

WISCONSIN STATE
LEGISLATURE
COMMITTEE HEARING
RECORDS

2005-06

(session year)

Assembly

(Assembly, Senate or Joint)

Committee on
Insurance
(AC-In)

(Form Updated: 11/20/2008)

COMMITTEE NOTICES ...

➤ Committee Reports ... CR
**

➤ Executive Sessions ... ES
**

➤ Public Hearings ... PH
**

➤ Record of Comm. Proceedings ... RCP
**

**INFORMATION COLLECTED BY COMMITTEE
FOR AND AGAINST PROPOSAL ...**

➤ Appointments ... Appt
**

Name:

➤ Clearinghouse Rules ... CRule
**

➤ Hearing Records ... HR (bills and resolutions)
**

➤ Miscellaneous ... Misc

05hr_AC-In_Misc_pt62b

(2005 documents)

when a law classifying individuals on the basis of physical condition was attacked, the proponent of the legislation must show that the law did not arbitrarily discriminate by demonstrating that the legislative classification substantially furthered a legitimate objective. The state constitution called for more than minimal scrutiny of such a classification, the court asserted, explaining that one class created by the statute was a group of malpractice victims who had suffered damage which could be fully compensated by an award within the statutory limitation, and the other, those victims whose damages would require more than the limit in compensation. Catastrophically injured persons such as the malpractice plaintiff in the case were physically handicapped and disadvantaged by the statutory classification at least as much as those persons whom the legislature intended to protect in drafting the constitution, the court concluded, and therefore the state or the LSU Board was obliged to show that there was a good reason for the statutory classification and that it substantially furthered a legitimate state purpose. [FN31]

See Beaucoudray v Brumfield (1994, La) 633 So 2d 1210, reh den (La) 635 So 2d 247, § 42.

In LaMark v NME Hosp., Inc. (1989, La App 4th Cir) 542 So 2d 753, cert den (La) 551 So 2d 1334, the court rejected a malpractice plaintiff's argument that the statutory cap on all damages recoverable in malpractice actions except medical and related expenses violated equal protection of the laws under the Louisiana Constitution, because it created classes of malpractice claimants which were treated differently based on the number of claimants per act of malpractice and on the proportion of the total award attributable to each claimant. The malpractice plaintiffs included the husband of the patient, on his own behalf, on behalf of his three minor children, and as curator of his injured wife, and an adult son on his own behalf. It was stipulated by the parties that the plaintiffs' damages would exceed the statutory limitation if it were not applied, exclusive of interest, costs, and medical expenses. The plaintiffs argued that the malpractice victim who was the sole claimant in a suit and whose damages exceeded the statutory limit recovered the full limit, while a malpractice victim with damages exceeding the limit, whose claim is joined with the claims of five family members, all based on the same act of malpractice, recovered substantially less after the statutory amount was apportioned among the claimants. The court said it was incumbent on the plaintiffs to show that the legislation did not suitably further any appropriate state interest, since the statute did not create a classification which would require complete repudiation under the constitution, or which would shift the burden to the compensation fund to demonstrate that it substantially furthered a legitimate state interest. The plaintiffs were mistaken that the purpose behind the statutory limitation was to assure full recovery for malpractice victims whose damages were less than the statutory cap, while assuring recovery of at least that amount for those whose damages exceeded it, observed the court, and in arguing that the limitation frustrated that interest. The purpose of the legislation was to insure the availability and affordability of medical care for the citizens of the state, the court asserted, and it was reasonable that the damages cap could substantially further that interest. With the statutory limit applicable, the amount of the surcharge medical providers pay to the compensation fund would be calculated on a known risk, said the court, and the legislature could believe that the stabilized rates would retard increases in costs of medical care.

In Owen v United States (1991, CA5 Tex) 935 F2d 734, reh, en banc, den (CA5) 1991 US App LEXIS 21322 and cert den (US) 116 L Ed 2d 775, 112 S Ct 870, the court, interpreting Louisiana law, held that the statutory limitation on damages recoverable against a medical malpractice defendant, exclusive of medical and related expenses, was constitutional under the equal protection clause of the Louisiana Constitution, LSA-Const. Art. 1, §§ 2 and 3. Noting that up to that time the Louisiana Supreme Court had confronted but never fully decided the validity of the cap under the state constitution, [FN32] the court relied on Williams v Kushner (1988, La App 4th Cir) 524 So 2d 191, amd (La) 549 So 2d 294, in which the court concluded that the cap was valid under the state's equal protection clause and access to the courts clause, although the Supreme

Court later decided on appeal [FN33] that the issue of the cap as applied against the health care provider was not properly before it because the attending physician settled with the plaintiff before trial for less than the statutory limit.

[b] Validity not upheld

A statute limiting the recovery of damages by a malpractice plaintiff, except for medical care and related expenses, violated the right to equal protection of the laws, the courts held in the following cases.

In Waggoner v Gibson (1986, ND Tex) 647 F Supp 1102, the court also failed to sustain the validity of the Texas statute limiting damages in medical malpractice actions, exclusive of medical and related expenses, against an equal protection challenge, stating that it violated both the Texas and Federal Constitutions. Applying a rational relationship test, the court found that limiting the recovery of the most deserving victims of medical malpractice was not a legitimate state interest, and furthermore, deprived them of due process of law. Even if a medical malpractice insurance crisis existed, continued the court, constitutional protections were not suspended in time of even legitimate crises, and concern for market conditions in the insurance and medical industries could not be allowed to overrun the rights of the seriously injured.

In Baptist Hospital of Southeast Texas, Inc. v Baber (1984, Tex App Beaumont) 672 SW2d 296, writ ref n r e (Tex) 714 SW2d 310, reh'g of writ of error overr (Sep 10, 1986), the court held that the trial court was correct in refusing to limit the damages of the plaintiffs in a medical malpractice action [FN34] declaring that Tex. Rev. Civ. Stat. art. 4590i, § 11.02 (Vernon Supp. 1984), which limited damages to a certain amount exclusive of expenses of necessary medical and related care, was unconstitutional under the equal protection clause, apparently of the Federal Constitution. [FN35] The finding of the legislature that there was a medical malpractice insurance crisis in the state had been quite forcefully challenged by some legal scholars, observed the court. In cases not involving a fundamental right or suspect classification, the court continued, a restrained standard of review was applied, usually referred to as the rational basis test. Many courts considering the constitutionality of statutes imposing disabilities on certain classes of tort victims have relied on the presence or absence of a quid pro quo to the disadvantaged class as a factor in their determination, said the court. Although this has not been established by the Supreme Court of the United States as a constitutional doctrine, when a true quid pro quo exists, it strengthens the statute's constitutionality, the court observed. The limitation of recovery did not provide adequate compensation to patients with meritorious claims, the court decided, and did nothing toward the elimination of nonmeritorious claims. The court limited its holding to hospitals, the only defendant in the action, declining to consider the statute as it related to other categories of medical providers, since one or more of them might in the future present a stronger case.

Citing Baptist Hospital of Southeast Texas, Inc. v Baber (1984, Tex App Beaumont) 672 SW2d 296, writ ref n r e (Tex) 714 SW2d 310, reh'g of writ of error overr (Sep 10, 1986) (this subsection), the court in Malone & Hyde, Inc. v Hobrecht (1985, Tex App San Antonio) 685 SW2d 739, set aside, remanded (Oct 9, 1985), held that a state statute limiting the damages recoverable in a medical malpractice action, except for medical care and related expenses, was not applicable to a corporation operating a pharmacy, even if it qualified as a health care provider under the act, because the limitation was unconstitutional. Appeal was taken from a judgment entered in a wrongful death and survivor's action brought by the estate of the deceased patient, [FN36] his wife, and three adult children against a pharmacy for the alleged malpractice of its employee in misfilling a prescription for syringes. The trial court had refused to reduce the verdict under the statute, Tex. Rev. Civ. Stat. Ann. art. 4590i, and the court observed that the suit had never purported to be a health care liability claim subject to the act, and the defendant had not filed special exceptions to the plaintiffs' wrongful death pleadings, or insisted on compliance with a prerequisite for the filing of such a claim under the

malpractice reform statute. Declining to decide whether the claim for limitation of damages was waived in the absence of an affirmative pleading invoking the limitation, nor to decide whether the pharmacy fell within the category of a health care provider so as to be entitled to the status afforded by the act, the court said it agreed that the limitation of recovery did not provide adequate compensation to patients with meritorious claims and indeed accomplished the opposite result for the most seriously injured claimants, without eliminating nonmeritorious claims. Accord, Detar Hospital, Inc. v Estrada (1985, Tex App Corpus Christi) 694 SW2d 359, in which the malpractice plaintiff challenged the validity of the Texas statute under the equal protection clauses of both the federal and state constitutions, and the court declared them unconstitutional under both provisions. Stating that the determination was whether the purpose of the statute justified the restriction on the plaintiff's constitutionally guaranteed right to obtain full redress for injuries caused by another's wrongful conduct, the court said there had not been a showing of sufficient societal quid pro quo to justify the limitation on liability imposed by the statute as applied to seriously injured medical negligence victims such as the plaintiff.

§ 11. --As applied to wrongful death actions

The court held in the following case that a statute limiting the damages recoverable in an action based on medical malpractice, except for medical and related expenses, did not violate the equal protection clause as applied to wrongful death actions. A statutory limitation of all damages except future medical expenses in medical malpractice wrongful death actions did not violate the equal protection clause of either the federal or state constitution, the court held in Rose v Doctors Hosp. (1990, Tex) 801 SW2d 841, reh'g of cause overr (Jan 23, 1991). After holding that a limitation on wrongful death damages did not violate the Texas open courts provision, [FN37] although as applied to common-law medical malpractice claims, the court had previously found a violation, [FN38] the court said that an equal protection analysis under both the state and federal constitutions dictated that when the classification created by a state statute did not infringe upon fundamental rights or burden an inherently suspect class, equal protection required only that the statutory classification be rationally related to a legitimate state interest. No fundamental rights or suspect classes were involved, the court continued, and the restriction on the class of beneficiaries under the wrongful death statute reflected the state's interest in insuring compensation for only those persons who normally have had the closest relationship to the deceased and who suffer the most from his death. The restrictive terms of that statute, therefore, relate rationally to an interest of the state and do not violate equal protection, said the court. The Medical Liability Act expressed the interest of the state in reducing excessive health care liability claims, decreasing the cost of those claims, making insurance available at reasonably affordable rates to health care providers, and making affordable health care accessible and available to the public, the court observed, and the damage limitation provisions by which the legislature sought to effect those purposes rationally relate to the interests of the state as asserted.

§ 12. --Of amendment treating public and private patients differently

The court held in the following case that an amendment to a statute limiting damages recoverable in a medical malpractice action, except for medical and related expenses, which did not apply retroactively to private patients, violated equal protection. It was a violation of the Louisiana constitutional guaranty of equal protection to refuse to allow a private hospital patient the benefit of a statutory amendment allowing the cost of future medical care and related benefits to be excluded from the statutory limitation on recovery in medical malpractice actions, LSA-R.S. § 40:1299.43, when the amendment would have applied if the patient had been injured in a state facility under the care of a state employee, the court held in Williams v Kushner (1989, La) 549 So 2d

294. After upholding the statutory limitation on recovery from the patient's compensation fund for damages other than future medical care and related benefits, [FN39] the court said that the exception for the cost of future medical care had been enacted, with regard to private sector claims, so that it would apply to claims filed only on or after a certain date, and would exclude the patient's claim. As to claims against the state, observed the court, the legislation provided that it would apply to pending claims and litigation, resulting in the anomalous situation that if the patient had been injured in a state facility, his future medical expenses would be recovered, but because he was treated in a private hospital under the care of a private physician, the expenses were legislatively placed in a different category. The act applying to private patient malpractice claims must be reformed to apply to claims and litigation pending when it was passed, said the court, and the patient was entitled to a judgment for the benefits provided and any future medical expenses and related benefits as provided by the statute.

§ 13. Under due process clause

In the following case the court held that a statute limiting the damages recoverable in a medical malpractice action, except for medical and related expenses, did not violate the right to due process under the Federal Constitution.

After certifying the question of the validity under the state constitution of a Texas statute limiting the damages recoverable in a malpractice action to the Texas Supreme Court, [FN40] in Lucas v United States (1986, CA5 Tex) 807 F2d 414, ques certified (CA5 Tex) 811 F2d 270, ctdf ques ans, in part, certificate for ques declined, in part (Tex) 757 SW2d 687, concurring op at (Tex) 31 Tex Sup Ct Jour 466 and dissenting op at (Tex) 31 Tex Sup Ct Jour 666 and later proceeding (Tex) 30 Tex Sup Ct Jour 468, the court held that the provision did not violate the due process clause of the United States Constitution. Any due process challenge must rely on a perceived abrogation of a common-law right to recover for tort damages worked by the statute, observed the court. However, the Supreme Court has held that no person has a property right or vested interest in any rule of the common law, and the Federal Constitution does not forbid the creation of new rights or the abolition of old ones recognized by the common law to obtain a permissible legislative object, the court stated.

But see Waggoner v Gibson (1986, ND Tex) 647 F Supp 1102, § 10[b], for a case in which the Texas statute limiting damages in medical malpractice actions, exclusive of medical and related expenses, was invalidated on equal protection grounds, and the court also stated that it deprived medical malpractice victims of due process.

§ 14. Under guaranty of open courts, as applied to claims of the catastrophically injured

The court held in the following case that a statute limiting the damages recoverable in a malpractice action, except for medical and related expenses, violated the open courts provision of the state constitution, as applied to claims of the catastrophically injured. In Waggoner v Gibson (1986, ND Tex) 647 F Supp 1102, a case in which a totally disabled patient sought damages well in excess of the limit provided by Tex. Rev. Civ. Stat. Ann. Art. 4590i, §§ 11.02 through 11.04, the court held that, in addition to violating the equal protection clauses of the state and federal constitutions, and as an independent state ground, the Texas statute limiting the damages recoverable in a medical malpractice action violated the open courts provision of the state constitution, Tex. Const. Art. I, § 13. Noting that the provision accorded state citizens greater protection than the federal due process clause, the court said that the open courts guaranty was violated when a right to redress, such as a cognizable common-law cause of action, was unreasonably restricted when balanced against the purpose of a statute. There was no forum to which a seriously injured victim of malpractice could appeal for recompense, said the court, and therefore no adequate substitute for the traditional right of recovery.

In Lucas v United States (1988, Tex) 757 SW2d 687, concurring op at (Tex) 31 Tex Sup Ct Jour 466 and dissenting op at (Tex) 31 Tex Sup Ct Jour 666, the court, answering certified questions from the Federal District Court, held that in the context of persons catastrophically injured by medical negligence, it was unreasonable and arbitrary to limit recovery in a speculative experiment to determine whether liability insurance rates would decrease, in violation of the open courts provision of the Texas Constitution. In an action against the United States under the Federal Tort Claims Act, the infant victim of medical malpractice had been awarded damages well in excess of the statutory limit provided by Tex. Rev. Civ. Stat. Ann. art. 4590i, §§ 11.02 and 11.03 (Vernon Supp. 1986), for loss of future earnings and pain and suffering, although the limitation did not apply to the expenses of necessary medical, hospital, and custodial care either received before judgment or required in the future. The statute also provided that should the limitation be invalidated, an alternative limit on solely noneconomic losses would be applicable. The limits of both sections were not absolute, the court observed, but increased or decreased depending on the consumer price index published by the Federal Government (§§ 11.01, 11.04). Noting that the legislature itself had evidently entertained doubts about the constitutionality of the liability limit set out in the first section of the statute, the court said that in construing Tex. Const. Art. I, § 13, it must be determined whether the litigant challenging a restriction had a cognizable common-law cause of action, and whether the restriction was unreasonable or arbitrary when balanced against the purpose and basis of the statute. Texas courts have long recognized that victims of medical negligence have a well-defined common-law cause of action to sue for injuries negligently inflicted upon them, said the court, and the statute failed to provide the medical malpractice plaintiff any adequate substitute to obtain redress for injuries. Rejecting any argument that the statute might be supported by alleged benefits to society generally, the court said it was arbitrary to limit recovery only in medical malpractice actions. The court found it significant that in some of the jurisdictions in which damages caps were upheld, the fact that alternative remedies were provided weighed heavily in the decision, and noted that a report to the legislature had recommended a victim's compensation fund as a statutory substitute, but the recommendation had not been followed. In balancing the restriction against the purposes of the statute, the court said that the legislature apparently did not intend to strike at frivolous malpractice suits, for it found that the filing of legitimate claims was a contributing factor affecting insurance rates, and that the legislature, although it found that a medical malpractice insurance crisis existed, went on to state that the adoption of certain modifications in the system "may or may not have an effect" on the rates charged by insurers. The state constitution guaranteed a litigant meaningful access to the courts whether liability rates were high or not, said the court, and as to the assurance that awards were rationally related to actual damages, a purpose mentioned in the statute, it was the province of the judicial and not the legislative branch of government to exercise that power (Tex. Const. Art. II, § 1). It was unreasonable and arbitrary for the legislature to conclude that damages caps, applicable to all claimants no matter how seriously injured, would help assure a rational relationship between actual damages and amounts awarded, continued the court. Pointing out that even the legislative commission, whose recommendations were the basis for the statute, could not conclude that there was any correlation between the damages cap and the stated purpose of improved health care, the court cited an independent study which had concluded that there was no relationship because fewer than .6 percent of all claims were for more than \$100,000. The court rejected the argument that the legislature had not denied access to the courts because it had not totally abolished a cause of action, replying that access to the court was granted for the purpose of redressing injuries, and if the legislature could constitutionally cap recovery at one amount, there was no reason why it could not cap the recovery at some other figure, or even at \$1. The court also pointed out that the plaintiff was not receiving the constitutional benefit of a jury trial when the jury verdict was limited. Having observed that there was no provision in the Federal Constitution corresponding to the state constitution's "open courts" guaranty,

the court noted the importance of state constitutions in restricting governmental power and guaranteeing individual rights.

