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EXPANDING APPLICATION OF THE SPECIAL LEGISLATION CLAUSE OF THE ILLINOIS CONSTITUTION

In recent years article IV, section 22 of the Illinois constitution has found expanded use in striking at legislation dealing with tort liability; specifically, in three areas: (1) access to courts,[1] (2) remedies available,[2] and (3) monetary limitations.[3] The most familiar invocation of article IV, section 22 is in cases where laws sustain the immunity of governmental units.[4] Almost all of the recent tort cases that involve an application of class legislation manifest the same rule of law.[5]

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[1] Lorton v. Brown County Community Unit School Dist., 35 Ill. 2d 362, 220 N.E.2d 161 (1966).

[2] Grasse v. Dealer's Transp. Co., 412 Ill. 179, 106 N.E.2d 124 (1952), *cert. denied*, 344 U.S. 837 (1952).

[3] Treece v. Shawnee Community Unit School Dist., 39 Ill. 2d 136, 233 N.E.2d 549 (1968).

[4] *See, e.g.*, Treece v. Shawnee Community Unit School Dist., 39 Ill. 2d 136, 233 N.E.2d 549 (1968).

[5] The history of the cases from Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 203 N.E.2d 573 (1964) to *Treece* shows how rapidly the Illinois Supreme Court has overturned several pieces of class legislation upon a single theory. The theory originated in Grasse v. Dealer's Transp. Co., 412 Ill. 179, 106 N.E.2d 124 (1952), *cert. denied*, 344 U.S. 837 (1952), where the supreme court declared paragraph 1, section 29 of the Illinois Workmen's Compensation Act unconstitutional under article IV, section 22 of the Illinois constitution. But *Grasse* did not discuss the question of governmental immunity from court actions. That issue did not really arise until *Harvey*. Between *Grasse* and *Harvey* came the important case of Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960). This case held, but not upon the grounds of section 22 of article IV, that a school district was liable in damages in an action arising from the negligent action of the school bus. The reasons that prompted the court to reject the school district's claim of immunity are not at issue here. However, it is important to note that both before and after the *Moliter* decision became final in December, 1959, the General Assembly enacted a large number of laws concerning the tort liability of municipalities. The importance of *Harvey* is that the supreme court applied to those laws what it declared to be the proper test of constitutionality under article IV, section 22. The test was taken, for the most part, from that applied in *Grasse* twelve years earlier. The legislation that had been adopted by the General Assembly had established a readily discernible pattern of governmental immunities. For example, forest preserves, park districts, and the Chicago Park District were not to be held liable for negligence. ILL. REV. STAT. ch. 57½, §3(a); ch. 105, §§12.1-1, 333.2(a) (1963). Public and private school tort liability was limited to $10,000. ILL. REV. STAT. ch. 122, §§821-31 (1963). But the Chicago Board of Education was required to insure its employees, and consequently no limitation on recovery in tort liability was apparent. ILL. REV. STAT. ch. 122, §34-18.1 (1963). The liability of county superintendents of highways was limited to $10,000. ILL. REV. STAT. ch. 121, §§381-87 (1963). District highway commissioners and township highway commissioners were, however, fully liable. ILL. REV. STAT. ch. 121, §6-402 (1963). Although counties were not liable for negligence, they had to indemnify sheriffs and their deputies up to $50,000 for any losses brought about by non-willful torts. ILL. REV. STAT. ch. 34, §301.1 (1963). Similarly, drainage districts were liable for negligent torts, but the commissioners of those districts were absolved of personal liability. ILL. REV. STAT. ch. 42, §4-40 (1963).

Harvey declared that regardless of whether the special legislation attacked under article IV, section 22 was a single law (unrelated to others of its type) or part of a legislative pattern the same test would be applied:

Many of the activities that frequently give rise to tort liability are

Broadly stated the rule is that plaintiffs whose injuries are brought about in the same tortious manner, but who are treated differently because of the nature of the defendant shall not be denied access to the courts, or full remedy, or be limited in monetary recovery, by any statute that legislates by class.[6]

> common to all governmental units. The operation of automobiles is an obvious example. From the perspective of the injured party, or from the point of view of ability to insure against liability for negligent operation, there is no reason why one who is injured by a park district truck should be barred from recovery, while one who is injured by a city or village truck is allowed to recover, and one injured by a school district truck is allowed to recover only within a prescribed limit. And to the extent that recovery is permitted or denied on an arbitrary basis, a special privilege is granted in violation of section 22 of article IV.

Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 65, 203 N.E.2d 573, 575 (1964). The court in *Harvey* relies heavily on *Grasse*. In *Grasse* the court had stated that it was the classification of those who were injured, not the classification of the defendant, that was controlling. *Harvey* specifically relied on the following language from *Grasse*:

> It is readily apparent that there is no rational difference between an employee injured in the course of his employment by a motorbus, and one injured by a farmer's truck. Each may sustain the same injuries, and be entitled to the same amount of compensation from their employers; neither had any control over the circumstances of their injuries, or the status of the party who hit them, yet in one case, the statute authorizes the employee to recover damages from the third party, and in the other case the employee must be content with the amount of compensation he may be entitled to receive from his employer.

Id. at 66, 203 N.E.2d at 576. The same reasoning was adopted by the court in Hutchings v. Kraject, 34 Ill. 2d 379, 215 N.E.2d 274 (1966), Lorton v. Brown County Com. Unit School Dist., 35 Ill. 2d 362, 220 N.E.2d 161 (1966), and Treece v. Shawnee Community Unit School Dist., 39 Ill. 2d 136, 233 N.E.2d 549 (1968). In an even more recent case, Haymes v. Catholic Bishop, 41 Ill. 2d 336, 243 N.E.2d 203 (1968), the supreme court struck down the $10,000 damage limitation provided for in the School Code, ILL. REV. STAT. ch. 122, §825B (1959). The court relied directly on *Harvey*, *Hutchings*, and *Lorton*. Similarly, in Begich v. Industrial Comm'n, 42 Ill. 2d 32, 245 N.E.2d 457 (1969) the court relied on the whole line of cases from *Grasse* through *Treece* to strike down as unconstitutional section 8(e)9 of the Workmen's Compensation Act, ILL. REV. STAT. ch. 48, §138.8(e)9 (1967). Thus between 1964 and 1968, the court had developed a rationale and formulated a specific test for the application of article IV, section 22. In one recent case, Sweney Gasoline & Oil Co. v. Toledo, Peoria & W. R.R., 42 Ill. 2d 265, 247 N.E.2d 603 (1969), the court, although holding for the defendant on other grounds, accepted unreservedly the concept that the legislature may not constitutionally create classifications that discriminate in tort cases between plaintiffs similarly situated who are suing defendants who have been classified by virtue of whether or not they are governmentally regulated. In effect the court struck down as unconstitutional a provision that allowed regulated corporations the privilege of having exculpatory clauses in their leases. ILL. REV. STAT. ch. 80, §15(a) (1967). The court, although relying on the case law of *Harvey* through *Treece*, did not even bother to cite such law.

