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No-Fault Insurance in Kentucky--A Constitutional Analysis

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NO-FAULT INSURANCE IN KENTUCKY—A CONSTITUTIONAL ANALYSIS

I. INTRODUCTION

Although the idea of no-fault insurance is not new,[1] it has only in recent years been seriously considered as an alternative to the tort concept of negligence. The major impetus for the current interest in no-fault insurance plans can be directly traced to the 1965 publication of the book *Basic Protection for the Traffic Victim* by Professors Robert Keeton and Jeffrey O'Connell. Professors Keeton and O'Connell discuss the problems they see with the present system and suggest a new system of compensation.[2] They also submit a model statute which could easily be adopted in almost any state.[3]

Proponents of no-fault argue that the present system has clogged the courts, delayed payments to injured parties, inflated claims, caused higher insurance premiums and wasted enormous amounts of money in legal battles over the determination of fault. The opponents of no-fault plans contend that such plans compromise the injured party's rights of action and in most cases completely abolish the right to sue for pain and suffering. In addition, no-fault plans undermine the policy of deterrence afforded by the tort liability system, by virtue of the tortfeasor's having to pay for the harm done.

Since 1965 a variety of plans and proposals have been introduced. Massachusetts,[4] Florida,[5] Illinois[6] and Puerto Rico[7] have adopted no-fault plans which are similar in basic structure to the Basic Protection Plan of Keeton and O'Connell. Delaware,[8] Minnesota,[9] Oregon[10] and South Dakota[11] have adopted various plans which differ considerably

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[1] *See* Smith, Lilly, & Dowling, *Compensation for Automobile Accidents: A Symposium*, 32 COLUM. L. REV. 785 (1932).

[2] R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965) [hereinafter cited as BASIC PROTECTION].

[3] *Id.* at 299-339.

[4] MASS. ANN. LAWS ch. 90, §§ 34A, 34D, 34M, 34N; ch. 175, §§ 22E-H, 113B-C; ch. 231, § 6D (Supp. 1971).

[5] FLA. STAT. ANN. §§ 627.730-.741 (1972).

[6] ILL. ANN. STAT. ch. 73, §§ 1065.150-163 (Supp. 1973).

[7] P.R. LAWS ANN. tit. 9, §§ 2051-65 (Supp. 1970).

[8] DEL. CODE ANN. tit. 21, § 2118 (Supp. 1972) [hereinafter cited as Delaware Act].

[9] MINN. STAT. ANN. §§ 65B.22-.27 (Supp. 1973).

[10] ORE. REV. STAT. §§ 743.786-.835 (1971).

[11] S.D. COMPILED LAWS ANN. §§ 58-23-6, 7, 8 (Supp. 1973).

from the Basic Protection Plan in approach and in the way in which they affect traditional concepts of tort liability.[12]

In Kentucky, a variety of proposals were introduced at the 1972 meeting of the General Assembly and it is expected that several will be introduced in 1974. A discussion of the *many* different no-fault plans is beyond the scope of this comment, so it will focus on the most common of these plans: the Keeton-O'Connell Basic Protection Plan.[13]

The Basic Protection Plan and its derivatives have two main features: (1) auto accident victims are reimbursed by their own insurance company for all out-of-pocket losses connected with bodily injury (medical bills, wage loss, funeral bills, etc.) without regard to who was at fault; and (2) the traditional tort recovery for pain and suffering is available only to those who can cross a certain threshold established by the statute. The threshold may be stated in terms of injuries within a specific category or in terms of expenses above a specified level. For example, a plan that abolishes the right to recover for pain and suffering unless the injury results in permanent disability or unless the medical bills are at least $500 is a threshold plan.[14] The major differences in the threshold plans are the dollar amounts chosen as the limit for reimbursement of out-of-pocket losses and the specific threshold to be crossed before a victim is allowed to sue for pain and suffering.

