University of Miami Law Review

Volume 28 | Number 2 Article 11

1-1-1974

Florida Supreme Court Finds Fault with No-Fault

Bruce S. Goldstein

dents of due process[36] and equal protection.[37] In *Jolicoeur*, the Supreme Court of California held that both the twenty-sixth amendment and California law require that local registrars treat all citizens eighteen years of age or older alike for all purposes related to voting.[38] The registrars were specifically forbidden from specially questioning the validity of an affiant's claim of domicile because of his age or occupational status.[39]

Thus, the *Whatley* decision is one of a continuing line of cases recognizing that the student is fully deserving of equal protection of the laws with regard to his voting rights. "The fundamental importance of the franchise, as both a symbol and a vital tool of our democracy, requires that every effort be made to apply uniform standards and procedures to all qualified voters equally."[40]

JAMES S. BRAMNICK

FLORIDA SUPREME COURT FINDS FAULT WITH NO-FAULT

Plaintiff brought an action in the Dade County Circuit Court alleging that defendant should be held liable for damages to her car, even though Florida's no-fault insurance law exempted defendant from tort liability.[1] Plaintiff, whose car had been involved in a collision with defendant's car, alleged that the driver of defendant's car had been negligent and had been formally charged with failure to yield the right of way. The recoverable damages were limited to $250, the fair market value of the car.[2] The circuit court dismissed the action on the ground that Florida's no-fault insurance law, Florida Statutes section 627.738 (1971), exempted defendant from tort liability. This statute provides that an owner who has elected not to purchase property damage insurance may maintain an action in tort only if such damage exceeds $550. On appeal to the Supreme Court of Florida, *held*, reversed and remanded: Florida Statutes, section 627.738 (1971) is void since it is repugnant

tiffs need only show that a burden has been placed on this precious right in order to avail themselves of the equal protection clause. Wilkins v. Bentley, 385 Mich. 670, 684, 189 N.W.2d 423, 429 (1971).

36. *Id.* at 678, 189 N.W.2d at 426-27.

37. *Id.* at 694, 189 N.W.2d at 434.

38. Jolicoeur v. Mihaly, 5 Cal. 3d 565, 582, 488 P.2d 1, 12, 96 Cal. Rptr. 697, 708 (1971).

39. *Id.*

40. *Id.* at 582, 488 P.2d at 11, 96 Cal. Rptr. at 707.

1. FLA. STAT. § 627.738 (1971).

2. Kluger v. White, 281 So. 2d 1, 3 (Fla. 1973). Damages were alleged to be $750, but the fair market value of the car was only $250. The court noted that plaintiff's damages were limited to the fair market value of the car, since repair costs could not be recovered when they exceeded the fair market value of the automobile before the collision. 25 C.J.S. *Damages* § 82 (1966); 15 D. BLASHFIELD, AUTOMOBILE LAW § 480.1 (3d ed. 1969).

to article I, section 21 of the Florida Constitution, which provides that "[t]he courts shall be open to every person for redress of any injury . . . ." *Kluger v. White,* 281 So. 2d 1 (Fla. 1973).

While no-fault insurance was designed to alleviate inequities inherent in the fault-based automobile reparations system, the adoption of no-fault insurance laws by the various state legislatures has raised serious questions concerning their constitutionality. *Kluger* is the first case to challenge the constitutionality of Florida's no-fault insurance law,[3] making Florida the third state to have such a challenge made. Both the Illinois[4] and Massachusetts[5] laws have faced similar attacks, and of the three, only the Massachusetts law has survived in its entirety.

