his right to a jury trial and also restricts his fundamental right to

attack individual elements of specific legislation.[7] Since all presently enacted no-fault legislation contains various exceptions and so-called "threshold" loss determinations above which tort recovery is not restricted, the equal protection attack has had some limited success against such specific classifications of the personal injury legislation.[8] Although the due process attack has not been successful against the personal injury legislation, it has fared somewhat better against the property damage no-fault plans.[9]

I. DUE PROCESS

The due process argument has two elements: first, the no-fault legislation provides no reasonable substitute for the abrogated common-law tort remedy; and second, the legislation bears no rational relationship to a legitimate legislative objective. The issue in the first element is usually not whether such a reasonable substitute has been provided, but whether such a substitute is constitutionally required of the legislation.[10] Although the courts have addressed these two attacks as separate questions, they appear in practice to be interrelated. That is, the less the legislation provides as a reasonable substitute for the abrogated tort remedy, the more rigorous will be the test of legitimate state purpose. However, to avoid basing a decision on this delicate balancing determination, whenever possible the courts either have upheld such legislation by showing that it provides a reasonable substitute remedy and satisfies the rational relation test, or else have struck

travel. Neither argument has succeeded. Lasky v. State Farm Ins. Co., 296 So. 2d 9, 23-24 (Fla. 1974); Manzanares v. Bell, 214 Kan. 589, 600-02, 616, 522 P.2d 1291, 1301-02, 1312 (1974); Opinion of the Justices, —N.H.—, 304 A.2d 881, 887 (1973).

[7] The cases upholding personal injury no-fault plans are: Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974); Manzanares v. Bell, 214 Kan. 589, 522 P.2d 1291 (1974); Pinnick v. Cleary, —Mass.—, 271 N.E.2d 592 (1971); Opinion of the Justices, —N.H.—, 304 A.2d 881 (1973). Personal injury no-fault legislation was struck down in Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972). *See* parts I *B* and I *C infra* for a discussion of the property damage litigation.

[8] *E.g.*, in Lasky v. State Farm Ins. Co., 296 So. 2d 9, 20-21 (Fla. 1974), the court held that to permit common-law tort recovery for a fracture of a "weight-bearing bone" while barring such recovery for other fractures was a denial of equal protection. The court upheld the no-fault statute but struck this particular distinction from it. In Grace v. Howlett, (Ill. Cook County Cir. Ct. 1971), *cited in* 1972 INS. L.J. 59, *aff'd on other grounds*, 51 Ill. 2d 478, 283 N.E.2d 464 (1972), the circuit court held that it was a denial of equal protection to require a $500 medical expense loss before tort recovery could be sought for pain and suffering on the theory that cheaper medical sources were available to the poor and, therefore, their injuries would have to be more severe in order to reach the $500 threshold amount. The Illinois Supreme Court based its decision not on these grounds, but on a clause in the Illinois Constitution providing that no special or local law shall be passed when a general law can be made applicable. ILL. CONST. art. 4, § 13. This provision resembles a strict equal protection clause.

[9] *See* parts I *B* and I *C infra*.

[10] *See* part I *A infra*.

it down by showing that neither test has been met. Therefore, property damage no-fault legislation must be examined in the absence of clear constitutional standards.[11]

Cases testing the constitutionality of legislation abrogating tort remedies must be distinguished according to whether they are decided by federal courts examining state laws under the federal due process clause, state courts examining state laws under either federal or state due process clauses,[12] or state courts examining state laws under a state constitutional "right to redress" clause.[13] One reason for this distinction is that federal courts will overturn state economic regulation only if the legislation "is restrained by some express prohibition in the Constitution."[14] As a result of this deference to state legislatures, federal courts have upheld state tort-abrogating legislation merely on a showing that the statute was within the state police powers,[15] while at the other extreme, some states with a "right to redress" clause in their constitution have held that legislation abrogating a tort remedy will only be upheld on a clear showing of public necessity.[16] Where a state court might fall in the continuum between these two positions is dependent upon the particular state constitutional clause and the willingness of the state court to re-examine legislative actions.[17]

A. The Reasonable Substitute Test

In *New York Central R.R. v. White*,[18] the Supreme Court upheld the New York workmen's compensation laws on the ground that they provided an adequate and reasonable substitute for the abrogated tort recovery by the employee against his employer.[19] The Court did not

[11] *See* parts I *B* and I *C infra*.