§ 15. --As applied to wrongful death actions

A statute limiting the damages recoverable in a medical malpractice action, except for medical care and related expenses, could validly be applied to wrongful death claims, the court held in the following case, and did not violate the open courts provision of the state constitution.

The open courts provision of Tex. Const. Art. I, § 13, did not bar the application of a statute limiting all damages except medical expenses in medical malpractice actions to wrongful death suits, the court held in Rose v Doctors Hosp. (1990, Tex) 801 SW2d 841, reh'g of cause overr (Jan 23, 1991), although earlier cases held to the contrary. [FN41] After stating that the decision in Lucas v United States (1988, Tex) 757 SW2d 687, concurring op at (Tex) 31 Tex Sup Ct Jour 466 and dissenting op at (Tex) 31 Tex Sup Ct Jour 666, [FN42] did not invalidate the statute providing for damage limitation in medical malpractice actions, except as applied to catastrophically damaged malpractice victims, the court said the limitations found in Tex. Rev. Civ. Stat. Ann. art. 4590i, §§ 11.02 and 11.03 (Vernon Supp. 1991), were invalid only as applied to common-law medical malpractice claims. The severability clause in the statute allowed the application of those sections in wrongful death actions, explained the court, because such operation remained complete in itself, capable of execution in accord with the legislature's intent, and independent of any application to common-law claims. The sections covered "health care liability claims" and the statutory definition of such claims expressly mentioned both common-law personal injury and wrongful death claims, observed the court. Validity of the damages limitations in the latter case depended on whether the plaintiffs' remedy was based upon a cognizable common-law cause of action, the court stated, and then whether the open courts provision prevented application of the statute to that cause of action. Pointing out that the survivors' action for wrongful death was based upon the patient's cause of action for negligence, and would have died with him had it not been preserved by the legislature in the wrongful death statute, the court explained that the remedy was conferred by statute and not by common law. The open courts provision did not apply to that claim, said the court, and therefore did not bar the application of the damages provision of the Medical Liability Act in wrongful death cases. Statutory \$500,000 cap on compensatory damages assessed against physician or health care provider, on a health care liability claim, did not violate open courts provision of Texas Constitution when cap was applied to statutory survival action against nursing home for negligent and grossly negligent care of resident. Vernon's Ann. Texas Const. Art. 1, § 13; V.T.C.A., Civil Practice & Remedies Code § 71.021; Vernon's Ann. Texas Civ. St. art. 4590i, § 11.02. Horizon/CMS Healthcare Corp. v. Auld, 985 S.W.2d 216 (Tex. App. Fort Worth 1999), petition for review filed, (Feb. 24, 1999).

§ 16. Under constitutional provision prohibiting governmental immunity

Under a constitutional provision which prohibited governmental immunity, the court in the following case upheld the validity of a statute limiting the damages recoverable by a malpractice plaintiff against the state, except for medical care and related expenses. The Louisiana Constitution, by denying the state immunity from suit in contract or tort or for injury to person or property, did not prohibit the legislature from limiting the damages recoverable in a malpractice action against the state, the court held in Sibley v Board of Supervisors of Louisiana State University (1985, La) 462 So 2d 149, on reh (La) 477 So 2d 1094, on remand (La App 1st Cir) 490 So 2d 307, cert den (La) 496 So 2d 325 and (superseded by statute on other grounds as stated in Hampton v Greenfield (La App 4th Cir) 576 So 2d 630, cert den (La) 581 So 2d 686, later proceeding (La App 4th Cir) 602 So 2d 327, affd in part and revd in part on other grounds (La) 618 So 2d 859) and (superseded by statute on other grounds as stated in Martino v Sumrall (La

App 1st Cir) 619 So 2d 87, cert den (La) 621 So 2d 821). The plaintiff alleged that the limitation of liability statute, La. R.S. § 40:1299.39, offended La. Const. Art. XII, § 10(A), contending that any statute which reduced the value of an award against the state for damages operated unconstitutionally to relieve the state of a part of its liability. The court observed that another statute which was struck down as offending the constitutional provision attempted to favor the state with a privilege, that is, exemption from payment of court costs, which was unavailable to other defendants in similar suits. However, the constitutional provision did not make the sweeping proscription of immunity for which the plaintiff argued, the court continued, the legislative history indicating that the primary purpose of the proponents of the waiver was to eliminate the unnecessary, burdensome, and costly step, previously required, of getting legislative approval in order to bring suit against the state or its subdivisions. [FN43]

C. Statutes Limiting All Damages Recoverable in Medical Malpractice Actions

§ 17. Under equal protection clause

[a] Validity upheld

The validity of a statute limiting the total damages recoverable by a medical malpractice plaintiff was upheld or deemed supportable under the equal protection clause by the courts in the following cases.

Accord, Boyd v Bulala (1989, CA4 Va) 877 F2d 1191, ctd ques ans 239 Va 218, 389 SE2d 670, ans conformed to (CA4 Va) 905 F2d 764, 17 FR Serv 3d 351, later proceeding (WD Va) 751 F Supp 576.

The South Dakota statute limiting the total damages recoverable in a medical malpractice action did not violate the equal protection clause of either the state or federal constitution, the court held in Knowles v United States (1993, DC SD) 829 F Supp 1147, affd, in part, ques certified (CA8 SD) 29 F3d 1261. The plaintiffs argued that the statute was unconstitutional because it adversely affected medical malpractice victims who had suffered damages exceeding the limit under the statute. The court observed that medical malpractice victims were not a suspect class and the right to recover damages for injury was not a fundamental right under federal equal protection and due process analysis, so that the statute was constitutional so long as its classifications were rationally related to a legitimate government interest. The legislative history indicated that SDCL § 21-3-11 was enacted to address a perceived medical malpractice insurance crisis which threatened the availability and cost of health care, said the court, although the plaintiffs argued that the record showed that no actual medical malpractice insurance crisis existed in the state. However, said the court, all that was required was that a legitimate purpose could reasonably have been the purpose of the legislature, and it was conceivable that the legislature felt that limiting damages available to malpractice victims would stabilize the perceived crisis and alleviate the concern over the availability of health care. Even if a so-called medical malpractice insurance crisis did not exist, the court continued, it was conceivable that the legislature believed that a damages cap would help prevent a crisis before it developed. As to the equal protection clause of the South Dakota Constitution, the court said that under the state test, a legislative classification was unconstitutional if it created distinctions which were purely arbitrary and totally unrelated to any legitimate state interest. The damages cap did not arbitrarily distinguish between different classes of persons, explained the court, because it applied equally to all persons regardless of race, gender, religion, or national origin. Furthermore, the classification was rationally related to the legitimate government interest as explained under the federal analysis, and therefore did not violate the equal protection clause of the South Dakota Constitution, the court

concluded.

See Davis v Omitowoju (1989, CA3 VI) 883 F2d 1155, § 3[a], in which the court, rejecting a malpractice plaintiff's claim that a statutory limit on noneconomic damages recoverable in malpractice actions violated equal protection and due process, said that its analysis was equally applicable to an amended version of the statute limiting all damages recoverable in such actions.

A state statute limiting the total damages recoverable in a medical malpractice action and limiting the proportion of that amount which could be awarded for noneconomic loss or injury did not violate the state constitutional right to equal protection of the laws, the court held in Scholz v Metropolitan Pathologists, P.C. (1993, Colo) 851 P2d 901, reh den (Colo) 1993 Colo LEXIS 502. The statute did not infringe on a fundamental right, observed the court, nor it did create a classification based on race, religion, national origin, or gender, and therefore it would not be found to violate equal protection guaranties so long as it was reasonable and bore a rational relationship to a legitimate state objective. The plaintiff argued that the statute created several arbitrary classifications, in that it treated individuals who suffered less than the statutory limit in noneconomic damages differently from those who incurred more than the statutory limit, and damages awards resulting from medical negligence, including derivative claims, were limited, while awards resulting from other torts did not include derivative claims within their limits. The court said that that did not amount to a showing that the statute violated the guaranty of equal protection, because most laws differentiate in some fashion between classes of persons and that fact will not alone suffice, as a general rule, to render the statute unconstitutional. The statute clearly satisfied the rational basis test, the court continued, because the debate concerning the availability of health care rendered it hardly arguable that the effort to increase its availability was not a legitimate governmental interest. It was also reasonable to assume that the sometimes unpredictable and large damages awarded for noneconomic injuries contributed to the rising cost of malpractice insurance, and operated to limit the availability of health care services, said the court. Therefore, the concerns prompting the passage of the statute, as expressed in the declaration of intent, as well as in the legislative history of the act, reasonably supported it, the court decided, noting that the wisdom and effectiveness with which the statute might remedy those concerns were not questions addressable by the court.

In Jones v State Bd. of Medicine (1976) 97 Idaho 859, 555 P2d 399, cert den 431 US 914, 53 L Ed 2d 223, 97 S Ct 2173, the court, considering whether a statutory limitation on recovery in medical malpractice actions created a classification which was discriminatory and in violation of the equal protection guaranties of both the Idaho Constitution and the Fourteenth Amendment to the United States Constitution, in that it distinguished between those who were damaged as a result of medical malpractice in amounts exceeding the limit and those whose damages were less than that amount, said that the record presented an insufficient factual basis for the court to determine whether the classification had a fair and substantial relationship to the achievement of the legislature's objective in enacting the statute. The plaintiff physicians and hospitals brought the suit for a declaratory judgment as to the legislation's constitutionality, claiming that they were compelled to maintain malpractice insurance coverage in excess of its liability limitations. The limitation provisions, enacted as part of the 1975 Idaho Hospital-Medical Liability Act, set a ceiling on recoverable damages for actions against physicians of a certain amount per claim and a greater amount per occurrence, I.C. § 39-4204, and similar ceilings on recoverable damages for actions against acute care hospitals, with the alternative of a limit comprised of a lesser sum multiplied by the total number of beds in the hospital, I.C. § 39-4205. As the court noted, the legislative purpose of the act as set forth therein was to assure that a liability insurance market would be available to physicians and hospitals at a reasonable cost, thus assuring the availability of such hospitals and physicians to provide health care to the people of the state. After indicating that the applicable standard for equal protection analysis in the instant case was a "means focus" test, or "intermediate tier" analysis, [FN44] the court

said it was unable to ascertain, on the basis of the record presented, how the classification between various victims of malpractice related to the asserted purpose of assuring medical care to the people of the state, whether there even was a crisis in medical malpractice insurance in the state, and whether there was a relationship between the statutory limitations in question and the abatement of the alleged crisis. [FN45] Emphasizing that the record provided no answers to the multitude of questions raised by its application of the "intermediate tier" analysis of the equal protection challenge to the statute, the court went outside the record to examine some of the literature on medical malpractice insurance. Reviewing that literature in some depth, the court acknowledged that while it cast some light on the existence of a medical malpractice insurance crisis and some of the problems inherent in that crisis, the record before it made no attempt to relate any findings of national scope to the state, and that the court itself lacked the ability to extrapolate any relationship from the national literature. Observing that since the state had only a fraction of the numbers of general practitioners, surgeons, and hospitals of the national totals, so that any limitation on the liability of physicians and hospitals in the state might then have only the most remote effect upon a nationwide medical malpractice insurance crisis, the court remanded the case for additional evidence, findings, and conclusions, noting that the burden of showing the unconstitutionality of the liability limitation provision still rested with those physicians and hospitals who challenged it.

A statutory limitation on the total amount of damages recoverable in a medical malpractice action was consistent with the equal protection clause of the Fourteenth Amendment, and with Ind. Const. Art. I, § 23, and Ind. Const. Art. IV, §§ 22 and 23, which prohibited special privilege legislation, the court held in Johnson v. St. Vincent Hospital, Inc. (1980) 273 Ind 374, 404 NE2d 585. The statute provided for a cap on the total amount recoverable for any injury or death of a patient and further provided that a health care provider was not liable for an amount in excess of a portion of that limitation for an occurrence of malpractice, the excess being recoverable from a patient's compensation fund. Conceding that the limitation imposed a special burden upon those persons damaged in excess of the statutory limit, and created a distinction between health care providers and others whose liability for malpractice damages was not limited, the court said that when neither a fundamental right nor a suspect classification was involved, the standard of review was that the classification not be arbitrary or unreasonable and that a "fair and substantial" relationship exist between the classification and the purpose of the legislation creating it. The statutory limitation was presumed constitutional, observed the court, and the plaintiffs had the burden to prove that there was no correlation between the limitation upon recovery and the promotion of health care. The court pointed out that in the absence of insurance, claims would have to be paid from the personal assets of health care providers and recovery in that circumstance would be doubtful. Even when insurance is available, the court continued, recovery becomes only more probable, since various circumstances such as policy limits may prevent complete recovery to an injured patient. There was evidence in the record that part of the private insurance industry ceased making malpractice insurance available to some health care providers in the state, because of the number and size of malpractice claims being prosecuted, said the court, and for constitutional purposes, the motivation behind the curtailment was not relevant, but rather that the legislature had to deal with that fact. In effect, the statutory limitation on damages served the same purpose for the patient's compensation fund as such limitations serve in private insurance contracts, the court continued, and the legislature could have reasonably considered the limitation to be an essential part of any operable plan to spread the risk of loss and meet the danger it perceived to the public welfare. Therefore the classifications of health care providers and injured patients challenged were composite parts of the limitation itself, and likewise justified, the court concluded.

In St. Anthony Medical Center, Inc. v. Smith (1992, Ind App) 592 NE2d 732, transfer den (Aug 27, 1992), the court upheld the constitutionality of the limitation on all damages recoverable in medical malpractice actions created under Ind. Code § 16-9.5-2-2 against

the contention that it violated the due process clause of the United States and the State of Indiana's Constitutions, violated the right to a jury trial, was an irrebutable presumption, violated the equal protection and special legislation clauses, and denied the right of access to the courts and the constitutional rights to a full and complete remedy, stating that it was bound by the opinion of the court in Johnson v St. Vincent Hospital, Inc. (1980) 273 Ind 374, 404 NE2d 585 (this subsection).

Accord, Bova v Roig (1992, Ind App) 604 NE2d 1, the court stating that it had recently addressed the same contentions in St. Anthony Medical Center, Inc. v Smith (1992, Ind App) 592 NE2d 732 (this subsection).

Facts that "patient" to whom statutory damage cap applies under Indiana Medical Malpractice Act is defined as a person who receives or should have received health care, with any derivative claim that might arise from the malpractice committed on the patient included within that patient's claim, and thus, that a parent who has a derivative claim for injuries sustained by minor child as result of medical malpractice is not a "patient" entitled to a separate statutory damages cap, does not violate equal protection provision of State Constitution. West's A.I.C. Const. Art. 1, § 23; West's A.I.C. 34- 18-2-22, 34-18-14-3. Indiana Patient's Compensation Fund v. Wolfe, 735 N.E.2d 1187 (Ind. Ct. App. 2000).