The basic premise behind the no-fault insurance concept is that the victim of an automobile accident is compensated by his own insurer for injuries to himself and/or his property, without regard to who was at fault in causing the accident. Traditional tort liability is thereby abolished for the party at fault.[6]

It was because of the severe inequities of the fault-based automobile reparation system that the no-fault concept emerged.[7] Critics regard the fault-based insurance system as incomplete and insufficient in compensating the accident victim. Of all automobile accident victims treated through emergency medical services, fifty-eight percent never recover in a tort lawsuit either because they are unable to prove fault or freedom from contributory negligence, or because the defendant was insolvent, or because only one car was involved.[8]

Critics contend that the fault-based system is also unnecessarily expensive to the insuring public for several reasons. First, legal costs are high because of the necessity to litigate each claim and the difficulty encountered in this litigation due to the dual criteria for compensation—case by case determination of fault, and assessment of damages without specific guidelines. Second, since the processing of each claim involves fixed administrative costs, the vast number of small claims filed channels a large percentage of the premium dollar into clerical processing rather than compensation of the accident victim.[9] In addition, insurance companies often settle small claims for more than they are worth to avoid the expense of litigation, thus making the system wastefully expensive.[10]

Critics of fault-based insurance also argue that this system burdens

3. FLA. STAT. §§ 627.730-.741 (1971).
4. Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972).
5. Pinnick v. Cleary, — Mass. —, 271 N.E.2d 592 (1971).
6. *See* W. ROKES, NO-FAULT INSURANCE 3-7 (1971).
7. *See* Keeton, *The Case for No-Fault,* 44 MISS. L.J. 1 (1973) [hereinafter cited as No-Fault].
8. Magnuson, *Nationwide No-Fault,* 44 MISS. L.J. 132, 137-38 (1973).
9. No-Fault, *supra* note 7, at 4.
10. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 2 (1955) [hereinafter cited as KEETON].

the community by causing congestion in the courts.[11] The increased taxes the public must pay to provide a courtroom, a jury, and the necessary personnel to try a case in which the traffic victim often receives less than $1000 above his lawyer's fees, is unnecessarily burdensome.[12]

While opponents of no-fault insurance do not deny the deficiencies of the fault-based reparation system, they are concerned that the adoption of a no-fault plan might well result in the abrogation of traditional constitutional guarantees. The attack against the constitutionality of the no-fault insurance laws has generally taken three approaches:[13] (1) denial of equal protection of the laws; (2) denial of trial by jury; and (3) violation of a provision in most state constitutions that every person shall have access to the courts for redress of injury.[14]

Kluger did not challenge the constitutionality of Florida's entire no-fault insurance law,[15] but limited its attack to Florida Statutes, section 627.738 (1971), which deals with property damage.[16] This section provides, in effect, that the traditional right of action in tort for property damage arising from an automobile accident is abolished, and compensation for property damage is only available from one's own insurer, unless the plaintiff is one who: (1) has chosen not to purchase property damage insurance, and (2) has suffered property damage in excess of $550.[17]

The plaintiff in this case raised all three constitutional objections to this provision of Florida's no-fault law,[18] but the court found it necessary to examine only one of his contentions.[19] Plaintiff contended that by abolishing his right to sue in tort, the no-fault insurance law conflicted with article I, section 21 of the Florida Constitution, which provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[20]

This provision of the constitution had previously been used to attack the constitutionality of statutes abolishing pre-existing common

11. *Id.* at 13.

12. No-Fault, *supra* note 7, at 10.

13. *See*, KEETON, *supra* note 10, at 483-504; DEPARTMENT OF TRANSPORTATION, AUTOMOBILE AND INSURANCE COMPENSATION STUDY: CONSTITUTIONAL PROBLEMS IN AUTOMOBILE ACCIDENT COMPENSATION REFORM (1970).

14. This approach often takes the form of a due process argument. Regardless of which form the argument takes, however, the considerations raised are generally the same. *See*, KEETON, *supra* note 10, at 489-90.

