

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

(Whitbeck, P.J.; Jansen and Davis, JJ.)

RODNEY McCORMICK,

Plaintiff-Appellant,

Supreme Court Docket No.136738

vs.

Court of Appeals No. 27 5888

LARRY CARRIER,

Genesee Cir Ct No 06-083549-NI

Defendant,

and

ALLIED AUTOMOTIVE GROUP, INC.

(Indemnitor of General Motors Corp.),

Defendant-Appellee.

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BRIEF ON APPEAL OF AMICUS CURIAE
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CONSTITUTIONS AND STATUTES

MCL 500.3135 6

Mich Const Art I, Sec. 17 9

STATEMENT OF QUESTION PRESENTED

IS THE SERIOUS IMPAIRMENT THRESHOLD FOR BEING ABLE TO SUE FOR AUTOMOBILE TORTS CONSTITUTIONAL?¹

Amicus says “no.”

STATEMENT OF FACTS

The Plaintiff in this case was injured when a truck backed over his ankle, breaking it. Restrictions were lifted a year later, but throughout Plaintiff was suffered pain in the ankle.

The courts below were charged with construing the following statute:

(1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement...

(3) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was in effect is abolished except as to...

(b) Damages for noneconomic loss as provided and limited in subsections (1) and (2)...

(7) As used in this section, “serious impairment of body function” means an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life. MCL 500.3135

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Since judges take an oath to uphold the constitutional, which oath would be violated by applying an unconstitutional law, this issue may be addressed by the Court whether or not it was raised by the parties.

ARGUMENT

I. THE THRESHOLD REQUIREMENT VIOLATES FUNDAMENTAL RIGHTS²

A. PERSONAL SECURITY IS A FUNDAMENTAL RIGHT

Every person in America has a constitutional right to life, liberty and property, which includes the right to personal security i.e., not to be struck by another. *Terry v Ohio*, 392 US 1, 8-9; 20 L Ed 2d 889; 88 S Ct 1868 (1968) (recognizing “inestimable right of personal security”); *Jenkins v Averett*, 424 F 2d 1228, 1232 (CA 4, 1970) (“physical integrity” is a fundamental right). That right is violated by a punch in the mouth, shooting with a gun, or running into the plaintiff with an automobile. *McDaniel v Hancock*, 328 Mich 78 (1950) (striking with an automobile is an assault).

Although most cases invoking this right involve *intentional* violations, Michigan’s Constitution makes no distinction between intentional and negligent violations: *both* are actionable. *Defer v Detroit*, 67 Mich 346 (1887) (damage to property by negligent construction of sewer); *Defnet v Detroit*, 327 Mich 254, 258 (1950) (*Id.*); *Herro v Chippewa County*, 368 Mich 263 (1962) (county liable for negligently allowing water to pool behind a road, resulting in a washout and death); *Buckeye Union Fire Insurance Co v Michigan*, 383 Mich 630 (1970) (state liable for

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We realize that some of these constitutional arguments were addressed in *Shavers v Attorney General*, 402 Mich 554 (1977). However, that decision was grounded on the fact that, since the No-Fault Act was only recently enacted, it was too early to judge its effects. In other words, while the Act was still experimental, the Court was willing to let the experiment proceed. Now, over 30 years later, there is nothing experimental about the Act, and hence no reason to accord it the benefit of the doubt granted in *Shavers*. Moreover, the constitutionality of the 1995 amendments to the serious impairment threshold has yet to be addressed (the *Kreiner* court not addressing it, since it was not raised).

negligently allowing fire to spread to plaintiff's property).

A moment's thought reveals why this is so. Whether a wrong is negligent or intentional goes to the blameworthiness of the actor. But the purpose of the Bill of Rights is not to assign blame or punish wrongdoing, but rather to protect rights. Since personal security is as much invaded by a negligent blow as by an intentional one, protection of constitutional rights calls for treating negligent violations no differently than intentional ones. Indeed, allowing constitutional liability to turn on whether the act is intentional allows an immaterial consideration (whether the violator was blameworthy) eclipse the material consideration (protection of the victim's personal security).

