1972

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NO-FAULT AUTOMOBILE INSURANCE IN PENNSYLVANIA — A CONSTITUTIONAL ANALYSIS

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I. THE BASIC PRINCIPLES AND CONSTITUTIONAL IMPLICATIONS OF A NO-FAULT SYSTEM FOR THE COMPENSATION OF AUTOMOBILE ACCIDENT VICTIMS IN PENNSYLVANIA — INTRODUCTION

THE CONCEPT OF NO-FAULT automobile accident compensation has become an increasingly prominent subject of debate on both the national and local levels. The most common of these plans, reduced to their essentials, embody two basic principles: (1) coverage, regardless of fault, for out-of-pocket economic losses up to a selected limit; and (2) the limitation or elimination of tort damage recovery based on negligence except for economic losses above the non-fault benefits and for damages for pain and suffering in cases of severe injury. In other words, under the no-fault schemes, benefits would be available to auto accident victims regardless of who was at fault in the accident, while traditional tort recovery for pain and suffering would be available only for specified categories of serious injuries.

The concept of no-fault compensation has found favor with many state and federal agencies, law professors, economists, and several state legislatures. In brief, the proponents of no-fault compensation systems contend that the application of traditional negligence law to automobile accidents in our modern, urban, motorized society results

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1. See, e.g., No-Fault Catches Fire, TIME, Mar. 6, 1972, at 64.
2. See, e.g., Keeton & O'Connell, Basic Protection Automobile Insurance, in CRISIS IN CAR INSURANCE 43-44 (hereinafter cited as CRISIS IN CAR INSURANCE).
in serious inefficiencies, inequities and misallocations of resources. Critics of the tort law system charge that the fault system has clogged the courts, delayed the payment of benefits to the injured, inflated claims, raised insurance premiums, overcompensated trivial claims while undercompensating serious ones, denied many injured plaintiffs any recovery because of their contributory negligence or inability to prove fault on the defendant's part, and wasted billions of dollars in futile legal battles over the determination of fault.4

Opponents of no-fault accident compensation have mounted vigorous attacks of their own.5 Their principal contention is that no-fault proposals compromise the right of accident victims to full recovery of "intangible" losses such as pain and suffering. They have insisted that the elimination of common law rights is not only unwise and unjust, but also offensive to the requirements of the federal and state constitutions. Forces opposed to no-fault legislation in Pennsylvania have insisted that any statutory interference with the traditional tort recovery for pain and suffering would clearly violate article 3, section 18 of the Pennsylvania constitution,6 which provides that, except for employment–related injuries, "in no . . . cases shall the General Assembly limit the amount to be recovered for injuries . . . ."7 This provision is said to clearly stand in the way of statutes which would abolish the right of any auto accident victim to recover in tort for full pain and suffering damages.

This study is devoted to an analysis of the obstacles in both the federal and Pennsylvania constitutions to the implementation of a no-fault compensation system by the Pennsylvania legislature. Particular attention is devoted to the narrow but particularly pertinent question of whether abolition of recovery for pain and suffering in certain specified categories of accident cases would necessarily violate article 3, section 18 of the Pennsylvania constitution.

II. No-Fault Insurance Plans and Constitutional Requirements of Due Process and Equal Protection

The weight of authority indicates that implementation of a no-fault automobile insurance system would not violate the due process and equal

5. See, e.g., AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS (1971).
7. PA. CONST. art. 3, § 18 (emphasis added).
protection provisions of the fifth and fourteenth amendments to the federal constitution and similar provisions found in state constitutions. The issue is no longer confined to the academic arena; the Massachusetts no-fault plan withstood constitutional challenges in Pinnick v. Cleary. Under the Massachusetts statute, an injured person may sue to recover damages for pain and suffering only if: (1) the reasonable medical expenses incurred exceed $500 or (2) the victim suffered a specified type of bodily injury, such as loss of a body member, permanent disfigurement, loss of sight or hearing, or a fracture. The Massachusetts constitution does not contain a provision comparable to article 3, section 18 of the Pennsylvania constitution, but the Massachusetts decision did consider the other basic constitutional issues.

It should be noted, however, that a lower court in Illinois has found that the requirements of due process and equal protection are not met by a no-fault statute which makes the amount of damages recoverable for pain and suffering dependent upon the dollar amount of reasonable medical expenses. The Illinois no-fault statute limited recovery in tort actions for pain and suffering to an amount equal to 50 per cent of the first $500 of reasonable medical expenses and 100 per cent of such expenses over $500. The court in that case stated that "the vast disparity in hospital costs and physicians' charges throughout the state results in a patently arbitrary and unreasonable discrimination among persons to whom the 'general damage' limitations of [the act] apply . . . ." The court also noted that, under the scheme of the Illinois statute, first-party benefits would not be recoverable by an injured person who was not covered by auto insurance (because, for example, he did not own a car) unless he was struck by an insured motorist. Whether the defendant was insured would be a "purely fortuitous circumstance," according to the court, since Illinois is not a compulsory insurance state. In short, the court found that the statute invidiously discriminated against poor people who did not own cars, did not have insurance or incurred less medical expense,
thereby creating "arbitrary, discriminatory and invidious classifications of persons and groups." 15

The Illinois decision poses no serious challenge to no-fault legislation because the features found objectionable in the Illinois statute could be modified to obviate constitutional infirmities. One remedy could be to make insurance coverage compulsory. Medical expense could be measured by a fixed standard that would eliminate differences based on hospital and physician charges; for example, so much for each day in a hospital, so much for a type of medical or surgical operation or treatment. Also, a statute which allowed recovery for pain and suffering in cases of specified bodily injuries, not based on the dollar amount of medical expense, such as cases of "severe disfigurement" or "loss of body members," would avoid the issue raised in the Illinois decision. Finally, it is doubtful that other courts would agree with that court's rather strict application of the equal protection and due process requirements. 16

In Pinnick, it was stipulated that the plaintiff could have recovered $800 for pain and suffering in an ordinary tort action, but because his medical expenses did not exceed $500 and his injury did not fall within one of the special categories, the Massachusetts law did not permit suit for pain and suffering. The court viewed the basic concept of the new law as follows:

[T]he statute affords the citizen the security of prompt and certain recovery to a fixed amount of the most salient elements of his out-of-pocket expenses . . . . In return for this he surrenders the possibly minimal damages for pain and suffering recoverable in cases not marked by serious economic loss or objective indicia of grave injury . . . . 17

The court dealt with the argument that the standards in the statute might operate in some cases to disqualify claims for serious amounts of pain and suffering:

The purpose of the Legislature in limiting recovery in this way was clearly to eliminate minor claims for pain and suffering . . . . The Legislature could reasonably have thought that the number of such cases was largely attributable to speculative and exag-

15. Id. It should be noted that in Pinnick, the Massachusetts Supreme Court expressly declined to consider the issue of invidious discrimination against the poor under that state's no-fault statute, which employs a $500 medical expense threshold for general damages recovery, because the plaintiff lacked standing and failed to come forward with evidence on this point. ___ Mass. at ___, 271 N.E.2d at 611. Massachusetts is also a compulsory insurance state.

16. See, e.g., Pinnick v. Cleary, ___ Mass. ___, 271 N.E.2d 592 (1971), wherein the court held that "[s]ome inequality in result is not enough to vitiate a legislative classification grounded in reason." Id. at ___, 271 N.E.2d at 610, citing Metropolis Theatre Co. v. Chicago, 228 U.S. 61 (1913).

17. ___ Mass. at ___, 271 N.E.2d at 597.
generated claims for pain and suffering in instances of relatively minor injury.\textsuperscript{18}

The court added:

A necessary corollary of the decision was that the minor claims had to be eliminated according to objective, easily applicable rules. If the rules were themselves subjective . . . the perceived evils would continue. Courts might well be clogged with claimants. . . .\textsuperscript{19}

The court admitted that, in spite of the statute's attempt to specify certain objective criteria of serious injury, "the $500 limit will exclude many sizable claims for pain and suffering which do not at the same time fall within the five other categories." Nevertheless, it maintained that "[s]ome inequality in result is not enough to vitiate a legislative classification grounded in reason."\textsuperscript{20} Thus, the court found no violation of due process or equal protection guarantees.

The argument that abolition of a common law right of recovery violated due process was rejected using analogies to cases which upheld the constitutionality of the statutory abolition of the action for breach of promise to marry and the abolition of a guest's common law right to recover from the careless driver of an automobile for ordinary negligence.\textsuperscript{21} The court also posited that the no-fault statute provides a reasonable substitute for pre-existing common law rights, relying on the United States Supreme Court decision in \textit{New York Central Railroad Co. v. White},\textsuperscript{22} in which a compulsory state workmen's compensation act was upheld against federal constitutional attack. There both the employee and employer surrendered certain rights they had at common law in exchange for a new compensatory system, which was deemed to be a reasonably adequate substitute.\textsuperscript{23}

Professor Bishop of Yale University has addressed himself to the question of whether the basic protection no-fault plan proposed by Professors Keeton and O'Connell, which abolishes the victim's right to recover for the first $5,000 of pain and suffering, would violate the fifth or fourteenth amendments of the Constitution by depriving the victim of property without due process of law and by denying him the equal protection of the laws.\textsuperscript{24} Professor Bishop con-

\begin{itemize}
  \item[\textsuperscript{18}] \textit{Id.} at \_\_\_, 271 N.E.2d at 609.
  \item[\textsuperscript{19}] \textit{Id.} at \_\_\_, 271 N.E.2d at 610.
  \item[\textsuperscript{20}] \textit{Id.} at \_\_\_, 271 N.E.2d at 610.
  \item[\textsuperscript{21}] \textit{Id.} at \_\_\_, 271 N.E.2d at 602.
  \item[\textsuperscript{22}] 243 U.S. 188 (1917).
  \item[\textsuperscript{23}] \textit{Id.} at 198-200.
\end{itemize}
sidered the constitutional issues raised by a no-fault statute analogous to those that were raised fifty years ago by workmen's compensation schemes which limited the amount recoverable for injury and abolished the tort recovery for pain and suffering. However, those statutes were held to be constitutional because they substituted a certain and speedy remedy for the uncertainty and delay of tort law. Thus, under both no-fault plans and workmen's compensation schemes, the injured person is not totally deprived of a reasonably adequate remedy. This is sufficient to satisfy due process and equal protection requirements. Indeed, Professor Bishop asserted that there is authority for the view that a state legislature may totally abolish a common law cause of action, without providing any substitute relief, if the legislature reasonably believes that the cause of action "produces greater evils than those which it was created to remedy." He pointed to state statutes which have abolished the actions for alienation of affections, breach of promise to marry and recovery by a guest in an automobile against the driver.