[6] Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 203 N.E.2d 573 (1964). The court said:

> The situation in this case is not unlike that which was before this court in *Grasse v. Dealer's Transport Co.* Section 29 of the Workmen's Compensation Act allowed a common law action by an employee who was injured by the negligence of a third party who was not bound by the act, but prohibited such an action by an employee who was injured by the negligence of a third party who was bound by the act. The distinction between the two types of defendants was held insufficient to afford a rational basis of classification from the point of view of the injured person. The court said: "All employees entitled to compensation for injuries sustained in the course of their employment and caused by third persons are not treated alike. Those injured by third party tortfeasors

Take as an example the following situation. A girl of the age of ten rides as a passenger in a taxicab. The driver of the cab is negligent. His negligence and the negligence of another driver combine to cause an accident. The girl, who is in no way contributorily negligent, is seriously injured. Disregarding for the moment defenses of both the driver of the cab and the other driver, the girl may recover from them jointly and severally. A lawsuit by the same ten year old girl, however, resulting from a ride with a friend of the family might have an entirely different outcome should an accident physically identical to the first occur.[7] There is a good chance that whereas she could recover from a taxidriver guilty of ordinary negligence, she might not be able to recover against the friend guilty of equal negligence.[8] The guest statute in Illinois is typical of the type of class legislation that is being attacked under the expanded application of article IV, section 22 of the Illinois constitution.[9]

If the example were to be extended to the same ten year old girl riding in a vehicle of the Chicago Transit Authority a different set of results might occur. For example, although the

bound by the act are not entitled to common-law damages from such persons, whereas those injured by third party tortfeasors not bound by the act are allowed to institute actions for damages. Both classes of injured employees may be entitled to compensation from their own employers, so that the amount of compensation, if any, received by the injured employee is not the basis for differentiation between the classes. Nor is there any basis for differentiation from the nature of the injuries sustained, or from the activity of the employee at the time of the injury, or from any other factor ordinarily related to an injured party's right to recover damages. The sole basis for differentiation, as far as the injured employee is concerned, is a fortuitous circumstance — whether the third party tort-feasor [*sic*] happens to be under the act."

Id. at 65-66, 203 N.E.2d at 576.

[7] She would, of course, be subject to the limitation of the state's guest statute. She would have to prove more than ordinary negligence:

> No person riding in or upon a motor vehicle or motorcycle as a guest without payment for such ride, or while engaged in a joint enterprise with the owner or driver of such motor vehicle or motorcycle, nor his personal representative in the event of the death of such guest, shall have a cause of action for damages against the driver or operator of such motor vehicle or motorcycle, or its owner or his employee or agent for injury, death or loss, in case of accident, unless such accident shall have been caused by the wilful and wanton misconduct of the driver or operator of such motor vehicle or motorcycle or its owner or his employee or agent and unless such wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought.
>
> Nothing contained in this section shall be construed to relieve a motor vehicle or motorcycle carrier of passengers for hire of responsibility for injury or death sustained by any passenger for hire. ILL. REV. STAT. ch. 95½, §9-201 (1967).

[8] *Id.* Additionally, it might have been better (for the sake of her case) for the girl to have trespassed in the friend's auto. Certain cases may be construed to stand for the proposition that the duty to a discovered trespasser may be to use ordinary care to avoid injuring him. *See* Briney v. Illinois Cent. Co., 401 Ill. 181, 81 N.E.2d 866 (1948); Cullman v. Mumper, 83 Ill. App. 2d 395, 228 N.E.2d 276 (1967); and Paterson v. Byrne, 24 Ill. App. 2d 565, 165 N.E.2d 374 (1960).

[9] *See* Brief for Appellant at 11-20, Delany v. Bedame, No. 41616 (Ill. Sup. Ct., filed May 1, 1969).

girl might be able as in the first two instances to collect damages from the driver of the car that collided with the bus, taxi, or friend's car, she might not be able to collect against the negligent Chicago Transit Authority unless the City of Chicago received notice within six months of the accident.[10] Were the girl unlucky enough to have been in a similar accident where the driver of the other vehicle was a state employee on state business, she might recover nothing at all. The Illinois constitution provides that the state shall never be made a defendant in any action of law or equity.[11] There is no guarantee that any case litigated successfully in the Illinois Court of Claims will actually give rise to the collection of damages since the state may still choose not to pay the award ordered by the court of claims.[12] Several elements detrimental to the plaintiff's action are present in a suit against the state: there are monetary limitations,[13] no right to appeal is present;[14] there is no right to a jury;[15] there is a six month notice requirement for personal injuries;[16] and there is always the knowledge in the plaintiff's mind that the suit is at the sufferance of the state and that the legislative approval necessary to the collection of damages may not be forthcoming.[17]

All of the different instances outlined above, however, would be made even more complicated, and from the plaintiff's view more discouraging, if the girl were to be killed. In that situation a suit by the parents for wrongful death would be faced by the state's wrongful death act.[18] By virtue of the act's silence with respect to punitive damages and the court made rule that where the act does not provide for damages they may not be recovered, the plaintiff (probably the parents) will possibly recover less than if the girl had lived. This may be true even though that death was brought about under the most willful and wanton circumstances of negligence on the part of all defendants concerned.[19] This paper is an examination of the case

[10] ILL. REV. STAT. ch. 85, §8-102 (1967).

[11] ILL. CONST. art. IV, §26. Additionally U.S. CONST. art. III, §2 and U.S. CONST. amend. XI apparently prohibit the suit. *See* Monaco v. Mississippi, 292 U.S. 313 (1933), Smith v. Reeves, 178 U.S. 436 (1899), Beers v. Arkansas, 61 U.S. 527 (1857).

[12] Illinois Court of Claims Act, ILL. REV. STAT. ch. 37, §439 (1967).

[13] Illinois Court of Claims Act, ILL. REV. STAT. ch. 37, §439.8 (1967).

[14] Illinois Court of Claims Act, ILL. REV. STAT. ch. 37, §439.17 (1967).

[15] Illinois Court of Claims Act, ILL. REV. STAT. ch. 37, §439 (1967).

[16] Illinois Court of Claims Act, ILL. REV. STAT. ch. 37, §439.22-2 (1967).

[17] Illinois Court of Claims Act, ILL. REV. STAT. ch. 37, §439 (1967).

[18] ILL. REV. STAT. ch. 70, §2 (1967).

[19] Illinois case law rests on the early case of Conant v. Griffin, 48 Ill. 410 (1868). The court in that case reasoned that punitive damages could not be recovered under the act:

> This action is the creature of the statute, and must be governed entirely by its provisions, and as they only provide for compensation for the pecuniary loss, the evidence should be confined exclusively to that. The

law in tort actions wherein article IV, section 22 of the Illinois constitution[20] is applied. The legislation involved in the above hypothesized examples might be affected by future supreme court decisions. It is, of course, not to be expected that the constitutional immunity of the sovereign state of Illinois can be challenged by article IV, section 22 of the same state constitution; but insofar as the equal protection clause of the United States Constitution may be similar to the Illinois constitutional provision, some challenges to sovereign immunity may be expected. To some extent the similarity of the provisions will be discussed below.

HISTORY

The abuses of special legislation under the 1848 Illinois constitution, with the resulting public outcry and judicial condemnation, led to the adoption of article IV, section 22 of the Illinois constitution of 1870.[21] Under the 1848 constitution the bill of rights was the major delimiting factor that controlled the passage of special legislation.[22] It was the opinion of the Illinois courts, for example, that the legislation which would force a municipality to incur debts for solely local purposes was unconstitutional under the theory that the sovereign cannot arbitrarily

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damages should be compensatory, or approximate thereto, but not vindictive or exemplary.
Id. at 413.