Although the Bill of Rights is a limitation on government action, it is not merely direct invasions by the government that violate those rights. Rather, the state also violates the Bill of Rights when it passes laws that take the side of the wrongdoer in private disputes, since this ratification of wrongs committed by private parties makes them wrongs indirectly committed by the government. *Ames v Port Huron Log Driving and Booming Co*, 11 Mich 139 (1863) (striking down statute that entitled one to take charge of another's logs and charge the other for it); *Grand Rapids Booming Co v Jarvis*, 30 Mich 308, 323 (1874) (legislature may not authorize booming companies to interfere with property rights); *Garth Lumber & Shingle Co v Johnson*, 151 Mich 205, 208 (1908) (*Id.*); *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419, 73 L Ed 2d 868, 102 S Ct 3164 (1982) (striking down statute that permitted cable companies to lay their cables on private land);³ *Park v Detroit Free Press*, 72 Mich 560, 567 (1888) (striking down statute that

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Although these are property right cases, that is not a basis of distinction, since the personal rights

eliminated noneconomic damages when a newspaper prints a retraction. “It is not competent for the legislature to give one class of citizens legal exemptions for wrongs not granted to others; and it is not competent to authorize any person, natural or artificial, to do wrong to others, without answering fully for the wrong”⁴).

B. THE NO-FAULT ACT PROVIDES NO ADEQUATE SUBSTITUTE

Having some discretion with respect to remedies for violations of fundamental rights, the state may replace an *uncertain* common-law remedy with a *more certain* statutory one (as was done with workplace injuries); or even abolish some remedies, if a reasonable remedy remains. However, the remaining or substitute remedy must in fact be adequate to vindicate the fundamental right to be free from personal injury, and will be struck down if it is not.

Proponents of the threshold requirement attempt to uphold its reasonableness by arguing that it does not abolish a remedy, but merely substitutes a surer remedy. We will see in the next part that the remedy is not surer, but rather is more cumbersome and less complete. But even if we pretended otherwise, the NFA cannot be upheld on that basis because, while *cutting back* on existing remedies, it provides no substitute remedy, leaving only a constitutionally inadequate

to *life and liberty* (Mich Const Art I, Sec. 17) are no less important than *property* rights. *Lynch v Household Finance Corp*, 405 US 538, 552; 31 L Ed 2d 424; 92 S Ct 1113, 1122 (1972). The right to personal security is among the liberty interests protected by the due process clause. *Johnson v Glück*, 481 F 2d 1028, 1032 (CA 2, 1973), cert den 414 US 1033, 38 L Ed 2d 324, 94 S Ct 462 (1973).

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This suggests a more fundamental reason why the Legislature may not interfere with the right to redress for a wrong done: since the people delegated powers to government to protect the citizenry, not wrongdoers, a law protecting wrongdoers is outside the powers delegated to government by the people.

remedy.

To illustrate this point, consider that other no-fault system, workers' compensation. While abolishing an employer's tort liability, the workers compensation act still permits the worker to sue the employer, albeit in a different forum (the workers' compensation bureau). More importantly, while the WCA eliminates noneconomic damages, it provides a quid pro quo in the form of liability without regard to fault, thus making the more limited remedy nevertheless more sure.

By contrast, where is the No-Fault Act's quid pro quo for the automobile tort victim? Is the tortfeasor now liable without fault? No, his negligence must still be proven. Is the tort victim given a surer recovery? No, the tort victim's recovery is now *less* sure: he must now sue in two fora to get one recovery (which is more expensive and thus makes it harder to find an attorney willing to represent him on contingency), and his tort recovery is rendered less sure by the victim's need to satisfy the threshold requirement. In short, the No-Fault Act simply reduces the tort victim's remedy without any substitute being provided.