The constitutionality of compulsory workmen's compensation statutes under the federal constitution was resolved in *New York Central Railroad Co. v. White*. Since the New York Workmen's Compensation Act was compulsory for both employer and employee, it was argued that the deprivation of old common law rights and the imposition of new liabilities and benefits violated federal due process and equal protection requirements. The Supreme Court first held that neither of these constitutional guarantees in the fourteenth amendment prohibited a state legislature from modifying the common law rights and duties surrounding the concept of negligence: "[T]he nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence." The Court maintained that the tort laws of negligence, as they affected employers and employees, could be altered by the legislature in the public interest: "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." The Court, however, took pains to emphasize that it had not held that a state would encounter no constitutional obstacles if it set aside all common law rules regulating the liability between employer and employee, without providing a "reasonably just substitute."

25. Id. at 44–47.
26. Id.
27. Id. at 51–52. *See Silver v. Silver, 280 U.S. 117 (1929) (Connecticut automobile guest statute held to be constitutional).*
29. Id. at 198.
30. Id.
31. Id. at 201.
tion statute did not present such a question, however, for the Court reasoned that:

If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of damages.\(^{32}\)

It added that the compensation for injuries prescribed by the statute had not been attacked as unreasonable in amount.\(^{33}\)

It should be added that, when the constitutionality of the Pennsylvania Workmen's Compensation Act was tested in *Anderson v. Carnegie Steel Co.*,\(^{34}\) the Pennsylvania Supreme Court relied on decisions of the United States Supreme Court in holding that no person has a vested interest in any rule of the common law.\(^ {35}\) It was argued in *Anderson* that taking away the employer's common law defenses was a deprivation of property without due process of law. The Pennsylvania Supreme Court rejected this contention, stating: "[T]he common law itself may be changed by statute, and, from the time it is changed, it operates in the future only as changed."\(^ {36}\)

In *Silver v. Silver*,\(^ {37}\) the United States Supreme Court held that when a tort cause of action becomes a source of "vexatious litigation," a state legislature may abolish it without violating the due process and equal protection guarantees in the Constitution.\(^ {38}\) The statute in question was Connecticut's guest statute, which prohibited a guest in an automobile from suing the driver for ordinary negligence, as opposed to gross or wanton negligence. The Court held that the Constitution "does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissable legislative object."\(^ {39}\) The abolition of the guest's cause of action for ordinary negligence can easily be analogized to the abolition of small claims for pain and suffering. The latter are alleged by many studies to be responsible for a serious increase in the evils of "vexatious litigation."\(^ {40}\) Therefore, their abolition under a no-fault plan would seem to en-

\(^{32}\) Id.
\(^{33}\) Id. at 205–06.
\(^{34}\) 255 Pa. 33, 99 A.2d 215 (1916).
\(^{35}\) Id. at 37–38, 99 A.2d at 216.
\(^{36}\) Id. at 37, 99 A.2d at 216.
\(^{37}\) 280 U.S. 117 (1929).
\(^{38}\) Id. at 123.
\(^{39}\) Id. at 122.
counter no serious objection on grounds of the due process or equal protection clauses.

III. OBSTACLES TO NO-FAULT AUTOMOBILE INSURANCE IN THE PENNSYLVANIA CONSTITUTION — ARTICLE ONE, SECTIONS SIX AND ELEVEN, AND ARTICLE THREE, SECTION EIGHTEEN

It has been noted that constitutional guarantees of due process and equal protection do not prevent the adoption of a no-fault compensation system by a state legislature. However, the constitution of Pennsylvania contains three additional provisions which may pose problems in the implementation of a compulsory no-fault system. The first two of these provisions present obstacles which are not insurmountable. The third, however, presents a serious problem.

A. Article 1, Section 6

Trial by jury shall be as heretofore, and the right thereof remain inviolate. 41

With respect to the constitutional guarantee of trial by jury, it should first be noted that Professors Keeton and O'Connell have stated that the provision for non-jury trial of small claims under their basic protection no-fault plan is not essential. 42 If the restriction presented by the right to trial by jury in the determination of no-fault claims were removed, this would obviate constitutional objections based on the jury trial guarantee. 43

It should be noted a plan for compulsory arbitration of small civil claims of auto victims would not be unconstitutional in Pennsylvania, so long as the right to appeal from the award were provided. In Application of Smith, 44 it was held that "there is no denial of the right of trial by jury if the statute preserves that right to each of the parties by the allowance of an appeal from the decision of the arbitrators or other tribunal." 45 The court added: "All that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions . . . which would make the right practically unavailable." 46

42. R. Keeton & J. O'Connell, supra note 3, at 504.
43. See Ruben & Williams, The Constitutionality of Basic Protection, 1 Conn. L. Rev. 44, 55 (1968); Bishop, supra note 24, at 25, 57-58.
45. Id. at 230, 112 A.2d at 629.
46. Id. at 231, 112 A.2d at 629. In that case, a requirement that the party appealing pay the arbitrator's fee was held not to be an undue burden.
If it were considered vital to have a non-jury determination of no-fault claims, an argument could be made that these claims do not involve a common law action, but rather a new statutory action. Such an answer has been given to objections of an unconstitutional denial of a jury trial in the workmen's compensation area. Professors Keeton and O'Connell have explained this argument as follows: "Under such a view, the right to jury trial is merely ancillary to the common law action, and when the common law action disappears, the right to jury trial disappears along with it."47 The test to be applied by the courts would be to ask whether the new action closely resembles the common law action it replaces. Professors Keeton and O'Connell argue that the new basic protection action is unlike the tort action in the following ways: (1) it is not based on the principles of negligence law or on fault; (2) it is directed against the victim's insurer rather than the alleged wrongdoer; and (3) it has eliminated the recovery for pain and suffering.48

The Pennsylvania Supreme Court never squarely faced the jury trial question in connection with workmen's compensation, because the Pennsylvania Workmen's Compensation Act has been viewed as a "voluntary," not compulsory, system. In Pennsylvania, a statutory procedure is set out whereby an employee may express his desire not to be regulated by the workmen's compensation system.49 Formally at least, the Pennsylvania act is contractual; the employee by contract may elect to have compensation for injuries determined in the manner provided by statute. Thus, when the original Pennsylvania act faced its first court test in Anderson v. Carnegie Steel Co.,50 in which the argument was made that the act violated the constitutional guarantee of trial by jury, the court answered that under the scheme of the act no party is deprived of a trial by jury "except by his own consent."52

Bills to amend the Pennsylvania Workmen's Compensation Act to make it compulsory on employer and employee have been introduced into the legislature, but none have passed, primarily due to the constitutional objection over the right to jury trial:

47. R. Keeton & J. O'Connell, supra note 3, at 496-97.
48. Id. at 497.
52. Id. at 39, 99 A.2d at 217.
These proposed amendments while seeking to change the plan from a voluntary to a compulsory system, also sought to maintain the present form of enforcement through administrative tribunals and not through courts with jury trials. Constitutional objections to a compulsory law which would deprive the parties of the right to trial by jury were interposed and the bills were rejected.  

Thus, the Pennsylvania law remains a voluntary system, at least formally. We say "formally" because some commentators have asserted that the elective feature of "voluntary" workmen's compensation acts is a fiction or a mere technicality. Professors Keeton and O'Connell have cited a Massachusetts study which could discover no case in which an employee had exercised his election to rely on the traditional tort law. An employer would not be obligated to hire an employee who refused his rights under the compensation act and elected to maintain his right to sue his employer at common law. In light of these observations, it is questionable whether the fictional consensual waiver of the right to jury trial would be given much weight in the Pennsylvania Supreme Court today.

The issue of the right to a jury trial involves intricacies beyond the scope of this study; however, it should be emphasized that the abolition of a jury determination of no-fault benefits is not an essential feature of the no-fault concept. As has been pointed out, arbitration for small claims could be provided in its place. The serious constitutional question is raised by that dey principle of auto insurance reformers which calls for the elimination of negligence actions for minor cases of pain and suffering. The elimination of this feature of the present tort system is viewed as essential to the efficiency, fairness, and practicability of a no-fault system.

B. Article 1, Section 11

All courts shall be open; and every man 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.

The next question to arise is whether article 1, section 11 of the Pennsylvania constitution stands in the way of a statutory abolition of tort claims for pain and suffering. Provisions substantially similar to that section are found in the constitutions of almost two dozen

53. W. Siuner, supra note 50, at 47.
states. These provisions speak of a right to legal redress for injury. The effect of such provisions on the legislature’s authority to abolish a common law cause of action, with or without providing a substitute remedy, has been the subject of controversy in many cases. The prevalent view today, however, is that such provisions are not intended as restraints on the legislature, but rather are meant to preserve procedural fairness for the injured person.