In Prendergast v Nelson (1977) 199 Neb 97, 256 NW2d 657, a plurality opinion, the court held that the statutory limitation on the total amount of damages recoverable in a medical malpractice action in the Nebraska Hospital-Medical Liability Act, Neb. R.S. §§ 44-2801 to 44-2855 (Supp. 1976), did not offend the equal protection and due process clauses of the state and federal constitutions. [FN46] The Act applied to all qualified health care providers, who were required to file proof of financial responsibility in order to qualify, and to pay surcharges levied on them for the benefit of a patients' excess liability fund. A patient's exclusive remedy against a qualified health care provider was under the Act, unless the patient had previously elected not to come within its provisions. In considering the constitutionality of the many challenged provisions of the Act, the court said that the legislature could pass a law which distinguished between different kinds of tort actions, provided the distinctions were reasonable and grounded upon real differences inherent in those tort actions. There were substantial reasons for legislative discrimination in the field of medical malpractice litigation, the court continued, citing legislative findings of fact that in recent years the growth of malpractice litigation had caused numerous insurance companies to withdraw from the field. The legislature could have found a fair, just, and reasonable connection with the legislation and the promotion of the health, comfort, safety, and welfare of the citizens of the state, decided the court, and the defendant failed to produce any evidence which would indicate that the legislation was not needed. Rejecting the argument that a ceiling on judgments constituted a special privilege for the health care provider and an undue restriction on the seriously injured patient, the court pointed out that the procedure was an elective one. The Act guaranteed a claimant who elected to be governed thereby an assured fund for the payment of any malpractice claim, a benefit not to be found under the common law, and in the case of an action against a doctor who had no malpractice insurance, the likelihood of collecting a substantial judgment would be remote, observed the court. Additionally, the claimant was assured of a procedure which would provide him access to an impartial medical review panel to determine whether the health care provider met the applicable standard of care, the court noted, agreement to the ceiling on damages being given by the claimant in return. The classification rested on reasons of public policy and a substantial difference between medical care providers and other tortfeasors, said the court, disagreeing with the suggestion that the legislation was enacted for the relief of medical care providers. The court also rejected the argument that if a common-law right was to be taken away, something must be given in return, but pointed out that the law did provide a quid pro quo in that the collectability of a judgment was a matter of considerable value. The court also dismissed the defendant's contention that the automobile guest statute did not constitute some precedent for the authority of the legislature to limit damages recoverable in malpractice cases. Although

the guest statute was not a limitation on damages per se, the court explained, it affected the result of jury trials, since it prescribed an increase in the degree of negligence which must be proven to establish a claim. Furthermore, the court maintained that the legislature was doing no more than the legislatures of other states had done in the enactment of no fault statutes in tort actions, affirming that a person had no property right or vested interest in any rule of the common law.

Statutory cap on damages recoverable in medical malpractice action satisfied principles of equal protection; reducing health care costs and encouraging the provision of medical services were legitimate goals, and rational relationship existed between those goals and statutory means selected by Legislature to accomplish them. (Per curiam, with three justices concurring and two justices concurring in result.) Const. Art. 1, § 3; Neb. Rev. St. § 44-2825(1). Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc., 265 Neb. 918, 663 N.W.2d 43 (2003).

In Foster v South Carolina Dep't of Highways & Public Transp. (1992) 306 SC 519, 413 SE2d 31, the court held that it was not a violation of equal protection that under the South Carolina Tort Claims Act the liability cap on damages recoverable in medical malpractice actions was significantly greater than the cap on other types of actions against the state. A plaintiff who had recovered quite a high verdict against the state for injuries suffered in an automobile accident argued that the application of the more restrictive liability cap to his verdict violated the equal protection clause because a greater recovery was allowed in medical malpractice actions. The court observed that the constitutionality of the general cap had been upheld, although the issue of the disparate treatment of victims of physician and dentist tortfeasors had not been before the court. The proper analysis of the constitutionality of the statute was the rational basis test, the court continued, which required that the classification bear a reasonable relation to the legislative purpose sought to be effected, that the members of the class were treated alike under similar circumstances, and that the classification rested on some reasonable basis. The court observed that one basis for the distinction was expressed in the statute, S.C. Code Ann. § 15-78- 20(g) (Supp. 1990), which stated that the higher limits and mandated coverages were a recognition by the legislature of significantly higher damages in cases of medical malpractice. The purpose of the statute was to balance the need for services and demands for reasonable taxes against the fair reimbursement of injured tort victims, said the court, but it need not accomplish the purpose with delicate precision in order to survive a constitutional challenge. Rejecting the plaintiff's argument that the rationale for the higher limit was erroneous because her damages exceeded even that limit, the court said that a legislative classification must be judged by reference to characteristics typical of the affected classes rather than by a focus on selected, atypical examples. The fact that a classification resulted in some inequity did not render it unconstitutional, the court continued, stating that the plaintiff had not met her burden of proof by a bare assertion that her damages were as high as damages that might be assessed against a physician or dentist.

A statutory limitation on the amount of damages recoverable by a malpractice plaintiff did not violate the equal protection clause of the Fourteenth Amendment to the Federal Constitution, the court held in Etheridge v Medical Center Hospitals (1989) 237 Va 87, 376 SE2d 525. The plaintiff acknowledged that the correct test to be applied was the rational basis test, which would be satisfied if the challenged classification promoted a legitimate state purpose. The plaintiff sought to "second guess" the general assembly by claiming that its factual findings did not constitute a reasonable basis for limiting recoverable damages in a medical malpractice action, said the court, and that even if there were some factual premise, there was no relationship between the goal and the means chosen to attain it. Based on a study and a report on malpractice insurance premiums for physicians, the general assembly made specific findings and a legislative judgment as to how the problem could best be addressed, said the court. It was presumed to have acted within its constitutional powers, said the court, refusing to conclude that the means chosen by the legislature to promote a legitimate state purpose were unreasonable or arbitrary.

Classifications created by statute which makes wrongful death actions against health care providers and their employees subject to damage limits generally applicable to wrongful death actions, but does not expand class of claimants entitled to recover for loss of society and companionship due to wrongful death of a patient caused by medical malpractice to include adult children of patient, are supported by a rational basis, and do not violate equal protection clause of State Constitution. W.S.A. Const. Art. 1, § 1; W.S.A. 665.007, 893.55(4)(f), 895.04(4). Czapinski v. St. Francis Hosp., Inc., 236 Wis. 2d 316, 2000 WI 80, 613 N.W.2d 120 (2000).

[b] Validity not upheld

The courts held in the following cases that a statute limiting the total damages recoverable by a medical malpractice plaintiff violated the guaranty of equal protection. The court in Wright v Central Du Page Hospital Asso. (1976) 63 Ill 2d 313, 347 NE2d 736, 80 ALR3d 566, struck down a statutory provision which imposed a limitation on all damages recoverable in medical malpractice actions, Ill. Rev. Stat. ch. 70, par. 101 (1975), as creating an arbitrary classification amounting to special legislation in violation of the equal protection provision of the Illinois Constitution. In response to the plaintiff malpractice victim's argument that the recovery limitation was an arbitrary classification that unreasonably discriminated against the most seriously injured victims of malpractice but did not limit the recovery of those victims who suffered moderate or minor injuries, the defendants--a hospital association, a doctor, and a hospital supply company--argued that such unequal treatment was necessary to deal with what they described as the "medical malpractice crisis." In support of their contention that the legislature had the power to set limitations on recoveries, the defendants cited cases upholding recovery limitations in actions brought under the wrongful death act and the dram shop act. The court distinguished these cases, however, as involving rights created by the legislature, thereby giving the legislature the concomitant power to limit recovery, while the right to recover damages for injuries arising from medical malpractice existed at common law. Also rejecting the defendants' analogy with the limitations on recovery under the Workmen's Compensation Act, the court emphasized that that law provided a quid pro quo in that the employer assumed liability without fault but gave up the risk of large damage judgments, while the employee's monetary recovery was limited but awarded without fault. The defendants' argument that the provision limiting recovery in medical malpractice actions contained a societal quid pro quo in that the loss of recovery to some malpractice victims was offset by lower insurance premiums and lower medical costs was also countered by the court, which pointed out that since this quid pro quo did not extend to the seriously injured medical malpractice victims, it failed to come within the workmen's compensation rationale. Furthermore, the court emphasized, under the recovery limitation in question, the seriously injured medical malpractice victim might not even be able to recover all medical expenses, let alone damages for any other loss suffered. Finally, the court rejected the argument that the classification created by the legislature was not unreasonable or arbitrary since the legislature had the power to effect reform one step at a time. Acknowledging that under some circumstances the legislature might abolish a common-law cause of action without a concomitant quid pro quo, the court said that nevertheless, to the extent recovery was denied on an arbitrary basis, it constituted a special privilege in violation of the state constitution. In Arneson v Olson (1978, ND) 270 NW2d 125, the court held that a statute limiting the liability of a qualified health care provider for all claims arising from any one occurrence of medical malpractice violated the equal protection clause of the North Dakota Constitution, § 20, and that of the Fourteenth Amendment to the Federal Constitution. The court considered the equal protection challenge to the statute in conjunction with the challenge under substantive due process analysis because the test of validity under either clause was whether there was a close correspondence between statutory classifications and legislative goals. Noting that the legislature had attempted to meet

some of the anticipated constitutional objections to the legislation as a whole, the court said it applied only to patients who "consented" to its provisions, in that ND Cent. Code § 26-40.1-04 provided that the statute applied when a patient elected to be bound by signing an acknowledgment of consent on forms to be furnished by the insurance commissioner. However, in situations requiring emergency treatment, a person was conclusively presumed to consent to treatment and in the absence of consent by a nonemergency patient, a physician was under no obligation to provide care. The court stated that while it did not hold that tort liability could never be waived by contract, the apparent harshness of these provisions was a factor in determining whether due process and equal protection were violated. Observing that the legislature no doubt had the authority to modify pre-existing law in many respects included in the statute, the court indicated that the overall extent and effect of the modifications were matters to be considered in the ultimate determination of the constitutionality of the statute. The court also stated that it did not hold, or even suggest, that no right could be limited or withdrawn without providing a quid pro quo, but that any limitation or elimination of a pre-existing right could not be arbitrarily imposed. Noting that no state court of last resort had upheld a limitation as low as the one imposed by the statute, the court said that it was common knowledge that some severely injured persons had normal life expectancies, and the cost of care required might well exceed the amount of the statutory limitation. The limitation of recovery did not promote the stated aims of the statute, concluded the court, pointing out that it did not provide adequate compensation to patients with meritorious claims, and did the opposite for the most seriously injured claimants, while doing nothing to eliminate nonmeritorious claims, and although the restrictions on recovery might encourage physicians to enter into practice and remain in practice, they did so only at the expense of patients with meritorious claims. Examining the basis for legislative action, the court said that the incidence of malpractice claims in the state was far lower than average, and while the legislature had been advised that insurance rates were determined on a national basis, the evidence in the case indicated that either the legislature was misinformed or subsequent events had changed the situation substantially. The finding of the trial court that there did not appear to be an availability or cost crisis as to medical malpractice insurance, based on evidence that one of the largest insurance companies was accepting applications for malpractice insurance in the state at rates lower than the national average, and premiums in the state were the sixth lowest in the United States, was not clearly erroneous, said the court. The act as a whole was unconstitutional, the court concluded, because the legislature would not have enacted the act without the provisions declared invalid, [FN47] particularly the statutory limitation on recovery in malpractice actions. See Hanvey v Oconee Memorial Hosp. (1992) 308 SC 1, 416 SE2d 623, in which the court, while not invalidating a damage limitation on malpractice suits per se, invalidated on equal protection grounds a statute limiting the general immunity of charitable hospitals further than the immunity granted to charitable organizations as a whole. The medical malpractice defendant had moved for partial summary judgment, alleging that S.C. Code Ann. § 44-7-50 (1977) limited its liability in the malpractice action to the lesser amount applicable to charitable and governmental hospitals. The plaintiff sought damages limited only by S.C. Code Ann. § 33-55-210 (1977), which limited the liability of any charitable organization, but allowed a bigger recovery, and also allowed judgment against its employees for reckless, willful, or grossly negligent conduct. In order to satisfy equal protection, said the court, the classification must bear a reasonable relation to the legislative purpose sought to be achieved, members of the class must be treated alike under similar circumstances, and the classification must rest on some rational basis. While reducing liability of health care providers was a legitimate purpose, the court continued, there was no rational basis for distinguishing between charitable hospitals on the one hand, and medical providers of goods and services, such as the Red Cross, on the other. Therefore, the statute limiting the liability of charitable hospitals was violative of equal protection, the court concluded, and the trial court properly held that the more general statute governed the malpractice plaintiff's recovery.

§ 18. Under due process clause

The contention that a statute limiting the total damages recoverable in a medical malpractice action was valid under the right to due process of law was upheld or deemed supportable by the courts in the following cases.

Accord, as to the Federal Constitution, and applying the Virginia court's holding as to the state constitution, Boyd v Bulala (1989, CA4 Va) 877 F2d 1191, ctfed ques ans 239 Va 218, 389 SE2d 670, ans conformed to (CA4 Va) 905 F2d 764, 17 FR Serv 3d 351, later proceeding (WD Va) 751 F Supp 576.

A statute limiting the total damages recoverable in a medical malpractice action did not violate the due process clause of either the state or federal constitution, the court held in Knowles v United States (1993, DC SD) 829 F Supp 1147, affd, in part, ques certified, (CA8 SD) 29 F3d 1261. The malpractice plaintiffs apparently urged a "substantive due process" claim alleging that the statute arbitrarily deprived them of the right to recover more than the statutory limit in damages, said the court. Since no fundamental right was involved, the court continued, the rational basis test must be applied, referring to its discussion of the constitutionality of the statute under equal protection, [FN48] in which the court found that there was a rational basis between the legislative goal of addressing a perceived medical malpractice insurance crisis and the damages cap found in the statute. As for its validity under the state constitution's due process clause, S.D. Const. Art. VI, § 2, the court noted that the plaintiffs had not asserted a deprivation of any recognized liberty or property interest protected by the state constitution. Even were the court to find that the right to recover damages was of sufficient importance, the statute did not offend the principles of due process, the court continued. Since it was reasonable for the legislature to believe that a cap on malpractice damages would stabilize malpractice insurance premiums, the court found that the statute bore a substantial relation to the evil perceived by the legislature.

See Davis v Omitowaju (1989, CA3 VI) 883 F2d 1155, § 4, in which the court, rejecting a malpractice plaintiff's claim that a statutory limit on noneconomic damages recoverable in malpractice actions violated due process, said that its analysis was equally applicable to an amended version of the statute limiting all damages recoverable in such actions.

In Scholz v Metropolitan Pathologists, P.C. (1993, Colo) 851 P2d 901, reh den (Colo) 1993 Colo LEXIS 502, the court held that limitations on damages awards recoverable in medical malpractice actions, on the total damages recoverable and on noneconomic damages in a lesser amount, did not violate the right to due process of law. The plaintiff apparently argued that because the statute imposed limits on potential damages awards, it inflicted a deprivation of property without a hearing, said the court. The constitutional guaranty of due process was applicable to rights, not remedies, replied the court, and there was no property right, in the constitutional sense, in any particular form of remedy. All that was guaranteed by the Fourteenth Amendment was the preservation of substantial rights to redress by some effective procedure, the court concluded, and thus the limitation was not unconstitutional.

In Jones v State Bd. of Medicine (1976) 97 Idaho 859, 555 P2d 399, cert den 431 US 914, 53 L Ed 2d 223, 97 S Ct 2173, the court rejected the argument that statutory limitations on recovery in medical malpractice actions were enacted without a quid pro quo and therefore constituted a denial of due process, but refrained from a decision on a second claim that such limits constituted a denial of due process in being arbitrary and without any relation to a particular injury which might result from medical malpractice. The provisions in question, I.C. §§ 39-4204 and 39-4205, which were portions of the 1975 Idaho Hospital-Medical Liability Act, set a ceiling on recoverable damages for actions against physicians of a certain amount per claim and a certain amount per occurrence, and similar ceilings on recoverable damages for actions against acute care hospitals, with an alternative limitation comprised of a lesser sum multiplied by the total number of beds in the hospital. After indicating that the appropriate due process

analysis would ascertain (1) whether the interest involved was a cognizable liberty or property interest, and (2) whether the challenged law bore a rational relationship to the preservation and promotion of the public welfare, the court turned to the claim that the statutory limitations on recovery in medical malpractice actions were invalid because they were enacted without a corresponding quid pro quo. The court, tracing the idea that due process imposes a quid pro quo requirement, concluded that the United States Supreme Court did not intend to engraft upon the traditional due process test an additional standard when the challenged statute involves alteration of some existing common-law doctrine. The court cited various opinions of the United States Supreme Court in which it had declared, without reference to a quid pro quo requirement, the principle that common-law rights were not beyond the legislature's power to alter. As to the second argument that such limitations were unreasonable and arbitrary, since there was no relation between the monetary limitations placed on a recovery and any particular injury which had resulted from medical malpractice, the court indicated that it did not necessarily agree that the amounts were selected for no other reason than political convenience. As articulated in the Act, the legislative purpose was to create a stable insurance market with reasonable rates, thereby securing a climate for continuous health care services to the people of the state. Expressing considerable doubt that the purpose of the limitations as declared in the Act was in fact the true object of legislative concern, as well as doubt as to the relationship between the challenged limitations and the legitimate public purposes which the Act might be said to serve, the court deemed it prudent to refrain from a decision on the question of due process without more facts. Remanding on this due process claim, the court emphasized that the remand was limited to the production of facts and that it did not mean to depart from what it had upheld as the traditional standard for consideration of questions of due process.