15. FLA. STAT. §§ 627.730-.741 (1971).

16. The remainder of the Florida Automobile Reparations Reform Act requires every owner or registrant of a motor vehicle in the state of Florida to acquire personal injury protection benefits. This provides coverage up to a maximum of $5000 for the accident victim's medical expenses, lost earnings resulting from a disability, and funeral expenses. The person at fault in the accident is exempted from tort liability unless medical and related expenses exceed $1000 or the injury consists of a permanent disfigurement, serious fracture, loss of a body member, permanent loss of a body function, permanent injury within reasonable medical probability, or death. FLA. STAT. §§ 627.730-.741 (1971).

17. 281 So. 2d at 3 (1973).

18. Brief for Appellant at 2, Kluger v. White, 281 So. 2d 1 (Fla. 1973).

19. 281 So. 2d at 3.

20. FLA. CONST. art. I, § 21.

law remedies,[21] but the court had never before established guidelines to determine its applicability to specific situations. The court was reluctant to prevent the legislature from ever abolishing any pre-existing remedy through this provision, for this would impose upon the legislature constraints too severe to allow it to keep pace with the continually changing requirements of society. It could not, however, allow whimsical destruction of a cause of action which has traditionally existed in the law of the jurisdiction.[22]

The court in *Kluger*, therefore, promulgated the following test for determining whether a pre-existing remedy can be abolished:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[23]

The court then examined those situations in the past where the legislature has abolished common law remedies, to determine whether this rule had been violated. In *McMillan v. Nelson*,[24] the Florida Guest Statute[25] withstood attack under a similar provision of the Florida Constitution of 1885.[26] The court noted, however, that this statute did not abolish the right to sue, but merely "changed the degree of negligence necessary for a passenger in an automobile to maintain a tort action against the driver" from ordinary negligence to gross negligence.[27]

The court then considered the workmen's compensation statutes,[28] which abolished the right to sue one's employer for a job-related injury.[29] Since workmen's compensation has been held valid under the United States

---

21. *E.g.*, McMillan v. Nelson, 149 Fla. 334, 5 So. 2d 867 (1942) (attacking the constitutionality of the Florida Guest Statute); Rotwein v. Gersten, 160 Fla. 736, 36 So. 2d 419 (1948) (attacking the constitutionality of the Florida statute eliminating a cause of action for alienation of affections, criminal conversation, seduction or breach of contract to marry); *cf.*, Spafford v. Brevard County, 92 Fla. 617, 110 So. 451 (1926) (attacking the constitutionality of a Florida statute which vested authority in the State Road Department to condemn property).

22. 281 So. 2d at 4.

23. *Id.*

24. 149 Fla. 334, 5 So. 2d 867 (1942).

25. Law of May 20, 1937, ch. 18033, [1937] Fla. Laws (repealed 1972).

26. FLA. CONST. Declaration of Rights § 4 (1885).

27. 281 So. 2d at 4.

28. FLA. STAT. §§ 440.01-.58 (1971).

29. 281 So. 2d at 4.

Constitution,[30] it has often been compared to no-fault insurance laws to justify their constitutionality.[31] In lieu of a tort action, workmen's compensation requires that all employers obtain insurance for their employees to provide compensation for injuries which occur on the job. The court, however, differentiated between the two laws. In Florida's no-fault insurance law, the injured party has not been required to cover himself by insurance, and is thus left without remedy if his right to sue is abolished. In the workmen's compensation law, since an employer must provide insurance for his employee, the employee is thereby "provided adequate, sufficient, and even preferable safeguards" if the need for compensation arises.[32]

An "overwhelming public necessity" was considered to have been established when, in 1945, the Florida Legislature abolished the common law remedies for alienation of affections, criminal conversation, seduction or breach of contract to marry.[33] In *Rotwein v. Gersten*,[34] in which the constitutionality of this act was challenged, the court stated that while these common law actions served a good purpose at one time, "when they become an instrument of extortion and blackmail, the legislature has the power . . . to abolish them."[35]

In enacting the no-fault insurance law, the legislature did not provide a reasonable alternative to protect the rights of the accident victim who, like Kluger, did not purchase property damage insurance and who incurred damages below $550. Nor was an "overpowering public necessity" for the abolishment of the common law right to sue in tort shown by the legislature when it enacted this law.[36]