The precise relationship between a provision such as section 11 and a no-fault proposal was decided in Pinnick where the Massachusetts Supreme Court upheld the constitutionality of that state’s no-fault system. Article XI of the Massachusetts Declaration of Rights guarantees “a certain remedy for having recourse to the laws, for all injuries or wrongs which . . . [one] may receive . . . .” It was argued that this provision prevented the state legislature from abolishing those causes of action for pain and suffering which the Massachusetts no-fault law sought to isolate. The court said that article XI of the Declaration of Rights was “clearly directed toward the preservation of procedural rights . . .,” adding that “changes in prior law are necessary in any ordered society.”

The view expressed by the Massachusetts Supreme Court has not always been held by the high courts of other states. In Heck v. Schupp, the Supreme Court of Illinois held that article II, section 19 of the Illinois constitution, which is substantially identical to article 1, section 11 of the Pennsylvania constitution barred the enactment of the Illinois “Heart Balm” Act. That act made it unlawful for any person to file a pleading seeking to recover upon any civil cause of action based upon alienation of affections or breach of contract to marry. The decision cited no authorities justifying the application of the constitutional provisions for this purpose, nor did it engage in any serious constitutional analysis.

The Heck doctrine was not consistent with an earlier Illinois Supreme Court decision which upheld the constitutionality of the

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57. Ruben & Williams, supra note 43, at 45.
58. Id.
59. Id. at ___; Mass. ___ 271 N.E.2d 592 (1971).
60. Id. at ___, 271 N.E.2d at 600.
61. Id.
guest statute in that state. In that case, it was held that such legislation did not violate article II, section 19 of the Illinois constitution. The court stated: "[That section] does not give a vested right not subject to change by legislative power, provided the change is reasonably necessary to promote the general welfare of the people and does not destroy a remedy." The new law did not strip the victim of all remedies since he could sue for aggravated carelessness; however, he was deprived of a cause of action for ordinary negligence.

The Heck decision lost most of its significance, however, when a revised "Heart Balm" Act was held constitutional in Smith v. Hill. This act did not totally abolish actions for breach of promise to marry or alienation of affection, but it robbed these common law causes of action of most of their practical significance. In an action for breach of promise to marry and for seduction, the new law disallowed recovery of damages for degradation, humiliation, and mental anguish. The court stated that there was no violation of article II, section 19 of the Illinois constitution since the legislation only limited recoverable damages without totally abolishing the cause of action, thus distinguishing the Heck decision. The dissent in the Smith case noted that the legislation barred damages compensatory in character and, in effect, limited the plaintiff to nominal damages.

The notion that a constitutional provision similar to article 1, section 11 of Pennsylvania's constitution exercises some restraint upon the legislature's power to abolish common law causes of action and modifying the substantive common law of rights and duties was dealt with in Lebohm v. City of Galveston. There it was argued that the charter granted to the City of Galveston by the Texas legislature violated article I, section 13 of the Texas constitution because it purported to confer immunity from tort actions upon the city. The court held that the section in question denied to legislative bodies the right to arbitrarily abolish causes of action. The court stated that the legislature can properly abolish a common law right of recovery if

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63. Clarke v. Storchak, 384 Ill. 564, 52 N.E.2d 229 (1943). "Guest" statutes, of which Pennsylvania has none, prohibit a person who is injured while riding as a guest in an automobile from recovering from his host unless it is shown that the host was guilty of wanton or reckless conduct.
64. Id. at 576, 52 N.E.2d at 236.
66. Id. at 590, 147 N.E.2d at 877 (dissenting opinion). See also Siegall v. Solomon, 19 Ill. 2d 145, 166 N.E.2d 5 (1960), wherein disallowance of damages for mental suffering and humiliation in an action for alienation of affection was held not to violate article II, section 19 of the Illinois constitution.
67. 275 S.W.2d 951 (Tex. 1955).
68. Article I, section 11 of the Texas constitution, substantially similar to article 1, section 11 of the Pennsylvania constitution provides:
All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have a remedy by due course of law.
it provides a reasonable substitute or if the abolition of the cause of action is a reasonable exercise of the police power in the interest of the general welfare. The court therefore upheld the constitutionality of the Texas Workmen's Compensation Act because that legislation "substituted a different but certain and adequate legal remedy for the one that existed at common law."70

It can readily be seen that the holding in the Lebohm case amounts to a restraint upon legislative power no greater than the restraint to which legislatures are subject under the general requirements of due process and equal protection.71 Cases decided under article II, section 6 of the Colorado constitution,72 a provision substantially similar to article 1, section 11 of the Pennsylvania constitution, shed further light on how this general mandate is construed by the courts. The constitutionality of a legislative abolition of all civil causes of action for breach of promise to marry and alienation of affection was upheld in Goldberg v. Musim.73 The court construed that section of Colorado's constitution as a mandate to the judiciary, rather than to the legislature, and held that the provision does not preserve causes of action at common law against non ex post facto legislative change. The legislature was held to possess the legal power to totally abolish these causes of action except where the injury occurred prior to enactment of the legislation.74

In Vogts v. Guerrette,75 the Colorado Supreme Court upheld that state's guest statute against the challenge that it violated article II, section 6 of the Colorado constitution, since it abolished tort actions for ordinary negligence. The court noted that many states have provisions substantially similar to those of Colorado, but that none of these states had decided that such a constitutional provision prohibited the legislature from changing common law duties in like situations.76

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69. 275 S.W.2d at 955.
70. Id. at 954.
71. See New York Cent. R.R. v. White, 243 U.S. 188 (1916); Silver v. Silver, 280 U.S. 117 (1929). See also text accompanying notes 24-40 supra. Basic notions of equal protection and due process would restrain a state legislature from arbitrarily (without any rational foundation in terms of public policy) abolishing a common law cause of action. In New York Central, the United States Supreme Court intimated that the setting aside of all common law rules of liability regarding employer and employee might be deemed arbitrary, if no "reasonable just substitute" were provided in their place. 243 U.S. at 201.
72. Colo. Const. art. 1, § 6 provides:
Courts of Justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.
73. 162 Colo. 461, 427 P.2d 698 (1967).
75. 142 Colo. 527, 351 P.2d 851 (1960).
76. Id. at 531–34, 351 P.2d at 854–55.
The court distinguished a recent Kentucky decision striking down that state's guest statute on the basis that Kentucky, unlike Colorado, had a constitutional provision which prohibited the legislature from limiting the amount of damages recoverable in an action for personal injury or property damage. The Kentucky precedent, while proving to be no obstacle for the Colorado court, may, as will be seen, have a larger effect in Pennsylvania, since the Kentucky constitutional provision is quite similar to article 3, section 18 of the Pennsylvania constitution.

The Vogts court explained that provisions such as article II, section 6 of the Colorado constitution are designed to insure that when a duty has been breached producing a legal claim, the claimant thereafter cannot be denied a remedy. Such provisions do not bar the legislature from redefining legal duties or rules of liability.

It is interesting to note Justice Frantz' dissenting opinion in Vogts, since it foreshadowed some of the arguments advanced by opponents of no-fault accident compensation plans. Justice Frantz vigorously objected to the legislature's attempt to abolish the injured victim's claim for damages for negligence under the guest statute:

Broken bodies, loss of eyes or limb, and even loss of life, resulting from negligence of the host, must go uncompensated, no matter how meritorious the claim of the non-paying guest, because in the exercise of the police power an end must be put to those suits in which hosts and guests collude to mulct insurance companies in damages. What injustice to the many claims based upon the legitimate ground of negligence!

If collusion and perjury warrant legislation such as the Guest Statute, perhaps the legislature could with as much justification do away with trial courts...[T]he police power with equal propriety could be invoked to put an end to trial process in order to prevent collusion and perjury...

This opinion is more than just a dissent — it is a warning and the sounding of an alarm...

In its essentials, this argument suggests that it is a violation of due process and of fundamental notions of fairness and justice to deny the injured guest recovery for injuries caused by the driver's negligence. Justice Frantz argued that freedom from personal injury caused by the negligence of another was "a natural right...a fundamental, inherent, inalienable right," and a far more sensitive legal interest than

78. 142 Colo. at 514, 351 P.2d at 859.
79. Id. at 531-34, 351 P.2d at 854-55.
80. Id. at 547-48, 351 P.2d at 862-63.
mere economic or commercial loss. The justice's strong sentiments, however, could not overcome the United States Supreme Court's holding in Silver v. Silver, that abolition of the guest's cause of action was not arbitrary or unreasonable and therefore was not so fundamentally unfair as to constitute a violation of due process or equal protection. However, Justice Frantz' strong sentiments probably were never intended to apply to a restriction on recovery for pain and suffering in cases of minor injury such as those envisioned by most no-fault plans. In this regard, it should also be noted that the plaintiff in Pinnick v. Cleary argued that the tort actions abolished by the Massachusetts no-fault law safeguarded "fundamental rights of personal security and bodily integrity," but the Massachusetts Supreme Court denied that the abolition of these minor pain and suffering recoveries unconstitutionally impinged on fundamental personal rights.

It may be seen that the consensus of the state courts have construed constitutional provisions substantially identical to article 1, section 11 of the Pennsylvania constitution as not posing a bar to legislation designed to implement a no-fault automobile accident compensation system. Thus, although there is strong reason to predict that the Pennsylvania Supreme Court would subscribe to this view, several Pennsylvania decisions contain dicta which preclude making such a prediction with total assurance.