In Johnson v St. Vincent Hospital, Inc. (1980) 273 Ind 374, 404 NE2d 585, the court held that a statute providing for limitations upon the total amount recoverable for injury due to the negligent conduct of health care providers was constitutional under the due process clauses of the Indiana Constitution, Ind. Const. Art. I, § 12, and the Fourteenth Amendment to the United States Constitution. Treating the analysis under the state constitution's due process clause together with the guaranty of a complete remedy for injury done to one wronged, the court said that the legislation would be sustained if it was a proper exercise of the state's police power for the promotion of the peace, safety, health, or welfare of the public, and if the recovery limitation were a rational means to achieve the goal which the legislature sought to achieve. The limitations of the act applied when a health care provider voluntarily qualified to come under its provisions, observed the court, and under Ind. Code § 16-9.5-2-2, a patient's total recovery for injury or death was limited, and the liability of a health care provider was limited to a lesser amount per occurrence under Ind. Code § 16-9.5-2-2(b). Under Ind. Code § 16-9.5-2-2(c), a damages award in excess of the total liability of all health care providers was paid from a patient's compensation fund, up to the amount limited by the statute. The court observed that two other statutes involving allocation and limitation of the expense of the risk of injury had been upheld against similar challenges: A federal statute placing liability upon coal-mining operators to compensate former employees who had worked in the mines for disability due to black lung disease, and another federal statute which placed a dollar limit upon the aggregate liability of licensed private companies and the government due to a single nuclear accident. There was a certain degree of arbitrariness in selecting the individual employer to be the source of compensation for its employee stricken with black lung disease, said the court, and there was a similar arbitrariness in selecting injured patients to carry the burden imposed by the recovery limitation of the statute. As to limiting nuclear accident liability, the court pointed out that the situation involved the lack of an effective risk-spreading device in a private industry and a public need to have the industry provide services, not unlike the circumstances in the health care industry. In both situations, the government established a form of government-sponsored insurance, set limitations upon liability, and placed the burden of the limitation upon persons injured by the industry, explained

the court, and the limitation on recovery was the natural consequence of the establishment of a kind of insurance program, providing a factor for calculating premiums and charges to those covered. Although the badly injured plaintiff may not recover full damages, at the same time, the damage limitation is large and its probable ability to fully compensate a large proportion of injured patients cannot be ignored, the court asserted, and badly injured patients would have little or no chance of recovering a large sum if the evil the act was intended to prevent were to come about. To the extent that the limitation upon recovery was successful in preserving the availability of health care services, it did so to the benefit of the entire community, including a badly injured plaintiff requiring significant care after the act of negligence, said the court. Since there was evidence in the record that the legislation was achieving its intended goal, the court concluded that the limitations were not arbitrary and irrational, but furthered the public purposes of the act in a manner consistent with due process of law guaranteed by the state and federal constitutions. Neither was due process denied in that the limitation created an irrebutable presumption that an injured patient's loss could never exceed the limitation precluding him from proving otherwise, the court continued, since the statute did not require the trier of fact to infer that the patient's damages were less than the statutory limit, and it was not a presumption which prevented a greater recovery, but rather the policy of the law as reflected in the statute.

Patient was afforded a constitutionally adequate remedy, in action against hospital and state for medical malpractice, although damages were statutorily capped at \$500,000; damages-cap statute was rationally related to state purpose of assuring continued availability of quality health care. LSA-Const. Art. 1, § 22; LSA-R.S. 40:1299.39. Armand v. State Dept. of Health and Human Resources, 822 So. 2d 671 (La. Ct. App. 1st Cir. 2002).

See Prendergast v Nelson (1977) 199 Neb 97, 256 NW2d 657, § 17[a], a plurality opinion, in which the court, treating challenges to the statutory limitation on the total amount of damages recoverable in a medical malpractice action in the Nebraska Hospital-Medical Liability Act, Neb. R.S. §§ 44-2801 to 44-2855 (Supp. 1976), under the equal protection and due process clauses of the state and federal constitutions together, held that the statute did not violate either constitutional guaranty.

But see § 17[b] for a North Dakota case invalidating a statute limiting the total damages recoverable in a medical malpractice action on substantive due process grounds, Arneson v Olson (1978, ND) 270 NW2d 125, in which the court considered the substantive due process challenge to the statute in conjunction with the challenge under equal protection because the test involved--that there must be close correspondence between statutory classifications and legislative goals--was very similar.

In Etheridge v Medical Center Hospitals (1989) 237 Va 87, 376 SE2d 525, the court held that a statute limiting the total damages recoverable for any injury to, or death of, a patient in a medical malpractice action did not violate the due process clauses of either the Virginia (Va. Const. Art. I, § 11) or the Federal Constitution (U.S. Const. Amend. XIV, § 1). The malpractice plaintiff whose damages had been reduced pursuant to the statutory limitation contended that she had been deprived of an effective opportunity to be heard since the statute purported to preordain the result of the hearing, creating a conclusive presumption that no plaintiff's damages would exceed the statutory limit. The court said that the plaintiff had not been denied reasonable notice and a meaningful opportunity to be heard, because the statute had no effect on her right to have a jury or court render an individual decision based upon the merits of her case. Unlike the administratively mandated maternity leave rule which had been held invalid, replied the court, the statute created no presumptions whatsoever regarding the individual merits of her medical malpractice claim, merely affecting the parameters of the remedy available to her after the merits had been decided. As to a deprivation of any substantive due process right, the court continued, a party had no fundamental right to a particular remedy or a full recovery in tort. The statutory limitation on recovery was simply an economic regulation entitled to wide judicial deference, the court continued, which must be upheld if it is reasonably related to a legitimate governmental purpose because it

infringed upon no fundamental right. The purpose of the statute, to maintain adequate health care services in the commonwealth, bore a reasonable relationship to the legislative cap, insuring that health care providers could obtain affordable medical malpractice insurance, said the court. Referring to a study in a report authorized by the General Assembly on malpractice insurance premiums, and the preamble to the legislation setting out the legislative findings, the court held that substantive due process had not been violated.

§ 19. Under right to trial by jury

[a] Validity upheld

The right to trial by jury was not transgressed by a statute limiting the total damages recoverable by a malpractice plaintiff, the courts held in the following cases.

Accord, as to the Federal Constitution, although an earlier case held to the contrary, [FN49] and applying the Virginia court's holding as to the state constitution, Boyd v Bulala (1989, CA4 Va) 877 F2d 1191, ctd ques ans 239 Va 218, 389 SE2d 670, ans conformed to (CA4 Va) 905 F2d 764, 17 FR Serv 3d 351, later proceeding (WD Va) 751 F Supp 576. The court added another reason for rejecting the contention that the statutory damages limitation in medical malpractice actions violated the right to trial by jury under the Seventh Amendment, stating that it was axiomatic that the Federal Constitution did not forbid the creation of new rights or the abolition of old ones recognized by the common law to attain a permissible legislative objective. If the legislature could completely abolish a cause of action, the court concluded, it could also limit the damages recoverable.

In Knowles v United States (1993, DC SD) 829 F Supp 1147, affd, in part, ques certified, (CA8 SD) 29 F3d 1261, more fully reported in § § 17[a], 18, an action against the United States under the Federal Tort Claims Act, the court held that the issue of whether a statute limiting the total damages recoverable in a malpractice action violated the right to a jury trial under the South Dakota Constitution was moot. The United States' waiver of sovereign immunity was limited under the FTCA (28 U.S.C.A. §§ 2674, 1346), observed the court, and absent that limited waiver, the plaintiffs would have no cause of action. There was no right to a jury trial under the FTCA, the court explained, and therefore there could be no issue of a violation of the plaintiffs' right to jury trial under S.D. Const. Art. VI, § 6, subsec. 2.

In Scholz v Metropolitan Pathologists, P.C. (1993, Colo) 851 P2d 901, reh den (Colo) 1993 Colo LEXIS 502, the court held that a state statute limiting both the total damages recoverable by a malpractice plaintiff and the amount of the total which might be awarded for noneconomic loss and injury did not violate the state constitution's guaranty of the right to jury trial. The statute, 6A C.R.S. § 13-64-302 (Supp. 1992), provided that the total amount recoverable for all damages for a course of care from all defendants in any civil action for damages in tort brought against a health care professional or a health care institution could not exceed a certain amount, present value per patient, including any derivative claim by any other claimant, and noneconomic damages were limited to a lesser sum, present value per patient, including any derivative claim by any other claimant. After deciding that the statute was in fact applicable to the plaintiff's cause of action against an unlicensed, nonprofessional lab technician, the court rejected the argument that in limiting the amount of damages the statute unconstitutionally infringed on the right to a jury trial in civil cases, stating that for over a century, Colo. Const. Art. II, § 23, had been interpreted as not guaranteeing a jury trial in civil cases as a matter of right. The court declined the plaintiff's invitation to overrule prior authority, reaffirming the traditional interpretation of the constitutional provision, and concluded that because the right did not exist under the state constitution, it followed logically that the provision limiting the plaintiff's ability to recover damages did not violate that "right."

The statutory limit on the total damages recoverable in a medical malpractice action did not violate the state constitutional right to a trial by jury, the court held in Johnson v St. Vincent Hospital, Inc. (1980) 273 Ind 374, 404 NE2d 585. The malpractice plaintiffs argued that the right to trial by jury included the right to have the jury determine all damages. The court pointed out that the issue of damages had been determined by the jury, prior to a request made to the trial court under the statute to determine the amount due from the patient's compensation fund, and therefore the statute did not withdraw the fixing of damages in excess of the statutory limitation from the jury at all. The right to have a jury assess the damages in a case properly tried by a jury was not a limitation upon the authority of the legislature to set limits upon damages, said the court. The legislature may terminate an entire valid and approvable claim through a statute of limitations, or may validly cause the loss of the right to trial by jury through failure to comply with the requirement of asserting the right by procedural rule, the court pointed out. The right to have the jury assess damages was available, said the court, subject to the policy of the legislation that recoveries be limited, and no more was required by Ind. Const. Art. I, § 20.

Statutory cap on damages recoverable in medical malpractice action does not violate constitutional right to jury trial. (Per curiam, with three justices concurring and two justices concurring in result.) U.S.C.A. Article 1 § 6; Neb.Rev.St. § 44-2825(1). Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc., 265 Neb. 918, 663 N.W.2d 43 (2003).

A statute limiting the total damages recoverable for any injury to, or death of, a patient in a medical malpractice action did not violate the state constitutional right to trial by jury, the court held in Etheridge v Medical Center Hospitals (1989) 237 Va 87, 376 SE2d 525. It was well settled, said the court, that Va. Const. Art. I, § 11, did not preserve or guarantee the right of a trial by jury except in those cases in which it existed when the constitution was adopted. Both historically and in the present, the court continued, the resolution of disputed facts was a jury's sole function, which, without question, extended to the assessment of damages. Once the jury has ascertained the facts and assessed the damages, however, said the court, the constitutional mandate was satisfied and the limitation on medical malpractice recoveries contained in Va. Code § 8.01-581.15 did nothing more than establish the outer limits of a remedy provided by the general assembly. A remedy is a matter of law, not a matter of fact, the court observed, and the trial court applied the remedy's limitation only after the jury had fulfilled its factfinding function. Moreover, the common law never recognized a right to a full recovery in tort, the court explained, and although a party has the right to have a jury assess damages, there was no right to have a jury dictate through an award the legal consequences of its assessment. The jury's function was to resolve the facts and assess the damages, and when the trial court applied the law, reducing the verdict in compliance with the statutory cap and the remedy prescribed by the general assembly, it did not infringe upon the right to trial by jury, the court concluded.

[b] Validity not upheld

In the following cases, the courts held that the right to trial by jury was violated by a statute limiting the total damages recoverable by a medical malpractice plaintiff. See Ray v Anesthesia Assocs., P.C. (1995, Ala) 674 So 2d 525, § 19[b].

In Kansas Malpractice Victims Coalition v Bell (1988) 243 Kan 333, 757 P2d 251 (criticized by Bair v Peck, 248 Kan 824, 811 P2d 1176), [FN50] the court held that a statute limiting the total damages recoverable by a medical malpractice victim, and his recovery for noneconomic loss in a lesser amount, and requiring that any recovery for future economic loss be reduced to present value and invested in an annuity contract, violated the state constitutional guaranty of the right to trial by jury. An award for current medical expenses also came under the cap, although a plaintiff in need could later petition the court for supplemental benefits up to an additional amount for future medical care. The case was a declaratory judgment action brought by a group of medical

malpractice victims against the Kansas Insurance Commissioner in his capacity as administrator of the Health Care Stabilization Fund. The fund was financed by surcharges based on premiums paid by health care providers for primary insurance coverage through another state agency, the Joint Underwriting Association, and was responsible for payment of damages awards above the primary coverage limits. The court observed that the limitation on the liability of the fund was not at issue, because as a state-run insurance company, its liability could be limited by the state in any amount, but the limitation on a negligent health care provider's liability was claimed to violate the right to trial by jury. It was very difficult to recover damages in a medical malpractice case, noted the court, pointing out that in one decade, the fund had settled and paid only 135 cases, of which only 5.19 percent were cases in which more than the statutory limitation was paid. Observing that the Bill of Rights of the Kansas Constitution existed to see, not that the will of the majority was carried out, but that the rights of minorities were protected, the court said that trial by jury was guaranteed only in those cases where it existed at common law, which, however, allowed for the recovery of damages for negligent injury. The jury's traditional role was to decide issues of fact, including the determination of damages, stated the court, and the statute restricted, before trial, the amount of damages available to those most severely injured, and also restricted access to whatever recovery was received through the requirement of annuities, which invaded the province of the jury and infringed the right to a jury trial. Pointing to the traditional distinction between legal and equitable actions, the court explained that the right to a jury trial turned on the type of remedy sought, and it would be illogical to find that a jury, impaneled because monetary damages were sought, could not then fully determine the amount of damages suffered. Although the legislature could modify the right to a jury trial through its power to change the common law, the court continued, such modification must meet due process requirements and be reasonably necessary for the public welfare. The legislative means selected must have a real and substantial relation to the objectives sought, which may be accomplished by a substitute remedy, said the court. However, in return for former rights of recovery in malpractice actions, said the court, the injured patient did not receive prompt payment (as in no-fault insurance) or a reduced burden of proof (as in workers' compensation). The court rejected arguments that, as a substitute benefit, plaintiffs would receive regular payments, unattachable by creditors; the benefits of lower cost health care because doctors would save money on their insurance and pass the savings on to their customers; more doctors able to continue their practices; and a guaranteed recovery because of doctors' insurance coverage under the act. Health care providers had been required to carry liability insurance, in order to practice, for over 10 years, replied the court, thus providing medical malpractice plaintiffs with a source of recovery which was not increased by the legislation. The savings promised by the statute did not outweigh the plaintiff's lost rights, the court continued, because the estimated 5-percent decrease in the fund surcharge on insurance premiums would result in at best a minuscule savings to each patient. In return, the terribly injured patient was denied all remedy for those injuries and losses which exceeded the statutory cap, said the court, so that the substitute remedy was truly inadequate. Characterizing the limitation as a statutory, compulsory, pre-established remittitur, the court pointed out that remittitur was allowed only when, in an individual case, the amount of damages shocked the conscience of the court, and only by providing the injured plaintiff with the option of accepting the remittitur or asking for a new trial. It was clearly the law that damages were an issue for the jury alone and not to be arbitrarily limited by the court, the court concluded. In *Mote ex rel. Mote v Satchell* (1992, F DC Kan) 1992 US Dist LEXIS 20329, the court rejected the malpractice defendants' argument that the statutory limitation on damages recoverable against a health care provider, K.S.A. § 50-3407, was constitutional based on Kansas Supreme Court decisions [FN51] upholding other restrictions on damages. The court said it had previously refused that proposition in an unpublished opinion, recognizing that the supreme court had gone to considerable length to avoid overruling *Kansas Malpractice Victims Coalition v Bell* (1988) 243 Kan 333, 757 P2d 251 (this

subsection). The malpractice plaintiffs' motion for a determination of law in advance of the settlement conference in the action that, inter alia, the statute limiting damages against the health care providers was inapplicable to their claims was therefore granted. For a Virginia case holding a limitation on total malpractice damages invalid under the constitutional right to jury trial, see § 19[a].