A similar situation was presented in *Park v Detroit Free Press*, *supra*. Before adoption of the statute in *Park*, a libel victim could recover both economic and noneconomic damages. The statute eliminated noneconomic damages in certain situations (where a retraction is printed) without providing anything in return. Regarding the remedy remaining (for economic damages), the court noted (at 72 Mich 565-566) that, in many if not most libel cases, noneconomic damages constitute the bulk of the total damages. The implication (borne out by the court's striking down the statute) is that economic damages is an inadequate vindicator of the

fundamental right to one's reputation.

That the automobile plaintiff may get certain economic losses from *his own* no-fault carrier is no more a "remedy" than telling an injured plaintiff, "pay your own damages" would be. Motorists could obtain that "remedy" even before passage of the no-fault act, by purchasing accident or disability insurance. The fact that no-fault coverage is made mandatory does not make it a "remedy," any more than would the legislature's requiring motorists to keep enough money in the bank (or post a bond) to pay for their own injuries.

Apart from "paying your own way" not being a remedy *in fact*, nor is it a *constitutionally adequate* remedy. Thus, in *Carlson v Green*, 446 US 14; 64 L Ed 2d 15; 100 S Ct 1468 (1980), individual violators argued that the constitution did not compel a remedy against them, since the wronged citizen could get full damages from the violator's employer. The court disagreed, holding that only a remedy *against the wrongdoer* adequately vindicates constitutional rights.

In short, the first-party no-fault coverage remaining to sub-threshold plaintiffs is not an adequate constitutional remedy, because a) it is not assessable against the one who committed the wrong, and b) it is but the tort victim paying for his own damages (albeit through insurance premiums). Consequently, the no-fault act merely reduces the common-law remedy, without providing any substitute. Per *Park v Detroit Free Press*, *supra*, that makes the NFA's tort limitation provisions unconstitutional.

II. THE STATE'S INTERESTS DO NOT JUSTIFY THE VIOLATION

A. A WEIGHING TEST IS UNCONSTITUTIONAL

That the threshold requirement traverses Plaintiff's right to personal security is enough

to render the requirement unconstitutional without regard to the governmental interests served by the requirement. *Loretto v Teleprompter Manhattan CATV Corp*, *supra* at 458 US 426 (uncompensated taking violates constitution “without regard to the public interest that it may serve”); Accord, *Stock v Jefferson Twp*, 114 Mich 357, 362 (1897); *Attorney General v Grand Rapids*, 175 Mich 503, 538 (1913). See also *Park v Detroit Free Press*, *supra*, which struck down a statute without addressing the state interests sought to be served by the statute.

There are, to be sure, other cases holding that, in analyzing the constitutionality of a statute, one weighs the interference with constitutional rights against the governmental interests served by the statute. Apart from contradicting the cases cited in the previous paragraph, such cases cannot be squared with the plain language, let alone a liberal construction, of the Constitution. The Bill of Rights is stated in peremptory terms: it says people have these rights; it does *not* say that people have these rights *unless the government posits a good reason to take them away*. Reading the latter limitation into the Constitution amounts to judicial legislation.

B. THE PURPOSES SERVED DO NOT SAVE THE THRESHOLD REQUIREMENT FROM UNCONSTITUTIONALITY

1. Introduction

Even if it is assumed that government purposes may override fundamental rights, such rights may not be overridden by a statute that only marginally serves the purpose, nor when a more narrowly crafted statute could achieve the same purpose without implicating fundamental rights (the so-called “overbreadth doctrine”):

Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly

stifle personal liberties when the end can be more narrowly achieved.

Shelton v Tucker, 364 US 479, 488; 5 L Ed 2d 231; 81 S Ct 247, 252 (1960). Accord, *In re Chmura*, 461 Mich 517 (2000); *Sponick v Detroit Police Dept*, 49 Mich App 162, 178 (1973). As we shall see, the no-fault threshold cannot be reconciled with this requirement.