For example, in Thirteenth & Fifteenth Street Passenger Ry. v. Boudrou, a Pennsylvania statute which limited the damages recoverable in a tort action against a common carrier to a maximum of $3,000 in cases of personal injuries and $5,000 in cases of death, was declared unconstitutional in that it violated article 1, section 11 of the Pennsylvania constitution. The court spoke of "the reserved right to every man, that for an injury done him in his person, he shall have remedy by due course of law." The court added:

The people have withheld power from the legislature and the courts to deprive them of that remedy, or to circumscribe it so that a jury can only give a pitiful fraction of the damage sustained. Nothing less than the full amount of pecuniary damage which a man suffers from an injury done to him . . . fills the measure secured to him in the Declaration of Rights . . . . A limitation of recovery to a sum less than the actual damage, is

81. Id. at 560-61, 351 P.2d at 869-70.
83. ___ Mass. ___ 271 N.E.2d 592.
84. Id. at ___, 271 N.E.2d at 599-601.
85. 92 Pa. 475 (1880).
87. 92 Pa. at 481.
palpably in conflict with the right to remedy by the due course of law.\textsuperscript{88}

The interpretation of article 1, section 11 set forth in \textit{Boudrou} need not be viewed as establishing a constitutional obstacle to the implementation of a no-fault compensation system, so long as that system provides injured persons with reasonable and fair compensation for their injuries. To maintain the proper perspective, it must be emphasized that the strong sentiments expressed in \textit{Boudrou} were focused on the highly unpopular act in question, under which a very seriously injured person was limited to a maximum recovery of $3,000, regardless of the extent of his economic loss or pain and suffering. Furthermore, while some might read broader implications into the language of the \textit{Boudrou} case, such an interpretation would probably not be viewed as applicable by the Pennsylvania Supreme Court today. The fact that the \textit{Boudrou} decision is almost a century old and that the interpretation of provisions similar to Pennsylvania’s in other jurisdictions has evolved through the years indicates that a reading of \textit{Boudrou} to the effect that the legislature is prohibited from abolishing or modifying tort causes of action would not be viable today.\textsuperscript{89}

The view that article 1, section 11 of the Pennsylvania constitution only requires the satisfaction of a due process standard is supported by language in a recent Pennsylvania decision concerning the state workmen’s compensation law. In \textit{Dolan v. Linton's Lunch},\textsuperscript{90} an employee who was physically assaulted by another employee was allowed to sue his employer for negligence in spite of the workmen’s compensation act. Although it was held that, as a matter of statutory interpretation, the workmen’s compensation act did not apply, the court also offered some constitutional analysis:

To read the act so as to deny plaintiff his existing common law remedy without permitting him to come within the protective coverage of the Workmen’s Compensation Act might well violate the mandate of Article 1, Section 11. . . . [The General Assembly is not authorized] to enact a law which vitiates an existing common law remedy without concurrently providing for some statutory remedy. Of course, the substituted remedy need not be the same, but that is far different from saying that no remedy at all may be substituted. It is only because of Article 3, Section 21 [now article 3, section 18] and the agreement of the

\textsuperscript{88} Id. at 482.
\textsuperscript{90} 397 Pa. 114, 152 A.2d 887 (1959).
parties, that the limited recovery in a Workmen's Compensation case is valid ... In all "other cases" nothing less than full actual damage would satisfy the requirements of Article 1, Section 11.91

This paragraph might be read to support the view that any no-fault plan which would deprive an injured auto victim of his right to sue for full compensation for his economic loss and for pain and suffering would violate both article 1, section 11 and article 3, section 18. On the other hand, the paragraph suggests that a substitute remedy might be adequate to meet the requirements of article 1, section 11. The paragraph also leaves open the possible argument that pain and suffering damages in cases of minor injury are not necessarily encompassed by the term "full actual damage." Finally, the paragraph should be interpreted in light of the fact that the Pennsylvania legislature has abolished several tort causes of action without providing any substitute remedy at all.92

Finally, scrutiny of the precise language of article 1, section 11 reinforces the conclusion that it was never intended to deny the legislature the power to abolish or redefine tort causes of action. The provision states that "every man for an injury done him . . . shall have remedy by due course of law . . . ." Pennsylvania decisions which have construed the operative term "injury" indicate that this expression refers to "legal wrongs" such as would entitle a claimant to damages at common law or by statute.93 Perhaps the most illustrative Pennsylvania case delineating the concept of "injury" is Jackman v. Rosenbaum,94 wherein the plaintiff sued to recover damages for injuries caused by the erection of a party wall. He contended that the failure of the statute regulating party walls95 to provide for the recovery of damages was in derogation of common law rights and violative of article 1, section 11 and the present article 3, section 18 of the Pennsylvania constitution. With respect to the contention grounded on article 1, section 11, the court pointed out that "the word 'injury' in this section of the Constitution has been construed uniformly in the strict sense of 'legal injury'."96 Similarly, it was said of the present article 3, section

91. Id. at 123-24, 152 A.2d at 892-93.
92. See notes 135-58 and accompanying text infra.
93. See, e.g., Pennsylvania R.R. v. Marchant, 119 Pa. 541, 13 A. 690 (1888) (construing the term "injury" as employed in the present Pennsylvania constitution, article 10, section 4); Pennsylvania Co. v. City of Philadelphia, 351 Pa. 214, 40 A.2d 461 (1945) (also construing the present Pennsylvania constitution, article 10, section 4); Manning v. Klein, 1 Pa. Super. 210, 217 (1869) (construing "injury" in the constitution of a private association to mean "unlawful infringement or privation of rights").
96. 263 Pa. at 168, 106 A. at 241.
that "[w]hile, under this constitutional provision, no valid statutory limitations may be placed upon claims for injuries recoverable at law . . . it does not have . . . the effect of conferring a right of recovery where none otherwise exists." 97 Most importantly, the court stressed the need for the common law to adapt to the changing requirements of society:

The fundamental principles of the common law, while liable to expansion, are in essence unchangeable, but their applicability to given conditions necessarily varies according to changes wrought by usage or statutory enactment; and, pursuing this thought, what today is a trespass, may, by development of law, not be so to-morrow. Therefore, it will not do to say (as plaintiff does), since, once upon a time, at common law, the uninvited entry upon the land of a neighbor, to build a partywall, would have been a tort, giving rise to a claim for damages, that at the present day such an act has all the attributes of a common law trespass, . . . for the contention overlooks the all important fact that, under present conditions, the law views an entry of this character as constituting no wrongful but a wholly rightful act . . . . [When] the necessity for party-walls in thickly populated districts was recognized, and their construction authorized and regulated, such an entry no longer constituted a trespass, and [the builder] could not be held answerable for consequential damages. 98

The logic of the Jackman decision supports the conclusion that the general assembly possesses the constitutional power to abolish certain tort causes of action which have become outmoded and unresponsive to the current needs of society. In other words, because of the evolution of the common law and statutory developments, transactions which once gave rise to causes of action for damages may no longer be regarded as legally actionable, and hence, no longer considered to be "injuries." Accordingly, by analogy, the constitutional power of the general assembly to abolish recovery for pain and suffering in specified categories of automobile accident cases can clearly be justified.

In sum, it is very doubtful that article 1, section 11 of the Pennsylvania constitution could be relied on today to prevent the state legislature from abolishing an outmoded tort cause of action, such as that for a minor claim for pain and suffering in auto accident cases. The dicta in the Pennsylvania cases discussed above do not completely close the door on some kind of no-fault system for Pennsylvania.

97. Id. at 169, 106 A. at 242. See note 129 and accompanying text infra.
98. Id. at 175-76, 106 A.2d at 244.
C. Article 3, Section 18

The final and most difficult constitutional issue concerns the effect of provisions such as article 3, section 18 of the Pennsylvania constitution on the legality of no-fault legislation.

1. Historical Background

A new provision was added to Pennsylvania's constitution in 1874, providing that:

No Act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property; and, in cases of death from such injuries, the right of action shall survive and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted. No Act shall prescribe any limitations of time within which suits may be brought against corporations for injuries to persons or property, or for other causes, different from those fixed by general laws regulating actions against natural persons, and such acts, now existing, are avoided.

This provision was amended to make an exception for the Pennsylvania Workmen's Compensation Act and was later renumbered.

A careful reading of the debates at the 1873 constitutional convention is important, because, as was said in Lewis v. Hollahan, "in endeavoring to determine the full scope and meaning of the section [what is now article 3, section 18], it should be considered, as a whole in the light of the evil intended to be remedied by its adoption." In Lewis the convention debates were expressly relied upon by the court in determining the meaning of the constitutional provision.

99. PA. CONST. art. 3, § 21 (1874).
100. PA. CONST. art. 3, § 21 (1874).
102. 103 Pa. 425 (1883).
103. Id. at 430.
104. Id. See also Moers v. City of Reading, 21 Pa. 188 (1853), wherein the court stated that "[t]he constitution is entitled, like other instruments, to a construction, as nearly as may be, in accordance with the intent of its makers." Id. at 200. The court added that the constitution should be construed in light of the "well known evil" which was "in the minds of the convention when the amendment was agreed on, or thought of by the people when they adopted it." Id.
The convention debates shed light on the purpose and meaning of the constitutional provision in question to the extent that they point out the social evil the framers intended to deal with or to correct.