[c] --Exception as to limitation on liability of patient's compensation fund

The court held in the following case that a statute limiting the total damages recoverable by a malpractice plaintiff from a state-operated patient's compensation fund did not violate the right to trial by jury.

In Kansas Malpractice Victims Coalition v Bell (1988) 243 Kan 333, 757 P2d 251 (criticized on other grounds by Bair v Peck, 248 Kan 824, 811 P2d 1176), more fully reported in § 19[b], the court, in deciding the validity of a statute limiting the total recovery of a medical malpractice plaintiff under the state constitutional right to trial by jury, observed that the limitation on the liability of the patient's compensation fund was not at issue, because, as a state-run insurance company, its liability could be limited by the state in any amount. [FN52]

§ 20. Under guaranty of open courts

[a] Validity upheld

Under the guaranty of open courts, the courts held in the following cases that statutes limiting the total damages recoverable by a malpractice plaintiff were valid.

In Knowles v United States (1993, DC SD) 829 F Supp 1147, affd, in part, ques certified (CA8 SD) 29 F3d 1261, more fully reported in § § 17[a], 18, the court held that a statute capping the damages recoverable in a medical malpractice action did not bar malpractice plaintiffs' access to the courts, but merely limited the recovery of damages. Noting that the legislature could impose reasonable restrictions upon available remedies, the court said that it was a valid exercise of legislative discretion to enact SDCL § 21-3-11, which did not eliminate an available remedy or bar access to the courts.

In Jones v State Bd. of Medicine (1976) 97 Idaho 859, 555 P2d 399, cert den 431 US 914, 53 L Ed 2d 223, 97 S Ct 2173, the court held that the provision of the 1975 Idaho Hospital-Medical Liability Act, placing limitations on damages recoverable in medical malpractice actions, I.C. §§ 39-4204 and 39-4205, did not contravene the state constitutional provision prohibiting a denial of the right of citizens to a redress for injuries, reversing a trial court's judgment to the contrary. The Act set a ceiling on recoverable damages for actions against physicians of a certain amount per claim and a certain amount per occurrence, and similar ceilings on recoverable damages for actions against acute care hospitals, with the alternative of a ceiling based on a certain amount multiplied by the total number of beds in the hospital. The state constitution provided as follows: "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and rights and justice shall be administered without sale, denial, delay or prejudice." The court pointed out that the holding of the trial court was predicated upon its belief that by this provision, the Idaho Constitution effectively adopted the common law as it existed in 1890 and thereby preserved the common-law right of action for medical malpractice. The trial court further reasoned that while the legislature may alter common law remedies, it must provide substitute procedures or remedies in lieu thereof or it cannot deny a remedy which existed at common law. The court said that to adopt such reasoning would be to hold that the common law as of 1890 governed the health, welfare, and safety of the citizens of the state and was unalterable without constitutional amendment. Pointing out that nothing in the above-quoted section of the constitution either explicitly or implicitly prohibited legislative modification of common-law actions, the court emphasized that the

common law prevailed in the state by legislative enactment and could, therefore, be repealed by the legislature either expressly or by the passage of a law inconsistent with the common law on a particular subject.

See Johnson v St. Vincent Hospital, Inc. (1980) 273 Ind 374, 404 NE2d 585, § 18, in which the court held that a statute providing for limitations upon the total amount recoverable for injury due to the negligent conduct of health care providers was constitutional under the state constitution's guaranty of a complete remedy for injury, treating the issue in conjunction with its analysis of the statute's validity under the due process clauses of the state and federal constitutions.

Limitation on recovery under provision of Indiana Medical Malpractice Act which establishes a statutory damages cap does not violate open courts provision of State Constitution. West's A.I.C. Const. Art. 1, § 12; West's A.I.C. 34-18-14-3. Indiana Patient's Compensation Fund v. Wolfe, 735 N.E.2d 1187 (Ind. Ct. App. 2000).

Statutory cap on damages recoverable in medical malpractice action does not violate open courts provision of State Constitution. (Per curiam, with three justices concurring and two justices concurring in result.) Const. Art. 1, § 13; Neb. Rev. St. § 44-2825(1). Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc., 265 Neb. 918, 663 N.W.2d 43 (2003).

[b] Validity not upheld

A statute limiting the total damages recoverable in a malpractice action violated a constitutional guaranty of open courts or the right to a remedy for injury, the court held in the following case.

Statutory limitations on the right of a medical malpractice plaintiff to full recovery violated § 18 of the Bill of Rights of the Kansas Constitution, the right to a remedy by due course of law, the court held in Kansas Malpractice Victims Coalition v Bell (1988) 243 Kan 333, 757 P2d 251 (criticized by Bair v Peck, 248 Kan 824, 811 P2d 1176).

[FN53] Observing that the legislature was permitted to modify remedies when required by public policy, the court said that due process requirements must be met, and when a common-law remedy was modified or abolished, an adequate substitute remedy must be provided to replace it. The statute infringed on the right to a remedy by limiting recovery for noneconomic loss, overall loss, and by forcing successful plaintiffs to accept their award over a number of years by means of an annuity contract, the court observed. The court reviewed other statutes which had been struck down because they abolished or restricted full remedy for an injury, such as a statute requiring a prospective libel plaintiff to give notice before filing a suit and limiting damages to actual money damages if a newspaper retracted the allegedly libelous statement. Statutes abolishing charitable immunity, and a later statute immunizing charitable assets from garnishment, were also overturned on the same basis, observed the court. The latter limited a patient's recovery to the extent of the hospital's insurance coverage, an arbitrary limit, said the court, and the statute at issue similarly cut off recovery at arbitrary amounts. The right to a remedy meant the right to a full remedy, the court continued, regardless of the likelihood of recovery. This principle must invalidate even the provisional higher limit on recovery for future medical expenses which can be applied for by a plaintiff for whom the original limit on recovery proved insufficient. The forced remedy of recovery of future damages by annuity also violated the common-law right to a remedy, said the court, for the annuity provided for was a contract owned and controlled by someone else, and while a plaintiff could certainly agree to accept his judgment in the form of an annuity or in any other form he chose, the concept of forcing him to accept an annuity limited his remedy and there was always the risk of default, however slight. The court rejected the contention that malpractice plaintiffs received an adequate quid pro quo for the limitations on their right to recover. Health care providers have been required to carry malpractice insurance for over a decade, said the court, so the plaintiffs receive nothing new in this regard, and if it were not for having received negligent health care, the victims would not need to have continuing health care

guaranteed, by statutes which supposedly will lower the cost of insurance, encouraging doctors to continue their practices. While the constitution did not guarantee a recovery in the sense that every judgment debtor will be able to pay, there was a difference between access to a source of recovery and the right to a remedy in due course of law, said the court. The legislature may legally abolish the fund or cap its liability, but cannot abolish the right by capping a plaintiff's recovery without providing an adequate substitute.

§ 21. Under separation of powers clause

A statute limiting the total damages recoverable in a malpractice action did not violate the constitutional prescription of the separation of powers, the courts held in the following cases.

As to the Federal Constitution, the court held in Boyd v Bulala (1989, CA4 Va) 877 F2d 1191, ctfd ques ans 239 Va 218, 389 SE2d 670, ans conformed to (CA4 Va) 905 F2d 764, 17 FR Serv 3d 351, later proceeding (WD Va) 751 F Supp 576, that Virginia's statutory limitation on the damages recoverable in medical malpractice actions could not violate federal separation of powers principles because those principles were not applicable. The law was settled that the doctrine of separation of powers embodied in the Federal Constitution was not mandatory for the states, observed the court.

Statutory cap on damages recoverable in medical malpractice action does not act as a legislative remittitur or otherwise violate principles of separation of powers. (Per curiam, with three justices concurring and two justices concurring in result.) U.S.C.A. Article 2 § 1; Neb.Rev.St. § 44-2825(1). Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc., 265 Neb. 918, 663 N.W.2d 43 (2003).

In Etheridge v Medical Center Hospitals (1989) 237 Va 87, 376 SE2d 525, the court held that a statutory limit on the total recovery of a medical malpractice plaintiff did not violate the separation of powers provision set forth in Va. Const. Art. III, § 1. The plaintiff argued that the limit interfered with the power of the court to enter and enforce its own judgments and sought to circumscribe the discretion and power of judicial officers, converting them into ministerial agents of the legislative department. The court observed that the powers of the courts were set forth in Va. Const. Art. VI, § 1, which provided that, subject to the provisions relating to the powers and jurisdiction of the court, the general assembly should have the power to determine the original and appellate jurisdiction of the courts of the commonwealth. The legislative powers were set forth in Va. Const. Art. IV, § 14, which specified that the general assembly's authority extended to all subjects of legislation not forbidden or restricted therein. There was nothing in the common law that was not subject to repeal by the legislature unless it had been re-enacted in a constitutional provision, said the court, and the legislature had the power to provide, modify, or repeal a remedy. Whether the remedy prescribed in Va. Code § 8.01-581.15 was viewed as a modification of the common law, or as establishing the jurisdiction of the courts in specific cases, it was a proper exercise of legislative power. A court ignoring the legislatively determined remedy, and entering an award in excess of the permitted amount, would be invading the province of the legislature, the court concluded.

Statutory cap on damages in medical malpractice cases did not violate separation of powers doctrine or invade province of the judiciary; state constitution did not give Supreme Court the exclusive authority to make rules governing practices and procedures to be used in courts. Const. Art. 6, § 5; Code 1950, § 8.01-581.15. Pulliam v. Coastal Emergency Services of Richmond, Inc., 257 Va. 1, 509 S.E.2d 307 (1999).

§ 22. Under special legislation clause

The court held in the following cases that it was not a violation of the constitutional prohibition of special legislation for a statute to limit the total damages recoverable in a malpractice action.

In Knowles v United States (1993, DC SD) 829 F Supp 1147, affd, in part, ques certified (CA8 SD) 29 F3d 1261, more fully reported in § § 17[a], 18, the court held that a statute limiting the total damages recoverable by a malpractice plaintiff was not special legislation proscribed by the South Dakota Constitution, S.D. Const. Art. III, § 23-9. The test of validity under the constitution was twofold, said the court, asking whether the legislation uniformly treated all members of the legislatively created class, and whether the legislation promoted the public interest. Rejecting the plaintiffs' argument that the statute extended special privileges to physicians and their insurers, while at the same time arbitrarily distinguishing between severely injured victims of medical malpractice and less severely injured medical malpractice claimants, the court said that the statute applied equally to all medical malpractice victims and all practitioners of the healing arts and therefore satisfied the first prong of the test. As to whether the legislation promoted the public interest, the court noted that the legislation must be upheld if it could be supported on any reasonable ground, and that it was rationally supported by the connection between the legislative goal of alleviating a perceived medical malpractice insurance crisis and the imposition of the cap on malpractice damages.

However, noting that it was clearly arguable that a statute limiting total medical malpractice damages was special legislation, in that it selected physicians and hospitals from a class of persons otherwise subject to liability for their negligent acts, and extinguished, at least in part, their liability, the court in Jones v State Bd. of Medicine (1976) 97 Idaho 859, 555 P2d 399, cert den 431 US 914, 53 L Ed 2d 223, 97 S Ct 2173, remanded the case to the trial court for its consideration of the constitutionality of the provision. Declaring that a state constitutional prohibition against special privilege legislation and the equal protection clause of the United States Constitution were adopted to serve distinctly different identifiable purposes, the court said that while it might be constitutional in the sense of equal protection for the state legislature to single out persons or corporations for preferred treatment, such treatment could nevertheless be regarded as in conflict with the state constitution's prohibition against special privilege legislation. The liability limitation provisions in question, I.C. §§ 39-4204 and 39-4205, set a ceiling on recoverable damages for actions against physicians of a certain amount per claim and per occurrence, and a ceiling on recoverable damages for actions against acute care hospitals of a certain amount per claim and per occurrence, or an alternative figure comprised of a certain amount multiplied by the total number of beds in the hospital. The court noted that while the constitutionality of the provision vis-a-vis the state constitutional prohibition against special privilege legislation had not been raised in the trial court, a similar limitation provision had been held violative of a similar state constitutional prohibition in Wright v Central Du Page Hospital Asso. (1976) 63 Ill 2d 313, 347 NE2d 736, 80 ALR3d 566, [FN54] since the trial court's decision, and the issue had been raised on appeal in the case before it. The provision could survive a challenge that it was special privilege legislation if it were found to have been enacted in response to a problem of statewide concern, and, by alleviation of that problem, found to serve the health and welfare of the people of the state, and the means adopted in the act must be found to be reasonably related to the solution of those problems, said the court.

For an Indiana case determining the validity of a statutory limitation on the total amount of damages recoverable in a medical malpractice action under Ind. Const. Art. I, § 23, and Ind. Const. Art. IV, §§ 22 and 23, which prohibit special privilege legislation, together with validity under the equal protection clause of the Fourteenth Amendment, see Johnson v St. Vincent Hospital, Inc. (1980) 273 Ind 374, 404 NE2d 585, § 17[a]. Statutory cap on damages recoverable in medical malpractice action did not violate principles prohibiting "special legislation." (Per curiam, with three justices concurring and two justices concurring in result.) U.S.C.A. Article 3 § 18; Neb.Rev.St. §§ 44-2801, 44-2825(1). Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc., 265 Neb. 918, 663 N.W.2d 43 (2003).

In Etheridge v Medical Center Hospitals (1989) 237 Va 87, 376 SE2d 525, the court held that a statutory limitation on the total amount recoverable by a malpractice plaintiff did

not violate constitutional provisions prohibiting special legislation. The provision in Va. Const. Art. I, § 4, specifying that no one was entitled to exclusive or separate emoluments or privileges from the community except in consideration of public services, had no reference to action of the legislature, said the court, and was not applicable to the case. As to the claim that Va. Code § 8.01-581.15 violated Va. Const. Art. IV, § 14, providing that the general assembly shall not enact any local, special, or private law, the plaintiff argued that the statutory limitation on medical malpractice damages conferred special privileges and immunities upon a small segment of the population, namely, physicians and their insurers, while at the same time arbitrarily distinguishing between severely injured victims of medical malpractice and less severely injured malpractice claimants as well as all other tort plaintiffs. Laws may be made to apply to a class only, asserted the court, and that class may be in point of fact a small one, provided the classification itself be reasonable and not arbitrary, and the law be made to apply to all of the persons belonging to the class without distinction. If the classification bears a reasonable and substantial relation to the object sought to be accomplished by the legislation, the court continued, it will survive a special-laws constitutional challenge. After careful and deliberate study, the general assembly determined that health care providers faced increasing difficulty in obtaining affordable malpractice coverage in excess of the statutory limit and that the situation would tend to reduce the number of health care providers available to serve the state's citizens, said the court. The necessity for and the reasonableness of classifications were primarily questions for the legislature, the court added, pointing out that the limitation applied to all health care providers and to all medical malpractice plaintiffs. According to the legislation the presumption of validity to which it was entitled, the court concluded that the classification was not arbitrary, bore a reasonable and substantial relation to the object sought to be accomplished, and that it applied to all persons belonging to the class without distinction and was not special in effect.

See Robinson v Charleston Area Medical Ctr., Inc. (1991) 186 W Va 720, 414 SE2d 877, § 3[a], in which the court, treating the analysis under the two constitutional provisions together, held that W. Va. Code § 55-7B-8, as amended, a statute limiting the amount of noneconomic damages recoverable by a plaintiff in a malpractice action, did not violate the right to equal protection under W. Va. Const. Art. III, § 10 (implied), and was not special legislation prohibited by W. Va. Const. Art VI, § 39.

§ 22.5. Under proscription against sovereign immunity

The court in the following case held that a statute limiting the state's liability in medical malpractice cases did not violate the constitutional proscription against sovereign immunity.

Statute limiting state's liability in medical malpractice cases to \$500,000 did not violate state constitution's proscription against sovereign immunity; statute merely afforded state the same limit of liability that was provided to private defendants who commit medical malpractice. LSA-Const. Art. 12, § 10; LSA-R.S. 40:1299.39, 40:1299.42, subd. B(1). Williams v. State, Dept. of Health and Hospitals, 703 So. 2d 579 (La. 1997), reh'g denied, (Jan. 9, 1998).

