Florida State University Law Review

Volume 2 | Issue 1 Article 6

1974

Kluger v. White, 281 So. 2d 1 (Fla. 1973)

Florida State University Law Review

is accepted by a majority of the Court, it may substitute useful problem-solving analysis for result-oriented fiat in the approach to a traditionally bothersome concept.

The familiar mechanism of the two-tier formula—often criticized for its lack of a clear constitutional basis[34]—may thus grow less recognizable in the near future, if it has not already. Equal protection analysis should assume an increasingly amorphous form if it does undergo the predicted modification. Whether it can quickly assume the trappings of coherent constitutional doctrine, however, may prove more important than what the ultimate substance of the new doctrine will be.

Insurance—NO-FAULT AUTOMOBILE PROPERTY PROTECTION—LEGISLATURE'S ABROGATION OF COMMON LAW TORT RIGHT TO RECOVER PROPERTY DAMAGE OF LESS THAN $550 VIOLATES FLORIDA CONSTITUTION. *—Kluger v. White,* 281 So. 2d 1 (Fla. 1973).

An automobile owned by Clara Kluger collided with another vehicle owned by Bernadette White; White was subsequently charged with failure to yield the right-of-way. Damage to the Kluger car was estimated at $250.[1] On the date of the accident, Kluger's car was insured by Manchester Insurance and Indemnity Company, but her policy did not provide for either "full" or "basic" property damage protection as described in Florida statutes section 627.738.[2] Kluger

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34. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 177, 179 (1972) (Rehnquist, J., dissenting).

1. The cost of repairing the automobile was estimated at $774.95. Since the fair market value of the 1964 Buick was only $250, however, it became necessary to apply the general rule of law that if the cost of repair exceeds the value of an automobile, the value of the automobile will be the measure of damages. *See* 15 BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 480.1 (1969); 25 C.J.S. *Damages* § 82 (1966). Had the former figure been accepted, Kluger could have sued in tort for the damage she sustained.

2. FLA. STAT. § 627.738 (1971) provides essentially that the owner of a motor vehicle is *not required* to maintain security with respect to property damage to his motor vehicle. However, every insurer providing security under the Florida No-Fault Automobile Insurance Law must *offer* the owner either full or basic coverage for accidental property damage to the insured motor vehicle. Full coverage is defined as insurance without regard to fault, whereas basic coverage is limited to insurance against damage *caused by the fault of another* resulting from contact between the insured vehicle and a motor vehicle as defined in FLA. STAT. § 627.732 (1971). Moreover,

alleged that she had not purchased the optional property damage protection because her insurance agent had not explained the possible consequences of failure to obtain this coverage.

Since Kluger was not entitled to no-fault property damage benefits under her own policy, she attempted to recover damages from the insurer of the vehicle owned by White. White's insurer rejected these attempts, however, contending that the $550 threshold set forth in Florida statutes section 627.738 had not been exceeded and that its insured enjoyed tort immunity regardless of her alleged negligence.[3] Shortly thereafter Kluger filed a complaint for declaratory relief in the Dade County Circuit Court,[4] asking that her insurance company (Manchester) be required to provide some "unstated equitable relief" and that she be permitted to bring an action against White.[5] Upon motions by Manchester and White, the circuit court dismissed the complaint with prejudice. In part, the order recited that Florida

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FLA. STAT. §§ 627.738(4)-(5) (1971) provide that an owner is exempted from tort liability for damages not in excess of $550. That is, if the property damages sustained by an owner to his automobile are less than $550, he must look to his insurer for relief or sustain the loss himself; whereas, if the damages are in excess of $550, the damaged party may maintain a tort action to recover the entire loss.

