

WISCONSIN STATE
LEGISLATURE
COMMITTEE HEARING
RECORDS

2005-06

(session year)

Assembly

(Assembly, Senate or Joint)

**Task Force on
Medical
Malpractice
(ATF-MM)**

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➤ **

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➤ Executive Sessions ... ES

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Annotation

VALIDITY, CONSTRUCTION, AND APPLICATION OF STATE STATUTORY PROVISIONS
LIMITING AMOUNT OF RECOVERY IN MEDICAL MALPRACTICE CLAIMS

Carol A. Crocca, J.D.

One of the more controversial medical malpractice tort reforms is the imposition by statute of a limit to the damages recoverable by an injured plaintiff and those whose claims against a health care provider derive from the patient's injury. Such statutes vary in the degree to which they constrain the recovery, and may be evaluated in terms of the reasonability of a complete statutory scheme affecting many aspects of medical malpractice litigation. An unusual approach was upheld in University of Miami v Echarte (1993, Fla) 618 So 2d 189, 26 ALR5th 831, in which the court considered the validity of statutes which imposed damage limitations when the parties chose to have their dispute arbitrated, or when the plaintiff chose to go to trial after refusing a defendant's offer to arbitrate. State constitutional provisions have been important in determining the validity of damage limitations, and some courts have demanded that the statutory scheme provide an adequate substitute for the malpractice victim's former rights. In addition to issues of validity, statutory damage "caps" also present questions of construction when, for example, multiple defendants or causes of action, or other statutes limiting damages in the particular circumstances, are involved. Cases deciding these and other issues relevant to the validity and application of statutes limiting medical malpractice recoveries are collected and analyzed in this annotation.

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Jeanne v Hawkes Hosp. of Mt. Carmel (1991, Franklin Co) 74 Ohio App 3d 246, 598
NE2d 1174--§ 23
Morris v Savoy (1991) 61 Ohio St 3d 684, 576 NE2d 765--§§ 23, 25[b]
Simon v St. Elizabeth Medical Center (1976, CP) 3 Ohio Ops 3d 164, 355 NE2d 903--§§
23, 27
Young v Alberts (1975, CP) 73 Ohio Ops 2d 32, 342 NE2d 700--§ 27

OKLAHOMA

Anderson v Eichner (1994, Okla) 890 P2d 1329--§ 24

SOUTH CAROLINA

Foster v South Carolina Dep't of Highways & Public Transp. (1992) 306 SC 519, 413
SE2d 31--§ 17[a]
Hanvey v Oconee Memorial Hosp. (1992) 308 SC 1, 416 SE2d 623--§ 17[b]

SOUTH DAKOTA

Knowles v United States (1993, DC SD) 829 F Supp 1147 (applying South Dakota law)--§ 30[a]
Knowles v United States (1994, CA8 SD) 29 F3d 1261 (applying South Dakota law)--§ 35[a]
Sander v Geib, Elston, Frost Professional Ass'n (1993, SD) 506 NW2d 107--§§ 2[b], 30[b]

TEXAS

Accord, Detar Hospital, Inc. v Estrada (1985, Tex App Corpus Christi) 694 SW2d 359--§ 10[b]
Baptist Hospital of Southeast Texas, Inc. v Baber (1984, Tex App Beaumont) 672 SW2d 296--§ 10[b]
Brownsville Medical Center v Gracia (1985, Tex App Corpus Christi) 704 SW2d 68--§ 15
Citing Baptist Hospital of Southeast Texas, Inc. v Baber (1984, Tex App Beaumont) 672 SW2d 296--§ 10[b]
Columbia Medical Center of Las Colinas, Inc. v Hogue, 132 S.W.3d 671--§ 37.5
Detar Hospital, Inc. v Estrada (1985, Tex App Corpus Christi) 694 SW2d 359-- § 15
Horizon/CMS Healthcare Corp. v. Auld, 985 S.W.2d 216--§§ 15, 43
Houston v Arney (1984, Tex App Houston (1st Dist)) 680 SW2d 867--§ 34[b]
Lucas v United States (1986, CA5 Tex) 807 F2d 414 (applying Texas law)--§ 35[a]
Lucas v United States (1988, Tex) 757 SW2d 687--§§ 10[b], 13-15
Malone & Hyde, Inc. v Hobrecht (1985, Tex App San Antonio) 685 SW2d 739--§ 10[b]
Mercy Hospital of Laredo v Rios (1989, Tex App San Antonio) 776 SW2d 626--§ 15
Rose v Doctors Hosp. (1990, Tex) 801 SW2d 841--§§ 10[b], 11, 15, 29[a]
Wynn v Cohan (1993, Tex App Houston (14th Dist)) 864 SW2d 205--§ 29[a]