2. The requirement does not assure swifter and surer recovery

Although assuring surer and swifter recovery would be a valid goal, the threshold requirement does not further that goal:

1. The Act forces a tort victim to split his cause of action and pursue *two* claims where there formerly was but one. This adds significantly to the expenses a tort victim must incur to be made whole.

2. Reducing the damages recoverable in the tort suit and creating the possibility of dismissal for failure to meet the threshold endanger an attorney's contingent fee, preventing some auto tort victims from being able to find an attorney willing to prosecute even valid claims.

3. The serious impairment defense creates the possibility (which becomes a reality in many cases) of tort victims going to the time and expense of a lawsuit that would be meritorious were it not for the requirement, only to be left with nothing to show for it.

4. And, of course, where the tort victim's injuries are in fact below the threshold, the requirement not only fails to promote speedy justice, but actually denies justice by guaranteeing that the tort victim will not be made whole.

Supporters of the threshold requirement would say, "Of course the requirement discourages tort suits; that was its intent." We will have something to say about that in the next

section. The point here is that, since the serious impairment requirement is a monkey wrench thrown into the works of justice, it can hardly be justified as making the justice system work more smoothly. On the contrary, the roadblocks thrown in the way of the auto tort victim amount to an unjustified (see next part) impingement on the constitutional right to access to the courts. *Cofrode v Circuit Judge*, 79 Mich 332, 342 (1890); *Boddie v Connecticut*, 401 US 371, 381; 28 L Ed 2d 113; 91 S Ct 780 (1971) (filing fee held violative of due process right to divorce); *Lindsey v Normet*, 405 US 56, 76-77; 31 L Ed 2d 36; 92 S Ct 862 (1972) (double bond provision in landlord-tenant cases violates equal protection).

3. Barring the courthouse door is an unreasonably overbroad way to cut costs

We can agree that assuring affordable automobile insurance and reducing litigation costs are valid state goals. Although it is not apparent that the threshold requirement has in fact reduced litigation,⁵ it seems logical that, if you reduce the number of tort suits, you will reduce liability insurance costs, which *may* make insurance more affordable.⁶ However, the means adopted to achieve these goals unnecessarily and unreasonably trenches on fundamental rights.

The point may be shown by analogy to the right of assembly. Freedom of assembly entails costs to erect barricades, hire extra policemen, etc. Assuming reducing those costs is a valid goal of government, there are reasonable and unreasonable means of achieving that goal.

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While dissuading some tort *suits* from being brought, the threshold requirement has produced hundreds of *appeals* revolving around the question of what the threshold means and whether it applies.

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It is an open question whether savings on liability insurance have been passed on to motorists, as opposed to merely swelling insurance company profits. It is likewise questionable whether any savings in *liability* insurance costs have been offset by increased costs of *no-fault* coverage.

A reasonable means would be to charge sponsors of a rally the additional costs, even as a litigant may be charged filing fees, jury fees and the like. An unreasonable means would be to pass an ordinance permitting no rallies consisting of more than twelve people. While the latter would surely promote the valid governmental purpose of protecting the public fisc, it would be unconstitutional because it achieves that purpose at the expense of unnecessarily impairing a constitutional right. In other words, it is unreasonable to address the costs connected with the exercise of a constitutional right by rationing the right.

Yet the latter is precisely what the No-Fault Act's threshold requirement does: it reduces the costs connected with citizens seeking to vindicate their right to personal security by simply saying that *certain citizens will not be permitted to vindicate that right*. That is like reducing the cost of assemblies by decreeing that some citizens may not assemble. Such rationing of fundamental rights is an unreasonable means of reducing costs.