Under the Basic Protection Plan, for example, the out-of-pocket expenses would be reimbursed up to a limit of $10,000 per person,[15] and a suit against the negligent party could not be brought unless the damages for out-of-pocket expenses were higher than $10,000 or the damages for pain and suffering were higher than $5,000.[16] By way of comparison, under the Massachusetts no-fault statute,[17] out-of-pocket

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[12] The Delaware, Minnesota and South Dakota plans have very little, if any, impact on tort liability. *See* Ghiardi & Kircher, *Automobile Insurance Reparations Plans: An Analysis of Eight Existing Laws*, 55 MARQ. L. REV. 1, 5, 55, 67 (1972).

[13] Massachusetts, Florida and Illinois are examples of states that have adopted plans that contain the principal features of the Basic Protection Plan. It should be noted that Illinois' statute was held to violate the Illinois Constitution by the Illinois Supreme Court in Grace v. Howlett, 283 N.E.2d 474 (Ill. 1972).

[14] Most no-fault plans do not encompass property damage. Although the Basic Protection Plan originally excluded property damage, it has been amended to include Vehicle Protection Insurance. *See* Keeton & O'Connell, *Alternate Paths Toward Nonfault Automobile Insurance*, 71 COLUM. L. REV. 241, 260-62 (1971).

[15] BASIC PROTECTION at 276-77, 280, 283.

[16] *Id.* at 274-76. When a suit based on negligence is brought and damages are awarded, only the amount awarded in excess of $5000 for pain and suffering and $10,000 for other items is collectible.

[17] MASS. ANN. LAWS ch. 90, §§ 34A, 34D, 34M, 34N; ch. 175, §§ 22E-H 113B-C; ch. 231, § 6D (Supp. 1971).

expenses are reimbursed up to a limit of $2000 per person[18] and the victim may bring suit to recover for pain and suffering only if (1) the reasonable and necessary medical and hospital costs exceed $500; (2) death occurs; or (3) injury consists in whole or in part of loss of a body member, permanent and serious disfigurement, loss of sight or hearing, or a fracture.[19]

We shall examine the obstacles a no-fault threshold plan might face in a *constitutional* test under Kentucky law[20] and point out ways in which such obstacles might be avoided.

II. CONSTITUTIONAL QUESTIONS INVOLVED

A study of the Kentucky Constitution and Kentucky case law construing its various provisions has revealed that four provisions of the Kentucky Constitution present, in varying degrees of severity, obstacles to the successful passage of a no-fault threshold statute. These provisions are sections 7, 14, 54 and 241. Each section will be discussed separately with suggestions as to how constitutional problems might be avoided.

A. *Section 7*

Section 7 of the Kentucky Constitution states as follows:

> The ancient mode of trial by jury shall be held sacred and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.[21]

This provision has been strictly construed by the Kentucky Court of Appeals since the adoption of the constitution as proclaiming a right that cannot be abrogated.[22] The Court of Appeals has held that a jury may be dispensed with only in those cases in which a jury was not customarily used at common law, such as cases involving minor injuries or amounts in controversy and cases purely in equity.[23]

A basic idea included in most no-fault insurance plans is that in less serious auto accidents, the victim will recover from his own

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[18] *Id.* § 34A.

[19] *Id.* § 34M.

[20] A discussion of the constitutionality of a no-fault plan under the United States Constitution is beyond the scope of this article. The reader is referred to articles written by other authors on the subject. *See, e.g.*, Martel, *No-Fault Automobile Insurance in Pennsylvania—A Constitutional Analysis*, 17 VILL. L. REV. 783, 784-90 (1972); CONSTITUTIONAL PROBLEMS IN AUTOMOBILE ACCIDENT COMPENSATION REFORM (U.S. Dep't of Transp., Auto. Ins. & Compensation Study 1970).

[21] KY. CONST. § 7.

[22] Mt. Sterling v. Holly, 57 S.W. 491 (Ky. 1900), O'Connor v. Henderson Bridge Co., 27 S.W. 251 (Ky. 1894); Stidger v. Rogers, 2 Ky. (Sneed) 52 (1801).