The reported debates show that article 3, section 21 of the constitution of 1874 was directed at a specific type of objectionable legislation. In the words of one scholar:

Prior to 1873 certain statutes had been in force limiting the amount of damages which could be recovered for personal injuries. It was suspected that such statutes had been procured through the influence of certain powerful corporations, and the convention determined to put an end to such practices.\(^{105}\)

Specifically, the convention was preoccupied with the Act of April 4, 1868,\(^{106}\) which limited the amount an injured person could recover in tort actions for negligence against railroad companies and common carriers to a maximum of $3,000 in case of personal injuries and $5,000 in case of death. This type of legislation was the chief target of the proponents of the constitutional provision in question. One proponent of the provision argued:

[The Act of 1868] is a denial of right and justice for an injury done to the person. In every case to which the Act of 1868 has been made to apply, and in which a suitor has been compelled to receive three thousand dollars in satisfaction of an injury inflicting damage to an amount exceeding that sum, the suitor has been refused his constitutional rights . . . . [W]e should lay a strong hand upon the legislative department, and say to it, you should not restrict the liability of a corporation or individual in these classes of cases. The prohibition of legislation should be clear, distinct and emphatic, so that there cannot possibly be an evasion of its provisions.\(^{107}\)

There was expressed throughout the debates a very strong sentiment that a man guilty of negligence should pay full compensation to the victim of his carelessness, and that an arbitrary limit on the amount of damages recoverable would be unjust to the victim and would eliminate the deterrent effect of the possibility of a heavy jury verdict. It was argued that the jury should decide who was at fault and the extent of damages, without being subject to an arbitrary limit by statute.\(^{108}\) The arbitrariness and unfairness of a limit such as that

\(^{105}\) T. WHITE, COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA 270 (1907).

\(^{106}\) Act of April 4, 1868, Pub. L. No. 58.

\(^{107}\) 2 CONVENTION DEBATES, supra note 101, at 730 (comments of Mr. Worrell).

\(^{108}\) See, e.g., 2 CONVENTION DEBATES, supra note 101, at 743 (comments of Mr. Cochran).
imposed by the Act of 1868 was repeatedly emphasized. In support of the constitutional provision it was argued that:

[One] cannot say that a man who has suffered an injury at the hands of another shall not recover full compensation without committing an outrage upon the elementary principles of justice.

One advocate of the constitutional provision contended that a man killed or disabled by a railroad might be earning $20,000 or $30,000 a year, but he or his family would be limited to a fraction of his yearly income as a total recovery under a law such as the Act of 1868. The Act was therefore condemned because it would operate to deprive some families of compensation for a large part of their catastrophic economic loss.

The desire to preserve a heavy deterrent against negligence was obvious among the supporters of article 3, section 21. It was posited that:

The very fact that juries are disposed to give [high] damages, shows that there is a feeling among the people that something should be done in cases of railroad accidents, to compel the companies, through fear of heavy verdicts against them, to keep their roads in such a condition that these accidents would not be continually occurring.

While the focus remained on railroad corporations and the preferential treatment they received under the Act of 1868, one proponent of the constitutional provision did argue that it would also prevent the legislature from arbitrarily limiting the liability of, for instance, lawyers or another professional group. But, even here, the focus was on the need for heavy verdicts as a deterrent against carelessness.

Those who argued against the constitutional provision and in favor of allowing the legislature the power to pass legislation such as the Act of 1868 insisted that the act established a reasonable limit on the arbitrary passions and prejudices of the juries. They contended that jury verdicts in negligence cases were often excessive and unreasonable, citing cases where the awards were grossly disproportionate to the actual economic loss. It was believed that these extravagant

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109. *Id.* at 730, 739-40, & 743 (comments of Messrs. Worrell, J. S. Black, & Cochran).
110. *Id.* at 740 (comments of Mr. J. S. Black).
111. *Id.* at 735 (comments of Mr. Gowen).
112. *Id.* at 730 (comments of Mr. Campbell). *See also 2 Convention Debates, supra* note 101, at 739 (comments of Mr. J. S. Black) (heavy jury verdict represents deterrent to railroad companies).
113. *Id.* at 740 (comment of Mr. J. S. Black).
114. *Id.* at 733 (comment of Mr. Woodward).
verdicts increased railroad costs for the entire public, while a few fortunate plaintiffs enjoyed a windfall.

The railroads that are compelled to pay these excessive damages necessarily increase fares and freights, and it becomes a burden upon the whole community, and injustice is done to all the people that justice may be done to the party claiming the damage.\textsuperscript{115}

The proponents of the constitutional provision insisted, however, that an injured victim should have the right to a jury’s measurement of his damage, without an arbitrary limit set by statute. It was suggested that better courts and better appellate review, rather than legislative limitation, were the proper cure for extravagant verdicts.\textsuperscript{116} Quite significantly in light of later developments, it was pointed out that excessive verdicts were sometimes rendered in breach of promise of marriage cases, so that the railroads were not a special case.\textsuperscript{117} It was maintained that a limit on the jury would cause injustice in many cases and that this was the overriding consideration.

A reading of the arguments made in the convention debates does not clearly show that the framers intended to prevent the legislature from making any adjustments, no matter how fair or reasonable, to modernize or adapt the law of torts to new social conditions. Indeed, had they been faced with the evidence of the inadequacies of the present tort law in dealing with auto accident compensation, the framers of article 3, section 18 could have been expected to have allowed the legislature the freedom to develop a fairer system of accident compensation.

The convention debates show that article 3, section 18 was intended to wipe out laws which set a fixed ceiling on how much an injured victim could recover from a negligent wrongdoer. The language says “in no other cases shall the General Assembly limit the amount to be recovered for injuries,” and this could reasonably be read to mean that only fixed ceilings on the amount of recovery are impermissible. The verb “limit” is used. \textit{Webster’s Third New International Dictionary} defines “limit” as follows: “to assign to or within certain limits;” “to set bounds or limits;” and “to curtail or reduce in quantity or extent.” It adds that the term “limit stresses the fact of existence of boundaries, checks to expansion, or exclusions which either are not passed over or cannot or may not be.”\textsuperscript{118} Furthermore,
courts have recognized that the term "limit" is not synonymous with such terms as "exempt" or "discontinue." In *Jones v. Wells Fargo Co. Express*, the court construed a statute which prohibited any agreement "exempting" a common carrier from liability:

To exempt from liability is one thing and to fix or limit the amount of damages is entirely another thing. Exempt means to release, discharge, waive, relieve from liability. . . . Limit is to fix a point or boundary beyond which the subject cannot pass or extend. . . . The liability for the loss . . . was not in any manner exempted by limiting the damages to fifty cents per pound.

Likewise, in *Rosenfeld v. American Art Textile Printing Co.*, which involved interpretation of a lease which reserved to the landlord the right to "limit" the amount of steam to be furnished, the court stated:

Funk & Wagnall's New Standard Dictionary defines "limit" as "to set a bound or bounds to; keep in bounds; confine; restrict; [sic]" and defines "discontinue" as "to break off, terminate or cease from; bring to an end; stop." . . . It was not the intention of the parties that the landlords should have the right at any time to discontinue or stop the sale of live steam.

The distinction between "abolition" and "limitation" can perhaps most clearly be seen by considering the converse situation. Where an agency is given the authority to "limit" a right, the agency is generally not thought to have the authority to completely abolish the right.

The definition of the term "limit" given in the dictionaries and arrived at by the courts quoted above is important for purposes of interpreting article 3, section 18 because "[i]t must be assumed that the people who voted upon the Constitution gave to the words employed their common and ordinary significance." Clearly the term "limit" would be applicable to a law such as the Act of 1868, which set an upper ceiling or boundary on the amount a victim could recover when suing a negligent railroad. On the other hand, the term "limit" does not seem applicable to a law which sets no upper boundary on the

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120. Id. at 511, 145 N.Y.S. at 603.
121. 115 N.Y.S.2d 21 (Sup. Ct. 1952).
122. Id. at 24.
123. See, e.g., *Dart v. City of Gulfport*, 113 So. 441 (Miss. 1927) wherein the court held that a zoning board's power to "restrict" did not constitute a power to "destroy" or "prohibit" the erection of buildings, for "restrict" meant "to restrain within bounds; to limit; to confine." Id. at 444.
124. Commonwealth ex rel. *Margiotti v. Lawrence*, 326 Pa. 526, 532, 193 A. 46, 49 (1937). *See* *Collins v. Kephart*, 271 Pa. 428, 434, 117 A. 440, 442 (1921) ("when simple words are used in writing the fundamental law, they must be read according to their plain, generally understood, or popular, meaning"). See also Pa. Stat. tit. 46, § 533 (1937). That section, which is Pennsylvania's Statutory Construction Act, states that "[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage."
amount recoverable in an action, but rather merely attempts to exclude
minor or small claims. The language of the provision would also not
seem to apply to the total abolition of a class of tort actions, as
opposed to the setting of a limit on recovery in recognized actions
for damages.

Proposals for a no-fault system of auto accident compensation
have attempted to abolish small claims for pain and suffering. The
Keeton and O'Connell proposal,125 for example, recommends the re-
tention of a tort action for pain and suffering if the victim can prove
his damages for pain and suffering exceeded $5,000. That proposal
places no upper limit on the amount that can be recovered. Their
proposal has little in common with the Act of 1868, the law against
which article 3, section 18 was primarily directed, in that the proposal
would not deny full compensation to the seriously injured; the quantity
of damages that could be recovered in these serious cases would not
be limited. On the contrary, it could be argued that the position of
the seriously injured victim is stronger under the Keeton and O'Connell
proposals for two reasons: (1) elimination of small claims will reduce
court backlogs and enable the plaintiff to prosecute his action more
speedily and (2) access to speedy no-fault compensation for economic
loss will reduce the pressure on the victim to settle his claim quickly
for less than his full damage, thereby removing a “limit” imposed by
existing conditions.