[20] ILL. CONST. art. IV, §22. The entire section is as follows:
The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For — Granting divorces; Changing the names of persons or places; Laying out, opening, altering and working roads or highways; Vacating roads, town plats, streets, alleys and public grounds; Locating or changing county seats; Regulating county and township affairs; Regulating the practice in courts of justice; Regulating the jurisdiction and duties of justices of the peace, police magistrates and constables; Providing for changes of venue in civil and criminal cases; Incorporating cities, towns or villages, or changing or amending the charter of any town, city or village; Providing for the election of members of the board of supervisors in townships, incorporated towns or cities; Summoning and impaneling grand or petit juries; Providing for the management of common schools; Regulating the rate of interest on money; The opening and conducting of any election, or designating the place of voting; The sale or mortgage of real estate belonging to minors or others under disability; The protection of game or fish; Chartering or licensing ferries or toll bridges; Remitting fines, penalties or forfeitures; Creating, increasing or decreasing fees, percentage or allowances of public officers, during the term for which said officers are elected or appointed; Changing the law of descent; Granting to any corporation, association or individual the right to lay down railroad tracks, or amending existing charters for such purpose; Granting to any corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted.

[21] *See* Kales, *Special Legislation as Defined in the Illinois Cases,* 1 ILL. L. REV. 63 (1906).

[22] *Id.* at 65-66.

deprive taxpayers of their property.[23] But the limitations upon the legislature worked by the bill of rights went only to control the deprivation of a citizen's property or liberty. Acts that applied to individual citizens or things were not specifically forbidden to the legislature; and as a consequence, the legislators were free under the 1848 constitution to enact local or special laws whenever those laws were not inconsistent with the basic provisions of the bill of rights.[24] Special or private laws were passed in ever growing numbers. In *People v. Meech,* Justice Walker asserted in strong terms that such laws worked to the advantage of the few (presumably those who were best able to afford the expenses of getting private or special laws passed) and to the injury, both direct and indirect, of the majority.[25] It is only with some idea of the history of the legislative abuses of that era that the clear and detailed prohibitions of article IV, section 22 of the constitution of 1870 can be understood. Section 22 prohibits the legislature from enacting special or local laws upon twenty-two distinct subjects; and it then adds the provision that "[i]n all other cases where a general law can be made applicable, no special law shall be enacted."[26]

There is no doubt that under the Illinois constitution certain legislative classifications are valid.[27] Classification is a necessary legislative tool, and it is inconceivable that the framers of the 1870 Illinois constitution would not have recognized it as such.[28] What the courts at present describe as proper classification under the Illinois constitution is, however, different from what the earliest opinions of the supreme court appear to indicate; indeed, some of today's opinions are significantly different from those of less than two decades ago.[29] The earliest decisions under the 1870 constitution indicate that the rule followed by the courts was to the effect that any legislative classification that applied to members of a group, but not to members of other

[23] *See* People v. Mayor of Chicago, 51 Ill. 17 (1869); People v. City of Chicago, 51 Ill. 58 (1869); Marshall v. Silliman, 61 Ill. 218 (1871); Barnes v. Town of Lacon, 84 Ill. 461 (1877). The Illinois constitution of 1848 did restrict the powers of the legislature with regard to the passing of special laws concerning divorces, art. 3, §22, the organization of townships, art. 7, §6, and the formation of corporations, art. 10, §1. The 1848 constitution also provided that when private or local laws were enacted, the law had to embrace but one subject, and that subject had to be expressed in the title, art. 3, §23.

[24] *See* Kales, *Special Legislation as Defined in the Illinois Cases,* 1 ILL. L. REV. 63 (1906).

[25] 101 Ill. 200 (1882).

[26] ILL. CONST. art. IV, §22.

[27] *See* Casparis Stone Co. v. Industrial Bd., 278 Ill. 77, 115 N.E. 822 (1917); Claffy v. Chicago Dock & Canal Co., 249 Ill. 210, 94 N.E. 551 (1911).

[28] *See* I Debates Constitutional Convention 1869-1870, at 576-87, 591-608.

[29] The landmark cases as discussed in this paper are Grasse v. Dealer's Transp. Co., 412 Ill. 179, 106 N.E.2d 124 (1952) and Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 203 N.E.2d 573 (1964).

groups similarly situated, was not a local or special law if there were some rational basis for discriminating among the groups, and if the reasons for the discrimination were apparent on the face of the law.[30] The early courts read the provisions of section 22 with little latitude while later courts, whether dealing with classification by population or other means, refused to interpret the language of section 22 in a strictly literal manner.[31] Significantly, when discussing classification questions the Illinois Supreme Court strongly accentuated the usual proposition that one who attacks a statute's constitutionality bears the burden of

[30] Potwin v. Johnson, 108 Ill. 70 (1883), found valid a law applying only to municipal corporations formed either after 1870 or those existing prior to the adoption of the 1870 constitution which did not change their charter; People v. Hoffman, 116 Ill. 587, 5 N.E. 596 (1886), found an election law valid that applied to only two localities because of the possibility that other cities or towns might later fall under it. People v. Hazlewood, 116 Ill. 319, 6 N.E. 480 (1886), found valid a classification of towns based on potential increases in population; Kingsbury v. Sperry, 119 Ill. 279, 10 N.E. 8 (1887), implied that a law allowing an identical proceeding in a county court but not allowing it in a probate court would be special legislation. West Chicago Park Comm'n v. McMullen, 134 Ill. 170, 25 N.E. 676 (1890), found valid a law giving park commissioners certain powers in connection with governmental units while denying the powers to park districts not having commissioners. Cummings v. City of Chicago, 144 Ill. 563, 33 N.E. 854 (1893), allowed classification according to population for the purposes of the payment of special assessments; Trausch v. County of Cook, 147 Ill. 534, 35 N.E. 477 (1893), found exceptions for pre-existing institutions within a statute regulating the sale of liquors to be valid; People v. Board of Trustees, 170 Ill. 468, 48 N.E. 901 (1897) found invalid a law permitting incorporated areas with prohibitory clauses in their charters to be treated differently from others merely because the electors from the area desired such treatment. *See also* Kales, *Special Legislation as Defined in the Illinois Cases*, 1 ILL. L. REV. 63 (1906), in which he discusses thirty-two Illinois special legislation cases. He derives three legal propositions that he asserts are applicable to all of them. He states: "*First:* If there is a rational ground for legislating in behalf of the objects to which the Act applies and not for others of the same general sort, and if the rationale of the distinction is embodied in the Act's description of the objects themselves to which it applies, then the Act is not a 'local or special' law." *Id.* at 66-67. He continues: "*Second:* If there be no rational ground of distinction, in any view of the facts, upon which some objects are legislated for and others of the same general sort are not, the Act is a 'local or special' law." *Id.* at 70. Finally he states: "*Third:* Even if there be one or more rational grounds for legislating in behalf of the objects to which the Act applies and not for others of the same general sort, yet if no rational ground is embodied in the Act's description of the objects to which it applies then the Act is held to be 'local or special.' " *Id.* at 76.