D. Statutes Limiting General Damages

§ 23. Validity not upheld

In the following cases, the courts held that a statute limiting the recovery of general damages in medical malpractice cases violated constitutional rights.

Patients' equal protection rights were not violated by legislature's omission of noneconomic damages cap of Health Care Availability Act (HCAA) from inflationary

adjustment to cap in negligence cases, where their malpractice claims accrued prior to effective date of inflationary adjustment. U.S.C.A. Const. Amend. 14; West's C.R.S.A. Const. Art. 2, § 25; West's C.R.S.A. § 13-21-102.5(3)(c)(IV). Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C., 95 P.3d 571 (Colo. 2004), as modified on denial of reh'g, (Aug. 16, 2004).

A statutory damage provision capping general damages in medical malpractice actions was unconstitutional under the Ohio Constitution's due process clause, the court held in Morris v Savoy (1991) 61 Ohio St 3d 684, 576 NE2d 765. The court responded to a certified question as to the constitutionality of the statute from the Federal Court, after a trial on the issue of damages for a malpractice plaintiff who had become paralyzed from the neck down following surgery, and was awarded a verdict significantly in excess of the statutory limit. A legislative enactment will be deemed valid on due process grounds if it bears a real and substantial relation to the public health, safety, morals, or general welfare, and if it is not unreasonable or arbitrary, observed the court. The language of the Ohio Medical Malpractice Act indicated that it was aimed at medical malpractice insurance rates, the court continued, which had been rising rapidly in the years previous to its passage. However, one provision of the Act required an annual report from the state superintendent of insurance on the effectiveness of certain of the Act's provisions in reducing medical malpractice insurance premiums, said the court, and the statutory damages cap was not listed among the statutes that the legislature obviously believed would have an impact on those premiums. Stating that it was unable to find, either in the amici briefs or elsewhere on the record, any evidence to buttress the proposition that there was a rational connection between damages awards over the statutory limit and malpractice insurance rates, the court pointed out that there was evidence of the converse in an independent study indicating that less than .6 percent of all claims brought were for more than the statutory cap. Another study by the Insurance Service Organization, the rate-setting arm of the insurance industry, found that the savings from various tort reforms, including a cap on noneconomic damages, were "marginal to non-existent," said the court. Furthermore, it was irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice, the court concluded.

However, although it invalidated the statute on due process grounds under the Ohio Constitution (this section), the court in Morris v Savoy (1991) 61 Ohio St 3d 684, 576 NE2d 765, held that Ohio R.C. § 2307.43, a statutory provision limiting general damages in medical malpractice actions, did not violate the equal protection clause. [FN55] The correct analysis was the "rational basis" test, said the court, because the right to malpractice damages did not involve a fundamental right or suspect class, and the statute must be upheld if there existed any conceivable set of facts under which the classification rationally furthered a legitimate legislative objective. The section of the Ohio Medical Malpractice Act, in placing a limit on general or noneconomic damages, distinguished between medical malpractice victims and all other tort victims, and equal protection required the existence of reasonable grounds for making the distinction, the court explained, concluding that if there were a crisis in the medical malpractice insurance area, the distinction satisfied the test of validity on equal protection grounds. The court pointed out that the statute also treated members of the class of medical damage claimants differently, in that the statute applied only to claims not involving death, and treated the most seriously injured malpractice victims differently from the rest of the class. Although there was no evidence to support the contention that the limitation eased the burden of alleged "exorbitant" malpractice awards, said the court, the vast weight of authority required that the courts defer to the legislature on the issue of constitutionality under the rational basis analysis.

In Jeanne v Hawkes Hosp. of Mt. Carmel (1991, Franklin Co) 74 Ohio App 3d 246, 598 NE2d 1174, motion gr, stay gr 61 Ohio St 3d 1401, 573 NE2d 676 and cause dismd 62 Ohio St 3d 1437, 579 NE2d 210, the court held that Ohio R.C. § 2307.43, limiting the amount of general damages recoverable by a medical malpractice plaintiff, violated the right to trial by jury guaranteed by Ohio Const. Art. I, § 5. The legislature could not in

any way attempt to limit or abolish the right to a trial by jury, said the court, and this included the right to have a jury determine the amount of damages. The statute limited the right to a trial by jury by putting a cap on the amount of damages a jury could award in a given case, which limit bore no reasonable relationship to anything, and prevented the jury from awarding damages based on the evidence adduced at trial. A statutory limitation on general damages recoverable in a medical malpractice action violated the due process clauses of both the Ohio and Federal Constitutions beyond a reasonable doubt, the court held in Duren v Suburban Community Hospital (1985) 24 Ohio Misc 2d 25, 495 NE2d 51. Noting that courts were divided on the constitutionality of limiting medical malpractice damages, the court distinguished the Ohio statute from a statute limiting only noneconomic damages, from another which provided for insurance coverage for all health care providers and had a higher limit, and from one providing a choice of participation in the statutory scheme, in a state with different constitutional safeguards. The court observed that, while damage limitation had been recognized as a proper subject for legislative action, invalidation had been based on both due process and equal protection arguments. It was unfair and unreasonable to impose the burden of supporting the medical care industry on those persons most severely injured, the court concluded.

E. Statutes Limiting Only Recovery From Health Care Provider

§ 24. Validity upheld

The courts upheld the constitutionality of a statute limiting only the amount of damages recoverable from a health care provider in a medical malpractice action, in the following cases.

The court rejected the contention that the legislature could not constitutionally limit the liability of a health care provider for damages recoverable in a medical malpractice action and transfer responsibility for the portion of the judgment in excess of that limit to a patient's compensation fund in Florida Patient's Compensation Fund v Von Stetina (1985, Fla) 474 So 2d 783, 10 FLW 286. The trial court had found the statutory section unconstitutional on the ground that it attempted to limit the court's inherent power to enforce judgments and violated both the equal protection and due process clauses of the Florida and United States Constitutions. The fund afforded medical malpractice liability coverage to health care providers for the benefit of both the health care providers and those members of the public who became victims of medical malpractice, observed the court. The concept of the fund and its assessment mechanism was upheld in Department of Ins. v Southeast Volusia Hospital Dist. (1983, Fla) 438 So 2d 815, app dismd 466 US 901, 80 L Ed 2d 149, 104 S Ct 1673, later proceeding (Fla App D1) 452 So 2d 91, review den (Fla) 456 So 2d 1181 and later proceeding (Fla App D1) 464 So 2d 1275, later proceeding (Fla App D1) 466 So 2d 379, 10 FLW 727, later proceeding (Fla App D1) 478 So 2d 820, 10 FLW 1250 and review den (Fla) 476 So 2d 676, the court continued, and the statutory scheme did not deny plaintiffs recovery of judgments, but was designed in part to insure that sufficient funds existed to pay substantial judgments to medical malpractice victims. Provision for the fund to be made a party to medical malpractice actions and responsible for portions of awards in excess of the limit of recovery against a health care provider did not substantially violate or change any of the plaintiffs' vested rights, said the court. The court went on, however, to caution that it did not address the constitutional right of a plaintiff to levy against a health care provider when the fund was fiscally incapable of or otherwise prohibited from paying validly entered judgments within a reasonable time because of inadequate rates and assessments.

Accord, Florida Patient's Compensation Fund v Tillman (1986, Fla) 487 So 2d 1032, 11 FLW 74, the court stating that it had upheld the constitutionality of the statute in Von

Stetina, and holding that the District Court erred in finding the limitation of liability provisions of Fla. Stat. § 768.54 unconstitutional.

In Mercy Hospital, Inc. v Menendez (1979, Fla App D3) 371 So 2d 1077, cert den (Fla) 383 So 2d 1198 and app dismd without op (Fla) 383 So 2d 1198 and appeal after remand (Fla App D3) 400 So 2d 48, petition den (Fla) 411 So 2d 383, more fully reported in § 38[a], the court, holding that medical malpractice plaintiffs had the burden of making the patient's compensation fund a party in any suit where recovery was sought against a health care provider in excess of the limit of damages recoverable against the provider, stated that the application of the statute was not given an unconstitutional effect by the requirement that the fund, which the plaintiff argued was like an insurance program, be joined in the suit, and the provision was not an invasion of the right of the court to establish rules of procedure.

In Garcia v Cedars of Lebanon Hospital Corp. (1984, Fla App D3) 444 So 2d 538, the court, stating it was adhering to its decision in Mercy Hospital, Inc. v Menendez (1979, Fla App D3) 371 So 2d 1077, cert den (Fla) 383 So 2d 1198 and app dismd without op (Fla) 383 So 2d 1198 and appeal after remand (Fla App D3) 400 So 2d 48, petition den (Fla) 411 So 2d 383, the previously reported case, held that Fla. Stat. § 768.54(2)(b), a provision limiting a judgment against qualified health providers in a medical malpractice action, was valid and enforceable.

Statutory cap on damages recoverable from state health care providers did not violate constitutional equal protection and access to courts provisions, although cap treated patients differently, as cap provided three benefits: (1) greater likelihood that offending health care provider has malpractice insurance, (2) greater assurance of collection from solvent fund, and (3) payment of all medical care and related benefits. LSA-Const. Art. 1, §§ 3, 22; LSA-R.S. 40:1299.39. Batson v. South Louisiana Medical Center, 727 So. 2d 613 (La. Ct. App. 1st Cir. 1998), writ granted, 741 So. 2d 1276 (La. 1999) and judgment rev'd on other grounds, 750 So. 2d 949 (La. 1999).

Monetary statutory limitation of \$500,000 for claims against private hospitals, as set forth in Louisiana Medical Malpractice Act, was not unconstitutional, even though no statutory monetary limitations existed in claims against state health care providers sued for medical malpractice. Miller v. Southern Baptist Hosp., 806 So. 2d 10 (La. Ct. App. 4th Cir. 2001).

Malpractice Liability for State Services Act's (MLSSA's) \$500,000 statutory cap on medical malpractice judgments against public health care providers is constitutional.

LSA-R.S. 40:1299.39. Ruiz v. Oniate, 806 So. 2d 81 (La. Ct. App. 4th Cir. 2001).

Governmental Tort Claims Act providing that resident physicians can be sued individually, notwithstanding their status as state employees, but limiting their liability to \$100,000, recognizes special burdens (financial amongst other) faced by student physicians and makes some accommodations to protect them should they be called upon to defend against lawsuit. That legislature felt need to protect residents in this special manner indicates underlying intent to subject faculty and student physicians to individual liability for torts committed while practicing medicine. Anderson v Eichner (1994, Okla) 890 P2d 1329.

§ 24.5. Application generally

State hospital did not prove that its health care providers were entitled to statutory limit of liability in medical malpractice action, and thus hospital was not entitled to benefit of statutory cap, where hospital did not introduce evidence that its employees were acting pursuant to written employment contracts meeting the requirements of the Malpractice Liability for State Services Act. LSA-R.S. 40:1299.39, 40:1299.39, subd. A(1)(ii)(aa), 40:1299.39.1. Ruiz v. Oniate, 697 So. 2d 1373 (La. Ct. App. 4th Cir. 1997), reh'g denied, (Aug. 29, 1997) and writ granted, 707 So. 2d 45 (La. 1998).

Nursing home was a "qualified health care provider" for purpose of determining whether it was liable for malpractice only to extent provided in Medical Malpractice Act (MMA); letter from Medical Malpractice Insurance Director of Patient's Compensation Fund (PCF)

indicated that nursing home was enrolled in PCF and that it was insured, and there was a certified copy of nursing home's certificate of enrollment showing that nursing home was certified as an enrollee under MMA. LSA-R.S. 40:1299.42; La.Admin. Code tit. 37, pt III, § 515. Roberson v. Arcadia Healthcare Center, Inc., 850 So. 2d 1059 (La. Ct. App. 2d Cir. 2003).

Under West Virginia law, as predicted by the district court, statutory cap on noneconomic loss awards in medical malpractice cases limited individual health care provider's liability for occurrence of medical practice to \$1 million, but did not limit total amount plaintiff could recover from multiple health care providers. West's Ann. W. Va. Code, 55-7B-8. Daniel v. Beaver, 300 F. Supp. 2d 436 (S.D. W. Va. 2004).

III. Construction and Application of Statute Limiting Damages in Medical Malpractice Actions

A. Generally

§ 25. Application to wrongful death claims [FN56]

[a] Held applicable

In the following case the court held that a statute limiting damages recoverable in a medical malpractice action was applicable to a wrongful death claim.

In Yates v Pollock (1987, 2nd Dist) 194 Cal App 3d 195, 239 Cal Rptr 383, the court construed a statutory limitation on the recovery of noneconomic damages in a medical malpractice action as applicable to a wrongful death action based on medical malpractice, reversing the trial court's refusal to reduce the noneconomic damages awarded to the plaintiffs under the Medical Injury Compensation Reform Act. The court noted that Cal Civ. Code § 333.2(a) provided that in any action, a plaintiff was entitled to recover noneconomic losses, and Cal Civ. Code § 333.2(b) specified that the amount of damages in any action could not exceed a certain amount. Furthermore, Cal Civ. Code § 333.2(c)(2) defined professional negligence as an act which resulted in either personal injury or wrongful death, the court continued, and the plain language of the statute indicated unequivocally that awards in all medical malpractice litigation were limited, whether the recovery was sought by injured patients or by their survivors. The legislative history also indicated an intent for a comprehensive provision because certain drafts which explicitly excluded plaintiffs in wrongful death actions from a specified ceiling were rejected, the court observed. Considering the plaintiffs' argument that because a certain subdivision referred only to actions for injury rather than injury or wrongful death, there was evidence of an intention not to include wrongful death actions, the court observed that wrongful death claims were also for "injuries," those suffered by the heirs of medical malpractice victims. The court also disagreed with the argument that since wrongful death plaintiffs could not recover for certain kinds of damage enumerated in the statute, the legislature must have intended to exclude wrongful death actions, pointing out that the section did not purport to set forth a comprehensive catalog of the types of losses to which the statute was applicable. Similarly, the court continued, the statute's reference to "nonpecuniary damage" was not fatal to its application to wrongful death actions, for while decisional law indicated that only pecuniary losses were compensable, damages in such cases, in fact, had never been restricted to those elements having an ascertainable economic value.

Medical malpractice noneconomic damages cap is applicable to wrongful death actions where the underlying claim is medical malpractice. M.C.L.A. §§ 600.1483, 600.2922. Jenkins v. Patel, 684 N.W.2d 346 (Mich. 2004).

Under medical malpractice noneconomic damages cap statute, plaintiff is subject to the

higher of two damages caps if, as a result of defendant's negligent conduct, plaintiff at some point thereafter, and while still living, suffered one of the enumerated statutory conditions allowing application of the higher noneconomic damages cap; thus, higher cap may apply even if plaintiff is dead at the time of judgment (Per Markman, J., with one justice concurring, and two justices concurring in result only). M.C.L.A. § 600.1483(1)(a-c). Shinholster v. Annapolis Hosp., 685 N.W.2d 275 (Mich. 2004).

Application of medical malpractice statutory cap of \$75,000 individually to each survivor or beneficiary of deceased patient for non-economic damages, established under the Virgin Islands Health Care Provider Malpractice Act and the Virgin Islands Wrongful Death Act, was proper; the cause of action in the case stemmed from the wrongful death of the decedent due to the negligence or malpractice of physician, and the Wrongful Death Act was very clear and unambiguous in its meaning, which was to provide "each survivor" with recovery for the death of a decedent. 5 V.I.C. § 76; 27 V.I.C. § 166b. Cebedo v. Tobar, 240 F. Supp. 2d 373 (D.V.I. 2003) (applying Virgin Islands law).

[b] Held not applicable

A statutory provision limiting the amount of damages recoverable in a medical malpractice action was construed in the following case not to apply to a wrongful death claim, although it did apply to the survivorship action.

In Duren v Suburban Community Hospital (1985) 24 Ohio Misc 2d 25, 495 NE2d 51, the court held that a statutory limitation on malpractice damages by its terms did not apply to the plaintiff's wrongful death action, although it would operate to reduce the verdict on the survivorship claim for pain and suffering, if it were constitutional. The statute, Ohio R.C. § 2307.43, provided that general damages should not exceed a certain amount in any medical claim not involving death. The plaintiff, administratrix of her deceased husband's estate, argued that the limitation did not apply because the action involved a death, and the court ruled that it unambiguously did not apply to the wrongful death claim, but did apply to the survivorship action. [FN57]

§ 26. Application to derivative claims

The court held in the following case that a statute limiting damages recoverable in a medical malpractice action was applicable to claims against health care providers derived from the patient's medical malpractice cause of action.