Free access to the courts does increase the cost to the public. But as long as citizens are entitled to vindication for violations of fundamental rights, that is a cost the public has a duty to bear. The third branch of government can be expensive but, absent a constitutional amendment, it may not be eliminated, nor the citizens' access to it impaired. *Cofrode v Circuit Judge*, supra at 79 Mich 332. As stated in *Int'l Textbook Co v Pigg*, 217 US 91, 112; 54 L Ed 678, 687; 30 S Ct 481, 487 (1910),

The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.

If barring the courtroom door is not a valid response to *litigation* costs, still less is it a valid

response to high *insurance rates*. There are ways to address high insurance rates without impairing the citizen's right to personal security: insurance company profits could be regulated, or taxes used to subsidize insurance coverage. While the latter would cost the public money, "It has always been a basic principle of the law that 'if the work is of great public benefit, the public can afford to pay for it.'" *Thom v State Highway Comm'r*, 376 Mich 608, 623 (1965). In other words, if low insurance rates are of such importance to the public, the public should be willing to subsidize the low rates, rather than "taking it out of the hide" of injured tort victims.

In short, while motivated by a valid desire to reduce insurance and litigation costs, the threshold requirement achieves those goals by barring the courthouse doors, despite less intrusive ways of achieving the goals. The requirement is therefore unconstitutionally overbroad.

III. THE THRESHOLD REQUIREMENT IS VOID FOR VAGUENESS

A. INTRODUCTION

Our system of government and rights is premised on the rule of law, not of men. A statute so vague that its enforcement turns on the personal whims of the enforcer cannot be reconciled with that principle, and in reality is not the rule of law at all. *Shuttlesworth v Birmingham*, 382 US 87, 90; 15 L Ed 2d 176; 86 S Ct 211 (1965); *Interstate Circuit v Dallas*, 390 US 676, 685; 20 L Ed 2d 2251; 88 S Ct 1298 (1968). Consequently, a law "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates due process of law." *Baggett v Bullitt*, 377 US 360, 367; 12 L Ed 2d 377; 84 S Ct 1316 (1964), quoting *Connally v General Construction Co*, 269 US 385, 391; 70 L Ed 322; 46 S Ct 126 (1926). This limitation applies even to laws concerning mere privileges rather than property rights. *Milford v*

PCHA, 380 Mich 49, 62 (1968).

Evidently aware that the serious impairment requirement was so vague that it was promoting rather than reducing litigation, in 1995 the Legislature added a definition of “serious impairment of body function.” However, the definition introduces some equally vague formulations, such as “important” body function and “general ability to lead his or her normal life.”

B. “IMPORTANCE”

Consider first the “importance” requirement. Is use of one’s little finger an “important” body function? Most people would say no; but what if the trier of fact is a concert pianist? Since “important” is a purely subjective term, asking decisionmakers to apply the serious impairment requirement using such a term amounts to granting or denying a tort remedy based on the decisionmaker’s personal opinion.⁷ If government is to be of laws, not of men, objective standards need to guide the important question of whether a tort victim will be granted his constitutional right to trial, trial by jury, and vindication of his right to personal security. “Importance” is not such a standard. *Coates v Cincinnati*, 402 US 611, 614; 29 L Ed 2d 214; 91 S Ct 1686 (1971) (“annoying” too subjective a standard to pass constitutional muster).

C. “GENERAL ABILITY”

The “lifestyle” requirement is even worse. To begin with, it is not apparent what is meant by “general ability.”

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The Supreme Court added to the vagueness of the threshold requirement by requiring that the effect on the plaintiff’s activities be “significant.” *Kreiner v Fischer*, 471 Mich 109, 132, 133 (2004). “Significant” is no less a subjective term than “important.”

1. One definition of “general” is “nonspecific,” thus simply meaning that one looks at general abilities (e.g., to work) rather than specific abilities (e.g., to move one’s arm).

2. Another meaning of “general” is relating to the whole rather than the parts; thus suggesting that all aspects of a person’s life must be affected, rather than *only* work or *only* recreation.