[31] *See, e.g.*, People v. Deatherage, 401 Ill. 25, 81 N.E.2d 581 (1948), and People v. City of Springfield, 370 Ill. 541, 19 N.E.2d 598 (1939), which held valid laws that did not apply to all persons potentially capable of falling under them, but demanded only that the laws apply to those in "substantially" the same circumstances at any particular time. Laws are not local or special merely because they operate on a single class or locale if there is any reasonable basis for the classification, Hunt v. Rosenbaum Grain Corp., 355 Ill. 504, 189 N.E. 907 (1934). Population has been accepted as a reasonable and not arbitrary basis of classification whenever the law has recognized that the problems solved by statutory recognition are essentially soluble only by such classification: Giebelhausen v. Daley, 407 Ill. 25, 95 N.E.2d 84 (1950); Littell v. City of Peoria, 374 Ill. 344, 29 N.E.2d 533 (1940); Matthews v. City of Chicago, 342 Ill. 120, 174 N.E. 35 (1930); Hughes v. Traeger, 264 Ill. 612, 106 N.E. 431 (1914); People v. Grover, 258 Ill. 124, 101 N.E. 216 (1913), Douglas v. People, 225 Ill. 536, 80 N.E. 341 (1907).

proof.[32] The court demanded of those who attacked the constitutionality of a classification that they prove not only that it was arbitrary but that it was completely unreasonable.[33] It was stated that the basis of classification had to be both unreasonable and essentially arbitrary.[34] Just to obtain a judicial review, the classification had to be patently arbitrary.[35]

Recently, in *Begich v. Industrial Commission*,[36] Justice House in his dissenting opinion looked back to *Bagdonas v. Liberty Land & Investment Co.*,[37] for support. Adopting that court's language, Justice House reiterates that the Illinois Supreme Court has repeatedly declared that the General Assembly has wide latitude to classify:

> The Legislature is not required to be scientific, logical or consistent in its classifications. In order to authorize a judicial review of such classifications it must clearly appear that there is no fair reason for the law that would not require with equal force its extension to others not included. The Legislature may determine upon what differences a distinction may be made for the purpose of statutory classification, between provisions otherwise having resemblance, if such power is not arbitrarily exercised and the distinction has a reasonable basis.[38]

The thrust of the quotation adopted by Justice House in his dissenting opinion is essentially that of most of the classification cases in Illinois until 1952. The court focused its interest upon two elements: (1) how the legislature distinguished the classes created, and (2) the basis upon which the classification rested. In effect, Justice House was reasserting the traditional interpretation of section 22 as it was outlined by Professor Kales over sixty years ago.[39] A law is not a local or a special law if the classification is rational on its face: "[i]f there is a rational ground for legislating in behalf of the objects to which the Act applies . . . and if the rationale of the distinction is embodied in the Act's description of the objects themselves to which it applies," then the law is neither local nor special, and it will be upheld as constitutional.[40]

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[32] Stewart v. Brady, 300 Ill. 425, 133 N.E. 310 (1921); Bagdonas v. Liberty Land & Inv. Co., 309 Ill. 103, 140 N.E. 49 (1923); People v. Saltis, 328 Ill. 494, 160 N.E. 86 (1928).

[33] People v. Saltis, 328 Ill. 494, 160 N.E. 86 (1928).

[34] Bagdonas v. Liberty Land & Inv. Co., 309 Ill. 103, 140 N.E. 49 (1923); Stewart v. Brady, 300 Ill. 425, 133 N.E. 310 (1921).

[35] People v. Linde, 341 Ill. 269, 173 N.E. 361 (1930).

[36] 42 Ill. 2d 32, 245 N.E.2d 457 (1969).

[37] 309 Ill. 103, 140 N.E. 49 (1923).

[38] Begich v. Industrial Comm'n, 42 Ill. 2d 32, 37, 245 N.E.2d 457, 460 (1969).

[39] Kales, *Special Legislation as Defined in the Illinois Cases*, 1 ILL. L. REV. 63 (1906).

[40] *Id.* at 66-67.

There is little doubt that the language of Justice House in *Begich* is the traditional language of the Illinois Supreme Court on the question of what is a valid legislative classification under article IV, section 22 of the Illinois constitution. Nor is his discussion of that section unlike that of the early cases. His dissent speaks in terms of whether the exercise of power by the legislature was arbitrary and whether such distinctions as were drawn by the legislature were reasonable.[41] But so does the majority opinion. "Arbitrary" and "reasonable" apparently mean something different to the majority. An analysis of the important tort cases in which section 22 was involved indicates that the Illinois Supreme Court has developed a new functional definition for those words in certain limited areas.[42]

In 1952, the supreme court decided *Grasse v. Dealer's Transport Co.*,[43] and this case set the precedent for a shift in emphasis in the interpretation of section 22. In *Grasse* the plaintiff was an employee of Swift & Co., and during the course of his employment, he received personal injuries due to the negligence of an employee of the third-party defendant, Dealer's Transport Company. Both Mr. Grasse and the employee of the third-party defendant fell under the Illinois Workmen's Compensation Act, and the sole issue of *Grasse,* as presented on appeal, was whether section 29, paragraph 1, of the Act was constitutional.[44] The constitutional challenge was based, among other things, upon article IV, section 22. The wording of the Act in question was as follows:

> Where an injury or death for which compensation is payable by the employer under this Act was not proximately caused by the negligence of the employer or his employees, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this Act, or being bound thereby under section three (3) of this Act, then the right of the employee or personal representative to recover against such other person shall be transferred to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under this Act, by reason of the injury or death of such employee.[45]

The plaintiff contended that the statute created unreasonable classifications. He alleged that the paragraph in question divided injured employees into two classes. One class fell under

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[41] Begich v. Industrial Comm'n, 42 Ill. 2d 32, 245 N.E.2d 457 (1969).
[42] *See* text at note 3 *supra.*
[43] 412 Ill. 179, 106 N.E.2d 124 (1952), *cert. denied,* 344 U.S. 837 (1952).
[44] ILL. REV. STAT. ch. 48, §166 (1947).
[45] *Id.*

the Act and could not recover for its injuries by the apparently mere fortuitous circumstance of whether the wrongdoer also fell under the Act. Employees who did not fall under the Act would be allowed recovery. Additionally, the plaintiff argued that the Act also divided wrongdoers into two classes, those who were immune from suit and those who could be held liable. Thirdly, the plaintiff contended that employers were also divided into two classes, those who might be reimbursed for the losses sustained in the payment of compensation and those who would not be reimbursed.[46]

The question of whether the Act divided either wrongdoers or employers into two classes, although answered by the court, was not necessary to its decision. The decisive utterance applied only to the arbitrary classification that operated upon employees. A classification which by fortuitous circumstance works to deprive one party of his common law tort action while allowing another party to maintain such an action cannot be constitutional unless the classification is:

> [B]ased upon some real and substantial difference in kind, situation or circumstance in the persons or objects on which the classification rests, and which bears a rational relation to the evil to be remedied and the purpose to be attained by the statute.[47]

The defendant contended that there was no constitutional question concerning classification insofar as the only classification was the single one of persons who fell under the Act and those who did not. Consequently, since all of the employees that fell under the Act were to be treated similarly under similar circumstances, the classification was logical and a proper exercise of the state's police power. The court rejected the argument that similar treatment satisfies both the equal protection clause of the United States Constitution and article IV, section 22 of the Illinois constitution. Moreover, the court specifically stated that section 22 of article IV of the Illinois constitution shall be considered as supplemental to the equal protection provision of the United States Constitution.[48]

However, the defendant's argument concerning the equal protection clause certainly seems to have merit. The legislature has the power to bring some persons within the Workmen's Compensation Act and to exclude others. The question is whether or not a classification maintaining distinctions among employees is unreasonable. The classification here was not illogical; nor

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[46] Grasse v. Dealer's Transp. Co., 412 Ill. 179, 106 N.E.2d 124 (1952), *cert. denied*, 344 U.S. 837 (1952).

