No. 124848

IN THE SUPREME COURT OF ILLINOIS

KEVIN MCALLISTER,

Plaintiff-Appellant

v.

ILLINOIS WORKERS COMPENSATION COMMISSION et al.,

Defendants-Appellees

On Appeal from the First District Appellate Court
Worker's Compensation Commission Division
Case No. 1-16-2747WC

On Appeal from Cook County, Illinois, Case No. 16 L 50097
Honorable Ann Collins-Dole, Judge Presiding

BRIEF OF *AMICUS CURIAE* ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF KEVIN McALLISTER

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INTERESTS OF *AMICUS CURIAE*

The Illinois Trial Lawyers Association (ITLA) submits this brief a*micus curiae*, in support of injured workers like Kevin McAllister. ITLA is an organization focused on protecting the rights of all injured persons, including injuries sustained in the workplace.

ARGUMENT

The nation's transition to an industrial economy brought workers face to face with dangerous machinery and injurious processes they had not encountered in the preindustrial world. Injuries followed and a lack of meaningful measures to address the carnage meant that the fallout landed squarely on workers and their families. The common law tort system had not evolved to address this fallout and structural barriers in the tort system thwarted easy adaptation of torts to workplace injuries. *See Grand T.W.R. Co. v. Indust. Com'n*, 291 Ill. 167, 173 (1919), citing to *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917). States enacted no-fault compensation systems to address these unmet needs of injured workers.

Illinois' compensation system was designed to provide "prompt, sure, and definite compensation, together with a quick and efficient remedy, for injuries... suffered by workers in the course of their employment. *See O'Brien v. Rautenbush* 10 Ill.2d 167, 174 (1956). This Court recognized that the expense and delay required for common law claims amounted to a denial of justice for these workers. *See Grand T.W.R.*, 291 Ill. at 173. Industry was to bear the costs of injuries rather than injured workers and their families. *Id.*, 291 Ill. at 174-175. The language of the Workers' Compensation Act ("Act") was to be liberally construed, and the Act's provisions read in harmony to achieve the goal of providing financial protection for injured workers. *See Peoria Bellwood Nursing Home v. Indust. Com'n*, 115 Ill.2d 524, 529 (1987).

Unfortunately, the appellate panel occasionally reads legal doctrines into the Act which are contrary to both the history and goals of the system.[1] *McAllister* represents the panel's latest battle over a new doctrine which conditions benefits upon risk assessments for each case. As explained below, the new risk assessment doctrine simply erects arbitrary barriers between workers and their benefits. The doctrine is not found in the language of the Act, it is contrary to the protective goals of the system and the agency has no legitimate role in separating which work activities are worthy of coverage from those which are not worthy. The legislature created a system which applies to all manner of work activities in the state. The agency should not be revisiting the legal duty issue every time a worker files for benefits after an injury. This case involves a matter of profound importance to workers and their families. Even constitutional rights and obligations hang in the balance.

The *Arising Out Of* Clause

The Act obligates employers to provide treatment and benefits for accidental injuries "arising out of" and "in the course of" the worker's employment. See 820 ILCS 305/2. These prongs have remained unchanged since the Act was adopted in

[1] In *Sisbro v Indust. Com'n*, this Court rejected an earlier appellate panel scheme which denied otherwise compensable cases on the grounds of either "normal daily activity exceptions" or "greater risk exceptions". *See* 207 Ill.2d 193 (2003). This Court explained that such issues could be relevant to the issue of whether a sufficient causal connection had been established between the injury and employment in the first instance. *Id.* *Amicus* certainly agrees with the Court that arbitrary doctrines should never get in the way of benefits. However, there is no logical reason to compare the risks involved in one worker's accident against the risks of any other job or population. Such comparisons are entirely arbitrary.

1912. This Court has interpreted the *arising out of* clause as containing two separate components: 1) a legal duty component (the scope of the employer's responsibility to cover injuries); and 2) a mechanical causation component. This Court has laid out workable principles for both components of the clause.