3. The court in *Kreiner v Fischer*, supra at 471 Mich 130, posited a third definition: “for the most part.” Although that is actually a definition of “*generally*,” if we accept the court’s assumption that it is proper to multiply definitions by consulting other grammatical forms of a word, we are left with three possible meanings, with differing results depending on which is selected. Such lack of specificity encourages arbitrary conduct, as the one applying the language chooses the definition that achieves the result he personally desires rather than the meaning intended by the Legislature.⁸ This is the precise evil meant to be avoided by the “void for vagueness” doctrine:

Vague standards...encourage erratic administration... individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual... rather than regulation by law.

Interstate Circuit v Dallas, supra at 390 US 685.

In short, the fact that, as to “general ability,” “men of common intelligence must

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Vagueness resulting from multiple definitions can sometimes be cured by rules of construction. However, the *Kreiner* court studiously avoided the applicable rules of construction (narrowly construing statutes in derogation of the common law, and construing statutes to eliminate not insubstantial constitutional doubts), since they would not have supported the definition selected by the court.

necessarily guess at its meaning and differ as to its application” renders the statute void for vagueness.

Even sticking with the definition adopted by *Kreiner* does not save the statute. Since being reduced from working eight hours to working six hours has not affected the plaintiff’s ability to work “for the most part,” this definition of “general” is not satisfied. *Kreiner* at 471 Mich 137. Indeed, under this definition, one whose ability to work is unimpaired, but whose ability to sleep has dropped from eight to 4.25 hours; whose sex life had been reduced by 49%; and whose enjoyment of life has dropped 49% would not be able to sue in tort. Since the noneconomic damages in such a case would dwarf the economic ones, precluding such a person from suing for noneconomic damages would flatly contradict *Park v Detroit Free Press*, *supra* at 72 Mich 565-566 (since the principal damages suffered by victim of libel are noneconomic, the Legislature has no authority to prevent recovery of same).

Although *Park* did not explain why eliminating the bulk of a tort victim’s damages is objectionable, it is not difficult to see. The legislature’s right to modify remedies is limited by the constitutional requirement that a reasonable remedy remain. Where the bulk of a tort victim’s damages are noneconomic, with few or no economic damages, abolition of noneconomic damages is tantamount to abolition of all reasonable remedy for the wrong done. In other words, since inadequate economic damages do not adequately vindicate a person’s right to be free from personal injury, eliminating noneconomic damages without providing something new in its stead violates the right to personal security.

In short, “general ability to lead his or her normal life” is unconstitutionally vague, and

Kreiner's adopting one definition does not save the statute, since the definition adopted by *Kreiner* leaves many tort victims with inadequate vindication for violation of their right to personal security.

D. DURATIONAL REQUIREMENT

We confess not to have sharp enough vision to descry any *durational* requirement in the threshold requirement as amended in 1995. Nevertheless, in *Kreiner* the Supreme Court held there was one.⁹ This also creates constitutional problems:

1. A durational requirement makes an auto tort victim's right to recover turn on an arbitrary factor, i.e., how quickly his case is decided. For example, suppose two auto tort victims suffer identical injuries which render them disabled for two months, but from which, thanks to surgery, they make a full recovery. Victim A meets an attorney the day of the collision, and the attorney files suit the next day. In lieu of an answer (as permitted by the court rules), the tortfeasor files a summary disposition motion based on the threshold. The motion is heard three weeks later (also permitted by the court rules). As of the hearing, victim A is still disabled, with any relief speculative at that point, since surgery has not yet taken place. Based on victim A's total disability, the judge is constrained to find that the threshold has been met. That victim A later recovers is immaterial, since we are, after all, talking about a threshold requirement, not a

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The Court claimed that it was merely counting duration as one factor to consider, not as a requirement (at 471 Mich 131, 133, n 18), yet held that Straub, though *totally* disabled for two months, did not satisfy the threshold (at 471 Mich 136). Since total disability is per se serious impairment, the only basis the Court had for denying serious impairment was that *the disability didn't last long enough*. It is disingenuous to claim that duration is not a "requirement," when failure to prove sufficient duration results in a holding that the threshold requirement was not satisfied.

continuing one.