[23] Houk v. Starck, 64 S.W.2d 565 (Ky. 1933); King v. Commonwealth, 238 S.W. 373 (Ky. 1922); Mt. Sterling v. Holly, 57 S.W. 491 (Ky. 1900); O'Connor v. Henderson Bridge Co., 27 S.W. 251 (Ky. 1894).

insurance company and not be able to sue the negligent party. The victim is generally denied his right to a jury trial to determine the extent of his injuries. At first glance this seems to present a major constitutional obstacle to the no-fault system. However, it should be noted that Professors Keeton and O'Connell have stated that the provision in their Basic Protection Plan for non-jury trials of small claims is not essential.[24] A statute could easily be drafted to provide for a jury trial solely to determine the extent of the victim's injuries but much time and expense would be saved by not having the jury determine which party was at fault.

The Kentucky Court of Appeals did not squarely face the jury trial question in connection with early cases ruling on the constitutionality of workmen's compensation. The Kentucky Workmen's Compensation Act passed in 1916 was held by the Kentucky Court of Appeals to be constitutional since it was a voluntary system.[25] Under the Act an employee is not deemed to have waived any constitutional rights to which he is entitled until he consents in writing to accept the provisions of the Act. Although the Court of Appeals held the Workmen's Compensation Act of 1914 unconstitutional on the ground that it was compulsory instead of voluntary,[26] they did not consider the *jury trial* question at any length. The major portion of the opinion was devoted to a consideration of sections 54 and 241 of the constitution and an explanation of the reasons why the Act violated these provisions. The Court summarily disposed of the contention that the Act violated the right to jury trial, along with several other questions raised, by stating that "[a] sufficient answer to all this is that these are matters addressed entirely to the wisdom of the Legislature and can be regulated as necessities may require."[27] In light of the strict interpretation of the Court with regard to the right to jury trial both before and after 1914,[28] it appears likely that the Court did not thoroughly consider nor sufficiently anticipate the import of such a statement and would not feel bound by it today.

One possible way to avoid the constitutional problem presented by section 7 without removing the non-jury trial provision is to provide for arbitration of small claims with the right to a trial *de novo* on appeal. A provision of this type appeared in the Illinois statute[29] and was used as one basis for holding the Illinois no-fault plan uncon-

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[24] BASIC PROTECTION at 504.
[25] Greene v. Caldwell, 186 S.W. 648 (Ky. 1916).
[26] Ky. State Journal Co. v. Workmen's Comp. Bd., 170 S.W. 1166 (Ky. 1914).
[27] *Id.* at 1171.
[28] *See* cases cited *supra* note 22.
[29] ILL. ANN. STAT. ch. 73, §§ 1065.159 (Supp. 1973).

stitutional.[30] However, the reasoning was based upon a peculiar objective of article VI of the Illinois Constitution[31] which the court said was to abolish the wasteful and duplicative process of trial *de novo*.[32]

The Pennsylvania Supreme Court, on the other hand, has upheld the constitutionality of legislation providing for similar arbitration proceedings for minor auto accident cases.[33] The Court determined that arbitration with trial *de novo* limited but did not abrogate the right to jury trial as it existed at common law and was constitutionally permissible.

The Kentucky Constitution has not been found to have the objective of eliminating trials *de novo*. In addition, the Kentucky Court of Appeals has repeatedly stated that arbitration is favored by the courts.[34] Although the Kentucky Court of Appeals has held that an agreement by the parties to a contract to arbitrate all of the disputes that might arise thereunder is invalid and unenforceable, the stated reason for not allowing such an agreement is that it is an attempt to oust the courts of their jurisdiction.[35] However, if there were a provision for a trial *de novo* on appeal, the courts would not be deprived of their jurisdiction, especially if it were required that the arbitration proceeding be initiated by the filing of a complaint in the circuit court and that the award be entered by the court in its record of judgments to have the effect of a final judgment upon the parties unless reversed on appeal. This last provision would also meet the requirements of the Kentucky statutes which provide that a question must be submitted to arbitration by order of the court[36] and that an award must be entered as a judgment of the court unless set aside.[37] The Kentucky statutes also indicate that an agreement to submit a matter to arbitration will be binding only if it is in writing and states the matter to be submitted along with the names of the arbitrators.[38] However, the Kentucky Court of Appeals has held that where parties have agreed on a