For legal duty, an injury typically arises out of one's employment when the worker performs acts the employer instructs him to perform, acts he might reasonably be expected to perform incident to those duties and acts compelled by law (statutory or common law). *See Caterpillar Tractor Co. v. Indust. Com'n*, 129 Ill.2d 52, 58 (1989). This legal duty component is the central issue in *McAllister's* appeal. For mechanical causation, recovery depends on the worker's ability to show that his work-related activity aggravated or accelerated the preexisting disease such that the current condition of ill-being is causally related to the injury and not simply the result of a normal degenerative process of the preexisting condition. *See Sisbro v. Indust. Com'n,* 207 Ill.2d 193, 204-205 (2003).

Despite the straightforward principles set forth by this Court, the *McAllister* decision reveals a wide chasm within the appellate panel as to what the "arising out of" clause really demands before compensation is available to injured workers. The *McAllister* majority and concurrence devote 25 pages each to criticizing each other's positions on how risks are to be assessed for individual cases. The entire appellate panel appears to agree that the Workers Compensation Commission (IWCC) should conduct some level of risk analysis before awarding benefits or treatment to any injured worker. However, the panel cannot agree on which details will be relevant

to the risk assessment or even the ground rules for assessing the factors. This uncertainty has resulted in mass confusion at the IWCC, resulting in *ad hoc* determinations as to which legal duty will apply to each individual case. The appellate panel further compounds the error by applying a deferential standard of review (manifest weight) to the IWCC's legal determinations. This cannot be right. The IWCC has no specialized expertise in interpreting the law. It serves a fact-finding role within a statutory framework. To the extent it has a specialty, the IWCC is conversant in medical and treatment issues, not in statutory interpretation. Reviewing courts are supposed to have the final say on how the statute is to be interpreted and applied by the IWCC.

More fundamentally, the appellate panel's risk assessment dispute springs from an invalid premise; the mistaken idea that risk assessments have a role in what is supposed to be a no-fault system. Risk assessments have no legitimate role in our system for the vast majority of workplace injuries.

ITLA urges this Court to adhere to its past interpretation of the arising out of clause. Treatment and benefits should be available for injuries arising out of duties which an employer assigns or directs the employee to perform, activities incidental to those duties, as well as duties compelled by statute or common law. *See Caterpillar*, 129 Ill.2d at 58. This is a logical understanding of the clause. There is no need to tack an additional barrier, in the guise of a risk assessment doctrine, onto the clause before workers can access their benefits.

I. Risk Assessments Are Irrelevant To Most Workers' Compensation Cases

Common law legal duties were historically grounded upon the idea that people should anticipate and guard against foreseeable risks. Foreseeability of risks gave rise to legal duties of conduct to avoid triggering those risks, resulting in liability for those who injured others by triggering the risks. Negligence, for example, is conduct which falls below the standard established for the protection of others "against unreasonable risk of harm." *Cunis v. Brennan*, 56 Ill.2d 372, 376 (1974), *citing to* Restatement (Second) of Torts (1965), section 282. The determination of whether a duty exists is a question of whether the defendant and plaintiff stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff. This is an issue of law to be determined by the court. *See Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill.2d 507, 525 (1987). The question of foreseeability is best answered when approached as a matter of fundamental policy in the law. *See Hutchings v. Bauer*, 149 Ill.2d 568, 599 N.E.2d 934, 936 (1992), *citing to* W. Keeton, Prosser & Keeton on Torts § 43, at 281 (5th Ed. 1984). Stated otherwise, assessing whether risks give rise to a duty is a question of law, not a fact to be found by the agency.

However, our legislature replaced this common law arrangement by imposing a no-fault administrative loss system on workplace injuries. *See Gannon v. M.S.P&P.R. Co.*, 13 Ill.2d 460, 463 (1958). Common law doctrines of negligence were no longer relevant to a worker's ability to obtain benefits for a workplace

injury. *Id.* The employer's duty to provide benefits was built upon the premise that workers faced a risk of harm in their workplaces. The legislature intended that industry bear the consequences of worker carnage. *See Grand Trunk R. Co. v. Indust. Com'n*, 291 Ill. 167, 175 (1919). The no-fault system was justified on at least two separate grounds. First, the relationship between workers and employers was such that the employer was responsible for the welfare of its workforce. Second, the employer would better be able to anticipate and control risks in his workplace. That is why the employer could no longer use the worker's own negligence as a defense against benefits. *See Gannon*, 13 Ill.2d at 463 (contributory negligence, assumption of risk and not features of the system). Thus, as the legislature imposed the legal duty through the Act, there is no need for the IWCC to revisit the duty issue each time a worker files a claim for benefits.