[47] *Id.* at 194, 106 N.E.2d at 132.

[48] *Id.* at 194, 106 N.E.2d at 132. The defendant later argued the question of whether any classes (except the one mentioned above) were created at all. See Motion of Appellee for Leave to file a Petition for Re-Hearing of the Court's Amended Decision of May 20, 1952.

was it patently arbitrary. The intention of the legislature is argued in *Grasse.* Nowhere does the court intimate that the legislature created a patently unreasonable or arbitrary classification among the groups it intended to classify. The opinion implies that it is the class *affected* by the legislation, not the one intentionally *created* by it, that is the source of the statute's unconstitutionality. The classification is the classification of those who were affected by the Act rather than those who the Act literally intended to classify.[49]

This interpretation of the significance of the *Grasse* case is supported by the court's later references to the reasoning of that opinion. In *Harvey v. Clyde Park District*[50] the court was presented with the question of whether the 1959 statute exempting park districts from tort liability was unconstitutional.[51] In its examination of the statute the court first turned to the standard test: "The determinative question under section 22 of article IV is whether the statutory classification is rational."[52] The court then went on to say that the fact that a statutory pattern is involved, rather than a single statute, will not bar a claim brought under the equal protection clause of the United States Constitution.[53] It is the next statement of the court, however, that both explains some of the reasoning implicit in *Grasse* and foreshadows the reasoning of several subsequent decisions:

> Nor is it significant that the quoted provision of section 22 of article IV has been held inapplicable to municipal corporations generally, and park districts in particular. *For more is involved here than just the classification of governmental units. Those persons who are injured by the negligence of particular governmental units are also classified,* and section 22 of article IV prohibits the granting of 'special or exclusive' privileges to individuals.[54]

The court then turns directly to *Grasse* for both its reasoning and precedent:

> The situation in this case is not unlike that which was before this court in *Grasse v. Dealer's Transport Co.* Section 29 of the Workmen's Compensation Act allowed a common law action by an employee who was injured by the negligence of a third party who was not bound by the act, but prohibited such an action by an employee who was injured by the negligence of a third party who was bound by the act. The distinction between the two types of defendants was held insufficient to afford a rational basis of classification from the point of view of the injured person. The court said: "All employees entitled to compensation for injuries sustained

[49] Grasse v. Dealer's Transp. Co., 412 Ill. 179, 106 N.E.2d 124 (1952), *cert. denied,* 344 U.S. 837 (1952). As authority the court cites Truax v. Corrigan, 257 U.S. 312 (1921).

[50] 32 Ill. 2d 60, 203 N.E.2d 573 (1964).

[51] ILL. REV. STAT. ch. 105, §12.1-1 (1963).

[52] Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 64, 203 N.E.2d 573, 575 (1964).

[53] *Id.* at 64-65, 203 N.E.2d at 575.

[54] *Id.* at 65, 203 N.E.2d at 576 (emphasis added).

in the course of their employment and caused by third persons are not treated alike. Those injured by third party tortfeasors bound by the act are not entitled to common-law damages from such persons, whereas those injured by third party tortfeasors not bound by the act are allowed to institute actions for damages. Both classes of injured employees may be entitled to compensation from their own employers, so that the amount of compensation, if any, received by the injured employee is not the basis for differentiation between the classes. Nor is there any basis for differentiation from the nature of the injuries sustained, or from the activity of the employee at the time of the injury, or from any other factor ordinarily related to an injured party's right to recover damages. The sole basis for differentiation, as far as the injured employee is concerned, is a fortuitous circumstance — whether the third party tort-feasor [*sic*] happens to be under the act."[55]

So far as the court in *Harvey* is concerned, the reasoning implicit in *Grasse* is fully applicable. The *Harvey* court fully explains itself. The court hypothesizes the following situation. If a child were to be injured on a slide negligently maintained by a school district, or by the state, some limited recovery might be had against the defendant. On the other hand, if a child, even the same child, had been injured on a slide negligently maintained by a forest preserve district, or, as was the case in *Harvey*, a park district, no recovery might be had from the defendant. The classification of the governmental units by the legislature is not on its face unreasonable. But the potential operation of that classification may lead to an unreasonable result. The court states that a classification which allows the same child injured in the same way through the same negligence to recover in some situations but not in others bears "no discernible relationship to the realities of life."[56] Therefore, the statute relied upon by the defendant "is arbitrary, and unconstitutionally discriminates against the plaintiff."[57] The language of the court may be the same as that of the early constitutional decisions, but *arbitrary* is being applied here not to the classifications intentionally created by the statute, but to the unintended classifications that came into being as a result of the operation of the statute.

Just what the court meant when it spoke of a "discernible relationship to the realities of life" is not clear. It might appear at first that the court was setting up a vague test that could only be used on an ad hoc basis. However, the final paragraph of the opinion refers directly and clearly to the test that the court has adopted. The court denies that it is undermining all and every type of class legislation upon municipal tort liability; and it suggests a way in which valid classification might be made:

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[55] *Id.* at 65-66, 203 N.E.2d at 576.
[56] *Id.* at 67, 203 N.E.2d at 577.
[57] *Id.*

> From this decision it does not follow that no valid classifications for purposes of municipal tort liability are possible. On the contrary it is feasible, and it may be thought desirable, to classify in terms of types of municipal function, instead of classifying among different governmental agencies that perform the same function.[58]

A valid classification (at least as regards the immunity of governmental units from tort liability) is one that classifies by function. Function, consequently, becomes the outer boundary of class. There can be no reasonable classification where the function of that which is classified differs from the purpose for which it was classified. Thus while the classification of governmental units that perform a certain function is on its face reasonable, the classification of governmental units as such (*i.e.*, without regard to their function, but only with regard to the fact that they are governmental units) is not reasonable. The ruling of the court in *Harvey* becomes clearer in the light of more recent decisions.

In *Lorton v. Brown County Community Unit School District*[59] the plaintiff offered an argument similar to that of the plaintiff in *Harvey*. Emma Lorton, a private kindergarten teacher, received personal injuries due to the alleged negligence of the defendants in maintaining the school premises. The plaintiff, however, had not filed her notice of injury within the six months required under the pertinent Illinois statute.[60] Failure to file such notice operated as a bar under the statute. Plaintiff argued that the statute violated section 22 of article IV. The court adopted *Harvey*:

> We believe the rationale of *Harvey* is controlling here, for if plaintiff's injury had occurred upon the property of a county, township, or drainage district, her cause of action would not have been barred by failure to file written notice within six months of the injury. If, however, the injury had occurred upon the property of a city or village, public or private school, as was actually the case, or the Metropolitan Transit Authority, the failure to file written notice within 6 months from the date of injury would wholly bar her from recovery. As in *Harvey*, there is in this pattern "no discernible relationship to the realities of life."[61]

If the court here is actually accepting the reasoning of *Harvey*, analysis of the case might be made as follows. The legislature created a classification of school districts and nonprofit private schools. The classification may have been based on reasonable differences between such groups and other groups of like kind. There is nothing patently arbitrary in legislation which distin-

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[58] *Id.*

[59] 35 Ill. 2d 362, 220 N.E.2d 161 (1966).