Florida is by no means the only state that has adopted a system of no-fault automobile insurance. The following are no-fault automobile insurance statutes in effect in other states: CONN. GEN. STAT. ANN. §§ 38-319 to -351(a) (Supp. 1973) (effective Jan. 1, 1973); MASS. GEN. LAWS ANN. ch. 90, §§ 34A, 34D, 34M, 34N, 34O (Supp. 1973) (effective Jan. 1, 1971); MICH. COMP. LAWS ANN. §§ 500.3101-79 (Supp. 1973) (effective Oct. 1, 1973); N.J. STAT. ANN. §§ 39:6A-1 to -20 (1973) (effective Jan. 1, 1973); N.Y. INS. LAW §§ 670-77 (McKinney Supp. 1973) (effective Feb. 1, 1974); UTAH CODE ANN. §§ 31-41-1 to -13 (Supp. 1973) (effective Jan. 1, 1974); Hawaii Laws 1973, act 203 (effective May 31, 1973, full implementation July 1, 1974); Kan. Laws 1973, ch. 198 (effective Jan. 1, 1974); Nev. Laws 1973, ch. 530 (effective Feb. 1, 1974); ILL. STAT. ANN. ch. 73, §§ 1065.150-.63 (Supp. 1973) (held unconstitutional, Grace v. Howlett, 283 N.E.2d 474 (Ill. 1972)). Two of these statutes have already been challanged on constitutional grounds. The Illinois Supreme Court in Grace v. Howlett, 283 N.E.2d 474 (Ill. 1972), held that state's no-fault provisions unconstitutional. The Illinois court based its holding essentially on the following facts: (1) a special law was passed when a general law could have been made applicable, in derogation of ILL. CONST. art. IV, § 13; (2) the general damages recoverable by an injured party were based upon his reasonable expenses for medical services which resulted in an irrational discrimination against those who received less expensive medical treatment in some portions of the state; (3) the compulsory arbitration of claims under $3,000 violated the rights of citizens to a jury trial in derogation of ILL. CONST. art. I, § 13. There are few similarities between Florida's no-fault law and Illinois' no-fault provisions. The Massachusetts no-fault law survived attacks on its constitutionality in Pinnick v. Cleary, 271 N.E.2d 592 (Mass. 1971). *See* note 38 *infra*.

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

4. *See* Kluger v. White, 37 Fla. Supp. 183 (Dade Co. Cir. Ct. 1972).

5. Brief for Appellee Manchester Ins. & Indem. Co. at 3, Kluger v. White, 281 So. 2d 1 (Fla. 1973).

statutes section 627.738[6] is a "constitutional exercise of legislative power."[7]

Kluger took exception to the order of the circuit court and appealed to the Florida Supreme Court.[8] Kluger's main contention was that, by depriving her of the right to sue a tortfeasor for compensatory property damage to her automobile, the Florida Legislature had denied her "redress for any injury" in violation of article I, section 21, of the Florida constitution.[9] Several additional challenges to section 627.738 were presented.[10] The court, however, directed its attention

6. It will be helpful to examine briefly the legislative purpose and rationale for the adoption of the statute. The purpose is set forth concisely in FLA. STAT. § 627.731 (1971), which provides:

> The purpose of §§ 627.30-627.41 is to require medical, surgical, funeral and disability insurance benefits to be provided without regard to fault under motor vehicle policies that provide bodily injury and property damage liability insurance, or other security, for motor vehicles registered in this state . . . .

The underlying rationale is clear from an article written by the major proponents of the no-fault law. William Gillespie and Kenneth MacKay wrote that the Florida no-fault system

> is a departure from the historic common law tort system which has developed over a period of several hundred years. It is a step which has become necessary because of the sheer number of automobiles, deaths and accidents upon our highways. It is expected to reduce the costs of administering automobile insurance rates and should provide fairer distribution of benefits to injured parties, insure prompter payment of benefits, reduce the number of accident victims who receive nothing from the tort system and make automobile insurance more readily available. The accident victim in smaller cases will be dealing with his own issuer instead of one which is a stranger to him. He will be treated more like the policy holder he is than as an adversary.