The decision in *Kluger* was not only the first constitutional test of Florida's no-fault insurance law, but it was also the first definitive judicial expression of the application of article I, section 21 of the Florida Constitution to laws enacted by the Florida legislature. Although the constitutionality of the remainder of Florida's no-fault law has yet to be tested under this section,[37] it differs in one important aspect from the property damage portion of the law. A reasonable alternative to suing in tort is provided for all accident victims in the personal injury section since insurance coverage is mandatory, thus the court strongly intimated that this portion of the law is constitutional under article I, section 21:

> Had the Legislature chosen to require that appellant be insured

30. New York Central R.R. v. White, 243 U.S. 188 (1917).

31. Pinnick v. Cleary, — Mass. —, 271 N.E.2d 592 (1971); *see* KEETON, *supra* note 10, at 485-87.

32. 281 So. 2d at 4.

33. FLA. STAT. § 771.01 (1971).

34. 160 Fla. 736, 36 So. 2d 419 (1948).

35. *Id.* at 739, 36 So. 2d at 421.

36. 281 So. 2d at 4.

37. The remainder of Florida's no-fault insurance law, FLA. STAT. §§ 627.730-.741 (1971), has been upheld as constitutional in Lasky v. State Farm Ins. Co., 37 Fla. Supp. 178 (Ct. Rec., Broward County 1972).

> against property damage loss—as is, in effect, required by Fla. Stat. § 627.733, F.S.A., with respect to other possible damages—the issues would be different. A reasonable alternative to an action in tort would have been provided . . . .[38]

The remaining portion of Florida's no-fault insurance law still may have to withstand the equal protection of law and trial by jury arguments, but similar laws in other jurisdictions have withstood these arguments.[39]

Nineteen states have now adopted no-fault insurance programs in one form or another, and the question of whether no-fault plans should be adopted is pending in many state legislatures.[40] The *Kluger* decision is an indication that in spite of the recognized virtues of no-fault insurance, the courts will not allow traditional constitutional guarantees to be abrogated. States which are now in the process of enacting no-fault laws should consider the guidelines established by *Kluger* in drafting their no-fault legislation to help avoid nullification by the courts.

BRUCE S. GOLDSTEIN

COMPARATIVE NEGLIGENCE: JUSTICE IN FLORIDA FOR THE CONTRIBUTORILY NEGLIGENT PLAINTIFF

Following the death of her husband in a truck-car collision, plaintiff brought actions for wrongful death alleging that defendant Phillip F. Hoffman had been negligent in operating a truck owned by a defendant Pav-A-Way Corporation.[1] The defendants' answers pleaded general denials and the defense of contributory negligence. The plaintiff's request for jury instructions based upon comparative negligence was denied by the trial judge and a jury verdict in favor of the defendants resulted. The plaintiff appealed to the District Court of Appeal, Fourth District, which, in an unprecedented decision, reversed the judgment of the trial court and ordered a new trial in accordance with its opinion rejecting the rule of contributory negligence and adopting the principle of comparative negligence.[2] The Supreme Court of Florida on conflict

38. 281 So. 2d at 5.

39. Pinnick v. Cleary, — Mass. —, 271 N.E.2d 592 (1971) (upholding the constitutionality of Massachusetts' no-fault insurance law); *contra*, Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972) (striking down Illinois' no-fault insurance law as unconstitutional).

40. BUSINESS WEEK, June 9, 1973, at 33.

1. Jones v. Hoffman, 272 So. 2d 529 (Fla. 4th Dist. 1973). The plaintiff maintained one action in her individual capacity as widow, and the second as administratrix of the decedent's estate.

2. *Id.* The holding of the district court was unprecedented in that it attempted to overrule precedent established by the Supreme Court of Florida 87 years earlier in *Louisville*