[12] *See* note 57 *infra*.

[13] *See* part I *B infra*. The effect of a "right to redress" clause is so similar to that of a due process clause that these clauses may be discussed under the same heading.

[14] Ferguson v. Skrupa, 372 U.S. 726, 729 (1963).

One commentator has noted that

> [t]he Supreme Court's recent reluctance to declare state laws unconstitutional under the due-process clause unless basic civil liberties are involved has important implications for litigation. The result may well be that constitutional litigation over state laws will be concentrated more and more in state courts under state constitutional provisions, and state constitutional law may become of dominant importance.

P. FREUND, ON UNDERSTANDING THE SUPREME COURT 115-16 (1949).

[15] *See* notes 56 and 71-76 and accompanying text *infra*.

[16] *See* part I *B infra*.

[17] *See* note 57 *infra*.

[18] 243 U.S. 188 (1917).

[19] After finding that a reasonable substitute had been provided, the court examined whether the legislation bore a rational relation to a permissible legislative objective.

> The subject-matter . . . is the matter of compensation for human life or limb

express a uniform test for reasonableness but examined fairness of the arrangement "from the standpoint of natural justice."[20] Apparently the Court felt that the certainty of recovery under workmen's compensation was a reasonable substitute for the denial of a possibly greater recovery through a common-law tort action. The Court recognized that it was not necessary to its disposition of the case to determine whether the due process clause required that a reasonable substitute remedy be furnished by all such legislation,[21] but in spite of this recognition, the Court implied that it thought a substitute might be required of all such legislation:

> It perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses, on the other, without setting up something adequate in their stead.[22]

However, this decision was written at a time when the Court was willing to apply its concept of fundamental fairness to state legislation;[23] it is doubtful that the Court would find the test necessary today.[24] Nonetheless, the dictum has given the reasonable substitute test considerable impetus in state courts.[25]

In the first constitutional test of personal injury no-fault legislation, the Massachusetts Supreme Court in *Pinnick v. Cleary*[26] held that the state statute satisfied the reasonable substitute test.[27] The statute abrogated all tort recovery for injuries resulting in economic loss of less than $2000.[28] It required[29] the owner to purchase no-fault insurance to cover his own economic losses[30] up to the level that the tort recovery was restricted, but the statute permitted no recovery for pain

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> lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare.

243 U.S. at 206.

[20] 243 U.S. at 202.

[21] 243 U.S. at 201.

[22] *Id.* It may be difficult to reconcile this dictum with the Court's statement, "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." 243 U.S. at 198. The Court's latter comment has been followed by a "plethora of authority." Manzanares v. Bell, 214 Kan. 589, 599, 522 P.2d 1291, 1301 (1974).

[23] *See* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

[24] *See* note 14 *supra* and notes 71-76 and accompanying text *infra*.

[25] All cases examining the constitutionality of no-fault legislation on due process grounds have applied this test. *See* cases listed at note 7 *supra*.

[26] —Mass.—, 271 N.E.2d 592 (1971).

[27] Although Massachusetts has a constitutional "right to redress" clause, the court held that it substantially duplicated the federal due process clause. The decision, therefore, was based on what the court took to be federal due process requirements. 271 N.E.2d at 600.

[28] MASS. GEN. LAWS ANN. ch. 90, §§ 34-A, 34-M (Supp. 1973).

[29] However, a deductible was permitted that effectively made the coverage optional. *See* note 52 and accompanying text *infra*.