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[30] Grace v. Howlett, 283 N.E.2d 474, 480-81 (Ill. 1972).
[31] ILL. CONST. art. VI.
[32] Grace v. Howlett, 283 N.E.2d 474, 480-81 (Ill. 1972).
[33] Application of Smith, 112 A.2d 625 (Pa. 1955).
[34] *See, e.g.*, Smith v. Hillerich & Bradsby Co., 253 S.W.2d 629 (Ky. 1952); Upington v. Commonwealth Ins. Co. of N.Y., 182 S.W.2d 648 (Ky. 1944); Gen. Exchange Ins. Corp. v. Harmon, 157 S.W.2d 126 (Ky. 1941); Poggel v. Louisville R.R., 10 S.W.2d 305 (Ky. 1928).
[35] Jones v. Jones, 16 S.W.2d 503 (Ky. 1929); Ison v. Wright, 55 S.W. 202 (Ky. 1900); Gaither v. Dougherty, 38 S.W. 2 (Ky. 1896); International Bd. of Elec. Workers, Local Union No. 1102, AFL-CIO v. Wadsworth Elec. Mfg. Co., 240 F. Supp. 292 (E.D. Ky. 1965).
[36] KY. REV. STAT. § 417.011 (1971) [hereinafter cited as KRS].
[37] KRS § 417.017.
[38] KRS § 417.010.

method of arbitration pursuant to a statute or statutory regulation, such agreements are valid.[39] Therefore, if a no-fault statute were upheld on the basis of implied consent as discussed *infra*, the parties involved could be deemed to have consented to the method of arbitration provided by the no-fault statute. If on the other hand, a constitutional amendment were passed to validate a no-fault statute, this entire problem could be eliminated by way of the amendment.

In summary, whether a no-fault plan in Kentucky provides for arbitration of small claims with the right to trial *de novo* on appeal or for a jury trial on the extent of injuries in a small claim, it seems likely that the plan would not be held to violate section 7 of the Kentucky Constitution.

B. *Section 14*

> All courts shall be open and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.[40]

The next question to be considered is whether the threshold feature of no-fault plans, which abolishes tort actions for pain and suffering in minor cases, is violative of section 14 of the Kentucky Constitution. A similar provision of the Massachusetts Constitution was considered by the Massachusetts Supreme Judicial Court in *Pinnick v. Cleary*[41] where the Court upheld the constitutionality of the Massachusetts no-fault statute. Article 11 of the Massachusetts Constitution guarantees "a certain remedy, by having recourse to the laws, for all injuries or wrongs which . . . [one] may receive. . . ." The Court found that this article had been construed by Massachusetts courts as directed toward the preservation of *procedural* rights and determined that it had no ramifications in the area of *substantive* rights. In holding that article 11 did not prohibit alterations of common law rights as such, the Court added that "changes in prior law are necessary in any ordered society. . . ."[42]

A provision similar to section 14 is found in article II, section 6 of the Colorado Constitution. When presented with the question, the Colorado Supreme Court refused to hold that the state's automobile guest statute violated the constitutional provision even though the

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[39] Northern States Contracting Co. v. Swope, 111 S.W.2d 610 (Ky. 1937); Norfolk & W.R.R. v. Harris, 84 S.W.2d 69 (Ky. 1935).

[40] KY. CONST. § 14.

[41] 271 N.E.2d 592 (Mass. 1971).