Gillespie & MacKay, *Florida's No-Fault Insurance Law*, 45 FLA. B.J. 400, 402 (1971).

7. 37 Fla. Supp. at 183.

8. The appeal was taken pursuant to FLA. CONST. art. V, § 4(2) (1968) which provides in part: "Appeals from trial courts may be taken directly to the supreme court, as a matter of right, . . . from final judgments or decrees directly passing upon the validity of a state statute . . . ." This jurisdictional grant is now embodied in FLA. CONST. art. V, § 3(b)(1).

9. Brief for Appellant, *supra* note 3, at 4. FLA. CONST. art. I, § 21, provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The Florida Supreme Court has stated that this section of the constitution "was designed to give life and vitality, to the maxim that for every wrong there is a remedy." Holland v. Mayes, 19 So. 2d 709, 711 (Fla. 1944). The section assumes that for every injury caused to an individual there is a remedy provided by either statutory law or common law. Cason v. Baskin, 20 So. 2d 243 (Fla. 1944). However, the section does not itself create new causes of action. Kirkpatrick v. Parker, 187 So. 620 (Fla. 1939).

10. *See* Brief for Appellant, *supra* note 3, at 10-19. It was argued that the Florida Legislature denied appellant justice without sale, in violation of FLA. CONST. art. I, § 21, by giving the appellant an option to purchase insurance in lieu of a tort action for negligently destroyed property. Kluger's counsel reasoned that the only manner in which someone who sustained property damages valued under $550 could receive redress would be to purchase "full" or "basic" property insurance as described in FLA. STAT. § 627.738(2) (1971). This requirement, counsel argued, constitutes the purchase

and confined its decision to appellant's argument based on article I, section 21,[11] and held that section 627.738 failed to comply with a "reasonable interpretation" of that constitutional provision.[12] Thus, the court significantly limited the effective scope of Florida's innovative no-fault automobile insurance law.

Noting that this was a case of first impression,[13] the court broadly phrased the issue involved as whether the legislature has the power to repeal or abolish a common law right without providing alternative protection.[14] The court adopted a definitive rule for determining the extent to which the legislature might limit such a right without violating article I, section 21, of the Florida constitution:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption

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of a remedy, which was prohibited by the Florida Supreme Court in Rainey v. Rainey, 38 So. 2d 60 (Fla. 1948). Brief for Appellant, *supra* note 3, at 10-11. The Declaration of Rights, § 4, of the 1885 Florida Constitution, which the *Rainey* court interpreted, contains essentially the same provisions as FLA. CONST. art. I, § 21.

Counsel also contended that the legislature denied Kluger equal protection of the law "by establishing different treatment for vehicle owners with property damage insurance as compared to vehicle owners without such insurance and vehicle owners suffering damage exceeding $550.00 as compared with vehicle owners suffering damage less than $550.00." Brief for Appellant, *supra* note 3, at 11.

Furthermore, counsel argued that Kluger was deprived of property without due process of law and was denied the right to have a jury determine the amount of damages to her automobile. As to denial of due process, it was argued that Kluger was not given an opportunity to be heard under FLA. STAT. § 627.738 (1971). As to denial of the right to trial by jury, counsel relied upon FLA. CONST. art. I, § 22, in reasoning that trial by jury in automobile accident cases was provided as of right prior to no-fault and therefore cannot be taken away or denied. Brief for Appellant, *supra* note 3, at 15-19. *See* Orr v. Avon Florida Citrus Corp., 177 So. 612 (Fla. 1937).

11. *See* 281 So. 2d at 3.

12. *Id.*

13. *Id.* In addition, the court opined that:

> Retaining the right of action for damages over $550.00 (Fla. Stat. § 627.738(5), F.S.A.) does not correct the constitutional infirmity, but merely gives rise to another argument, that appellant has been deprived of the equal protection of the law solely on the basis of the value of her automobile in violation of Fla.Const., art. I, § 2, F.S.A., and U.S.Const., amend. XIV, § 1. It is unnecessary to reach the merits of this contention because the statute under consideration has already failed constitutional muster on other grounds.