[30] Such losses included medical expenses and lost wages. MASS. GEN. LAWS ANN. ch. 90, § 34-M (Supp. 1973).

and suffering unless the medical expenses exceeded $500.[31] Adopting reasoning similar to that in *New York Central*, the court in *Pinnick* held that the certainty of recovery by the injured party for his losses was a reasonable substitute for the possibility of tort recovery for pain and suffering.[32] As did the Supreme Court in *New York Central*, the Massachusetts court specifically noted that it was not deciding whether failure to meet the reasonable substitute test would invalidate the legislation.[33]

Apart from no-fault litigation, the only recent examination of whether the reasonable substitute test is constitutionally required has appeared in a pair of Minnesota cases involving an element of the state's workmen's compensation laws which abrogated the right of a third-party tortfeasor to recover contribution from the employer.[34] Since the third-party tortfeasor received no benefits from the workmen's compensation law, the court held that no reasonable substitute had been offered. Thus, the court was directly faced with the question of whether the substitute was constitutionally required. In the first case, *Haney v. International Harvester Co.*,[35] after an examination of decisions from other jurisdictions involving tort-abrogating legislation, the court concluded,

> The point which emerges is that a common-law right of action may be abrogated without providing a reasonable substitute if a permissible legislative objective is pursued. In the cases which have arisen involving such abrogated rights of action, it has been determined that the legislative objective has been to prevent vexatious litigation.[36]

Although the constitutional challenge to the legislation in *Haney* was under both the federal due process clause and the Minnesota "right to redress" clause,[37] the court made no attempt to distinguish whether those cases it examined had been decided on federal or state constitutional grounds. The *Haney* court reached no final decision; it

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[31] MASS. GEN. LAWS ANN. ch. 231, § 6-D (1974).

[32] The *Pinnick* court also examined whether the legislation satisfied the rational relation test. *See* note 59 and accompanying text *infra*.

[33] 271 N.E.2d at 605 n.16. Other courts have not been so careful. *See, e.g.*, Carlson v. Smogard, 298 Minn. 362, 215 N.W.2d 615 (1974) cited at note 39 *infra*.

[34] MINN. STAT. ANN. § 176.061(10) (Supp. 1974).

[35] 294 Minn. 375, 201 N.W.2d 140 (1972). The statute was not in effect at the time the tort occurred in this case. Thus, had the court reached a decision, it would have been based on policy implicit in other Minnesota statutes relating to workmen's compensation.

[36] *Id.* at 385, 201 N.W.2d at 146. *Cf.* Silver v. Silver, 280 U.S. 117 (1929). There may be some question about the accuracy of this determination. *See* text accompanying note 75 *infra*. Furthermore, the abrogation of any tort will prevent some vexatious litigation.

[37] MINN. CONST. art. 1, § 8.

remanded to the trial court for a full trial, and the case was settled before reaching the supreme court again.[38]

The Minnesota court again considered the issue in *Carlson v. Smogard*.[39] This time the court did not use the results of the examination of other cases that it conducted in *Haney*; rather, it stated simply that the test was twofold—whether a reasonable substitute was offered and whether the rational relation test was met, citing *Pinnick v. Cleary*.[40] The *Carlson* court found that neither test had been met by the legislation and, therefore, struck down the statute. Thus, while the dictum in *Carlson* would require that both tests be satisfied, the courts holding that neither had been met may imply that legislation must meet only either of the tests. If so, the rational relation test being necessarily applicable to any legislation, the holding logically negates the necessity of the reasonable substitute test. However, statutes abrogating the third-party remedy have been upheld in other states whose courts appear to have found some justification for such legislation.[41] Perhaps the *Carlson* court was using the failure of the legislation to meet the reasonable substitute test in order to require a stronger justification of the statute under the rational relation test. At any rate, the confusion of the *Haney-Carlson* opinions is typical of decisions that fail to distinguish whether the challenge before the court is based on federal or state grounds and whether the cases cited are based on similar constitutional provisions and interpretations.

B. The "Right to Redress" Clauses

The first judicial challenge to property damage no-fault legislation occurred in *Kluger v. White*.[42] The Florida law barred all tort recovery for property damage incurred by a vehicle if the total of such damage was less than $550.[43] The law also provided that the purchase of the no-fault insurance was optional for damage below that amount.[44] Since such "no-fault" property damage insurance had always been available in the form of collision insurance, the Florida court reasoned

[38] Carlson v. Smogard, 298 Minn. 362, 215 N.W.2d 615 (1974).

[39] 298 Minn. 362, 215 N.W.2d 615 (1974).

[40] Recall that the *Pinnick* court made no claim that it was deciding this question. *See* note 33 *supra*.

[41] The majority of states uphold such legislation. Annot., 53 A.L.R.2d 977, 978 (1957).

[42] 281 So. 2d 1 (Fla. 1973).