UTAH

Judd v. Drezga, 2004 UT 91, 103 P.3d 135--§§ 3[a], 4, 5.5, 5[a]

VIRGIN ISLANDS

Cebedo v. Tobal, 240 F. Supp. 2d 373 (applying Virgin Islands law)--§ 25 [a]

VIRGINIA

Bulala v Boyd (1990) 239 Va 218, 389 SE2d 670--§§ 2[b], 30[a], 31
Etheridge v Medical Center Hospitals (1989) 237 Va 87, 376 SE2d 525--§§ 17[a], 18, 19[a], 21, 22, 29[c], 30[a], 31, 34[a]
Fairfax Hosp. System, Inc. v McCarty (1992) 244 Va 28, 419 SE2d 621--§§ 2 [b], 31
Following Bulala v Boyd (1990) 239 Va 218, 389 SE2d 670--§ 36[c]
Modaber v Kelley (1986) 232 Va 60, 348 SE2d 233--§ 31
Power v Alexandria Physicians Group (1995, ED Va) 887 F Supp 845, 48 Soc Sec Rep Serv 290 (applying Virginia law)--§ 36[a]
Pulliam v. Coastal Emergency Services of Richmond, Inc., 257 Va. 1, 509 S.E.2d 307--§ 21
Starns v United States (1991, CA4 Va) 923 F2d 34 (applying Virginia law)-- § 30[a], 35[a]

WEST VIRGINIA

Daniel v. Beaver, 300 F. Supp. 2d 436 (applying West Virginia law)--§ 24.5

Robinson v Charleston Area Medical Ctr., Inc. (1991) 186 W Va 720, 414 SE2d 877--§§ 3[a], 4, 5[a], 6, 22, 30[a]
Verba v. Ghaphery, 552 S.E.2d 406--§§ 3[a], 7.5

WISCONSIN

Czapinski v. St. Francis Hosp., Inc., 236 Wis. 2d 316--§ 17[a]
Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund, 2005 WI 125, 2005 WL 1639450--§ 3[b]
Guzman v. St. Francis Hosp., Inc., 240 Wis. 2d 559--§ 7.5
Herman v Milwaukee Children's Hospital (1984, App) 121 Wis 2d 531, 361 NW2d 297--§§ 30[a], 41
Jelinek v St. Paul Fire & Casualty Ins. Co. (1994) 182 Wis 2d 1, 512 NW2d 764--§§ 32, 34[a]
Martin by Sceptur v Richards (1995) 192 Wis 2d 156, 531 NW2d 70--§ 27
Maurin v. Hall, 2004 WI 100, 682 N.W.2d 866--§§ 3[a], 4, 5[a]
Phelps v. Physicians Ins. Co. of Wisconsin, Inc., 2004 WI App 91, 681 N.W.2d 571--§ 45
Phelps v. Physicians Ins. Co. of Wisconsin, Inc., 2005 WI 85, 698 N.W.2d 643--§ 45
Rineck v Johnson (1990) 155 Wis 2d 659, 456 NW2d 336--§§ 32, 34[a]
Wisconsin Patients Compensation Fund v St. Paul Fire & Marine Ins. Co. (1984, App) 119 Wis 2d 41, 349 NW2d 719--§ 29[a]