Of course, few rules are absolute in their application. A risk analysis *might* be justified for those outlier fact patterns which have a tenuous connection to employment. These outlier cases have traditionally been handled under what is known as the "neutral risk doctrine". See *Illinois Institute of Technology v. Indust. Com'n*, 314 Ill.App.3d 149, 163 (2000) (listing stray bullets, dog bites, lunatic attacks, lightning strikes, bombing and hurricanes as examples of neutral risks). A question naturally arises as to whether the legislature could ever have contemplated that such atypical fact patterns would fall within the scope of the Act. Again however, defining the outer limits of the Act's reach is a legal call rather than

a fact to be determined by the IWCC. The IWCC has no reason to assess risk for the vast majority of work injury claims.

Moreover, when we place new proof hurdles between workers and their benefits, we rewrite the grand bargain to the sole detriment of injured workers. Rewriting a legislative scheme raises separation of powers concerns. Carving away at the worker's benefit from the grand bargain also runs afoul of due process concerns. See *New York C.R. Co. v. White*, 243 U.S. 188, 205 (1917) (states must offer meaningful exchanges for forfeiture of common law rights); *Arizona Employers' Liability Cases*, 250 U.S. 400, 419 (1919) (arbitrary and unreasonable changes are not permissible substitutions). The wisdom of reading exceptions and limitations into the statute is also not obvious. See *Salisbury v. Illinois Workers Comp. Com'n*, 2017 Il App (3d) 160138 WC P.13; *Wingert v. Hadrisky*, 2019 IL 123201 *P44 (no rule of statutory construction permits a court to rewrite a statute to include additional elements). Rather, this Court should continue to interpret the "arising out of" clause as allowing benefits for injuries arising out of duties which an employer directs the employee to perform, activities incidental to those duties, as well as duties compelled by statute and common law. *See Caterpillar*, 129 Ill.2d at 58.

II. If A Risk Analysis Is Required For Each Claim, This Court Should Define What Standards Will Govern The Analysis

If risk assessments are now going to be a component of each case, this Court must provide guidance on which factors will be assessed and the framework for

evaluating the factors. We find no guidance from the text of the Act as risk assessments are not mentioned in the Act. Judicial creation of an atextual risk doctrine would also seem to run afoul of the egalitarian goal of the Act. The Act is supposed to apply to workers in all trades, with the exception of certain job classifications which have their own systems. Nevertheless, if risk assessments are now going to be a feature of each case, this Court should provide some guidelines as to which work activities are worthy enough to warrant compensation. Unfortunately, there are no rational guideposts for drawing lines between worthy and unworthy types of work.

A. Identifying Relevant Factors

The appellate panel has not even settled on which factors are relevant to the analysis. In our underlying case, the appellate panel focused on whether McAllister was performing assigned duties at the time of his accident. In other recent cases, the panel focused on how the worker's movements quantitatively or qualitatively compare to movements of the general public. *See Adcock v. Illinois Workers' Comp. Com'n*, 2015 IL App (2d) 130884WC. In yet other cases, the focus appears to be on the item involved in the injury. *See Mytnik v. Illinois Workers' Comp. Com'n*, 2016 IL App (1st) 152116WC (occasionally picking up bolt from floor is worthy); *but compare Noonan v. Illinois Workers' Comp. Com'n*, 2016 IL App (1st) 152300WC (occasionally picking up pen from floor is not worthy). The appellate panel's inability to define the parameters of its own doctrine hardly inspires

confidence in the plan. Uniformity and predictability must be features of the system.

B. Identifying The Legal Framework For Assessing Factors

After the Court identifies which factors litigants should be looking at, we need a legal framework for assessing the factors. Litigants need to understand why the system grants benefits to a worker picking up bolts but not to workers bending for pens or carrots. *Amicus* contends that we should not be doing risk assessments for individual cases, unless they involve the unusual fact patterns covered by the neutral risk doctrine. This Court should adhere to its *Caterpillar* formulation of making benefits available for assigned duties, incidental duties and duties otherwise compelled by law. Yet if the Court sees a need for risks assessments for each case, this Court should outline a sound framework for assessing the factors. As explored in the next section, creating the framework is a daunting challenge.