[42] *Id.* at 600.

statute abolished, in most cases, a guest passenger's right to sue the driver of the car in which he was riding.[43] The Court explained that such provisions are designed to insure that when a legal wrong has been committed the victim cannot afterwards be denied a remedy; such provisions are not designed to "'. . . preserve existing duties against legislative change made before the breach occurs.' "[44]

Even though provisions similar to section 14 of the Kentucky Constitution have been interpreted in many states as intended only to protect procedural rights and not to act as a restraint on the legislature, Kentucky's provision has been more strictly construed. In the case of *Ludwig v. Johnson*,[45] the Court of Appeals was faced with the question of the constitutionality of Kentucky's automobile guest statute, which barred a tort action by a guest in an automobile unless the host was intentionally reckless. In holding that the statute was unconstitutional, the Court stated:

> It was the manifest purpose of the framers of that instrument [the constitution] to preserve and perpetuate the common-law right of a citizen injured by the negligent act of another to sue to recover damages for his injury. The imperative mandate of section 14 is that every person, for an injury done him in his person shall have remedy by due course of law.[46]

In the recent case of *Saylor v. Hall*,[47] the Kentucky Court of Appeals recognized that many states have construed their state constitutions as not forbidding ". . . the creation of new rights or the abolition of old ones recognized by the common law . . ." provided the legislation is to attain a permissible objective. Hence these states have experienced no difficulty in upholding compulsory workmen's compensation laws and automobile guest passenger statutes.[48] But the Court of Appeals pointed out that the Kentucky Constitution "has been held to prohibit the legislative branch from abolishing common-law rights of action for injuries to the person caused by negligence or for death caused by negligence."[49]

It should also be noted that the Court of Appeals has on numerous occasions indicated the importance of a person's right to recover damages for pain and suffering.[50] On one occasion, the Court felt impelled to state:

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[43] Vogts v. Guerette, 351 P.2d 851 (Colo. 1960).
[44] *Id.* at 854-55.
[45] 49 S.W.2d 347 (Ky. 1932).
[46] *Id.* at 351.
[47] 497 S.W.2d 218 (Ky. 1973).
[48] *Id.* at 221-22.
[49] *Id.*
[50] *See, e.g.*, Ashland Coca-Cola Bottling Co. v. Brady, 66 S.W.2d 57 (Ky. 1933); Warfield Natural Gas Co. v. Wright, 54 S.W.2d 666 (Ky. 1932).

> The right to recover of a wrongdoer compensation or allowance looking toward recompense for pain and suffering caused by him has been everywhere recognized as a fundamental and cardinal principle of law, because it is naturally connected with all physical injuries and must be considered as a direct and proximate result.[51]

The strict construction of section 14 followed by the Kentucky Court of Appeals and the Court's stated belief in the right to sue for pain and suffering could present a serious obstacle to a no-fault statute in Kentucky which incorporates the threshold approach. It has been noted that the Court of Appeals has historically refused to allow the General Assembly to abolish the common-law right to sue for injuries caused by another's negligence, and there is no indication that the Court would take a different position with respect to the abolition of the right to sue for pain and suffering in minor accident cases.

C. *Section 54*

Another important question that will arise in connection with a no-fault threshold plan in Kentucky is the effect of section 54 on such a plan. This section provides:

> The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.[52]

Professors Keeton and O'Connell apparently concede that provisions such as section 54 would bar implementation of their Basic Protection Plan by state legislatures:

> The constitutions of a few states expressly forbid the enactment of any law limiting the amount recoverable for personal injuries and death. . . . In the past these provisions stood squarely in the way of enacting a compulsory workmen's compensation statute. . . . Similarly, such provisions would seem to stand clearly in the way of enacting the basic protection system. . . . It should be noted that Massachusetts and most other states present no problem in this regard since they are without any constitutional provision proscribing the enactment of laws limiting damages for personal injury.[53]

As was noted earlier,[54] the Kentucky Workmen's Compensation Act of 1914 was held unconstitutional as violative of section 54. The Act was found to be compulsory on the employee and hence any cause of action he might have against his employer was taken away