281 So. 2d at 5. *See* Pinnick v. Cleary, 271 N.E.2d 592 (Mass. 1971) (similar provision in the Massachusetts no-fault law did not deny equal protection).

14. 281 So. 2d at 4. The court's initial reaction to the issue presented is reflected in the following analysis:

> Upon careful consideration of the requirements of society, and the ever-evolving character of the law, we cannot adopt a complete prohibition against such legislative change. Nor can we adopt a view which would allow the Legislature to destroy a traditional and long-standing cause of action upon mere legislative whim, or when an alternative approach is available,

Id.

> of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right *without providing a reasonable alternative* to protect the rights of the people of the State to redress for injuries, *unless* the Legislature can show an *overpowering* public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[15]

After setting forth the foregoing rule, the court responded to appellees' allegations that it had "previously approved action by the Legislature which violated [this] rule."[16] These allegations were based on the supreme court's approval of the "guest statute," the Workmen's Compensation Law and the abolition of the actions for alienation of affections, criminal conversation, seduction and breach of contract to marry.[17]

The *Kluger* court answered by distinguishing these prior legislative initiatives from the enactment of the Florida No-Fault Automobile Insurance Law. The court characterized its prior affirmation of the constitutionality of the "guest statute"[18] as the approval of a *modification* of a pre-existing right. The court stated that the right to sue had not been abolished; rather, the degree of negligence required to bring suit had been altered.[19] With respect to its approval of the Workmen's Compensation Law,[20] the court conceded that a tort right had been eliminated, but emphasized that an adequate alternative remedy was provided. The court described the Florida workmen's

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15. *Id.* (emphasis added). *See also* 16A C.J.S. *Constitutional Law* § 710 (1956).

16. 281 So. 2d at 4; *see* Brief for Appellee White at 24, Brief for Appellee Manchester Ins. & Indem. Co. at 10, Kluger v. White, 281 So. 2d 1 (Fla. 1973).

17. *See* Brief for Appellee Manchester Ins. & Indem. Co. at 10-14, Brief for Appellee White at 24-26.

18. Fla. Laws 1937, ch. 18033, § 15 (repealed 1971). The "guest statute" provided that no guest or nonpaying passenger could recover damages from the driver of the car in which they were riding unless the driver had been grossly negligent in causing the accident.

19. *See* McMillan v. Nelson, 5 So. 2d 867 (Fla. 1942) (upholding the constitutionality of the "guest statute").

The degree of negligence required for a guest to sustain a cause of action against the driver was changed from "ordinary" negligence to "gross" negligence. The rationale behind this change was that nonpaying passengers are

> quite often mere acquaintances and, as often, probably unknown persons now commonly called 'hitch-hikers' who deliberately solicit free rides and to whom the owner or driver of the automobile should be under no obligation except that not to do those things which he knows, or should know, may reasonably be expected to result in injury to the guest.

Id. at 870.

20. FLA. STAT. ch. 440 (1971).

compensation system as providing "adequate, sufficient, and even preferable safeguards for an employee who is injured on the job."[21] The assertion that the court had previously approved complete abolition of the rights of action for alienation of affections, criminal conversation, seduction and breach of contract to marry[22] was similarly unpersuasive to the majority. Quoting from its opinion in *Rotwein v. Gersten*,[23] the court responded that the legislature had acted out of public necessity when it abolished those particular causes of action.[24] In sum, it was the court's opinion that a common law right can certainly be modified, but it cannot be abolished altogether, unless either an adequate alternative remedy is provided or an "overpowering public necessity" exists.[25]

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21. 281 So. 2d at 4. The Florida Supreme Court has described the Workmen's Compensation Law in the following language:

> In return for accepting vicarious liability for all work-related injuries regardless of fault, and surrendering his traditional defenses and superior resources for litigation, the employer is allowed to treat compensation as a routine cost of doing business which can be budgeted for without fear of any substantial adverse tort judgments. Similarly, the employee trades his tort remedies for a system of compensation without contest, thus sparing him the cost, delay and uncertainty of a claim in litigation.