III. The Appellate Panel's Battle Over Risk Assessments Illustrates Why We Should Never Condition A Victim's Remedy On Arbitrary Standards

The disagreement between the appellate justices in *McAllister* illustrates the folly of conditioning a victim's remedy on arbitrary thresholds. Two panel members wish to continue with the panel's 2015 version of the risk assessment doctrine. That 2015 version told the IWCC to "not award benefits for injuries caused by everyday activities like walking, bending or turning, even if an employee was

ordered or instructed to perform those activities as part of his job duties, unless the...job required him to perform those activities more frequently than members of the general public or in a manner that increased the risk." *Adcock v. Illinois Workers' Comp. Com'n*, 2015 IL App (2d) 130884WC *P39. The panel referred to these options as "quantitative" and "qualitative" options for coverage. While this version of the doctrine was later rejected by a slight majority of the panel in *McAllister*, the 2015 doctrine illustrates the problem with inserting arbitrary layers of proof between workers and their benefits.

Consider *Adcock's* demand that injured workers prove up how their movements and risks compare to the general public (quantitative and qualitative options). This Court disavowed a need for such comparisons over a century ago: "[t]he question whether a risk arises out of and in the course of employment does not depend on whether such risk is more than the ordinary normal risk incurred by other persons, but on whether that risk is one peculiar to that particular employment". *Ohio Bldg Safety Vault Co. v. Indust. Bd.*, 277 Ill. 96, 106 (1917). Whether the risks or dangers of any particular employment are greater or less than the risks of other employments is not essential to be decided in determining whether the risk of a given employment grows out of his employment. *Id.* This Court presumably rejected the need for such comparisons because there is no logical connection between Mr. McAllister's workplace environment and what any other person is doing anywhere else. Pegging a victim's remedy to an arbitrary comparison violates the victim's due process rights. See *Wingert v. Hradisky*, 2019

IL 123201 *P37 (due process will not tolerate imposition of liability on person who has no causal connection with the victim).

Adcock's quantitative and qualitative thresholds do not even offer credible yardsticks for coverage. The quantitative threshold requires workers to prove that they perform movements or face risks more than the general public. However, if benefits are limited to workers above the population average, then the half of the population below the average will find no remedy in the Act. Throwing half the population out of the system is a breach of the State's constitutional obligation to provide its citizens with fair mechanisms to redress losses (see argument V.A. below); unless, of course, the State provides an alternative remedy for the expelled workers. This Court could certainly restore the common law rights of the expelled workers, but that triggers its own set of constitutional challenges. Some above-threshold workers who are limited to an IWCC remedy will undoubtedly raise equal protection and due process challenges for their disparate treatment. Constitutional issues arise any time we impose arbitrary thresholds on a victim's remedy.

Further consider the discriminatory impact of population movement thresholds. Any movement threshold will predictably have a bigger impact on workers of advanced age and those more vulnerable to physical breakdown. This impact could not be consistent with the paternal goals of the Act or this Court's handling of pre-existing conditions. *See Sisbro v. Indust. Com'n,* 207 Ill.2d 193, 205 (2003) (even if employee has pre-existing condition which makes him more

vulnerable to injury, recovery will not be denied as long as employment was also a causative factor).

There is also zero evidence that movement averages even correlate with how often members of the general public develop injuries from the movements, and thus no reason to conclude the threshold is anchored in reality. If movement averages correlated with the likelihood of an injury, then the more vigorous half of population should show signs of injury for any given movement. That is clearly not the case.

The qualitative threshold option is even a less meaningful standard for benefits. The quantitative threshold at least had us comparing our movements to an identifiable population average. However, the qualitative threshold offers no meaningful boundaries for the assessment. Workers perform tasks in a dizzying variety of ways, leading to purely *ad hoc* rulings as to which types of movements are compensable. That is how we ended up with cases awarding benefits to a worker picking up a bolt (*Mytnik v. Ill. Worker's Comp. Com'n*, 2016 IL App (1st) 152116WC) but not to a worker picking up a pen (*Noonan v. Ill. Worker's Comp. Com'n*, 2016 IL App (1st) 152300WC). Both injuries came from bending, both scenarios affect production and both workers removed items from the floor which (theoretically) posed a safety threat for other workers. An injured worker's benefits should never rise and fall on arbitrary thresholds.