[43] FLA. STAT. ANN. § 627.738(5) (1974).

[44] The term "no-fault insurance" is a slight misnomer. As used here, it is nothing more than collision insurance. The Massachusetts and Michigan "no-fault property damage insurance" is also optional. MASS. GEN. LAWS ANN. ch. 90 § 34-0 (Supp. 1974); MICH. COMP. LAWS ANN. § 500.3121 *et seq.* (Supp. 1974).

that the only practical effect of the law was to completely abrogate a tort remedy without offering any substitute. Thus, the *Kluger* court had to face the issue of what additional constitutional justification would be required of legislation that failed to meet the reasonable substitute test.[45]

Florida's constitution has, as do twenty-nine other state constitutions,[46] a so-called "right to redress" clause promising that the courts will be open for every person for redress of any injury.[47] Some states having such provisions have held that their "right to redress" clause guarantees no more than a due process clause would.[48] However, in *Kluger*, the Florida court held that such a clause would guarantee that tort actions, at least those existing at the time of enactment of the constitution, may not be abrogated by the legislature without substantial justification.[49] Thus, the *Kluger* court held, not on the basis of a due process clause but on the state's "right to redress" clause, that if the reasonable substitute test were not met, then the burden shifted to the legislature to show "an overpowering public necessity" which could not be met by alternate means. The court noted that no such overpowering necessity had been demonstrated and struck down the legislation.[50]

Although the *Kluger* decision represented a setback for the property damage no-fault concept, it could hardly be considered fatal; relatively few states have interpreted their "right to redress" clauses to incorporate existing tort actions into the state constitution. Furthermore, the Florida court's reasoning that optional insurance is no substitute for the abrogated tort remedy is somewhat questionable. For example, the court in *Pinnick* noted that the plaintiff had the option to choose

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[45] A holding that failure to satisfy the reasonable substitute test would itself invalidate the legislation would have run contra to Florida precedent because the court had previously upheld the Florida automobile guest statute, McMillan v. Nelson, 149 Fla. 334, 5 So. 2d 867 (1942), and also upheld the abrogation of the action for alienation of affections, Rotwein v. Gersten, 160 Fla. 736, 36 So. 2d 419 (1948). *See* note 50 *infra*.

[46] *See* Comment, *"No-Fault" Insurance—Lack of Reasonable Substitute for Eliminated Cause of Action for Property Damage Violates State Constitution*, 4 MEMPHIS ST. U.L. REV. 635, 639 n.31 (1974).

[47] FLA. CONST. art. I, § 21, states, "[t]he Courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

[48] *E.g.*, Pinnick v. Cleary, —Mass.—, 271 N.E.2d 592, 611 (1971); Manzanares v. Bell, 214 Kan. 589, 522 P.2d 1291 (1974).

[49] *See also* Saylor v. Hall, 497 S.W.2d 218, 222 (Ky. 1973); Lebohm v. City of Galveston, 154 Tex. 192, 199, 275 S.W.2d 951, 954 (1955). *See* cases collected at 16A C.J.S. *Constitutional Law* §§ 709e-10 at 1216-19 (1956).

[50] The court distinguished the *McMillan* and *Rotwein* cases (*see* note 45 *supra*) by saying that in *McMillan* the legislature had not abolished the guest's right of action in the guest statutes but merely adjusted the requirements for recovery from negligence to intentional injury. In *Rotwein*, the abolition was justified because the overpowering purpose was to avoid extortion and blackmail. 281 So. 2d at 4.

a deductible so large that, in effect, he would not be covered by the "mandatory" no-fault insurance provided by the law.[51] Thus, under the Massachusetts law, personal injury protection was as optional as the Florida property damage coverage; yet the *Pinnick* court appeared not even to consider whether, as the *Kluger* court later concluded, the no-fault coverage thereby failed to provide a substitute for the old tort remedy.[52] A more serious problem with the *Kluger* court's reasoning is that it is difficult to understand why any mandatory system of insurance might be constitutional while the seemingly lesser imposition of a system which differs only by being optional is not.[53] Apparently, the only way to avoid this problem is to suggest that it is the requirement to make a choice that is unconstitutional, not the choices offered.[54]