Actions brought by relatives of the primary victim for emotional distress and loss of consortium were subject to the limitation of damages recoverable in an action for medical malpractice of Cal Civ. Code § 333.2, the court held in Taylor v United States (1987, CA9 Cal) 821 F2d 1428, 8 FR Serv 3d 674, cert den 485 US 992, 99 L Ed 2d 510, 108 S Ct 1300, 10 FR Serv 3d 714, an action against the United States under the Federal Tort Claims Act. The patient had sustained brain damage when his ventilator disconnected and his wife had witnessed efforts to revive him, and the appeal concerned the application of the statute to a verdict in her favor for an amount exceeding the damages cap. In a footnote, the court observed that neither party had discussed the issue of whether the statute applied to actions for noneconomic damages brought by persons other than the patient, and no court had decided the question. However, considering the application of the medical malpractice statute of limitation to such actions by the California Supreme Court, the court decided that the damage limitation should also apply, since that would further the state legislature's purpose of controlling liability associated with medical malpractice. Although amici contended on appeal that the operation of the statute limited the economic damages recoverable in all actions arising out of a single act of malpractice, rather than applying per action, plaintiff, or injury, the court declined to decide these questions because the government had not raised them below. [FN58]

The professional negligence liability of a medical group consisting of a partnership of physicians, as employer or principal of the physicians, was limited under the doctrine of respondeat superior to the liability of the employee physicians, and therefore, under the

Medical Injury Compensation Reform Act (MICRA), the medical group could not be held vicariously liable for noneconomic damages in excess of the statutory damages cap of \$250,000. West's Ann. Cal. Civ. Code § 3333.2. Lathrop v. Healthcare Partners Medical Group, 114 Cal. App. 4th 1412, 8 Cal. Rptr. 3d 668 (1st Dist. 2004).

Claim for loss of consortium that was brought by patient's wife was a derivative claim, and thus wife could not recover separate judgment on that claim or recover award of prejudgment interest in medical malpractice action that resulted in patient recovering statutory damages cap under Medical Malpractice Act; damages awarded to wife were included within cap applicable to patient's claim. West's A.I.C. 34-18-14-3(a)(2). Johnson v. Eldridge, 799 N.E.2d 29 (Ind. Ct. App. 2003).

See Descant v Administrators of the Tulane Educ. Fund (1994, La) 639 So 2d 246, § 40. Patient's husband's award of noneconomic damages for loss of consortium was not subject to same statutory damages cap as was applied to noneconomic damages awarded to patient in medical malpractice action for failure to timely diagnose patient's ovarian cancer; although loss of consortium claim was derivative, spouse was not automatically entitled to damages for such claim, and thus, husband was separate plaintiff bringing separate personal injury action for loss of consortium. V.A.M.S. § 538.210, subd. 1. LaRose v. Washington University, 154 S.W.3d 365 (Mo. Ct. App. E.D. 2004), reh'g and/or transfer denied, (Jan. 5, 2005) and transfer denied, (Mar. 1, 2005).

§ 27. Retroactive effect

Statutory provisions limiting the amount of damages recoverable in a medical malpractice action, or amendments thereof, were construed in the following cases not to apply retroactively, the courts being in agreement that if a cause of action accrued before the effective date of the statute or amendment, the right thus vested could not be limited by subsequent legislation.

The trial judge did not err in refusing to apply the amended version of a statutory damages cap when reducing the jury's verdict in a malpractice action, the court held in Davis v Omitowaju (1989, CA3 VI) 883 F2d 1155, an action which was pending at the time the amended statute became law. The patient's cause of action had arisen, and she had filed her complaint with the Malpractice Review Committee and with the trial court, before the effective date of the amendment, which would reduce her total recovery further than the original malpractice damages limitation statute. The defendant argued that some provisions of the new statute were passed with a clause specifically limiting their application to actions arising after the amendment's effective date, but that no such clause was enacted with respect to the amendments involving the total amount of damages which could be awarded. The canon that statutes operate prospectively required the application of the original version of the statute, said the court, because the rule was applied when application of a new law would affect rights or obligations existing prior to the change. The patient sought the doctor's services at a time when her recovery was limited by the original statute, and thus the rights and obligations of the parties were predicated upon that statute, the court concluded, and there was no clear legislative indication that the amended statutory cap should be applied.

In Martino v Sumrall (1993, La App 1st Cir) 619 So 2d 87, cert den (La) 621 So 2d 821, the court held that an amendment to the public medical malpractice statute, providing that the statute, including its limitation of damages provisions, should apply to the state and any of its departments, including state hospitals, could not be applied retroactively to the cause of action of a plaintiff who had been injured before the amendment. The court observed that La. R.S. § 40:1299.39 limited the liability of the state of Louisiana in malpractice cases to a certain amount, exclusive of liability for medical expenses, but at the time of the plaintiff's injury, the legislation applied only to state-employed physicians and other professionals providing medical and related health care services. The supreme court had specifically held that the liability cap did not apply to judgment rendered against the

[Next Part](#) | [First Part](#)

[Next Part](#) | [Previous Part](#) | [First Part](#)

state itself, the court continued, [FN60] but later the legislature amended the statute to include such judgments. Retroactive application of the statute would disturb vested rights, and therefore the amended version could not be applied to the damages recoverable by the plaintiff in the instant case, the court concluded.

Louisiana medical malpractice cap, La Stat § 40:1299.39, was not made applicable to state and its hospitals until 1988; statute was not retroactively applicable to case filed in 1983 in connection with 1983 death of patient. Smith v Louisiana Health & Human Resources Admin. (1994, La App 4th Cir) 637 So 2d 1177, cert den (La) 644 So 2d 634. In Marcel v Louisiana State Dep't of Public Health (Dept. of Health & Human Resources) (1986, La App 1st Cir) 492 So 2d 103, cert den (La) 494 So 2d 334, the court held that the trial court did not err in failing to impose a limit on the malpractice defendants' liability, pursuant to the provisions of LSA-R.S. § 40:1299.39, when the patient's cause of action arose well before the effective date of the statute. The child's injuries began shortly after birth, caused by the defendants' failure to diagnose a genetic disorder known as phenylketonuria. The statute limited malpractice liability for state services, the court observed, and was intended for immediate application. While under La. Civ. Code art. 8 a law can prescribe only for the future, and under LSA-R.S. § 1:2 no section of the revised statutes is retroactive unless expressly stated, this general rule of prospective application applied only to substantive laws as distinguished from procedural or remedial laws, said the court. However, no law may be applied retroactively if that would operate to disturb vested rights, the court continued, noting that even in those cases in which statutes of limitation have been retroactively applied, the courts have determined that the statute must provide a reasonable period after enactment for the filing of suits based upon pre-existing causes of action. Whether or not the statute was substantive in nature, clearly the legislature never intended for the law to be applied retroactively, since to do so would allow pre-existing vested rights to be disturbed without a reasonable grace period, said the court, affirming judgment for the full amount of damages against the defendants.

Relying on the decision in Marcel v Louisiana State Dept. of Public Health (Dep't of Health & Human Resources) (1986, La App 1st Cir) 492 So 2d 103, cert den (La) 494 So 2d 334, the case previously reported, the court held that an amendment to the Public Medical Malpractice Statute, which provided that the limitation on damages recoverable against the state in medical malpractice actions included actions against state hospitals, should not be applied retroactively to limit the recovery of a malpractice plaintiff who had been injured before the statute became effective but did not obtain a judgment until after the effective date, in Hampton v Greenfield (1991, La App 4th Cir) 576 So 2d 630, cert den (La) 581 So 2d 686, later proceeding (La App 4th Cir) 602 So 2d 327, affd in part and revd in part on other grounds (La) 618 So 2d 859. At the time of the plaintiff's injury, the limitation of liability in La. R.S. § 40:1299.39 applied only to state-employed physicians and other professionals providing medical and related health care services on behalf of the state. [FN59] The defendants argued that an amendment to the statute, including the state and any of its departments in the definition of "persons covered," should be applied retroactively to limit the recovery against the state and charity hospital, relying on authority that a limitation on the amount of general damages recoverable in a personal injury suit against the state could be retroactively applied without disturbing vested rights. However, the court rejected the analogy, stating that the personal injury statute differed from the malpractice limitation because it was a limitation on the amount of general damages only, specifically excluding medical care and related benefits, loss of earnings and loss of future earnings. The limitation found in the public medical malpractice statute, on the other hand, applied to all items of

damages except future medical care and related benefits. The inclusion of special damages distinguished the statutory limitation at issue because recovery of certain items of special damages may be considered a vested right, said the court. Applicable noneconomic damages cap amount in medical malpractice case was \$547,000, which was the cap amount in effect at time of trial; noneconomic damages cap statute was not amended between time of negligent acts that caused patient's death and time of trial, statute provided cap on noneconomic damages in malpractice action and for yearly increase or decrease in cap amount in accordance with economic index, malpractice cause of action arose after enactment of statute, and thus, in sense that legislature did not enact a statute during life of this cause of action, constitutional article providing that no ex post facto law nor law impairing obligations of contracts nor retrospective in its operation shall be enacted was inapplicable. V.A.M.S. Const. Art. 1, § 13; V.A.M.S. § 538.210. Cook v. Newman, 142 S.W.3d 880 (Mo. Ct. App. W.D. 2004), reh'g and/or transfer denied, (Aug. 31, 2004) and transfer denied, (Sept. 28, 2004). Statute governing the structure of damage awards in medical malpractice actions did not apply to action commenced prior to July 1, 1985. McKinney's CPLR § 5031 et seq. Rodriguez v. Long Island College Hosp., 702 N.Y.S.2d 363 (App. Div. 2d Dep't 2000). A statutory limitation on recovery of general damages in malpractice actions was construed, along with other provisions of the 1975 Ohio Malpractice Act, [FN61] not to apply retroactively in Young v Alberts (1975, CP) 73 Ohio Ops 2d 32, 342 NE2d 700, the court denying a pretrial motion for a continuance and/or compliance with the Malpractice Act. The defendants--doctors and a medical products' manufacturer--contended that the malpractice plaintiff was required to comply with the provisions of the Act, which became effective before the trial of the action was scheduled, although the plaintiff's cause of action arose and the original complaint was filed prior to the effective date. In reaching the conclusion that the Act did not apply to any events occurring before the effective date, the court first cited a statutory provision stating the presumption that statutes have prospective application unless expressly made retroactive, indicating that there was no provision in the Malpractice Act for retroactive application of any of its parts. Noting a second statutory provision which specified that the re-enactment, amendment, or repeal of a statute does not have retroactive application, the court observed that while the provision limiting recovery was new legislation and not a re-enactment or amendment, the provision re-enforced the presumption of a statute's prospective effect. There was only one reference to an effective date of a particular provision of the Malpractice Act, and that was to a later date than the effective date of the Act generally, observed the court, pointing out that if the damage recovery limitations were construed to apply retroactively, the alteration of a substantive right would render the provision unconstitutional. Finally, taking judicial notice of the fact that the problems sought to be resolved by the Act were national in scope and arose from increased malpractice insurance costs and health care providers' threats to withdraw their services from the public because of such costs, the court said that the Act looked ahead to creating conditions where malpractice insurance could be purchased and maintained at reasonable costs, and made no attempt to change any substantive or procedural law governing events that had occurred prior to its enactment. Since a statutory provision limiting the amount of compensatory damages in medical malpractice claims affected substantive rights, [FN62] such a provision could not be applied retroactively, the court held in Graley v Satayatham (1976, CP) 74 Ohio Ops 2d 316, 343 NE2d 832 (disapproved on other grounds as stated in Griffey v Rajan, 33 Ohio St 3d 75, 514 NE2d 1122). Noting that it is the general law that statutes affecting substantive rights may not be applied retroactively, the court went on to quote approvingly from the opinion in Young v Alberts (1975, CP) 73 Ohio Ops 2d 32, 342 NE2d 700, this section, which set forth the reasons for not construing the 1975 Ohio Malpractice Act to apply retroactively. The malpractice victim filed the action subsequent to the effective date of the Act, although the alleged malpractice occurred prior to it. Accordingly, the court overruled the defendant clinic's motion to dismiss the complaint because the plaintiff claimed damages in excess of the statutory limit.

Similarly, in Simon v St. Elizabeth Medical Center (1976, CP) 3 Ohio Ops 3d 164, 355 NE2d 903 (disapproved on other grounds as stated in Griffey v Rajan, 33 Ohio St 3d 75, 514 NE2d 1122), the court held that the Ohio Medical Malpractice Act, containing a provision limiting recovery of damages for a medical malpractice claim, was not retroactive in effect because the Act affected substantive rights. [FN63] Noting that the accrual of the action was the critical date, the court said that therefore, even though the plaintiff had filed suit after the effective date of the Act, the cause of action arose before that date, making the Act inapplicable.

See Schiavo v John F. Kennedy Hosp. (1992) 258 NJ Super 380, 609 A2d 781, affd 131 NJ 400, 620 A2d 1050, concerning an amendment to the Charitable Immunity Act, N.J.S.A. § 2A:53A-8, which increased hospital liability for medical malpractice, in which the court limited application of the statute to claims accruing on or after the effective date of the amendment. Statutes relating to substantive rights should be construed prospectively unless the legislature indicates otherwise, observed the court, the reason for this general rule being that retroactive application of new statutes carries a high risk of unfairness, unless a contrary legislative intent clearly appears. Three circumstances compel retroactive application of an amendment or new statute, the court continued: (1) an explicit or implicit legislative intent that the statute apply retroactively; (2) the statute is curative; or (3) the expectations of the parties warrant retroactive application. There was nothing explicit or implicit in the text of the statute, or in the extant legislative history, indicating an intent to apply the amendment retroactively, the court concluded, and the amendment, which increased liability exposure significantly, was not curative but a substantive policy change of some magnitude undertaken by the legislature. The change implicated insurance premiums and loss exposures, at least to some extent, and such matters could only be dealt with prospectively, noted the court. Since the plaintiff brought suit 2 years after his injury, and the bill to amend the statutory damage limit was introduced a year after that, the court reasoned there was no basis for any reasonable expectations of the parties warranting retroactive application of the amendment. Furthermore, there was no language indicating that the amendment should apply to any action pending on its effective date, and the "time-of-decision" rule was not pertinent, arising, as it does, after a lower court or administrative agency decision occurs and there is then a change in the relevant law that governs the disposition of the issues on appeal, concluded the court.

But see Florida Patient's Compensation Fund v Von Stetina (1985, Fla) 474 So 2d 783, 10 FLW 286, in which the court, while not deciding the retroactive effect of a statute limiting damages, considered whether an amendment to a statute which limited the portion of any judgment exceeding a certain amount which could be paid in a given year by a patient's compensation fund was applicable when the amendment did not become effective until 2 months after the entry of the trial court's judgment. The court disagreed with the District Court, which had found that the statutory change affected a substantive matter and its application would constitute an impermissible retroactive application. The judgment awarded in favor of the malpractice plaintiff was not final until the case had been disposed of on appeal, said the court, and an appellate court was generally required to apply the law in effect at the time of its decision. The amendment to Fla. Stat. § 768.54 was remedial in nature, as it did not alter the size of the judgment in favor of the claimant, but prescribed the method by which the judgment was to be paid, the court concluded.

Retroactive application of statutory cap on noneconomic damages violated due process rights of patient who was rendered partial spastic quadriplegic as result of medical malpractice where retroactive application would have insignificant or nonexistent affect upon cap's express purpose, i.e. medical malpractice costs, statute in effect at time of patient's injury implicitly gave her substantive right to unlimited damages, and manner in which her right would be impaired by cap was inherently unfair, in that cap was published one day and became law the next, so that patient, without any meaningful notice, was stripped of her right to unlimited damages. Martin by Sceptur v Richards (1995) 192 Wis 2d 156, 531 NW2d 70.

B. Application of Statute to Multiple Claims or Defendants

§ 28. Multiple acts of malpractice

[a] Plaintiff(s) limited to one recovery

Although separate acts of malpractice against the patient were alleged in the following cases, a statutory provision limiting the amount of damages recoverable in a medical malpractice action was construed to apply to the total recovery based on all claims arising from an injury or death.