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[51] Ashland Coca-Cola Bottling Co. v. Brady, 66 S.W.2d 57, 58 (Ky. 1933).
[52] KY. CONST. § 54.
[53] BASIC PROTECTION at 504-05 (citations omitted).
[54] See text accompanying notes 25-27 *supra.*

without a voluntary waiver on his part. The Court had no difficulty in determining that the legislature had no power to do this: "[t]he law has no right to force him to accept the compensation fixed by this board by depriving him of his causes of action."[55]

It must be recognized that there is a basic difference between a compulsory no-fault insurance plan and a compulsory workmen's compensation statute. The workmen's compensation statute was designed to put an *upper limit* on the amount that could be recovered by an injured employee. The no-fault plan, on the other hand, puts no upper limit on the amount that can be recovered. If the victim can cross the stated threshold, he is allowed to recover any amount provable as damages. Hence it could be argued, that the no-fault plan does not put a limit on the amount that can be recovered. It merely takes away a cause of action for pain and suffering in minor cases and this is not prohibited by section 54.

The Court of Appeals dealt with such an argument when it considered the constitutionality of Kentucky's guest passenger statute in *Ludwig v. Johnson*.[56] It was contended that section 54 was not designed to prevent the Legislature from abolishing causes of action:

> It is insisted that this section of the Constitution does not guarantee the continuation of the right of action theretofore existent, but merely applies to such causes of action as continue to exist, and prohibits the Legislature from limiting the amount of damages to be recovered for the injuries resulting in death or for injuries to person or property so long as a right of action exists for such injuries, but does not prohibit it from abolishing the right of action.[57]

The Court, however, was not persuaded by this argument:

> When that section is read in connection with other sections of the same instrument, such as sections 14 and 241, the conclusion is inescapable that the intention of the framers of the Constitution was to inhibit the Legislature from abolishing rights of action for damages for death or injuries caused by negligence.[58]

Thus, it appears that the Court of Appeals has taken a definite stand on the right of the Legislature to abolish a cause of action and it can be expected that the Court will find that a no-fault plan which incorporates a threshold is violative of section 54 in that it abolishes the tort action for pain and suffering of many accident victims.

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[55] Ky. State Journal Co. v. Workmen's Comp. Bd., 170 S.W. 1166, 1169 (Ky. 1914).
[56] 49 S.W.2d 347 (Ky. 1932).
[57] *Id.* at 349.
[58] *Id.* at 350.

D. *Section 241*

The final constitutional provision which might present an obstacle to the implementation of a no-fault plan in Kentucky is section 241. That section provides, in pertinent part:

> Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. . . .[59]

This provision has been strictly construed by the Court of Appeals as preventing the legislature from abolishing tort actions in death cases. Kentucky's guest passenger statute was held to clearly contravene section 241 since it took away the right to recover for death resulting from negligence or resulting from a wrongful act amounting to anything less than an intentional act.[60] Quoting from an earlier case, the Court stated:

> "It was the manifest intention of the constitutional provision quoted [section 241] to allow an action to be maintained whenever the death of a person was caused by the negligent or wrongful act of another and it is not within the power of the Legislature to deny this right of action. The section is as comprehensive as language can make it."[61]

The Court has found that a cause of action for death does not exist under the constitution only in those cases in which such an action did not exist at the time the constitution was adopted, such as actions against a charitable institution[62] or against a municipal corporation performing a duty which the municipality owed to the public.[63] In these cases a cause of action for death was not taken away; such a cause of action never existed at common law.

In spite of the strict construction of section 241, this provision is

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[59] The remainder of the provision states as follows:
. . . Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person.

[60] Ludwig v. Johnson, 49 S.W.2d 347 (Ky. 1932).

[61] *Id.* at 349, quoting from Howard's Adm'r v. Hunter, 104 S.W. 723, 724 (Ky. 1907). Also see text accompanying note 58 *supra.*

[62] St. Walburg Monastery of Benedictine Sisters of Covington, Ky., Inc. v. Feltner's Adm'r, 275 S.W.2d 784 (Ky. 1955); Cook v. John V. Norton Memorial Infirmary, 202 S.W. 874 (Ky. 1918). Note, however, that the charitable immunity doctrine has recently been eliminated in Kentucky. *See* Mullikin v. Jewish Hospital Ass'n of Louisville, 348 S.W.2d 930 (Ky. 1961).