[60] ILL. REV. STAT. ch. 122, §§823-24 (1963).

[61] Lorton v. Brown County Community Unit School Dist., 35 Ill. 2d 362, 365-66, 220 N.E.2d 161, 163 (1966).

guishes these groups from others for various purposes. But the question here was whether the classification for the purpose of providing certain procedural steps that must be taken in originating law suits against the schools was reasonable. One test of reasonableness is whether the classification operates in different ways upon persons similarly situated. The court looks to see if the setting up of one class produces, in effect, other classes among persons similarly situated. Insofar as this latter classification differentiates among persons who are similarly situated (and in no way rationally distinguishable), it is both arbitrary and unreasonable.

> "The courts of this State must be open to all those similarly situated upon the same conditions, and where procedures are provided which are applicable to some and not applicable to others under substantially like circumstances and there are no discernible logical reasons apparent for the variations, they must fall as violative of section 22 of article IV of the Illinois constitution."[62]

The court is holding that where the function of that which is classified (in this case education is the function of that which is classified) differs from the purpose for which it was classified (here to set procedural limitations in legal actions), the classification cannot be valid under section 22. The test to find if there is an inconsistency between the purpose of the classification and that which is actually classified is whether the original legislative classification (public and non-profit schools) creates, through its operation on persons similarly situated, a second classification that on its face would be unreasonable. In *Lorton* the court could find no rational distinction between those who were injured on the property of a governmental unit devoted to educational purposes and those who were injured in an identical manner on the property of a governmental unit devoted to sanitation.[63]

Treece v. Shawnee Community Unit School District[64] exemplifies two contrasting ways that the Illinois Supreme Court has treated the application of section 22. In an action arising from a fatal accident in a physical education class, the defendant school district asked leave to file a third party counterclaim against the physical education teacher. The trial court refused the motion, citing section 10-21.6 of the School Code.[65] The trial court concluded that since the teacher would be entitled to indemnification by the school district for any loss resulting from the plaintiff's suit, no action by the district for damages against the teacher could be sustained. The defendant school district ap-

[62] *Id.* at 366, 220 N.E.2d at 163.
[63] *Id.* at 365-66, 220 N.E.2d at 163.
[64] 39 Ill. 2d 136, 233 N.E.2d 549 (1968).
[65] ILL. REV. STAT. ch. 122, §10-21.6 (1965).

pealed alleging that section 10-21.6 of the School Code was in violation of section 22 insofar as it may grant "a special or exclusive privilege" to employees of a school district having a population of less than 500,000.[66] The court ruled that although different sized school districts may carry the burdens of different duties (*i.e.*, to indemnify employees of the district when the population is less than 500,000 and to insure them when the population exceeds 500,000), the general intent and effect of section 10-21.6 was within constitutional bounds.

> We reject the argument that this difference between the duties imposed on school boards, *i.e.*, to indemnify in one case and to insure in the other, based on population, violates section 22 of article IV of the constitution. In *Latham v. Board of Education* we said at page 182 that: "The controlling rule is well established that: 'Classification on the basis of population is not objectionable where there is reasonable basis therefore in view of the object and purpose to be accomplished by the legislation and such an act is not local or special merely because it operates in only one place, if that is where the conditions necessary to its operation exist.' "[67]

The defendant school district based its argument on *Harvey*, quoting the court's statement that "there is no discernible relationship to the realities of life" in legislation that allowed different recoveries to similarly situated plaintiffs. The *Treece* court, in considering the school district's argument, said that in *Harvey* the court was striking down legislation that created a contradicting pattern of immunity and liability among similar governmen-

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[66] Under section 10-21.6 a school board has the duty:
To indemnify and protect school districts, members of boards of education, employees, and student teachers against death and bodily injury and property damage claims and suits, including defense thereof, when damages are sought for negligent or wrongful acts alleged to have been committed in the scope of employment or under the direction of the board of education. No agent may be afforded indemnification or protection unless he is a member of a board of education, an employee of a board of education or a student teacher.
Prior to amendment in 1965, section 10-21.6 was worked exactly as section 34-18.1 of the School Code, which applies to school districts with a population of over 500,000. Section 34-18.1 reads:

> The board of education shall insure any member of the board or any agent, employee, teacher, officer or member of the supervisory staff of the school district against financial loss and expense, including reasonable legal fees and costs arising out of any claim, demand, suit, or judgment by reason of alleged negligence or alleged wrongful act resulting in death or bodily injury to any person or accidental damage to or destruction of property, within or without the school premises, provided such board member, agent, employee, teacher, officer or member of the supervisory staff, at the time of the occurrence resulting in such death, bodily injury, or damage to or destruction of property was acting under the direction of the board within the course or scope of his duties.

In 1965 section 10-21.6 was revised so that it no longer imposed a duty on a board to insure school officers, agents, and employees against financial loss but does impose a duty to indemnify them. Section 34-18.1 retained the duty to insure in a school district with a population of over 500,000.

[67] Treece v. Shawnee Community Unit School Dist., 39 Ill. 2d 136, 141, 233 N.E.2d 549, 552 (1968).

tal entities, whereas in the case at hand a legislative requirement that school districts with a population of over 500,000 cover employees through insurance cannot be said to be arbitrary and unreasonable. The court referred to its opinion in *Gaca v. City of Chicago:*[68]

> The question of classification . . . is dictinctly within the province of the legislature, and this has never been a judicial question except for the purpose of ascertaining whether the legislative action is clearly unreasonable.[69]

In further support it turned to *Du Bois v. Gibbons,*[70] in which the court had declared that:

> [A] legislative classification based upon population will be sustained where founded on a rational difference of situation or condition existing in the persons or objects upon which it rests and there is a reasonable basis for the classification in view of the objects and purposes to be accomplished.[71]

On the face of the argument, *Treece* seems to have reverted to earlier interpretations of article IV, section 22. But the court was merely distinguishing cases of classification by governmental unit from those of classification by population. Both apparent reasons for the court's action are inadequate, however, to explain the court's assertion at the end of the opinion that the recovery limitation of the current school code would be stricken as unconstitutional if that question were to be presented:

> We deem that the challenge by the defendant Bridewell to the constitutionality of section 825A of the School Code which limits the recovery in each separate cause of action against a public school district to $10,000 is well founded. While this court has not specifically ruled on the validity of the restricting statute in question, our attitude toward arbitrarily formulated and restricting statutes of this type has been made clear by our expressions in *Lorton v. Brown County Community Unit School District* and *Harvey v. Clyde Park District.*[72]

Implicit in the court's reasoning is the concept that classifications of governmental units by population are generally constitutional because the classification only affects the groups themselves. And all members of the groups are similarly situated. No secondary classification of persons occurs as the proximate result of the first classification. Additionally, there is no problem as to the function of that which is classified since there can be no conflict between the purpose of the classification and the function of the groups classified. Consequently, the tests of the earliest cases under section 22 are applicable. On the other hand, to the extent that section 825A of the School Code