A wrongful death plaintiff whose decedent had allegedly been a victim of two separate acts of malpractice was nevertheless confined to a single recovery as limited by statute, the court held in St. Anthony Medical Center, Inc. v Smith (1992, Ind App) 592 NE2d 732, transfer den (Aug 27, 1992). The patient had suffered a stroke after a preadmission intravenous pyelogram test, preliminary to prostate surgery, and after being hospitalized for the stroke, was administered incorrect medication and died while in the hospital. His wife, as plaintiff, argued that the jury verdict should not have been reduced to the statutory limitation provided by Ind. Code § 16-9.5-2-2(a) because of the two separate and distinct occurrences of malpractice. The statute provided that the total amount recoverable for any injury or death of a patient could not exceed the limitation, said the court, and when the intent is clearly expressed by the language of the legislation it may not be construed to mean something else. Assuming arguendo that the jury found two separate acts of malpractice, the plaintiff may still recover only the statutory limit allowed for "injury or death," the court continued, for the patient suffered a single injury, a stroke, which led to his death, and his wife's claim was derived from the death, for which he may recover only once. Under the Act, a health care provider was not liable for an amount in excess of a certain portion of the total recoverable damages (Ind. Code § 16-9.5-2-2(b)), observed the court, rejecting the malpractice plaintiff's additional contention that the hospital was liable for twice that amount, based on the two acts of malpractice. The limitation of an individual health care provider's liability to the statutory amount "for an occurrence of malpractice" should be read in conjunction with subsection (a)'s limitation on the total amount recoverable "for any injury or death," the court concluded.

A medical malpractice plaintiff who alleged more than one act of malpractice nevertheless suffered a single injury and was entitled to only one recovery subject to the limitation of I.C. § 16-9.5-2-2, the court held in Bova v Roig (1992, Ind App) 604 NE2d 1. The patient alleged that the first act of malpractice occurred during surgery on his eye and the second act of malpractice occurred when difficulties after the operation were improperly treated, resulting in the loss of sight in the eye. The trial court did not err as a matter of law in reducing the verdict to conform to the limit on total recovery imposed by the act, said the court, stating that where the intent of the legislature was clearly expressed in the statute, it could not be construed to mean something other than what was plainly stated. The statute allowed a recovery of a certain amount for "any injury or death," the court continued, so that even if the jury had found two separate acts of medical malpractice, the limitation of the act would allow the patient to recover only the amount allowed by the statute and only the lesser amount which applied to a health care provider's liability. That limitation, "for an occurrence of malpractice," should be read in conjunction with the other limitation on the total amount recoverable, because interpreting "occurrence" to be a less comprehensive term than "injury or death" would be inconsistent with the intent of the act, explained the court. The patient suffered a single injury, blindness in his left eye, and was entitled to recover only once, the court concluded.

Medical Malpractice Act places \$500,000 limitation on plaintiff's recovery for each injury

or death caused by health care provider's negligence; thus, plaintiff may recover only once no matter how many acts of negligence may have contributed to his injury. Thus, hospital was not liable to child patient who suffered brain damage where patient had entered into settlement with treating physician for \$100,000 and obtained recovery of \$400,000 from Patient Compensation Fund, and patient's brain injury constituted only one injury as matter of law, even though affidavit of physician with whom plaintiff had settled attempted to distinguish alleged acts of malpractice which led to injury. Miller by Miller v Memorial Hosp. (1994, Ind App) 645 NE2d 631, reh den (Mar 1, 1995) and transfer granted (Jul 3, 1995).

In medical malpractice cases to which the statutory cap applies, the injured party can recover only one \$500,000 cap for all malpractice claims, including any derivative claims that arise from the same act of malpractice. Armand v. State, Dept. of Health and Human Resources, 729 So. 2d 1085 (La. Ct. App. 1st Cir. 1999), writ denied, 741 So. 2d 661 (La. 1999).

When the damage to a patient cannot be apportioned between multiple tortfeasors because the damage is indivisible, the claim is not severable and patient can not pursue each qualified health practitioner for full amount recoverable under the Medical Malpractice Act but is limited to single damages cap, but if the damage or injury can be divided into two or more parts, with each part caused by a separate defendant, then each part constitutes, in effect, a separate injury that could allow recovery of full amount under separate damages caps. LSA-R.S. 40:1299.42, subd. B(1). Maraist v. Alton Ochsner Medical Foundation, 808 So. 2d 566 (La. Ct. App. 1st Cir. 2001), writ denied, 800 So. 2d 882 (La. 2001).

[b] Plaintiff(s) not limited to one recovery

Under a statute limiting the recovery of an injured patient to a certain amount per occurrence of medical malpractice, the courts held in the following cases that a plaintiff was entitled to more than one recovery of the maximum amount allowed by statute. In Wiltshire v Government of Virgin Islands (1990, CA3 VI) 893 F2d 629, the court, interpreting both a statute limiting recovery in medical malpractice actions and the language of an insurance policy insuring the government of the Virgin Islands against medical malpractice, held that an injured infant was entitled to three individual recoveries under the statute, for three independent acts of malpractice. The premature infant suffered from mental retardation, motor disability, scarring, hearing impairment, spastic quadriplegia and a seizure disorder, and alleged three negligent acts: improper placement of an umbilical venous catheter, improper resuscitation procedure, and improper placement of a feeding line in her scalp. The government, the insurer, and the infant and her parents had agreed to settle the claim for the maximum amount recoverable under the policy, which limited recovery to the same amount as the statute, per occurrence, and contained further language that the total recovery because of injury to one person as a result of an occurrence could not exceed the limit. The statute, 27 V.I.C. §§ 166 et seq., also limited recovery to a certain amount per occurrence and further specified that injury arising out of continuous or repeated exposure to substantially the same conditions should be construed as arising out of a single occurrence. The court observed that liability of the government was not predicated on the insurance policy, but existed because under the Health Care Provider Malpractice Act, by which the government waived its immunity in malpractice cases, the purchase of insurance was mandated, and the Act imposed an ultimate limit of a certain amount for a single injury to a patient. [FN64] The statute also authorized the purchase of group insurance for health care providers by the commissioner of insurance, at a minimum amount per occurrence, which was less than the statutory limit. Agreeing with the District Court's analysis of the facts and its conclusion that the patient's injuries were not the result of continuous or repeated exposure to the same condition, the court concluded that the liability limit of the statute was applied anew with each negligent event. By its plain meaning, the court stated, and even under the strict standard of

construction applicable in waiver of immunity cases, the statute allowed the maximum recovery for each occurrence of malpractice, and the patient was so entitled, dependent, of course, on the insurance coverage purchased by the government hospital. The court then interpreted the insurance policy language to provide coverage "per occurrence" and "per person" for each incident of malpractice, stating that a contrary conclusion would lead to the result that, for example, a patient injured by administration of the wrong medication, subject to an improperly performed operation, and then dropped in transport to his room would be entitled to but one recovery, just because the negligent acts happened to a single person.

In *McDonald v Thomas* (1990, F DVI) Civil No. 88/329, 1990 US Dist LEXIS 18114, the court held that when expert testimony adequately supported a malpractice plaintiff's contention that her injuries were caused by at least two distinct acts of malpractice, she was entitled to recover up to the statutory limitation on noneconomic damages recoverable in a medical malpractice action for those damages associated with each condition resulting from the acts of malpractice. The Health Care Provider Malpractice Act, 27 V.I.C. §§ 166 et seq. (Equity Supp. 1989) provided in § 166b(c) for a limit on awards for noneconomic damages for any injury to a patient as a result of a single occurrence, said the court, and § 166b(e) provided that injuries arising out of continuous or repeated exposure to substantially the same conditions must be considered as arising out of a single occurrence. Referring to prior authority, [FN65] the court said that an analysis which looked to the cause or causes of the accident in order to determine whether there were single or multiple occurrences of malpractice was appropriate, and concluded that the malpractice act's liability provisions were applied anew with each negligent event. At the hearing on damages, the plaintiff's expert witness testified that the defendant had deviated from accepted orthopedic standards in three ways: (1) the original surgery on the plaintiff's ankle was substandard, (2) the ankle was not supported adequately after the surgery, and (3) the plaintiff was permitted to bear weight on the ankle too soon after the surgery, observed the court. The expert also testified that the first two deviations resulted in distinct injuries to the plaintiff in that as a result of the inadequate fixation, the ankle pointed to the left, and as a result of the insufficient support, the achilles tendon shortened, resulting in a "dropped foot." No noneconomic damages from an injury resulting from the third deviation were sought, the court noted, but decided that the testimony adequately supported the contention that the injuries were caused by distinct acts of malpractice. The turned ankle and the dropped foot were not the result of but one proximate, uninterrupted, and continuous cause, the court concluded, and since the language used in the section limiting recovery of noneconomic damages was substantially similar to that which had been held to allow more than one recovery, the plaintiff could recover up to the statutory limit for each result of the acts of malpractice.

Surgeon's actions during one surgery of ineffectively suturing patient's colon and leaving hemoclip attached to patient's ureter each constituted an "occurrence of malpractice," for purposes of section of Medical Malpractice Act limiting amount that health care provider has to pay for an occurrence of malpractice, and thus surgeon was required to make two maximum health care provider payments; surgeon twice breached a duty owed to patient, and surgeon inflicted two readily distinguishable injuries on two different bodily systems. West's A.I.C. 34-18-14-3(b). Medical Assur. of Indiana v. McCarty, 808 N.E.2d 737 (Ind. Ct. App. 2004).

If a patient can prove more than one act of malpractice and separate and distinct injuries, then that patient is entitled to separate recoveries, each separately limited in accordance with the Medical Malpractice Act. West's A.I.C. 34-18-15-3. Infectious Disease of Indianapolis, P.S.C. v. Toney, 813 N.E.2d 1223 (Ind. Ct. App. 2004).

Medical malpractice claimant may recover damages equal to two medical malpractice "caps" when two separate acts of medical malpractice by two different health care providers converge to cause claimant's injuries, regardless of whether the liability of the health care providers is controlled by the Medical Liability for State Services Act (MLSSA) or the Medical Malpractice Act (MMA). LSA-R.S. 40:1299.39, 40:1299.40 et seq.

Williams v. O'Neill, 813 So. 2d 548 (La. Ct. App. 4th Cir. 2002).

Statute capping noneconomic damages in medical malpractice actions at \$280,000 did not apply in action in which defendant nursing home received \$220,000 setoff against \$300,000 verdict. M.C.L.A. § 600.1483. Markley v. Oak Health Care Investors of Coldwater, Inc., 660 N.W.2d 344 (Mich. Ct. App. 2003).

§ 29. Multiple defendants

[a] Application of one cap to each defendant

A statutory provision limiting the amount of damages recoverable in a medical malpractice action was construed in the following cases to apply to each defendant. In action by shipowner against hospital for equitable indemnity based on plaintiff's \$6 million settlement to satisfy foreign judgment in action by ship employee for injuries sustained due to improper medical treatment, trial court erred in entering judgment for \$1.8 million against hospital, reflecting its proportional share of liability, where Medical Injury Compensation Reform Act (MICRA) limited recovery of noneconomic damages by injured party against health-care provider to \$250,000, and health-care provider may invoke this limit in action for partial equitable indemnity based on professional negligence. Statute operates as limitation on liability, and to extent it precludes recovery for noneconomic damages against health-care providers in excess of \$250,000, it concomitantly limits their joint liability irrespective of proportionate fault. Thus, concurrent tortfeasors have no right of indemnification beyond that amount. Western Steamship Lines, Inc. v San Pedro Peninsula Hosp. (1994) 8 Cal 4th 100, 32 Cal Rptr 2d 263, 876 P2d 1062, 94 CDOS 5854, 94 Daily Journal DAR 10626, reh den (Sep 22, 1994) and mod 8 Cal 4th 440c, 94 CDOS 7275, 94 Daily Journal DAR 13404. See Romero v United States (1994, ED Mo) 865 F Supp 585 (applying Mo law), § 35[a]. In Vincent v Johnson (1992, Mo) 833 SW2d 859, the court remanded for a determination of whether a doctor sued for malpractice was insured as an employee of the codefendant hospital, for the purpose of deciding whether one or two caps applied to the judgments in favor of an infant injured at birth and her parents, under a statute limiting noneconomic damages recoverable in medical malpractice actions. The court said that under RS Mo § 538.210.2(1), the question turned on whether there were one or two defendants, which would be determined by whether the doctor was insured against malpractice as an employee of the hospital, as to which there was no evidence in the record. If he was so insured, there was one cap, said the court, and if not, there were two, and the share of the net settlement proceeds representing the hospital's noneconomic damages should be applied against the doctor's damages before the doctor's cap was considered.

In Rose v Doctors Hosp. (1990, Tex) 801 SW2d 841, reh'g of cause overr (Jan 23, 1991), the court held that in a wrongful death action, the amount of damages under the statute limiting medical malpractice recoveries was to be calculated on a "per defendant" basis. The patient's widow and parents filed the wrongful death action against the hospital and another defendant after the patient received an allegedly fatal dose of morphine. Each of the claimants was awarded damages by the jury in an amount in excess of the limitation found in Tex. Rev. Civ. Stat. Ann. Art. 4590i, § 11.02 (Vernon Supp. 1991), for civil damages liability of a physician or health care provider in an action on a health care liability claim. After holding that the damages limitation in the Medical Liability Act, when applied to wrongful death actions, did not violate the Texas Constitution, [FN66] the court said that the damages cap should be calculated on a "per defendant" basis because the language of the provision clearly applied to the recovery against the individual defendant, and not the award to the individual plaintiff. Plaintiffs who recover against more than one defendant may therefore obtain a judgment in excess of the cap, the court continued, so long as the combined maximum statutory liability of all defendants is not exceeded.

In Wynn v Cohan (1993, Tex App Houston (14th Dist)) 864 SW2d 205, writ den (Mar 9, 1994) and reh'g of writ of error overr (Apr 6, 1994), holding that it was mandatory for the trier of fact to determine the percentage of responsibility attributable to each settling defendant in a medical malpractice action in order to ascertain the dollar-for-dollar credit to which a nonsettling defendant was entitled, the court reiterated the principle, as determined in the previously reported case, that plaintiffs who recover against more than one defendant may obtain a judgment in excess of the statutory cap on medical malpractice damages, so long as the combined statutory liability of all the defendants was not exceeded.

In Wisconsin Patients Compensation Fund v St. Paul Fire & Marine Ins. Co. (1984, App) 119 Wis 2d 41, 349 NW2d 719, the court held that a statute limiting the amount that a malpractice victim could recover against a health care provider did not limit the combined liability of physicians in a service corporation to the same amount. The compensation fund had been granted the right to recover over from the insurer of the doctors who were members of the same service corporation, but the insurer claimed that their combined liability was limited to the statutory amount. The claim had been submitted to a pretrial panel, which found all three physicians negligent but did not apportion negligence among them, and no question of apportionment was raised in the trial court. The court observed that if the three insured physicians were not members of the same service corporation, each would be liable to the patient for up to the statutory limit which would more than cover the patient's settlement without any one physician having to pay more than the statutory limit. The patient would then have no need to claim against the compensation fund as authorized by the statute, Wis. Stat. § 655.27. The court found no legislative intent in the statute to change the result simply because the physicians had formed a service corporation, noting that if that would reduce liability, the liability of the compensation fund would anomalously depend on a physician's choice of whether to do business alone or with others. The court also rejected the argument that there would be no purpose for the amendment of Wis. Stat. § 655.001(8) to include service corporations in the definition of "health care provider" unless the combined liability of the physicians within the corporation were limited to the statutory amount, pointing out that an obvious purpose of the amendment was to prevent patients from avoiding submitting their claims to a pretrial panel by suing the corporation directly for its vicarious liability. Similarly, Wis. Stat. § 655.23(5m), which limited the joint liability of a physician and a physician's service corporation to the statutory amount did not support the insurers' position, because it merely limited the corporation's liability, rather than evidencing a legislative intent to permit a physician to reduce liability by incorporating, the court concluded.

[b] --Aggregate recovery limited by cap on recovery from patient's compensation fund

In a jurisdiction in which damages recoverable against a health care provider were limited to a certain amount by statute, and total recovery was limited to a greater amount, which recovery was from a patient's compensation fund, the court held that the aggregate recovery against multiple health care providers could not exceed the larger cap on recovery from the patient's compensation fund.

In Butler v Flint Goodrich Hosp. of Dillard University (1992, La) 607 So 2d 517, cert den (US) 124 L Ed 2d 249, 113 S Ct 2338, more fully reported in § 8, the court, holding that a statutory limitation on all medical malpractice damages except those for past and future medical expenses did not violate the state or federal constitution, even as applied against multiple defendants, implied that more than one recovery up to the statutory limitation could be had if there were multiple defendants. Nevertheless, the aggregate recovery could not exceed the larger cap on damages recoverable against the patient's compensation fund, which paid damages allowed in excess of those recoverable against an individual health care provider, added the court.

Total amount that medical malpractice plaintiff could recover from Louisiana Patient's Compensation Fund and two physicians who failed to diagnose patient's breast cancer,