C. The Rational Relation Test

The second element of the due process attack against no-fault legislation has been the requirement that the statute bear a rational relationship to a legitimate legislative objective. Of course, this test is not unique to tort abrogation legislation, and even decisions that have found the reasonable substitute test to have been satisfied have nonetheless applied this second test to the legislation.[55] Here again, one must distinguish whether a federal or state court is applying the test. While the federal courts require only that some "reasonably conceivable state of facts [exist] that relates the regulation to any reasonably conceivable permissible objective,"[56] the state courts appear to vary,

[51] Pinnick v. Cleary, —Mass.—, 271 N.E.2d 592, 607 (1971). The *Pinnick* decision actually utilized the fact that the coverage could be optional to support the constitutionality of the statute against the plaintiff's claim that he had been deprived of due process by being forced to insure himself through a private, profit-making corporation. *Id.* at 607.

[52] The dissent in *Kluger* noted this element of the *Pinnick* holding, 281 So. 2d at 8, but the majority did not attempt to resolve the two positions.

[53] The *Kluger* decision noted that the issues would be different if the insurance coverage had been made mandatory. 281 So. 2d at 5. Again, this logical difficulty was noted by the dissent, 281 So. 2d at 10, but the majority did not respond to the problem.

[54] It might be argued that in spite of the existence of accurate statistics, the public is sufficiently ignorant of probability theory that it should not be forced to decide intelligently whether to waive its rights to recovery either in tort or on an insurance contract. Furthermore, while the individual may have some knowledge about whether or not his own conduct is more likely than that of an average person to result in a loss, he is in no position to know whether he will be an innocent victim of a negligent tort. These arguments have not been discussed in the cases, however.

[55] *See, e.g.*, New York Central R.R. v. White, 243 U.S. 188 (1917); Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974); Pinnick v. Cleary, —Mass.—, 271 N.E.2d 592 (1971). No court has yet found that a reasonable substitute was provided by the legislation but that it nonetheless failed the rational relation test.

[56] Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 106. The test is similar to the equal protection test. *See* McGowan v. Maryland, 366 U.S. 420, 426 (1961).

and some will require considerably more justification than the federal courts will.[57]

In all cases concerning personal injury no-fault legislation the courts have held that the rational relationship test has been satisfied.[58] These decisions have found, as the legislatures presumably found, that the common-law tort recoveries for personal injuries in automobile accidents were cumbersome and slow, riddled with inequities and excessive litigation expenses, and a drain on judicial resources.[59] Recall, however, that property damage loss differs from personal injury loss in that the loss can generally be quickly, accurately, and objectively determined.[60] Thus, the difficulties in the determination of damages that cause the protracted personal injury litigation are not present in property damage cases.[61] In the initial test of Michigan's no-faulty property damage legislation,[62] the Wayne County Circuit Court in *Shavers v. Kelley*,[63] found that none of the above justifications for personal injury no-fault plans exists in support of property damage legislation. After hearing extensive testimony, the court struck down the Michigan no-fault property damage provisions, finding that

> [i]n short, the clear evidence was that the tort property damage indemnification system was working efficiently, and that there was no social objective to be served by abrogating tort rights of owners of property damaged by negligent tort feasors.[64]

Indeed, precisely such a conclusion prompted the early advocates of no-fault to exclude property damage from their proposals.[65]

The *Shavers* decision followed the *Kluger* reasoning that because the property damage coverage was merely optional, it offered nothing to the public that did not already exist under the prior system, and, therefore, the statute abrogated a tort remedy without furnishing any

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[57] Although the federal courts no longer use so-called substantive due process to justify examining state economic regulation from a natural justice standpoint (*see* notes 14 and 23 *supra*) many state courts continue to use this approach. Hetherington, *State Economic Regulation and Substantive Due Process of Law* (pts. 1-2), 53 NW. U.L. REV. 13, 226 (1958); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

[58] *See* note 55 *supra*.

[59] Pinnick v. Cleary, —Mass.—, 271 N.E.2d 592, 602-05 (1971). These are precisely the shortcomings of tort recovery noted by early no-fault advocates. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 11-34 (1965).

[60] *See* note 4 and accompanying text *supra*.

[61] Mehr & Eldred, *Should the Automobile Property Damage Liability Insurance System be Preserved?*, 48 NOTRE DAME LAW. 811 (1973).