SPECIALIZED COURTS

WI 80, 613 N.W.2d 120--§ 17[a]
WI App 21, 623 N.W.2d 776--§ 7.5

ARTICLE

I. Preliminary Matters

§ 1. Introduction

[a] Scope

This annotation [FN1] discusses those cases in which the courts have considered the validity and construction of state statutory provisions which limit the amount of damages recoverable in a medical malpractice action. Only cases dealing with statutory provisions specifically limiting malpractice damages are included, and not those considering statutes, for example, which limit personal injury or wrongful death damages generally, limit governmental or charitable immunity generally, or provide for the structuring of a medical malpractice award without limitation of amount. [FN2] Although the abrogation of the "collateral source" rule may result in a lower allowable recovery in medical malpractice actions, cases considering the validity of such statutes are not included. [FN3] The questions of when a defendant qualifies as a health care provider so as to be entitled to the benefit of a statutory damage limitation, [FN4] and which patient and nonpatient claims are medical or healing art malpractice within the meaning of such a statute, have also been treated elsewhere. [FN5]

A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject. These provisions are discussed herein only to the extent and in the form that they are reflected in the courts' opinions that fall within the scope of this annotation. The reader is consequently advised to consult the appropriate statutory or regulatory compilations to ascertain the current

status of all statutes discussed herein, including those listed in the Jurisdictional Table of Cited Statutes and Cases.

[b] Related annotations

Validity, Construction, and Application of State Birth-Related Neurological Injury Compensation Programs. 111 ALR5th 459.

Tort Claim for Negligent Credentialing of Physician. 98 ALR5th 533.

Malpractice in diagnosis and treatment of male urinary tract and related organs. 48 ALR5th 575.

Allowance of punitive damages in medical malpractice action. 35 ALR5th 145.

Recovery of damages for expense of medical monitoring to detect or prevent future disease or condition. 17 ALR5th 327.

Medical malpractice: who are "health care providers," or the like, whose actions fall within statutes specifically governing actions and damages for medical malpractice. 12 ALR5th 1.

Joint and several liability of physicians whose independent negligence in treatment of patient causes indivisible injury. 9 ALR5th 746.

What patient claims against doctor, hospital, or similar health care provider are not subject to statutes specifically governing actions and damages for medical malpractice. 89 ALR4th 887.

What nonpatient claims against doctors, hospitals, or similar health care providers are not subject to statutes specifically governing actions and damages for medical malpractice. 88 ALR4th 358.

Validity and construction of state statute abrogating collateral source rule as to medical malpractice actions. 74 ALR4th 32.

Validity and construction of statute or ordinance limiting the kinds or amount of actual damages recoverable in tort action against governmental unit. 43 ALR4th 19.

Validity of state statute providing for periodic payment of future damages in medical malpractice action. 41 ALR4th 275.

Priority and apportionment of liability between medical and hospital expense insurers. 25 ALR4th 1022.

Effect of anticipated inflation on damages for future losses--modern cases. 21 ALR4th 21.

Validity of statute establishing contingent fee scale for attorneys representing parties in medical malpractice actions. 12 ALR4th 23.

Per diem or similar mathematical basis for fixing damages for pain and suffering. 3 ALR4th 940.

Collateral source rule: injured person's hospitalization or medical insurance as affecting damages recoverable. 77 ALR3d 415.

Admissibility of expert medical testimony as to future consequences of injury as affected by expression in terms of probability or possibility. 75 ALR3d 9.

Allowance of punitive damages in medical malpractice action. 27 ALR3d 1274.

Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon. 18 ALR3d 10.

Necessity and manner, in personal injury or death action, of pleading special damages in the nature of medical, nursing, and hospital expenses. 98 ALR2d 746.

Collateral source rule: receipt of public or private pension as affecting recovery against a tortfeasor. 75 ALR2d 885.