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[68] 411 Ill. 146, 103 N.E.2d 617 (1952).
[69] *Id.* at 154, 103 N.E.2d at 622.
[70] 2 Ill. 2d 392, 118 N.E.2d 295 (1954).
[71] *Id.* at 399, 118 N.E.2d at 300 (1954).
[72] Treece v. Shawnee Community Unit School Dist., 39 Ill. 2d 136, 145-46, 233 N.E.2d 549, 554 (1968).

created a classification that in turn would operate to effect another classification among individuals similarly situated, the court found a violation of section 22.[73]

It was only a matter of months after *Treece* that the court declared unconstitutional another section of the School Code. In *Haymes v. Catholic Bishop of Chicago*[74] the plaintiff was injured due to the negligence of a nonprofit private school. After receiving $10,000 damages (the maximum then allowable under the code)[75] in a jury trial, the plaintiff appealed, asserting the unconstitutionality of the damage limitation. The court decided in his favor. The court gave a summary of recent applications of section 22. Speaking of the challenged section 825B the court said:

> That provision is part of the comprehensive School Tort Liability Act designed, as set forth in section 821, to protect public and nonprofit private schools conducted by *bona fide* eleemosynary and religious institutions from excessive diversion of their funds from their educational functions. The School Tort Liability Act of 1959 was one of numerous statutes enacted within two months after the decision of this court in *Molitor v. Kaneland Community Unit Dist.*, was announced on May 21, 1959, and before the rehearing and final decision in that case on December 16, 1959. In *Molitor* the court abolished prospectively the tort immunity of school districts, and rejected as "unjust and unsupported by reason" the vestigial concept of government tort immunity. The legislature modified the *Molitor* decision by enacting that series of laws granting absolute immunity to some units of government and limited the liability of others. Some of those statutes have been held unconstitutional in violation of section 22 of article IV of the Illinois constitution insofar as they created an arbitrary and irrational pattern for imposing tort liability on governmental units. *Harvey v. Clyde Park Dist., Hutchings v. Kraject, Lorton v. Brown County Community Unit School Dist.*
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> The constitutionality of the School Tort Liability Act itself was first considered in *Lorton v. Brown County Community Unit School Dist.*, where the notice requirements (Ill. Rev. Stat. 1959, chap. 122, par. 823) were deemed to violate section 22 of article IV of the Illinois constitution. The court enunciated the guidelines for resolving the constitutional question at p. 366: "The courts of this State must be open to all those similarly situated upon the same conditions, and where procedures are provided which are applicable to some and not applicable to others under substantially like circumstances and there are no discernible logical reasons apparent for the variations, they must fall as violative of section 22 of article IV of the Illinois constitution."[76]

A more recent case, *Begich v. Industrial Commission*,[77]

[73] *Id.* at 145-46, 233 N.E.2d at 554.
[74] 41 Ill. 2d 336, 243 N.E.2d 203 (1968).
[75] ILL. REV. STAT. ch. 122, §825B (1959).
[76] 41 Ill. 2d 336, 342-44, 243 N.E.2d 203, 206-07 (1968).
[77] 42 Ill. 2d 32, 245 N.E.2d 457 (1969).

adopts the reasoning of *Grasse, Harvey,* and *Treece.* The question presented to the court was whether the provision in section 8(e)9 of the Workmen's Compensation Act[78] that limits recovery to compensation for the loss of a hand, though part of the forearm has been removed for the purpose of permitting the use of an artificial member, is constitutional. The court accepted the plaintiff's argument that the legislature cannot constitutionally provide that an injured employee's measure of recovery should be determined by the point of injurious impact rather than the actual extent of injury. The plaintiff had argued that employees were receiving different recoveries for essentially similar injuries.[79] The legislature had created a classification of recovery based on impact of injury, but that classification had operated to create other classes among persons similarly situated:

> Here, the classification of employees such as the appellant is based on the situs of the trauma without regard to the final disability or loss incurred as a result of the employment injury. We cannot find a reasonable basis for differentiating between the appellant's class and those who lost the use of an arm solely through trauma. The attempted classification is unrealistic or, as we put it in *Harvey,* does not bear any "discernible relationship to the realities of life."[80]

In *Begich* the legislative classification was not of persons but of the loss which persons suffer. The legislature had classified recovery and the impact of injury. But the court said that such classification affected "the final disability or loss" of individuals who had been similarly injured. *Begich* is a logical extension of *Grasse, Harvey, Lorton,* and *Treece.*

Another recent case, *Sweney Gasoline & Oil Co. v. Toledo, Peoria & Western Railroad Co.*[81] indicates the extent to which the court has utilized this type of reasoning. The plaintiff oil company had leased property from the defendant railroad adjacent to the railroad tracks. A train operated by the defendant derailed, and property of the plaintiff was damaged. The lease between the parties contained an exculpatory clause providing that the lessee should hold the railroad harmless for losses arising through the negligence of the railroad. The trial court held that the exculpatory clause barred the plaintiff from recovering. It looked to a 1959 statute which voided certain exculpatory clauses in leases, but which excepted, *inter alia,* corporations regulated by a state or federal commission or agency.[82] The plaintiff urged that the statute be held unconstitutional insofar as it made a

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[78] ILL. REV. STAT. ch. 48, §138.8(e)9 (1967).
[79] 42 Ill. 2d 32, 245 N.E.2d 457 (1969).
[80] *Id.* at 37, 245 N.E.2d at 459.
[81] 42 Ill. 2d 265, 247 N.E.2d 603 (1969).
[82] ILL. REV. STAT. ch. 80, §15(a) (1967).

discriminatory classification without reasonable basis. The court, without even entertaining in its opinion the arguments of the defendant on this point, held that the statute violated section 22.

> We see no reasonable basis for exempting municipal corporations, governmental units or corporations regulated by a state or federal commission from the provisions of this statute. The statute in effect grants immunity to these governmental units and regulated corporations in an unconstitutional manner and is therefore void.[83]

But why should it be void under section 22? Certainly, on its face the distinction drawn by the legislature is not unreasonable. Nor is it patently arbitrary. It is not a necessary deduction that the distinction between corporations regulated by a state or federal commission or agency and corporations not so regulated is irrational. But the court was not interested in whether the distinction was rational. It demanded that the statute affirmatively state a reasonable basis for the immunity,[84] thereby asserting by implication that the rationale of the distinction was not embodied in the act's description of the objects to which the act applied.[85] If, as it appears, the distinction is not irrational on its face, the court must be requiring that the legislature do precisely that which Justice House (dissenting in *Begich*) argued the legislature has no constitutional need to do.[86] Additionally, if the basis that the legislature had written into the statute did not classify by function, the basis might not be reasonable under *Harvey*.[87]

CONCLUSION

There are two closely related tests that can be used in evaluating a statute under article IV, section 22. The court will ask if the classification created by the legislature, even though not arbitrary or irrational on its face, operates to effect a secondary classification among persons who are similarly situated. If it does, the classification will be said to have created a privilege or immunity that is constitutionally forbidden. In addition, the court will look to the statute to see if the class legislated for is one that is defined functionally. If it is, then the statute may be valid; but if it is not, and if the court finds none of the other permissible ways of defining the class for the purposes of classification, then the classification will be said to have created a privilege or immunity that is constitutionally forbidden. At least these rules hold true for the purposes of statutes that limit plaintiffs in respect to (1) access to courts, (2) remedies available, and (3) monetary damages. Apparently, classifications by popu-

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[83] 42 Ill. 2d 265, 267, 247 N.E.2d 603, 605 (1969).