Thus, several very important distinctions should be drawn be-
tween proposals for no-fault accident compensation and legislation
similar to the Act of 1868. No-fault proposals are designed to promote
fairer and more adequate compensation for the victims of car accidents.
A proposal such as the Keeton and O'Connell basic protection plan
would not reduce the amount that a seriously injured person could
recover. The Act of 1868, on the other hand, restricted even the
most seriously maimed or disfigured victim to a maximum recovery
of $3,000. Furthermore, the Act of 1868 was not part of a legislative
reform designed to improve compensation for victims of railroad acci-
dents; the limit on recovery could only be justified as an economy
measure, sacrificing full and adequate compensation for the severely
injured victim. No-fault proposals, in marked contrast, are designed
to improve compensation for those seriously set back by auto accidents,
at the cost only of abolishing claims for small amounts of pain and
suffering, which are often exaggerated and without merit and which,
statistics show, are foreseeable for almost all vehicle occupants at some
time during their lifetime.

125. See R. KEETON & J. O'CONNELL, supra note 3, at 504.
Critics of our present tort law system of compensation argue that the negligence concept of fault causes injustice and hardship when applied to modern automobile accident cases. They maintain that retention of the fault principle serves no real deterrent function because liability insurance in most cases bears the cost of auto accidents. Most of the arguments made by the proponents of article 3, section 18 in the constitutional debates would not be applicable to no-fault legislation designed to modernize the compensation system in light of these new developments. Article 3, section 18 was designed to prohibit legislation which would destroy the deterrent effect of large jury verdicts and prevent the fair and adequate compensation of victims of negligence. No-fault proposals are consistent with these purposes. They preserve a tort action in the event of serious injury and promote more adequate compensation for all victims.

Neither the language of article 3, section 18 nor the stated purposes of its framers indicate that this provision was intended to prevent the legislature from totally abolishing a common law cause of action if, for example, the legislature decided that the cause of action had outlived its original purpose and was no longer helpful in promoting justice in the community. The language of the provision does not say “the General Assembly shall not abolish causes of action for injuries to person or property;” rather, it speaks only of placing no limit on the amount to be recovered. Therefore, one may fairly conclude that the framers intended that, so long as the legislature considered a tort cause of action a useful social mechanism for the achievement of justice, no legislation be passed that would place a limit on the amount to be recovered in such an action. The language of the provision does not compel the conclusion that an antiquated and anachronistic cause of action cannot be wiped out by the legislature. Such an interpretation would freeze the law of torts in a rigid, inflexible mold and prevent its adaptation to changing social conditions. The total abolition of all tort actions in cases of automobile accidents, to be replaced with a no-fault system of compensation, would not be the type of legislation which article 3, section 18 expressly or impliedly forbids. That this is a correct interpretation of that section is demonstrated by the fact that no constitutional obstacles have been encountered in Pennsylvania when the legislature has totally abolished or modified traditional tort actions for injuries to persons or property.

Finally, it should be noted that further scrutiny of the precise language of that section reinforces the conclusion that the framers

127. See notes 135-58 and accompanying text infra.
did not intend to deny the general assembly the power to abolish or redefine tort causes of action. The pertinent language of article 3, section 18 prohibits the general assembly from limiting the "amount to be recovered for injuries." Pennsylvania decisions which have construed the term "injuries" indicate that this expression refers to "legal wrongs" which would entitle a claimant to damages at common law or from a statute. As was seen with the case of Jackman v. Rosenbaum Co., the fact that article 3, section 18 prohibits placing limits on the amount of recovery in tort actions does not preclude total abolition of those causes of action when they have become outmoded or unresponsive to the changing needs of society. Further, the decision indicates that once a traditional tort cause of action has been wiped out by statute, the prohibition against limitation of damages in article 3, section 18 would no longer be applicable.

In summary, it can be said that neither the plain language of article 3, section 18 nor its historical background creates an insurmountable constitutional barrier to the implementation of some kind of no-fault system in Pennsylvania, since the language of that provision is somewhat ambiguous and allows for the interpretations which have been advanced. It should be emphasized, however, that the very ambiguity of that section and its historical background will also provide opponents of a no-fault plan with the material with which to fashion a forceful constitutional argument. This is truly a case where the legal arguments on both sides carry considerable weight, and it cannot be predicted with confidence which side would prevail in the Pennsylvania Supreme Court.

2. Judicial Application

None of the Pennsylvania decisions which have dealt with article 3, section 18 provide clear indications as to how the Pennsylvania Supreme Court could be expected to resolve the issue of the constitutionality of no-fault plans. The case law is sparse to begin with, and the seriousness and depth of the analysis in the cases is weaker still.

The first cases of any significance applying the present article 3, section 18 were, of course, concerned with the Act of 1868, which limited the amount of damages recoverable in suits against railroads for negligence, since the constitutional provision was aimed specifically at that act. The act was voided by the Constitution of 1874 in Lewis

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128. See note 93 supra.
v. Hollahan,\textsuperscript{130} where the court gave the following interpretation of that section:

\begin{quote}
[\textit{I}n endeavoring to determine the full scope and meaning of the section, it should be considered, as a whole in the light of the evil intended to be remedied by its adoption. It is very evident that the evil at which it was aimed was the obnoxious statutory limitation as to the amount of damage to be recovered . . . .

The purpose of the twenty first section of the third Article of the Constitution was to nullify, as far as possible, then existing legislation limiting the amount to be recovered for injuries resulting in death, or for injuries to persons or property . . . and, at the same time, prevent all such legislation in the future. The phraseology of the section as well as the discussion that took place during the course of its adoption clearly indicates that such was the intention of the framers of the Constitution.\textsuperscript{131}
\end{quote}

This decision acknowledges that the constitutional provision was primarily directed towards legislation such as the Act of 1868.\textsuperscript{132}

Article 3, section 18 has been most frequently cited in cases involving Pennsylvania's workmen's compensation law. Commentators who have considered the constitutionality of no-fault plans under the federal Constitution have regarded cases involving workmen's compensation as providing the closest analogy for purposes of constitutional analysis.\textsuperscript{133}

The Pennsylvania constitution was amended in 1915 to permit the legislature to enact a workmen's compensation system. Because of the fact that a constitutional amendment was made and that the law itself is regarded as "voluntary," the courts of Pennsylvania have never directly considered the question as to whether a compulsory workmen's compensation act would violate the Pennsylvania constitution.\textsuperscript{134}

Various dicta in cases decided under the Pennsylvania workmen's compensation law indicate, however, that a compulsory law might be regarded as a violation of article 3, section 18.

\textsuperscript{130} 103 Pa. 425 (1883).
\textsuperscript{131} \textit{Id.} at 430.
\textsuperscript{132} See also Pennsylvania R.R. v. Bowers, 124 Pa. 183, 16 A. 836 (1889).
\textsuperscript{133} See, e.g., Cowen, Due Process, Equal Protection and No-Fault Allocation of the Costs of Automobile Accidents, in CONSTITUTIONAL PROBLEMS IN AUTOMOBILE ACCIDENT COMPENSATION REFORM 1, 29 (U.S. Dep't of Transp., Auto. Ins. & Compensation Study 1970), in which the author opined:

Both [no-fault plans and workmen's compensation] are concerned with the prompt payment without regard to fault of at least a portion of the costs of injuries received, in one instance in automobile accidents and in the other in the course of certain specified types of employment. Both assess these costs, through the medium of some sort of insurance plan, on one who may not be at fault; both limit the recovery available.

\textsuperscript{134} See notes 47-54 and accompanying text \textit{supra}. See also W. Skinner, \textit{supra} note 50, at 48.
It was seen in *Dolan v. Linton's Lunch* that the general assembly might well be able to abolish common law causes of action without running afoul of article 1, section 11 of the constitution, if at the same time it enacts a reasonable substitute therefor. The case, however, makes little mention of article 3, section 18 with regard to possible application to schemes like no-fault plans. It does leave open the interpretation that the court in that case was concerned with the payment of "full actual damages," and that damages for pain and suffering in cases of minor injury are not included within that term. "Pain and suffering" are regarded as substantive losses in Pennsylvania and, therefore, the notion of "full actual damage" might be held to include the right to recover for pain and suffering.

The seriousness with which pain and suffering damages are viewed is illustrated by *Burgan v. Pittsburgh*. Being struck by a motorcycle, the victim in that case suffered very serious injuries, including fractures, permanent disfigurement, and a crippled leg. The court stated, in connection with the recovery of damages for pain and suffering:

Pain and suffering are substantive losses and, for the same reason that a person is entitled to retain, against the encroachment of others, the full and unimpeded use of his limbs, organs and other parts of his body, so is he equally guaranteed freedom from physical and sensory torment. Pain and suffering, while existing, can be as much a disability as crippling, rupture, or dismemberment. It is the jury's duty to appraise the pain and the agony of the anatomy in discord and to affix monetarily the responsibility of the person or legal entity which broke nature's harmony.

This strongly-feled sentiment would not necessarily refer to claims for pain and suffering in cases of minor injury, but it must be taken as an indication of how strongly the Pennsylvania Supreme Court might feel about a no-fault plan which would deprive some seriously injured claimants of full compensation for pain and suffering.

The most recent decision discussing article 3, section 18 is *DeJesus v. Liberty Mutual Insurance Co.* This case held that a workmen's compensation insurance carrier is included within the term "employer" as used in section 303 of the Workmen's Compensation Act, and thus the insurance carrier shares the employer's immunity from common law liability. The court further held that this interpretation...

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136. 373 Pa. 608, 96 A.2d 889 (1953).
137. Id. at 613, 96 A.2d at 891.
of the Workmen's Compensation Act did not violate article 3, section 18. The court explained that the Pennsylvania constitution had been amended to permit the enactment of the Workmen's Compensation Act. The court quoted that section, emphasizing the language "in no other cases shall the General Assembly limit the amount to be recovered for injuries . . . ."