[63] Twyman's Adm'r v. Board of Councilmen of Frankfort, 78 S.W. 446 (Ky. 1904).

not likely to present a serious obstacle to the implementation of a no-fault plan in Kentucky. The problem could easily be avoided if the plan left the present tort action available in death cases. Although the Basic Protection Plan was not designed in this way, most of the no-fault plans adopted in other states place no restriction on tort recovery in death cases.[64] Since the most serious problems intended to be eliminated by a no-fault plan are related to claims for pain and suffering in minor cases, leaving the present tort liability in death cases intact would not seriously impair a no-fault plan.

E. *Implied Consent*

It can be argued that despite the constitutional problems presented by sections 7, 14, 54 and 241 of the Kentucky Constitution, a no-fault threshold plan could be held constitutional in Kentucky on the ground that each person who uses the highways of Kentucky impliedly consents to accept the provisions of the no-fault plan and waives any constitutional objections he may have to such a plan. Such a statement of implied consent could be drafted into the statute.

The implied consent doctrine was held constitutional in relation to the Kentucky statute[65] which provides that a person's driver's license may be revoked if he refuses to take a chemical test to determine the alcoholic content of his blood, breath, urine or saliva after he has been arrested for allegedly driving while under the influence of intoxicating beverages.[66] The statute states that "[a]ny person who operates a motor vehicle in this state is deemed to have given his consent" to such a chemical test.[67] The statute was held not to violate the due process and equal protection clauses of the United States and Kentucky Constitutions even though the driver's license is revoked before a hearing is held. The Court of Appeals reasoned that this is a valid exercise of the state's police power and that the statute provides for a hearing to be held soon after the license is revoked. The Court pointed out that the public must be protected against the improper use of a motor vehicle.

It must be noted that there are basic differences between implied consent in connection with a chemical test in drunk driving cases and implied consent in connection with giving up the right to sue as given by the Kentucky Constitution. The implied consent doctrine in

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[64] Delaware, Florida, Illinois and Massachusetts, for example. *See* Ghiardi & Kircher, *supra* note 12.

[65] KRS § 186.565.

[66] Craig v. Commonwealth, 471 S.W.2d 11 (Ky. 1971).

[67] KRS § 186.565(1).

connection with a chemical test is based on the strong public policy of protecting the public from drunken drivers whereas the no-fault plan seems to be based only on the public policy of clearing the court dockets and providing faster and more certain recovery for the injured parties. Also, under the statute providing for a chemical test, unlike the no-fault plan, a person is not impliedly consenting to waive basic rights specifically delineated in the constitution such as those provided by sections 7, 14, 54 and 241. In addition, implied consent under a no-fault plan would have to be attributed to persons other than those driving automobiles on the highways. The implied consent would have to be extended to passengers and pedestrians as well.

If an attempt is made to circumvent the constitutional problems by using implied consent, a provision would have to be made for obtaining consent for persons under legal disability. The most obvious method for obtaining such consent would be to allow the parent or legal guardian of a person under legal disability to impliedly consent for such person. This, however, would present serious constitutional problems. This would permit one person to waive specific constitutional rights of another person. Constitutional rights have always been cherished rights and neither the Workman's Compensation Act nor the statute dealing with a chemical test for alcoholic content in the blood allows one person to waive the constitutional rights of another. Each person can consent or "impliedly" consent to a waiver of his constitutional rights only. In addition, the rights of persons under some legal disability have always been carefully protected by our law. Under the present law, for example, the statute of limitations with respect to any cause of action does not begin to run against a person under a legal disability until the disability is removed.[68] Thus if a child of age eight is injured by some negligent person, the period of one year[69] in which he has to bring suit against the negligent person does not begin to run until the child reaches the age of legal majority. The child is protected until he is old enough to make his own decision; another person is not allowed to make the decision of whether or not to bring suit for the child.