[62] MICH. COMP. LAWS ANN. § 500.3121 *et seq.* (Supp. 1974).

[63] Civil No. 73-248-068-cz [CCH Auto. Ins. Cas. [1973-1975 Transfer Binder] ¶ 8308] (Mich., Wayne County Cir. Ct. May 20, 1974). An appeal is pending at this writing.

[64] Civil No. 73-248-068-cz at 59.

[65] *See* note 4 *supra*.

substitute. Although Michigan does not have a "right to redress" clause, the court said that the state and federal due process clauses require that

> [s]uch abrogation of tort remedies without substitute remedy cannot stand . . . unless there be found some interest in society to be served . . . and unless the means selected to eliminate that evil are reasonable and appropriate.[66]

The court's decision was based not on whether the means selected were reasonable but on the failure of the legislation to serve a societal interest.[67]

Thus, the *Shavers* decision may have more impact on the future of no-fault legislation than the *Kluger* case. First, *Kluger* was based on a peculiar clause of the Florida constitution, while *Shavers* rested on the pervasive due process clause. Secondly, the factual determination by the *Shavers* court that the legislation served no societal interest may bear on the rational relation test without regard to whether a reasonable substitute has been offered.[68] Thus, by following the *Shavers* reasoning that no social purpose is served by the legislation, a court might avoid the logical difficulties involved in determining that no reasonable substitute had been offered.[69]

II. DUE PROCESS: FUTURE POSSIBILITIES

Even if subsequent courts agree with the *Shavers* determination that tort recovery for property damage is working fairly and efficiently, property damage no-fault plans may yet be upheld on any of three grounds. First, a court may determine as a matter of judicial policy that the legislature was legitimately acting within its police powers (*i.e.*, authority to regulate to promote the health, safety, and welfare of the public) and that, as long as the legislation related to these powers, the wisdom of the legislation would not concern the courts. Second, a court might hold that the legislation would be reasonable if the legislature had found that the property damage recovery under the tort system was as plagued with difficulties as the personal injury

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[66] Civil No. 73-248-068-cz at 57. The Michigan law also required vehicle operators to carry property protection insurance which would cause the insurer to be liable without regard to fault for up to $1,000,000 for all damage to property other than another operated vehicle. MICH. COMP. LAWS ANN. §§ 500.3101, 500.3121 (Supp. 1974). The court held, alternately, that this violated equal protection. Civil No. 73-248-068-cz at 60-61.

[67] Shavers v. Kelley, Civil No. 73-248-068-cz at 60.

[68] Recall that the *Kluger* decision stated that, had the insurance been mandatory, the question would be different. *See* note 53 and accompanying text *supra*.

[69] *See* notes 51-54 and accompanying text *supra*.

recovery system and that—also as a matter of judicial policy—it is not the function of a court to review such legislative determinations. Third, there exist lesser justifications for no-fault property damage legislation which the *Shaver* decision did not mention, holding, apparently, that such justifications, even if found to exist, were not sufficient to balance the abrogation of the tort remedy.[70] Other courts may balance these factors differently.

For example, in *Silver v. Silver*,[71] the Supreme Court upheld the "automobile guest statutes" on both the first and second of the above grounds. Generally, these guest statutes provide that the driver of an automobile is not liable to a gratuitous guest for the guest's injuries caused by the driver's simple negligence. The justifications for these statutes appear to be to avoid collusion between the driver and guest to recover from the driver's insurer and to prevent the gratuitous guest from being so ungracious as to demand that his host exercise ordinary care not to injure him.[72] The Court dismissed the argument that due process was violated:

> Whether there has been a serious increase in the evils of vexatious litigation in this class of cases . . . is for legislative determination and, if found, may well be the basis of legislative action further restricting the liability. Its wisdom is not the concern of the courts.[73]

The Court thus required no additional justification because of the abrogation of the guest's tort remedy, nor did it mention the dictum in the *New York Central* case that it was apparently overruling.[74] The Court clearly was not willing to reexamine the legislative determination that the statute tended to reduce vexatious litigation. But this does not imply that the Supreme Court agreed—as the *Haney* court understood it to have done[75]—with the legislature's determination. In fact, the language of the decision seems to grant to the legislature great leeway in determining a legitimate basis for such legislation; avoidance of vexatious litigation is only one such possible basis. This deference

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[70] *See* text accompanying note 80 *infra*.