Even if we can all agree on which risk factors we should be looking at, the system must still be accessible to workers. However, the cost demands for establishing where a worker falls in relation to any threshold creates an

insurmountable barrier between workers and their access to the system. We presumably need accurate information on population movements if we are using the standard as a threshold for benefits. Yet population movement averages are unknown. People exhibit enormous variance in range of motion of their joints, differences in recruitment patterns and speed of the muscles animating the joints, and variations in overall body health and diet, with resulting differences in the body's ability to get nutrients to the tissues for repair. We could use surveys to identify population averages. The more variables we face, the larger our sample size must be. However, the cost for surveys will easily exceed the value of most cases at the IWCC.

For illustration, assume we use a tiny 100 person sample to define population averages, our ergonomist charges $50 an hour and further limits observations to a single 24 hour period per person. The observations alone will cost $120,000 ($50 x 100 subjects x 24 hours) before the expert has even crunched the data to identify the averages. 2,400 hours of observation time will be needed. Then the worker will still have to pay the expert to present admissible evidence at trial. Such cost barriers will place the system out of reach for all workers. The Act will cease to serve any purpose.

If we are not going to use accurate data for our analysis (begging the wisdom of why we are applying such a doctrine in the first instance), we could alternatively present expert testimony on the subject. However, it is not obvious which experts will have probative information on population movements or risk averages or

whether the information even exists. If experts can be located, we still add thousands in litigation costs to each worker's compensation claim. Even this modest expense creates a real barrier for workers. IWCC claims had an average value of $2,389 in 2013 and $2,346 in 2012. See *FY 2014 Annual Report from the Illinois Workers Compensation Commission. (*www2.illinois.gov/sites/iwcc/Documents/annual reportFY14.pdf) The IWCC stopped publishing claim value data for several years and then resumed in a different format in 2018. The new format sets out average claim values for cases handled by in-house lawyers ($ 1,660) versus lawyers at private firms ($ 2,966). Claim values had not materially improved by 2018. *See FY 2018 Annual Report from the Illinois Workers Compensation Commission* (www2.illinois.gov/sites/iwcc/Documents/annualreportFY18.pdf). There is no practical way for workers to prove up the thresholds to get access to their benefits, and this is a problem of constitutional magnitude.

Cost barriers blocking citizens from access to courts present due process violations. See *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971). A person's right to access is so fundamental that states must have a truly extraordinary need to block access. The free access clause of our state constitution (Art. I, §12) also prohibits such barriers to the system. *Schultz v Lakewood Electric Corp.*, 362 Ill.App.3d 716, 722 (1st Dist.2005). Arbitrary thresholds and qualifications have no role in denying a fair remedy to victims. See *Grace v. Howlett*, 51 Ill.2d 478, 485 (1972) (legislature is not permitted to adopt an arbitrary or unrelated means of addressing

a problem); *Grasse v. Dealer's Transport Co.*, 412 Ill. 179 (1952) (legislative transfer of injured worker's tort rights against a third party is not a valid exercise of police power); *Best v. Taylor Machine Works,* 179 Ill.2d 367, 406 (1997) (caps are categorically unconstitutional when they operate without regard to the facts or circumstances of the actual case); and *Begich v. Indust.Com'n*, 42 Ill.2d 32, 36-37 (1969) (permanency classifications are irrational, unrealistic and artificial if they provide different values for what is essentially the same physical loss from an injury).

The overarching principle behind these rulings is that victims have a right to fair recourse against those who injure them as well as a right to protect and restore bodily integrity (see argument V. below). The State possesses no ownership interest in a citizen's bodily integrity. Therefore, the State has no legitimate right to create windfalls for employers and their carriers by throwing insurmountable barriers in the way of injured workers. The federal and state constitutions prohibit such overreach. If the legislature is restricted from enacting arbitrary limitations against remedies, the judiciary should also refrain from reading such limitations into a protective compensation system.