Mullarky v. Florida Feed Mills, Inc., 268 So. 2d 363, 366 (Fla. 1972). A workmen's compensation act similar to that of Florida was approved by the United States Supreme Court in New York Cent. R.R. v. White, 243 U.S. 188 (1917). The Supreme Court's extensive reasoning in the *White* case is totally supportive of the conclusions reached by the Florida Supreme Court in *Mullarky* upholding the Florida Workmen's Compensation Law.

22. FLA. STAT. ch. 771 (1971). The court upheld the enactment of this statute in Rotwein v. Gersten, 36 So. 2d 419 (Fla. 1948).

The rights of action for alienation of affections and criminal conversation existed for the protection of the marriage relationship from third parties. Alienation of affections is the "robbing" of husband or wife of the conjugal affection, fellowship and comfort that exists in the normal marriage, whereas criminal conversation is aimed at protection of the "marriage bed." Seduction is the act of enticing a woman to have unlawful intercourse through persuasion, solicitation or other means without employment of force; this action could be brought at common law by anyone entitled to the services of the woman. An action based on breach of the marriage promise is governed by the common principles of contract law and is actionable by either the man or the woman.

23. 36 So. 2d 419 (Fla. 1948). The *Rotwein* court stated that "when [transactions] become an instrument of extortion and blackmail, the legislature has the power to, and may, limit or abolish them." *Id.* at 421. At the time of enactment of the legislation abolishing the rights of redress in question, husbands and wives were profiting from the threat of suit. A wife or husband would encourage development of a relationship with a "victim" and the "injured" marriage partner would then demand payment from the victim in return for a promise not to sue for alienation of affections, criminal conversation, etc.

24. Because an overpowering public necessity for the abolition of such rights was shown, the legislature did not need to provide any alternative remedy. *See* note 15 and accompanying text *supra*.

25. 281 So. 2d at 4.

Guided by this rule, the *Kluger* court proceeded to consider whether an adequate alternative was provided for, or overwhelming public necessity justified the complete abolition of, the right to sue for property damage of less than $550. No "overpowering public necessity for the [complete] abolishment of such right"[26] was shown, although, by attempting to provide an alternative remedy to the abolished tort right, the legislature demonstrated that it did not intend to eliminate completely all rights to redress. However, the court apparently concluded that the alternative provided by the legislature—the "option" to purchase collision insurance—was not a sufficient substitute for the right to sue in tort.[27] This conclusion is well-founded: an automobile owner with minimal education might easily misunderstand the waiver he must sign if he elects not to purchase "basic property protection."[28] Moreover, there is no assurance that an insurance salesman will explain intelligibly the potential consequences of a driver's failure to purchase property protection.[29] As the court itself noted, the very facts in *Kluger* demonstrate that no sufficient alternative to the tort remedy was provided, since a nonnegligent party was left without any available means of obtaining redress for damage she had sustained.[30]

Dissenting from the majority opinion, Justice Boyd, joined by Chief Justice Carlton and Justice Dekle, concluded that the abolition of the right to sue for property damage under $550 did constitute a legitimate exercise of legislative power. Like the majority, Justice Boyd referred to various instances in which the court had permitted the abolition or modification of previously existing rights of redress.[31] However, Justice Boyd seemed to rely upon those decisions simply as

26. *Id.*

27. The court did suggest that mandatory collision insurance would be sufficient. *See* note 51 and accompanying text *infra.*

28. The prescribed waiver form provides:

"The named insured acknowledges and agrees that (1) the Company has offered to provide basic property protection coverage or collision insurance; and (2) the named insured hereby rejects this offered coverage; and in effecting this rejection, the named insured acknowledges and understands that the Florida Automobile Reparations Reform Act may preclude recovery from others for accidental property damage to the automobile."