[71] 280 U.S. 117 (1929).

[72] W. PROSSER, THE LAW OF TORTS 187 (4th ed. 1971). Prosser seriously questions the social policy of these laws. *Id.* at 187.

[73] 280 U.S. at 123.

[74] *See* note 22 and accompanying text *supra*. In fact, it is not clear that vexatious litigation has been reduced by the guest statutes:

> There is perhaps no other group of statutes which have filled the courts with appeals on so many knotty little problems involving petty and otherwise entirely inconsequential points of law.

W. PROSSER, THE LAW OF TORTS 187 (4th ed. 1971).

[75] *See* note 36 and accompanying text *supra*.

to state legislatures in their economic regulation is characteristic of the Supreme Court, however, and the *Silver* decision should be weighed in that context.[76]

Thus, state courts that are willing to defer in areas of economic regulation to state legislatures acting either legitimately within their police powers or as bodies determining fact as a basis for policy may uphold property damage no-fault legislation. However, state courts have generally not been so willing to defer to state legislative wisdom in the latter's exercise of police powers[77] or the fact finding function.[78] For example, several state courts have recently declared automobile guest statutes to be unconstitutional.[79]

Courts may yet uphold property damage no-fault legislation by finding other social policies to which such legislation is reasonably related. For social policy justifications of the property damage statute, the *Shavers* decision looked only to factors that had been cited as justification of personal injury no-fault legislation.[80] Other justifications for property damage coverage may exist. For example, in states with personal injury no-fault plans, it may be administratively wasteful to maintain dual recovery systems for personal injury and property damage claims. As another possible justification, the legislature may determine that the overall social cost of expensive-to-repair cars should be borne by those placing such cars on the highway. Thus, the decision that the owners of such cars should bear the burden of purchasing insurance to cover damage to these cars may be a legitimate social policy determination by the legislature. Finally, in abrogating any tort remedy, there are at least minimal savings in judicial resources. Any of these reasons may qualify as legitimate legislative objectives, and some courts may find them sufficient justification to counterbalance the abrogation of the injured party's tort recovery for property damage.

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[76] *See* notes 14 and 56 and accompanying text *supra*.

[77] *See* note 57 *supra*.

[78] The Michigan Supreme Court, for example, has admitted evidence that public health was not in fact promoted by a law banning the bottling of milk in gallon containers. The law was then held unconstitutional because it lacked a rational relationship to its suggested purpose. Grocers Dairy Co. v. Department of Agriculture, 377 Mich. 71, 138 N.W.2d 767 (1966). *Compare* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[79] *See* Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974); Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974); Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974). *But see* Justice v. Gatchell, —Del.—, 325 A.2d 97 (1974); Duerst v. Limbocker, —Ore.—, 525 P.2d 99 (1974). Although these decisions are based on equal protection grounds, the *Silver* decision also held that the classifications were rationally related to a legitimate legislative purpose and thus the guest statutes did not violate the federal equal protection clause. Thus, these state courts do not feel as restrained as the federal courts in examining such legislation.

[80] Personal injury no-fault *was upheld* in *Shavers* because it was an attempt to reduce the tort recovery problems discussed at note 60 and accompanying text *supra*.

III. CONCLUSION

It appears that in balancing the possible failure of legislation to offer a reasonable substitute remedy with the social policy to be promoted by such legislation four key factors will affect the judicial determination of constitutionality: (1) whether the challenge is based on federal or state constitutional grounds; (2) if on state grounds, what the provisions of the particular state constitution are; (3) whether the challenge is in state or federal court; and (4) if in state court, the extent to which the court is willing to re-examine legislative actions. Whether a state court will follow the federal courts' policy that failure to provide a reasonable substitute will merely give standing to a plaintiff to question the rational relationship of the legislation to a proper legislative objective, or whether the courts will follow the Florida decision that failure to provide such a substitute will place the burden on the legislature to show an overpowering social interest to be served will depend upon the individual state constitutional provisions and the state's traditional orientation toward judicial review.

—*Stephen L. Jones*