Hospital and medical services furnished to injured person by government as affecting damages recoverable for personal injury or death. 68 ALR2d 876.

Immunity from liability for damages in tort of state or governmental unit or agency in operating hospital. 25 ALR2d 203.

Federal Tort Claims Act: medical malpractice cases. 9 ALR Fed 16.

§ 2. Summary and comment

[a] Generally

The most direct method attempted to alleviate the increasing cost of medical malpractice insurance has been the enactment of statutes limiting the damages recoverable by medical malpractice plaintiffs. Such statutes modify the result of the application of the general rules applicable to an award of damages in a medical malpractice action, which are those governing the recovery of damages generally. [FN6] Statutes limiting the damages recoverable in medical malpractice actions differ, however, not only in the specific limit applied, but in the types of damages limited, and as to whether a patient's compensation fund is created as a source of recovery beyond the judgment allowed against a health care provider. Jurisdictions providing for a patient's compensation fund, which may be found in conjunction with a medical malpractice insurance program, have usually created a scheme in which there is a statutory cap on damages recoverable from a health care provider or providers, and a higher cap on total damages recoverable, with the fund liable for the difference. These different kinds of statutes have met with various challenges, under both state and federal constitutions, but when statutes have been invalidated, there has invariably been an independent state constitutional ground.

Equal protection arguments have been based on the fact that the statutes at issue distinguish between medical malpractice plaintiffs and other tort victims, and also between less seriously and more seriously injured patients, the former being able to receive full compensation for their damage within the statutory limitation, while the latter are not. Of those damage limitations enacted, proportionately more of the least restrictive type, on noneconomic damages only, have been upheld. Courts have both upheld (§ 3[a]) and invalidated (§ 3[b]) statutes limiting noneconomic damages on equal protection grounds, the outcome depending on how closely the statute is scrutinized under the rational basis test. While the courts are in agreement that that test is the proper one, and the statutes do not affect a suspect class requiring the closest scrutiny, some courts have examined the evidence for the existence of a medical malpractice insurance crisis, or the purported effectiveness of damage limitations in ameliorating it, while others have declined to second guess legislative determinations. Under the similar analysis used to determine validity under the due process clause, statutes limiting only noneconomic damages in medical malpractice actions were upheld (§ 4). When deprivation of the right to trial by jury has been asserted, again courts have diverged, some finding it the prerogative of the legislature to regulate the remedies available to plaintiffs (§ 5[a]), and others deciding that the jury must determine, not only what the plaintiff is entitled to, but what he or she will receive in damages (§ 5[b]). As to a challenge under a state constitutional provision guaranteeing that the courts of the state be open and afford a remedy for every injury, the court held that a statute limiting noneconomic medical malpractice damages was not invalid, because it did not create any preconditions or procedural barriers to suit (§ 6), rejecting the contention that the legislature must provide a quid pro quo when it exercised its right to modify or abolish a common-law right of action. Another court, however, upheld a statute which imposed noneconomic damage limitations when the parties agreed to have their dispute arbitrated, or when a plaintiff refused a defendant's offer to arbitrate (§ 7), against the argument that it violated the right to access to the courts, even though the court required the statute to provide a benefit commensurate with the loss of the right fully to recover medical malpractice damages.

Another type of statute applicable to medical malpractice actions limits all the plaintiffs' damages except for medical and related expenses. The validity of such a statute was upheld by the state supreme court against various state and federal constitutional challenges, as to both the cap on damages recoverable from a health care provider (§ 8), and the limit on damages for which the patient's compensation fund was liable (§ 9). Earlier, that court had promulgated the analysis appropriate for the determination of

validity under the right to equal protection, and the statute was upheld by other courts against such a challenge (§ 10[a]). Another statute of the same type, however, failed to survive an equal protection challenge against its application to claims of the catastrophically injured (§ 10[b]), although it was found valid as applied to wrongful death actions (§ 11), the court deciding that there was a sufficient nexus between the statute and the state's interest in insuring compensation only to those who have the closest relation to the deceased. A violation of equal protection was found, however, when amendments allowing the exclusion of medical and related expenses from statutory limitations on medical malpractice damages differed in terms of their retroactive application to public and private patients (§ 12), because there was no rational basis for distinguishing between them in this regard.