Both parties to the present action concede that the italicized portion of the Constitution, as quoted above, precludes the enactment of legislation limiting the amount of compensation payable to employees for injuries other than those "arising in the course of their employment."

We now specifically find that the purpose of Section 18, as amended, was to permit the General Assembly to enact a workmen's compensation program, but to preclude the enactment of general legislation covering injuries other than those arising in the course of employment. . . . In the light of this purpose, particularly as applied to the instant situation, it is clear that Section 18, as amended, did not restrict the General Assembly to legislating with respect to payments to be made by employers, as opposed to payments to be made by insurers.140

It is doubtful, however, that the DeJesus statement that article 3, section 18 precluded the enactment of general legislation covering compensation for injuries other than those arising in the course of employment, was intended to have the sweeping impact which its broad language may suggest. If that provision precludes the enactment of all legislation "covering injuries other than those arising in the course of employment," it is difficult to see how several Pennsylvania statutes which have abolished or substantially modified common law tort actions for the recovery of damages to compensate for injuries to person or property have evaded constitutional invalidation.141 If indeed, article 3, section 18 meant that the legislature was precluded from enacting any

140. 439 Pa. at 183-85, 268 A.2d at 926-27 (citations omitted and emphasis added).

141. The common law tort actions for alienation of affections and breach of promise to marry have been totally abolished in Pennsylvania. PA. STAT. tit. 48, §§ 170 & 171 (1935). The only case in which the constitutionality of these sections was questioned is McMullen v. Nannah, 49 Pa. D. & C. 516 (C.P. Beaver Co. 1943). In that case the court only circumspectly considered the issue, stating that the "authorities, including those of Pennsylvania, are unanimously in favor of constitutionality." Id. at 522. One is therefore forced to speculate as to how the abolition of the cause of action for alienation of affections could be reconciled with article 3, section 18. To be sure, if one could treat the complete abolition of the action for alienation of affections as a limitation of less than zero damages, the statutory provision would be rendered unconstitutional. The conclusion that is compelled by the successful abolition of these and other common law causes of action is that since "abolition" and "limitation" are not synonymous terms, the constitution must absolutely prohibit only the latter.
legislation which affected the amount of damages recoverable in tort actions, tort concepts, no matter how mischievous or antiquated, which for a long time had been a burden on society and the judicial system, could not be discarded or reformed, rendering Pennsylvania's tort system totally inflexible and unresponsive.

The abolition of tort actions to recover damages for minor claims of pain and suffering can be analogized to the abolition of the tort action for alienation of affections. According to Professor Prosser, this tort action was a common law cause of action based on a tortious interference with family relations. In an action for alienation of affections, the aggrieved husband would sue the defendant for damages for the loss of the love, comfort, society, and companionship of his wife.\textsuperscript{142} The common law actions dealing with wrongful interference with domestic relations, such as alienation of affections and breach of promise to marry, were found by state legislatures to have been peculiarly susceptible to abuse. According to Professor Prosser:

\[\text{[I]t is notorious that [these actions] have afforded a fertile field for blackmail and extortion by means of manufactured suits in which the threat of publicity is used to force a settlement. There is good reason to believe that even genuine actions of this type are brought more frequently than not with purely mercenary or vindictive motives; that it is impossible to compensate for such damage with what has derisively been called "heart balm," that people of any decent instincts do not bring an action which merely adds to the family disgrace; and that no preventive purpose is served, since such torts seldom are committed with deliberate plan...}\textsuperscript{143}

Similarly, the cause of action for pain and suffering in cases of minor injury in car accidents has been attacked as a source of vexatious litigation which does not serve the ends of justice.\textsuperscript{144} In a typical small case, the certainty of closing the claim is worth more to the defendant insurance company than it is to the claimant, and therefore small claims are generally overpaid.\textsuperscript{145} Furthermore, compensation for pain and suffering in cases of minor injuries is widely believed to invite exaggeration or fraud in claims.\textsuperscript{146}

In response to mounting evidence showing the actions for alienation of affections and breach of promise to be susceptible to abuse,

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\textsuperscript{142} W. PROSSER, THE LAW OF TORTS 876 (4th ed. 1971).
\textsuperscript{143} Id. at 887.
\textsuperscript{144} VOLPE REPORT, supra note 3, at 131.
\textsuperscript{145} NEW YORK REPORT, supra note 3, at 26-29; R. KEETON & J. O'CONNELL, supra note 3, at 225-26.
\textsuperscript{146} Note, supra note 40, at 438.
\end{flushright}
legislatures in many states abolished these causes of action. Professor Prosser commented on this legislative development:

[These statutes] reverse abruptly the entire tendency of the law to give increased protection to family interests and the sanctity of the home, and undoubtedly they deny relief in many cases of serious and genuine wrong. It may be that they do away with spurious suits at too great a price, and that other methods of limitation or control are to be preferred.147

Nevertheless, the facts are that the Pennsylvania legislature has already enacted a statute which abolished the established common law right of recovery of damages for a wrongful interference with domestic relations and that this statute "undoubtedly" denies relief "in many cases of serious and genuine wrong;" yet, the statute has not been held to be unconstitutional. This demonstrates that article 3, section 18 does not preclude the legislature from wiping out a tort cause of action for damages for injuries to person or property.

Further examples can be given of statutes passed by the Pennsylvania General Assembly which wipe out common law causes of action in tort for damages to person or property. Although the Medical Good Samaritan Act148 abolished a cause of action in tort where a person is injured by a physician who, in good faith, renders aid during an emergency unless the physician is grossly negligent or reckless, its constitutionality has not been questioned. Likewise, neither the Non-medical Good Samaritan Act149 nor several sections of the Disease Prevention and Control Law of 1955, which sections provide that a physician will not be liable for treating a minor for venereal disease without his parents' consent,150 have met with constitutional problems. These provisions are apparently buttressed by the strong public policy considerations that would encourage persons to render aid to those in need and that claims arising from such actions serve no useful function in promoting these aims of society. Similarly, such strong policy considerations might underlie the institution of a no-fault system, on the theory that, where the injured party can be made whole for his medical damages within the system, the often exaggerated claims for pain and suffering arising out of small medical claims are so susceptible of abuse and so lacking in serving the useful function

147. W. PROSSER, supra note 142, at 887–88 (emphasis added).
149. PA. STAT. tit. 12, § 1643 (Supp. 1972), amending PA. STAT. tit. 12, § 1643 (Supp. 1966) (abolishing a cause of action for ordinary negligence in connection with emergency care rendered by a fireman, policeman, or other members of a rescue squad).
of equitably reimbursing the injured party without mulching the defendant that they should be abolished.

A Pennsylvania statute which changed the liability of an innkeeper or hotel proprietor for loss of personal property of guests\textsuperscript{151} was upheld against constitutional attack in \textit{Sherwood v. Elgart}.\textsuperscript{152} This statute exempted a hotel proprietor for loss of personal property which the guest left in his room and which was destroyed by an "unintentional fire." An interpretation of article 3, section 18 to include "abolish" within the meaning of "limit" would have rendered the statute unconstitutional because the statute "limits" recovery for losses of property to zero by entirely abolishing the guest's common law right to recover for the negligence of the hotel owner. As was explained in \textit{Kelly v. Milner Hotels, Inc.},\textsuperscript{153} "the common law made an innkeeper a virtual insurer of all property of his guests. Since this Act is in derogation of common law, it should be strictly construed."\textsuperscript{154} Despite this contention and the fact that the statute abolishes a traditional tort recovery for negligence, the Pennsylvania Supreme Court summarily rejected the argument that the statute offended the Pennsylvania constitution.\textsuperscript{155}

Another Pennsylvania example of a statutory modification of a common law tort cause of action is the statute providing that, in a tort action for the conversion of property of fluctuating value, such as securities, "damages shall be limited to the difference between the proceeds of the conversion . . . and such higher value as the property may have reached within a reasonable time after he [the owner] had notice of the conversion."\textsuperscript{156} At common law, damages for conversion of property of fluctuating value were measured by the highest value reached by the property between the time of conversion and the time of trial. This statute terminated the "highest-value" period at the expiration of a reasonable time after notice of the conversion. Such a change of the traditional tort law measure of damages has been recognized by the Pennsylvania Supreme Court as a "limitation upon the recovery of damages,"\textsuperscript{157} and as being "in derogation of the common law,"\textsuperscript{158} yet the constitutionality of the statute has gone unquestioned.

The statutes discussed above furnish evidence that article 3, section 18 does not pose a barrier to reasonable legislative efforts to

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\item \textsuperscript{151} PA. STAT. tit. 37, § 61 (1954).
\item \textsuperscript{152} 383 Pa. 110, 117 A.2d 899 (1955).
\item \textsuperscript{153} 176 Pa. Super. 316, 106 A.2d 636 (1954).
\item \textsuperscript{154} Id. at 318, 106 A.2d at 637.
\item \textsuperscript{156} PA. STAT. tit. 68, § 481 (1965).
\item \textsuperscript{157} Foley v. Wasserman, 319 Pa. 420, 428, 179 A. 595, 599 (1935).
\item \textsuperscript{158} Wolfe v. Pennsylvania Co., 322 Pa. 344, 346, 185 A. 292, 293 (1936).
\end{itemize}
modernize the law of torts to keep legal rights and duties in step with modern social and economic conditions. One qualification, however, should be added at this point. The power of the general assembly to abolish or modify tort actions for fatal personal injuries may be circumscribed by the language of article 3, section 18 which says that in case of death, "the right of action shall survive."