By contrast, victim B has trouble finding a lawyer, with the result that his summary disposition motion is heard over two months after the collision, and after surgery has made him well. Based on *Kreiner*, the judge holds that, because disability lasted only two months, the threshold is not met. Identical injuries, opposite results: That about defines “arbitrary.” Statutes that arbitrarily allow recovery to some while denying it from others violate equal protection. *Manistee Bank & Trust Co v McGowan*, 394 Mich 655, 679 (1975) (“...it is not settled that even the effort of government to reduce costs and protect the public fisc is a sufficient justification for selecting a discrete class for disparate treatment”).

2. In the previous hypothetical, we assumed that two months of total disability is not enough, merely because the Supreme Court said so. But what objective criterion did the Court apply to the question? And what objective criterion is to guide lower courts when faced with questions of whether five weeks, or six weeks, is enough? The simple and obvious answer: there is none. Whether disability of a given length is significant is purely in the eye of the beholder. Thus, to a juror who is a workaholic who rarely takes a vacation (and then no more than a week at a time), being unable to work for three weeks, with concomitant loss of customers and business, would be a significant effect on one’s life. By contrast, to a juror who puts in only enough work during the summer to draw unemployment compensation during the winter, three weeks off work may be no big deal. Thus, identical effects on lifestyle will be judged serious or not serious, based solely on the subjective opinion of the one making the decision.¹⁰ *Cf. Kern v*

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The constitutional problems that arise from trying to objectively assess the *degree* of effect on

Blethen-Coluni, 240 Mich App 333 (2000) (three weeks off school satisfies requirement); *Metivier v Schutt*, Ct App No 216325 (July 31, 2001) (3-1/2 weeks off work satisfies requirement); *Hewitt v Buckley*, Ct App No 238211 (March 25, 2003) (one month off school satisfies requirement); *Patterson v Chavez*, Ct App No 203034 (July 17, 1998) (three weeks off work does not satisfy requirement); *Crandall v Richmond*, Ct App No 202296 (May 7, 1999) (*Id.*); *Bieszczyk v Bane*, Ct App No 233643 (Oct. 25, 2002) (*Id.*).

In short, under *Kreiner*'s durational requirement, "individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual... rather than regulation by law." Such "rule by men, not of laws" is inconsistent with due process.

E. CONCLUSION

While we can understand the difficulty in trying to craft a statute that will keep minor injuries out of court, such difficulty does not relieve the Legislature of its duty to provide objective, justiciable criteria for determining whether a case may go to trial. The automobile tort threshold requirement, both as written and as amended by the Supreme Court in *Kreiner*, fails to do that.

IV. CONCLUSION

Vindication from those who injure us is a fundamental right which the Legislature violated when it limited automobile tort remedies without providing nor leaving an adequate substitute remedy. No legislative purpose can or does justify that violation: the NFA does not

one's lifestyle is a reason for construing the serious impairment requirement as being satisfied by any effect on lifestyle. *Workman v DAIIE*, 404 Mich 477, 508 (1979) (statutes should be construed to avoid constitutional problems).

provide a surer remedy (or indeed any remedy at all in both the common and constitutional meaning of the word), and *if* it reduces litigation and insurance costs, it does so by unreasonably and overbroadly barring the courthouse door to some whose fundamental rights have been violated.

Moreover, even if we assumed no fundamental rights were at stake, the serious impairment threshold is unenforceable because the standards provided by the Legislature (“important”; “general ability”) and by the courts (i.e., the durational requirement) are too vague to be justiciable.

For the foregoing reasons, the serious impairment limitation on an auto tort victim’s right to sue should not be merely reconstrued, but rather declared invalid.

Respectfully submitted,

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