



# Attorney General

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November 14, 1989

The Honorable Karen R. Mills  
Chairman, House Banking and  
Insurance Committee  
Arizona House of Representatives  
State Capitol - House Wing  
Phoenix, Arizona 85007

Re: I89-091 (R89-133)

Dear Chairman Mills:

You ask whether legislation providing for elective no-fault automobile insurance is constitutional under Ariz. Const. art. XVIII, § 6 and art II, § 31. You presently do not have any specific legislation for our review in answering your request. However, we conclude that any such legislation would be unconstitutional if it limited the right of injured persons to sue for damages without their consent.

Ariz. Const. art XVIII, § 6 provides:

The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

The right to recover damages is also protected by article II, § 31:

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.

These clauses establish the common-law right to recover damages for bodily injury as a fundamental constitutional right. Kenyon v. Hammer, 142 Ariz. 69, 79-83, 688 P.2d 961, 971-975 (1984).

The right to pursue damages may not be abrogated without granting a reasonable choice to all persons who are entitled to seek damages. Alabam's Freight Co. v. Hunt, 29 Ariz. 419, 443-44, 242 P. 658, 665-66 (1926).

Although Alabam's Freight involved a workman's compensation statute, it stands for the general proposition that the Arizona Constitution assures to all persons the right to assert common-law negligence claims. 29 Ariz. at 444, 242 P. at 666 ("The common-law action of negligence, as modified by the Constitution, is now as much 'provided' by that instrument for the benefit of all, be they employees or others, . . . and no statute can take away the right to pursue it without granting a reasonable election to all who, on the facts, are entitled to it."). The Arizona Supreme Court, in Kenyon v. Hammer, also stated that article XVIII, § 6, although found in the "labor" section of the Constitution, guarantees "to all citizens, employees and others, the common law cause of action for negligence." 142 Ariz. at 82, 688 P.2d at 974. Consequently, the Constitution guarantees to all the right to pursue a common-law damage action and that right cannot be taken away without the consent of the injured person.

In your letter to us, you indicate the nature of no-fault insurance legislation under consideration:

The elective no-fault system under consideration would permit motorists to choose between fault-based insurance and no-fault insurance. Except, perhaps, for accidents involving serious and permanent injury, a motorist selecting no-fault insurance could not sue or be sued for injuries resulting from an automobile accident.

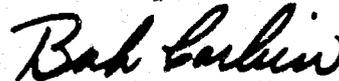
A statute which abrogates the right of injured persons to recover damages in a common-law action without their consent would be unconstitutional. The elective no-fault insurance which you describe does not give injured persons the choice of pursuing a common-law action for damages or of accepting compensation under a no-fault insurance policy. That election is made by the person obtaining the insurance coverage prior to an accident. Consequently, the injured person's right to pursue a common-law action would depend entirely on circumstances over which he has no control. Such a statutory scheme does not grant a reasonable election as required by Arizona's Constitution.

Our conclusion should not be read to mean that the Legislature may not adopt a no-fault insurance statute. Any no-fault law adopted, however, may not violate the people's fundamental right to sue for damages. In considering no-fault legislation, the Legislature should be guided by the following test:

The test of "reasonable election" as the distinction between regulation and abrogation was followed by this court in Kilpatrick v. Superior Court, 105 Ariz. 413, 466 P.2d 18 (1970) and Ruth v. Industrial Commission, *supra*, and is, we believe, still a proper test. The legislature may regulate the cause of action for negligence so long as it leaves a claimant reasonable alternatives or choices which will enable him or her to bring the action. It may not, under the guise of "regulation," so affect the fundamental right to sue for damages as to effectively deprive the claimant of the ability to bring the action. Kenyon, *supra*, 142 Ariz. at 88, 688 P.2d at 980 (Hays, J., concurring.) The intent of our unique constitutional provisions was to enact a "different and more advanced" policy . . . "which made it possible to enforce in court a claim for personal injury or death without the necessity of overcoming practically insurmountable defenses." Industrial Commission v. Crisman, 22 Ariz. at 595, 199 P. at 395 (McAlister, J., concurring).

Barrio v. San Manuel Div. Hosp. For Magma Copper Co., 143 Ariz. 101, 106, 692 P.2d 280, 285 (1984). We would conclude that any no-fault insurance legislation which met this test would be constitutional.

Sincerely,



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Attorney General

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