A no-fault plan could easily avoid this problem, of course, so long as it left the present tort action available in death cases. Because the most serious shortcomings of the present tort system are related to claims for pain and suffering in minor injury cases, leaving the present tort action intact with respect to fatal injuries would not be a serious compromise for those dedicated to accident compensation reform.159 This compromise may not be necessary, however, if one subjects the precise language of article 3, section 18 to closer inspection. The language says "the right of action" shall survive; this terminology would leave open the possibility that survival was intended only for those rights of action which the general assembly has not abolished. Surely it is doubtful that an exception for fatal injuries would be made by the courts for this statutory modification simply because of the constitutional language in question. Should this argument fail to persuade the Pennsylvania Supreme Court, however, modifications of the no-fault system to deal with fatal accidents would have to be made.160

3. The View of the Commentators and Cases Decided in Other States

Professors Keeton and O'Connell have apparently conceded that provisions such as article 3, section 18 in state constitutions 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. Although some states passed amendments to these provisions making way for workmen's compensation acts, the amendments were usually tailored only for workmen's compensation. . . . Thus further amendments would be needed to enact the basic protection system. It should be noted that Massachusetts and most other states present no problem in this regard since they are without

159. R. KEETON & J. O'CONNELL, supra note 3, at 508.
160. Id. at 505-14.
any constitutional provision proscribing the enactment of laws limiting damages for personal injury.\textsuperscript{161}

It should be emphasized, however, that none of the commentators has actually devoted intensive study to this particular constitutional issue, and it appears that, in the case of Pennsylvania at least, they may very well have prematurely leaped to the wrong conclusion. None of them have confronted the point set forth above, namely, that provisions such as article 3, section 18 have not been held to prevent the legislature from passing any law which abolishes an antiquated or useless tort cause of action, as opposed to passing a law which limits the amount to be recovered under an unabolished cause of action.

Careful attention must be given to the precise language used in these constitutional provisions. For example, one should compare article I, section 16 of the New York constitution, which provides that "[t]he right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation," with the language of article 3, section 18 of the Pennsylvania constitution, which provides that "in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive . . . ." A New York study concluded that the New York constitutional provision would prevent the implementation of a no-fault plan with respect to injuries causing death:

[L]oss to the survivors due to the death itself would not be covered by our proposal [for no fault compensation], because the New York State Constitution [article 1, section 16] forbids any impairment of actions to recover damages for injuries resulting in death. The present tort action would thus continue to be available in death cases. Fatal accidents could be compensated efficiently under our proposed plan, and we would recommend that the constitution be appropriately amended.\textsuperscript{162}

The language in the Pennsylvania constitution is not as explicit or compelling as that contained in the New York constitution. Indeed, the difference in language between the provisions is a substantial indicator that a different result was intended in Pennsylvania, at least as to non-fatal injuries.

\textsuperscript{161} Id. at 504-05 (citations omitted and emphasis added). See also Bishop, supra note 24, at 43 ("[s]ome state constitutions undoubtedly contain provisions which would have to be amended before the legislatures of such states could enact the plan into law"); Ruben & Williams, supra note 43, at 47 n.20.

\textsuperscript{162} New York Report, supra note 3, at 86 n.139. For a discussion of the effect of a provision such as article 1, section 16 of the New York constitution on a basic protection proposal, see R. Keeton & J. O'Connell, supra note 3, at 508-10.
It is also very instructive to compare article 3, section 18 with article 18, section 6 of the Arizona constitution, which provides: "[t]he right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation." This language is markedly different from that of the Pennsylvania constitution; it expressly prohibits the abrogation of any right of action to recover damages for injuries. In addition article 2, section 31 of the Arizona constitution provides: "No law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person." This provision is substantially identical to article 3, section 18 of the Pennsylvania constitution. Obviously, cases decided under the Arizona constitution can be distinguished for our purposes because of the express prohibition of Arizona's article 18, section 6. It is also interesting to note that the Arizona legislature has not passed a statute abolishing the causes of action for alienation of affections, seduction, or breach of promise to marry, as has Pennsylvania.

However, Arizona does have a "Good Samaritan" Act, similar to the one in Pennsylvania, which exempts a physician from liability for ordinary negligence in emergency situations. Yet this statute would clearly be unconstitutional if the Arizona Supreme Court today were to interpret the constitution of that state as literally as it did in 1917, when it considered the constitutionality of the state's "voluntary" workmen's compensation laws. In a dictum about compulsory workmen's compensation acts, the court said:

A statute which would attempt to forcibly limit the amount recoverable for personal injuries suffered would be in direct conflict with these plain, simple provisions of the state Constitution. Statutes which provide a limited amount in satisfaction of damage and leave to the parties interested the right to elect to abide by its provisions are controlled by other principles of law and should not be confused with statutes imperative in their terms.

The constitution of Kentucky also contains a provision substantially identical to article 3, section 18 of the Pennsylvania constitution. Section 54 of the Kentucky constitution reads: "The general assembly

164. Inspiration Consol. Copper Co. v. Mendez, 19 Ariz. 151, 167, 166 P. 278, 284-85 (1917), aff'd sub nom. Arizona Employer's Liab. Cases, 250 U.S. 400 (1919), overruled on other grounds, Consolidated Ariz. Smelting Co. v. Egici, 22 Ariz. 543, 199 P. 132 (1921). This is the dictum which Professors Keeton and O'Connell felt would stand in the way of their no-fault plan. R. Keeton & J. O'Connell, supra note 3, at 504-05. However, as was noted above there is no reason to believe that this sentiment would necessarily prevail in Pennsylvania, where the constitutional obstacles are less explicit and where there are precedents for the abolition of tort actions.
shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.” In addition, section 241 of that constitution provides that “[w]henever 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. . . .” Furthermore, section 14 of the Kentucky constitution is substantially similar to article 1, section 11 of the Pennsylvania constitution. Under these provisions, the Kentucky guest statute, which barred a tort action by a guest in an automobile unless the host were “intentionally” reckless, was held to be constitutional in *Ludwig v. Johnson.* 65 In the *Ludwig* case, the defendant argued that section 54 of the Kentucky constitution should not be read to prevent the legislature from abolishing a tort 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 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. 66

It will be noted that this is the position herein taken with respect to article 3, section 18 of the Pennsylvania constitution. The Kentucky court, however, rejected this argument:

> When [section 54 of the constitution] 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. 167

The court added:

> The statute under consideration violates the spirit of our Constitution as well as its letter as found in sections 14, 54, and 241. It was the manifest purpose of the framers of that instrument to preserve and perpetuate the common-law right of a citizen injured by the negligent act of another to sue to recover damages for this 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. If the allegations of appellant's petition are true, he has suffered serious injuries occasioned by the negli-

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165. 243 Ky. 533, 49 S.W.2d 347 (1932).
166. Id. at 537, 49 S.W.2d at 349.
167. Id. at 538–39, 49 S.W.2d at 350.
gent acts of the appellee . . . . The Constitution guarantees to
him his right to a day in court for the purpose of establishing
the alleged wrong perpetrated on him and recovery of his re-
sultant damages.188

The Ludwig decision is obviously a precedent which, if it so chooses,
the Pennsylvania Supreme Court could decide to adopt and extend to
a no-fault statute. However, the court in Ludwig emphasized section
14 of the Kentucky constitution, which is similar to article 1, section 11
of the Pennsylvania constitution, so strongly as to suggest that the
failure of the guest statute to provide a substitute remedy was the real
defect in the legislation. Viewed in this light, even Ludwig would
not stand as a bar to a no-fault plan.

Two other states have constitutional provisions substantially simi-
lar to article 3, section 18. These are article 10, section 4 of the
Wyoming constitution and article 5, section 32 of the Arkansas consti-
tution. In both of these states, however, there are also automobile
guest statutes. In spite of plaintiff’s reliance on the Ludwig decision,
the Arkansas court held the guest statute to be constitutional in Rob-
erson v. Roberson.169 Furthermore, neither the Wyoming guest statute170
nor the Wyoming statutes abolishing actions for alienation of affections
or breach of promise to marry171 have been challenged on constitutional
grounds.

IV. Conclusion

From the foregoing, it appears that, of the three possible constitu-
tional obstacles to the implementation of no-fault automobile accident
compensation proposals of the sort discussed in Pennsylvania, the
only serious problem arises from article 3, section 18. On the theo-
retical level, it would appear that the prohibition of any limitation on
the amount recoverable in a tort action, such as prescribed by that
section would not be violated by a total abolishment of the cause
of action for negligence in automobile injury cases, at least for
damages for pain and suffering as the result of minor injuries (as
opposed to death actions), so long as the no-fault plan is deemed to
be a reasonable substitute for the common law cause of action. Serious
problems remain, however, since article 3, section 18 may pose a bar
to the application of the no-fault plan to death actions. This would
prove to be a formidable defect in the goals of the system, considering
the fact that a substantial portion of the deaths caused by automobile

168. Id. at 542-43, 49 S.W.2d at 351.
169. 193 Ark. 669, 101 S.W.2d 961 (1937).
170. WYO. STAT. ANN. § 31-233 (1967).
accidents occur instantaneously. It is questionable, however, how much reliance can be placed on the existence of statutes abolishing common law remedies in states whose constitutions contain provisions similar to article 3, section 18 and where those statutes have not yet come under constitutional attack. The reasons for this uncertainty are twofold. First, the effects of statutes abolishing actions for alienation of affections and for breach of promise to marry are not nearly as far reaching and monumental in their scope as is a no-fault plan. Secondly, the failure to attack such statutes on constitutional grounds may be largely the result of apathy or lack of financial interest to pursue the matter. Even without the aid of a crystal ball, it can be said with relative assurance that the same will not be the case with any no-fault plan that may be enacted. Such a plan is sure to come under constitutional attack.