IV. We Also Need Clarification About The Judiciary's Role In The New Risk Assessment Scheme

This Court should also clarify what role the reviewing courts will play in the new risk assessment scheme. Risk is a legal concept rather than a fact to be found at trial. Evaluation of risks for any given case is a question about whether the Act

imposes a legal duty on an employer to provide benefits to the worker. Risk assessments are therefore legal conclusions about what legal duty is imposed by the Act. The limited expertise of the IWCC suggests no specialized competence for fashioning risks into standards for duty. See *Daniels v Indust. Com'n*, 201 Ill.2d 160, 165 (2002) (the agency has no general or common law authority). Yet the appellate panel routinely defers to IWCC risk assessments by applying a manifest weight review standard to the assessments. This is an unwarranted transfer of judicial authority to the IWCC.

Our Constitution vests judicial power exclusively in the "Supreme Court, Appellate Court and Circuit Courts." Ill. Const. of 1970, Art. VI, § 1. The application of principles of law is inherently a judicial function and article VI, section 1 of the Constitution vests the exclusive and entire judicial power in the courts." *Wright v. Central Dupage Hosp. Ass'n*, 63 Ill.2d 313, 322 (1976). Thus, any risk assessment drawn by the IWCC should be reviewed under a *de novo* standard rather than manifest weight standard of review.

Characterizing the risk issue as a mixed question of fact and law does not change the equation. Reviewing courts should not surrender their constitutional authority simply because the agency applied some facts to the duty question. Courts can always defer to the IWCC's fact findings in any case while reserving to themselves the final say on legal duty. Deference to an agency's determination of mixed questions should be limited to cases where "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts

satisfy the statutory standard..." *AFM Messg'r Serv. Inc. v. Dep't pf Employ. Sec.*, 198 Ill.2d 380, 391 (2001). Thus, reviewing courts should always apply a *de novo* review standard to IWCC assessments of risk.

V. Constitutional Level Rights And Obligations Hang In The Balance

A. The State's Obligation To Provide A Fair Mechanism for Redress

The need to avoid arbitrary barriers is heightened by the constitutional rights and obligations in play at the agency. The IWCC fulfils the State's constitutional obligation to provide workers with a mechanism for fairly redressing injuries. It is the duty of every state "to provide for the redress of private wrongs." *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885). The right "lies at the foundation of all well-ordered systems of jurisprudence" and is "founded in the first principles of natural justice." *Windsor v. McVeigh*, 93 U.S. 274, 277, 280 (1876). The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). One of the first duties of government is to afford that protection. *Id.*

This duty arises out of the social compact obligations of democratic government. Individuals possess a natural privilege to respond to mistreatment by others. Insofar as the state denies individuals the privilege of self-help and self-assertion in the name of civil peace and justice, the state becomes obligated to

provide alternative mechanisms for redress. *See* John C.P. Goldberg, Benjamin C. Zipursky, *Civil Recourse Theory Defended: A Reply To Posner, Calabresi, Rustad, Chamallas and Robinette*, 88 Ind. L. J. 572-573 (2013). William Blackstone and John Locke both recognized the right to fair redress and the right traces back many centuries earlier through the natural law of England. *See* John C.P. Goldberg, *The Constitutional Status Of Tort Law: Due Process And The Right To A Law For The Redress Of Wrongs*, 115 Yale L. J. 532-559 (2005).

Art.1 §12 of the Illinois Constitution protects each citizen's access to justice. The guarantee is not simply an aspiration or policy goal of the State, it is a core constitutional obligation of the State.[2] For injury claims between employers and workers, Illinois satisfies its obligation by providing a fair and functioning workers compensation system for its workers to use. The State is not obligated to ensure that workers win their cases. However, the State is obligated to empower its citizens by providing a mechanism which they can use to obtain recourse. *See* John C.P. Goldberg, Benjamin C. Zipursky, *From* Riggs v. Palmer *to* Shelley v. Kraemer:

[2] The Court occasionally minimizes the import of this clause when faced with a party demanding entitlement to a particular remedy. Respectfully, diminishing the clause in this way works a disservice to the purpose of the clause. Similar clauses were included in most state constitutions, reflecting the fundamental nature of one's opportunity to seek redress for an injury. See Judith Resnick, *Constitutional Entitlements To And In Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 St. Louis U.L.J. 917, 921-922 (2012). 80% of the state constitutions contain textual references to one's right to a remedy. See Appendix I to Resnick's article (pages 1002-1023). And the nine states without express "right to remedy" provisions guaranteed one's right to use the courts to redress wrongs through due process or open courts provisions. See Appendix 2 (pages 1024-1037). The "right to access" is intrinsic to democracy and deeply embedded in constitutional texts and doctrines. *Id.* at 921-922.