[84] *Id.* at 266-67, 247 N.E.2d at 604-05.

[85] This is precisely the demand outlined in Kales' first rule; see note 30 *supra*.

[86] Begich v. Industrial Comm'n, 42 Ill. 2d 32, 245 N.E.2d 457 (1969).

[87] Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 203 N.E.2d 573 (1964).

lation are subject to these rules; although it is not clear what effect the *Treece* ruling against the defendant school board has on the argument that a statute that classifies by population has a discernible enough relationship to the realities of life that it may not be challenged as essentially irrational and patently arbitrary on that ground alone.

It is not difficult to predict the types of statutes that will be attacked under the case law that has developed in tort cases from *Grasse* through *Treece.* Notice provisions in general may be subject to attack. The provision, for example, that the Chicago Transit Authority be exempt from actions for personal injuries where there has been no notice is typical of the type of statute that may be attacked. It can be expected that the plaintiff would argue that there is no essential difference in situation between a class of persons injured in an accident with a vehicle of the Chicago Transit Authority and a vehicle of any other owner. The argument would follow *Harvey* and assert, for example, that a pedestrian injured by a bus of the *ABC* Transit Corporation who gives no notice of an accident within a six month period to that corporation is treated differently from a pedestrian injured in precisely the same manner by a bus of the Chicago Transit Authority. If he gave no notice within the statutory period, he is barred. The only difference, as far as the plaintiff is concerned, is that in the second instance he was unlucky enough to have been injured by the wrong legal entity.

Similarly, statutes such as the guest act may be vulnerable to attack under *Harvey.* It is generally conceded that an auto guest could recover at common law where the action was based on the ordinary negligence of the driver.[88] The statute precludes recovery for such ordinary negligence.[89] The argument for allowing recovery for ordinary negligence under section 22 would certainly speak in terms of a comparison between a person injured in an auto and one injured in a boat. Under the statute, the auto guest must prove more than ordinary negligence. The guest in a boat, other elements being assumed equal, must prove only ordinary negligence. The question arising under *Harvey* and the subsequent cases would be whether there exists a rational difference of condition or situation in the persons or objects upon which the classification rests.[90] If the legislative classification is based on function, there will probably be no problem in upholding it, especially in the light of the strong public policy in favor of the statute. But if the original legislative classification

[88] Summers v. Summers, 40 Ill. 2d 338, 239 N.E.2d 795 (1968); Reed v. Zellers, 273 Ill. App. 18 (1933).
[89] ILL. REV. STAT. ch. 95½, §9-201 (1967).
[90] Begich v. Industrial Comm'n, 42 Ill. 2d 32, 245 N.E.2d 457 (1969).

operates in such a way as to create a secondary classification upon persons or objects similarly situated, the court may find it unconstitutional.[91]

Another area of possible attack upon a classification arises in connection with the Illinois Wrongful Death Act. The Act does not provide for punitive damages. Early case law provided the rule that where the statute was the creature of the legislature, and the legislature saw fit to provide only for certain types of compensation to the plaintiff, the plaintiff's remedy had to be confined to those remedies.[92] As a consequence of the conjunction of the Act and the case law, the anomalous situation exists that where a party is injured through the willful, wanton, and reckless conduct of a defendant and manages to survive his injuries, he may collect punitive damages; but where the defendant manages to kill by way of his recklessness, the defendant need not worry about paying punitive damages to, for example, a surviving spouse or children of the deceased. It is anticipated that an action will eventually reach the supreme court on this question; and the plaintiff will probably argue that the rule creates arbitrary classifications of both the defendant and the plaintiffs in violation of section 22, and the equal protection clause of the United States Constitution.[93]

Another interesting possibility of the application of section 22 has recently been raised.[94] The decisions of the Illinois Supreme Court in *Molitor v. Kaneland Community Unit District,*[95] *Harvey, Hutchings, Lorton,* and *Treece* have effectively abolished the immunity from tort liability of all of Illinois' governmental units except the state itself. The State of Illinois cannot be sued under its constitution.[96] In none of the cases in which the Illinois Supreme Court decided that the governmental unit under attack could be sued did that court have to discuss the immunity of

[91] This is the form of the argument taken in at least one case: see Brief for Appellant at 11-20, Delany v. Bedame, No. 41616 (Ill. Sup. Ct., filed May 1, 1969).

[92] Conant v. Griffin, 48 Ill. 410 (1868).

[93] *See, e.g.,* Plaintiff's Supplemental Memorandum of Law in Opposition to Defendant, Sky Climber Division, Western Gear Corporation's Motion to Strike that Count of Plaintiff's Complaint Seeking Recovery of Punitive Damages in Addition to Recovery under the Illinois Wrongful Death Act, Jackson v. Aetna Life & Casualty Co., No. 67 L 18281 (Cir. Ct., Cook County, 1969).

[94] *See,* Brief for Appellant, Edelen v. State of Illinois, No. 41457 (Ill. Sup. Ct., filed November, 1968), and the answering Brief for Appellee. The plaintiff appellant argues that the equal protection clause of the United States Constitution, when read in conjunction with article IV, section 22 of the Illinois constitution and the case law from *Grasse* through *Treece* effectively destroys the sovereign immunity of the state despite the Illinois constitutional prohibition of suits or actions in equity or law against the state.

[95] 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied,* 362 U.S. 968 (1960).

[96] ILL. CONST. art. IV, §26.

the state itself. But the discussions of the court in those cases, and especially in *Molitor*, of the whole question of sovereign immunity indicates that the concept is repugnant to the court. The Illinois Supreme Court in *Molitor* adopted the language of *Barker v. City of Santa Fe.*[97] The court said:

> The whole doctrine of governmental immunity from liability for tort rests upon a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, 'the King can do no wrong,' should exempt the various branches of government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.[98]

The plaintiff would argue that the constitutional prohibition against suits against the state is a form of classification similar to those struck down under *Harvey*. The plaintiff's argument would rest partly on the two tests for whether a classification is valid: (1) does the classification operate to effect a secondary classification of persons that in itself would be unreasonable, or (2) does the classification classify by function. The contention would be that the distinction between the state as a class and all other entities could lead to situations outlined in *Harvey* wherein persons similarly situated would be granted or denied relief on the sole basis of the class of the defendant.[99] Additionally, they would argue that the classification of the state as immune while other entities have no such immunity has no relationship to the function of that which is classified. Were there no constitutional prohibition in Illinois against a suit against the state, the result of such a case might be in keeping with the decisions of *Molitor* through *Treece*. The problems inherent in the constitutional prohibition, however, cannot be overcome without resort to the United States Constitution. Such questions as arise under the due process and equal protection clauses of the United States Constitution are outside of the scope of this paper. It should be recognized, however, that the Illinois Supreme Court has by way of dictum said that the classifications that it struck down were repugnant to both the Illinois and United States Constitutions.[100]

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[97] 47 N.M. 85, 136 P.2d 480 (1943).

[98] Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 21, 163 N.E.2d 89, 94 (1959), *cert. denied*, 362 U.S. 968 (1960).

[99] Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 65-66, 203 N.E.2d 573, 576 (1964).

[100] Grasse v. Dealer's Transp. Co., 412 Ill. 179, 200, 106 N.E.2d 124, 135 (1952), *cert. denied*, 344 U.S. 837 (1952).