281 So. 2d at 5 n.1.

29. Kluger argued that her dilemma resulted from this problem. *See* 281 So. 2d at 2.

30. The argument that Kluger's situation was the result of her own free choice, and that the state should not require an individual to act for his own benefit is, of course, the same argument once raised by those who opposed social security. That argument has found little judicial solicitude. *See* note 49 *infra.*

31. Mr. Justice Boyd briefly reviewed the decisions of the court approving the Workmen's Compensation Law, the "guest statute" and the abolition of the actions for alienation of affections, criminal conversation, seduction and breach of contract to marry. 281 So. 2d at 6-9.

precedent for his general conclusion that the right to bring suit "is subject to reasonable restraints."[32] Unlike the majority,[33] the dissent did not distinguish those prior decisions from the abolition of the right to sue for property damage—nor did the dissent attempt to refute the majority's conclusion that those prior instances of abolition or modification were, in fact, distinguishable.[34]

Justice Boyd warned that a "literal and dogmatic construction" of article I, section 21, of the Florida constitution would prohibit the legislature and the courts from imposing "logical limitations on the constitutional right to use the courts of Florida."[35] However, the pragmatic rule of law set forth by the majority[36] would seem to preclude any such "literal and dogmatic construction" of section 21, and Justice Boyd did not suggest that the rule was erroneously stated or that it was inappropriately applied to the abolition of the tort right considered in Kluger. Indeed, Justice Boyd did not address himself to the majority rule at all.

The dissent relied substantially upon the reasoning of the Massachusetts Supreme Court in *Pinnick v. Cleary*,[37] where a statutory provision similar to Florida statutes section 627.738 was upheld against constitutional attack.[38] Justice Boyd premised his dissent upon a questionable analogy between the two laws.[39] Noting that the "arguments

32. 281 So. 2d at 6.

33. *See* notes 18-25 and accompanying text *supra*.

34. 281 So. 2d at 7.

35. *Id.* at 6.

36. *See* note 15 and accompanying text *supra*.

37. 271 N.E.2d 592 (Mass. 1971).

38. *Id.* In *Pinnick*, the Massachusetts Supreme Court was confronted with constitutional challenges to a provision of the Massachusetts no-fault insurance law similar to the provision challenged in *Kluger*. The Massachusetts provision includes a $500 medical expense threshold that must be exceeded before an injured party can sue for pain and suffering; the Florida law includes a $550 threshold that must be exceeded before a party can bring suit for property damage. The challenges to the Massachusetts law in *Pinnick* were similar to those raised by the appellant in *Kluger*. However, it was necessary for the *Pinnick* court to consider all the challenges to the statute because the provision in question passed constitutional muster on each succeeding challenge.

The challenge that a substantive common law right had been abolished by the personal injury section of the Massachusetts statute was rejected by the *Pinnick* court. The court reasoned that the article in question is "clearly directed toward the preservation of procedural rights and has been so construed." *See, e.g.*, Commonwealth v. Hanley, 149 N.E.2d 608 (Mass. 1958); Cressey v. Erie R.R., 180 N.E. 160 (Mass. 1932). The court further reasoned that "changes in prior law are necessary in any ordered society, and to argue that art. 11 prohibits alterations of common law rights as such . . . flies in the face of all reason and precedent." 271 N.E.2d at 600.

39. Justice Boyd premised his dissent upon a supposed analogy between the Florida law, which allows suit by one who declines to purchase property insurance only when his property damages exceed $550, and the Massachusetts law, which provides that one who elects a deductible—and thus, effectively, declines to purchase otherwise com-

raised against the Massachusetts law mirror those made against the Florida law,"[40] Justice Boyd quoted verbatim the response of the Massachusetts court to those arguments, apparently believing the language of the Massachusetts court sufficient to refute Kluger's allegations.