In view of the fact that the law has always felt a need to protect people under legal disability, it seems likely that the Kentucky Court of Appeals will take a dim view of a law which allows a person to consent for another person to a law which takes away basic constitutional rights.

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[68] KRS § 413.170.
[69] KRS § 413.140(a).

III. ALTERNATIVES

A workable alternative to a compulsory no-fault threshold plan is the plan which was adopted in Delaware and became effective January 1, 1972.[70] Under this plan, each owner of a motor vehicle must purchase certain types of insurance coverage in order to be allowed to operate his vehicle in Delaware.[71] Four types of insurance coverage are required by the Delaware law, one of which is liability coverage. The other three provide first party benefits and include bodily injury protection, non-vehicular property damage and collision coverage.[72] Although these coverages are required they may be written subject to certain deductibles that could apply to the named insured only or to him and members of his household and would be a matter of election by the named insured.[73]

Even though the plan requires every automobile owner to carry insurance which provides first party benefits, the Delaware plan has very little effect on tort liability for personal injury or property damage. The plan only prohibits those injured parties "eligible" for first party benefits under the Act from suing the negligent party for injuries for which first party benefits are "available."[74] The prohibition applies "without regard to any elective reductions in such coverage and whether or not such benefits are actually recoverable."[75] Thus, this provision prevents an injured party from collecting damages twice. It also prohibits him from recovering the amount of a deductible that he chose to take in his insurance coverage. It should be noted, however, that the victim's cause of action based on tort liability is not impaired by this plan. His right of recovery still exists with respect to any losses not covered by the first party benefits and with respect to any losses in excess of the insurance coverage limits. His right to sue for pain and suffering is not impaired no matter how small the claim. In addition, the plan permits the ultimate burden for the accident losses to fall on the person responsible for the accident since it provides that the insurer of the injured person is subrogated to the rights of the person to whom the benefits are paid.[76]

Therefore, it appears that the Delaware plan could accomplish many of the purposes of a no-fault plan without running afoul of the

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[70] Delaware Act § 2118.
[71] *Id.* § 2118(a).
[72] For a good discussion of the Delaware law and the different coverages required, see Ghiardi & Kircher, *supra* note 12, at 5.
[73] Delaware Act § 2118(a)(2)B.
[74] *Id.* § 2118(g).
[75] *Id.*
[76] *Id.* § 2118(f).

Kentucky Constitution. Without abolishing any causes of action the plan offers a method of speeding up reimbursements to injured parties and shifts the burden of bringing suit in the smaller cases to the injured's insurer. Moreover, the plan allows the burden of the accident to fall ultimately on the negligent party and thus provides an element of deterrence.

As a second alternative, the legislature might decide that it is desirable to propose a constitutional amendment which would allow a compulsory no-fault threshold plan to be adopted. Because of the time necessary for such an amendment to be passed, of course, the adoption of a no-fault plan would be delayed. However, the time required might not be any longer than the time that would pass before a second statute could be drafted and passed if the first statute did not withstand a constitutional test. In addition, by proposing such an amendment and allowing the people to decide on its passage, the legislature would be giving the people an opportunity to indicate whether or not they would prefer a no-fault threshold system to the present tort liability system.

IV. CONCLUSION

In view of the foregoing analysis, it seems likely that a no-fault threshold plan would face serious constitutional problems in Kentucky unless a constitutional amendment were passed. Sections 14 and 54 of the constitution present serious obstacles to the implementation of a no-fault threshold plan which apparently could not be overcome even if an attempt were made to uphold the plan on the theory of implied consent. Before a no-fault plan is adopted for Kentucky, all possible constitutional problems should be carefully considered and serious thought should be given to the possibility of adopting a no-fault plan without a threshold, such as the Delaware plan, or the possibility of first proposing a constitutional amendment and letting the people decide for themselves which type of protection they would prefer.

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