The Continuing Significance of the Law-Equity Distinction, in Philosophical Foundations of the Law of Equity (Dennis Klimchuk, Irit Samet & Henry Smith eds., Oxford Univ. Press 2019); also p.4 of https://dx.doi.org/10.2139/ssrn.3182593.

It is further true that the State must provide a fair means for redress to pass constitutional muster. See *New York C.R. Co. v. White*, 243 U.S. 188, 205 (1917) (due process will not tolerate the substitution of an insignificant compensation system for common law rights); and *Arizona Liability Cases*, 250 U.S. 400, 419 (1919) (arbitrary and unreasonable changes are not permissible substitutions for common law rights). Consistent with these principles, this Court has long protected an injured person's rights against arbitrary and unreasonable legislative encroachment. *See Grace v. Howlett*, 51 Ill.2d 478, 485 (1972) (legislature is not permitted to adopt an arbitrary or unrelated means of addressing a problem); *Grasse v. Dealer's Transport Co.*, 412 Ill. 179 (1952) (legislative transfer of worker's tort rights against a third party is not a valid exercise of police power); *Best v. Taylor Machine Works,* 179 Ill.2d 367, 406 (1997) (caps are categorically unconstitutional when they operate without regard to the facts or circumstances of the actual case); and *Begich v. Indust. Com'n*, 42 Ill.2d 32, 36-37 (1969) (permanency classifications are irrational, unrealistic and artificial when they provide different values for what is essentially the same physical loss from an injury). These cases obviously involve decisions under a variety of different constitutional provisions, yet the decisions all drive toward the idea that injured individuals have fundamental rights hanging in the balance which the State is

obligated to protect. Inserting arbitrary risk doctrines between injured workers and their benefits runs afoul of our State's constitutional duty to provide a fair mechanism for redress.

B. Each Worker Has A Fundamental Right To Protect Bodily Integrity

The need for fairness in the system is underscored by the fact that workers turn to our compensation system to protect their most fundamental of interests, bodily integrity. Bodily integrity enjoyed special protection under common law, it was enshrined in federal and state constitutions and courts bend over backwards to protect the right against a variety of potential threats.

Common law protections for bodily integrity long predate our country's founding. *See* Robert J. Kaczorowski, *The Common Law Background Of Nineteenth-Century Tort Law*, 51 Ohio St. L. J. 1127, 1131 (1990) (referencing a 1374 claim for negligent treatment by a surgeon). The ancient torts of assault and battery provided individuals with a mechanism for redressing injury to bodily integrity. See *Maksimovic v. Tsogalis*, 177 Ill.2d 511, 518 (1997), citing to 3 W. Blackstone, Commentaries * 119-120, 127-128. Most civilizations provided mechanisms to redress injuries to bodily integrity. The English called their protections torts, Romans called them delicts, Babylonians redressed some personal injuries in the Law Code of Hammurabi, and hunter-gatherer bands and tribal groups have their own mechanisms for redressing injuries.[3] Groups of clearly different structure and

[3] A chapter titled "A Genealogical View of Law" provides a wonderful overview of some of the of the protective mechanisms offered by human groupings through the ages. Brian Z. Tamanaha, *A Realistic*

resources have all felt compelled to provide protections for bodily integrity. That is a powerful indication that bodily integrity is a fundamental interest.

The concern for bodily integrity was also prominently enshrined in the federal and state constitutions, in clauses protecting both life and liberty. States shall not deprive any person of life, liberty or property without due process of law. *See* Ill. Const. art.1 §2; U.S. Const. amend. XIV, §1. The Illinois constitution declares life and liberty as inherent and inalienable. *See* Ill. Const. art.1 §1. Our bill of rights are fundamental charter reservations of liberty and rights to the people as against possible encroachments from the executive, judicial or legislative branches of government, which every court is bound to enforce. *See People v. Humphreys*, 353 Ill. 340, 342 (1933).