The dissent also quoted the *Pinnick* court's discussion of the United States Supreme Court decision in *New York Cent. R.R. v. White.*[41] In *White* the Supreme Court upheld the New York Workmen's Compensation Act,[42] reasoning that, although the employee had lost his common law right to sue, he had gained the assurance of some compensation, without delay, for any accident suffered.[43] The *Pinnick* court noted that the Massachusetts no-fault law altered prior legal rights "to a much less drastic extent" than did the New York Workmen's Compensation Act.[44] Justice Boyd quoted this language from *Pinnick,*[45] evidently concluding that, if the Massachusetts law altered prior rights less drastically than did workmen's compensation, the Florida law must similarly alter rights less drastically than did the statute approved in *White.* However, immediately following that portion of *Pinnick* quoted by Justice Boyd, the Massachusetts court went on to consider the "exchange of rights" implicit in the Massachusetts law, and concluded that a fair "trade-off" had resulted.[46] Justice Boyd did

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pulsory insurance—may sue for pain and suffering only when his medical expenses exceed $500. But the analogy seems to fail upon closer examination. There is a significant difference between the "right" to bring suit for property damage and the "right" to sue for "pain and suffering." The speculative nature of "pain and suffering" precludes any realistic valuation of damages, as the *Pinnick* court seemed to recognize. *See* 271 N.E.2d at 597. Moreover, the Massachusetts law does allow suit, regardless of medical expense involved, where certain serious injuries that are more likely to result in actual pain and suffering occur. And finally, as the *Pinnick* court noted, the Massachusetts law does allow "double recovery" for those who maintain personal medical insurance, as well as no-fault medical insurance. *Id.* at 599. Thus, the excess compensation resulting from holding two policies can in part offset what might have been awarded in damages for pain and suffering. *Id.* In short, loss of the right to sue for pain and suffering in Massachusetts is not really so total as loss of the right to sue for property damage in Florida. Therefore, the fact that the Massachusetts court upheld the abolition of the former does not necessarily suggest, as Justice Boyd assumed, that the reasoning of the Massachusetts court supports abolition of the latter.

40. 281 So. 2d at 8.

41. 243 U.S. 188 (1916).

42. N.Y. WORKMAN'S COMP. LAW §§ 1-401 (McKinney 1965).

43. *See* 243 U.S. at 204.

44. 271 N.E.2d at 606.

45. 281 So. 2d at 9.

46. 271 N.E.2d at 606. The effects of the Massachusetts No-Fault Automobile Insurance Law were: (1) to make available to motorists compulsory insurance at lower rates; (2) to assure the injured motorist of quick and efficient payment of the first $2,000 of defined losses incurred; (3) to enable a nonnegligent motorist to avoid the uncertainty, delay and cost of a tort proceeding; and (4) to permit an injured party

not carry his analysis that far, and did not suggest why the trade-off implicit in Florida statutes section 627.738 was similarly sufficient.

The dissent did advert to perhaps the most compelling rationale for upholding Florida's no-fault law: the assurance of quick settlement and recovery of at least reasonable damages whenever an accident occurs.[47] But his dissent failed to deal realistically with the problem that troubled the majority—the fact than an individual such as Kluger might be left with neither property protection nor a right to sue as long as the coverage in section 627.738(1)-(2) was optional. Rather, Justice Boyd reasoned that, since the legislature could require the purchase of collision insurance, it obviously could permit an automobile owner, at his discretion, "either to acquire said insurance, or to be his own insurer."[48] This questionable logic ignores the fact that Florida statutes section 627.738 not only "permitted" an individual to be his own insurer, but also abolished his right to sue in tort. Thus, the dissent failed to offer any means of protecting a driver who may not understand the consequences of waiving basic property protection, or who may be misled—even unintentionally—by an insurance salesman.

The *Kluger* decision may only temporarily restrict the scope of Florida's no-fault law. The supreme court alluded to a corrective measure which might cure the law's constitutional infirmity:

> Had the Legislature chosen to *require* that appellant be insured against property damage loss— as is, in effect, required by Fla. Stat. § 627.733, F.S.A., with respect to other possible damages—the issues would be different. A reasonable alternative to an action in tort would have been provided and the issue would have been whether or not the requirement of insurance for all motorists was reasonable.[49]

Therefore, the short term effect of Kluger may be to increase automobile accident litigation, but, as intimated by the court, the pro-

who has exceeded the threshold in medical expenses to retain the option of recovering additional sums by litigation.

47. 281 So. 2d at 10.

48. *Id.*

49. 281 So. 2d at 5 (emphasis added). The Massachusetts court in *Pinnick* addressed the constitutionality of mandatory insurance: "Any doubts as to the power of the Legislature to require the citizen, for the good of the public as a whole, to take measures for his own benefit have long since been settled in a series of cases sustaining such statutes." 271 N.E.2d at 607. *See also* Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 505-6 (1937) (Alabama Unemployment Compensation Act, requiring contributions from employees as well as employers); Helvering v. Davis, 301 U.S. 619, 634-35 (1937) (Social Security Act establishing "Federal Old Age Benefits," requiring contributions from employees through a special income tax deducted from their wages).

perty protection section of the no-fault law might ultimately be revived by the legislature. The question remains whether the legislature will follow the suggestion of the court, or will be content to leave property protection outside the no-fault statute.[50]

Criminal Law—WIRETAPPING—CONSENTING PARTY TO CONVERSATION RECORDED BY POLICE WITHOUT WARRANT REQUIRED TO VERIFY AT TRIAL CONSENT TO RECORDING PRIOR TO ITS ADMISSION AGAINST OTHER PARTY TO CONVERSATION.—*Tollett v. State*, 272 So. 2d 490 (Fla. 1973).

While jailed for possession of marijuana, Ted Tollett became friendly with a cellmate, Jesse Davis. Captain Campbell of the Leon County Sheriff's Department asked Davis " 'to help me with Mr. Tollett on making a buy.' "[1] Although he initially refused, Davis ultimately agreed to cooperate. After Tollett was released, Davis, under Campbell's direction, telephoned him four times. Three of the calls originated from Campbell's office, where they were recorded; Davis placed the fourth call from the county jail while Campbell listened on an extension. Acting upon telephoned instructions, Tollett came to the jail allegedly to sell drugs to Davis. Later Tollett went to a motel room to discuss the possible sale of his unborn child with a potential buyer, who in reality was an undercover agent. The conversation between Tollett and the agent also was recorded. Tollett and his wife were then charged both with attempting to sell an unborn child and with dispensing contraband at the Leon County Jail. At trial the state played the recorded conversations to the jury over defense objections. Davis never appeared in court, nor was his absence explained. Tollett was convicted of dispensing contraband and LSD to a prisoner; he and his wife were convicted of attempting to sell the unborn child.

Holding that the trial court properly allowed the recordings to be played before the jury, the First District Court of Appeal affirmed the

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50. Allowance of tort claims when the value of property damage does not exceed $550 will probably not substantially increase automobile accident litigation. The expense involved in pursuing a claim of less than $550 would almost neutralize the potential recovery. Partly for this reason, the Chairman of the House Insurance Committee will probably recommend that the property protection section of no-fault not be re-enacted. Chairman Birchfield believes that property protection is not an essential part of an effective no-fault system. Interview with Representative William Birchfield, Chairman of the House Insurance Committee, in Tallahassee, Florida, October 31, 1973.

1. 272 So. 2d at 491.