The "life" and "liberty" terms both offer protections for bodily integrity, although the liberty term has attracted all the litigation. In an 1877 case from Illinois, Justice Steven Fields explained that *life* under the 14th Amendment means more than mere animal existence. See *Munn v. Illinois*, 94 U.S. 113, 142 (1877) J. Fields dissent. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. *Id.* The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul

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Theory of Law, 82-117 (2017). Cites to anthropological and archeological works can be found there. The author observes in the final section of the chapter that law, even in its most rudimentary form, established protections and restrictions relating to property, people, family unions and sacred matters. These are the same interests we deem fundamental in our system.

communicates with the outer world. *Id.* Although he was in the dissent in *Munn*, Justice Field's views of 14th Amendment protections greatly influenced our present understanding of the scope of the clause. By 1891, a majority of the court agreed that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law". *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).[4]

The *liberty* term has more readily been applied to disputes over bodily integrity. These include rights a person has against infringement of bodily integrity [*Cruzan v. Missouri Dept. of Health,* 497 U.S. 261 (1990) (right to refuse medical care/life-saving hydration and nutrition); *Washington v. Harper*, 494 U.S. 210, 221 (1990) (liberty interest in avoiding unwanted administration of antipsychotic medication); *Winston v. Lee*, 470 U.S. 753, 764-765 (1985) (liberty interest against compelled surgery); *Rochin v. California*, 342 U.S. 165, 172 (1952) (liberty interest against forcible extraction of stomach content); *Youngberg v Romeo*, 457 U.S. 307, 315 (1982) (right to personal security is a historic liberty interest)], as well as the right to compel the state to provide services when the state takes custody over the person. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) (right to medical treatment at government's expense

[4] Botsford involved the denial of a defendant's demand for a medical examination of the plaintiff. While the court ultimately allowed reasonable physical examinations under the court's supervisory authority, *Union Pacific* remains relevant for two related points. First, the court recognized that bodily integrity is the most fundamental of interests protected in the law. Second, the case shows that deprivations of bodily integrity are permitted only in only the most extraordinary of circumstances.

while restrained).

It is easy to understand the vital role the IWCC serves for injured workers. The integrity of one's body impacts their survival as well as their ability to function in the world. Internal drives and reflexes attempt to protect us from injury while basic cellular mechanisms repair damaged tissue. These mechanisms only go so far in restoring the body after an injury. That is why professional treatment is often required for injuries suffered in the workplace. Fractured bones must be set, squeezed nerves released, tendons reattached to bone, infectious tissues debrided and tissues sutured. More serious injuries require more urgent treatment. When the worker finds himself disabled from the injuries, prompt financial support is needed. The IWCC provides the mechanism for workers to satisfy those needs. Arbitrary risk assessment doctrines have no legitimate role in the system.

The design of our system also warrants protective handling of claims by the State. The Act contains mandatory coverage and exclusive remedy provisions which force workers into a ward-like state of dependence on the IWCC process when they are injured. *See* 820 ILCS 305/3; 820 ILCS 305/5. The State must ensure that its own powers are not misapplied to defeat fundamental needs of vulnerable citizens. *See DeShaney*, 489 U.S. 189 (duty to provide services where person is in government custody or government creates the danger). Arbitrary risk doctrines should never be placed between workers and their benefits.

CONCLUSION

Ultimately, if the balancing of legal obligations in the workers' compensation system must be redrawn, the legislature should probably lead the way. Judicial rewriting of the grand bargain will undoubtedly raise separation of powers issues. If we alter the no fault feature of our system by imposing additional proof hurdles on workers, due process issues will also be triggered. ITLA encourages the Court to avoid all of these issues by rejecting the appellate panel's demand for risk assessments at the IWCC. The *Caterpillar* interpretation of the "arising out of" clause is a logical solution to the appellate panel's dispute. Benefits and treatment should be available for injuries arising out of duties which an employer directs the employee to perform, activities incidental to those duties, as well as duties compelled by statute and common law. *See Caterpillar*, 129 Ill.2d at 58.

Respectfully Submitted,
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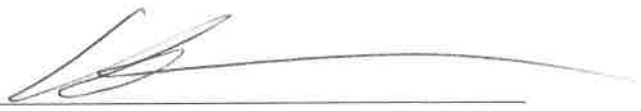
CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief is 25 pages.

Dated: 10-29-19 By 

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