Although a statute limiting medical malpractice damages except for medical and related expenses was found valid under the federal due process clause (§ 13), it was determined to violate the open courts provision of the state constitution, as applied to claims of the catastrophically injured (§ 14). Because that provision protected only common-law causes of action, however, the statute could validly be applied, under the constitutional guaranty of open courts, to wrongful death claims, which had been created by the legislature (§ 15). A court also found that there was no violation of a state constitutional provision prohibiting governmental immunity by a statute limiting medical malpractice damages, except for medical and related expenses, recoverable against the state (§ 16).

A third type of statute limits the total damages recoverable in a medical malpractice action. Some courts have sustained such statutes under equal protection clauses (§ 17[a]), having found a rational connection between the damage limitations and the goal of reducing medical malpractice insurance rates. Other courts have invalidated them (§ 17[b]), often stating that it was unjust to require the most seriously injured malpractice victims to bear the burden of alleviating a perceived malpractice insurance crisis. When challenged under the right to due process, however, statutes limiting the total damages recoverable in medical malpractice actions have been upheld (§ 18), whether the claim was based on substantive or procedural grounds. Violation of the right to trial by jury has also been the basis for invalidating statutes limiting total medical malpractice damages (§ 19[b]), although other courts have sustained them (§ 19[a]), because the jury retained its function as factfinder of the amount of damages, while the statute implemented the right of the legislature to limit the actual remedy. Considering a statute providing separate limits of liability for health care providers and a state-run patient's compensation fund, the court recognized that the right to trial by jury was not violated by the limit on the fund (§ 19[c]). The argument has also been made that statutes limiting the total damages recoverable in medical malpractice actions offend constitutional rights to access to the courts or to redress for injury, and, while that argument has been the ground for invalidating a statute (§ 20[b]), most courts have rejected it (§ 20[a]). Such statutes have also been upheld against the contention that they violated constitutional provisions for the separation of powers because they encroached on judicial power to enforce judgments or establish rules of procedure (§ 21). A statute limiting total medical malpractice damages was sustained under a constitutional provision prohibiting special legislation, the court deferring to the legislative power to create reasonable classifications (§ 22), while another court remanded the issue, after specifying the standard to be applied in determining it. Courts have also had occasion to consider the validity of a statute limiting general damages in medical malpractice actions (§ 23). Although invalidating the statute under the due process clause of the state constitution, the court found it did not violate the right to equal protection. Another type of damage limitation constrained only the allowable recovery from a health care provider, and the court upheld the validity of the statute, which transferred liability for the remainder of a malpractice plaintiff's judgment to a patient's compensation fund (§ 24). [FN7]

In addition to deciding the validity of statutes limiting damages in medical malpractice actions, the courts have had to determine their construction and application in various

circumstances. The general applicability of one such statute to wrongful death claims (§ 25) and derivative claims (§ 26) has been upheld. The courts are in agreement that statutes limiting damages affect the substantive rights of medical malpractice plaintiffs and thus may not be applied retroactively (§ 27).

In many malpractice actions, the argument has been made that more than one recovery under a statute limiting damages should be allowed. When separate acts of malpractice have been alleged, under a statute limiting recovery for "any injury or death," the courts held that the plaintiff was entitled to only one recovery (§ 28[a]), while under another statute, which imposed a limit "per occurrence" of malpractice, more than one recovery was permitted (§ 28[b]). The courts have also differed as to whether one cap should apply to the recovery against each defendant (§ 29[a]), or to the aggregate recovery against all defendants (§ 29[c]). One court, having determined that the statutory limitation applied separately to each defendant, held that the total recovery against all defendants was nevertheless limited to the amount authorized to be recovered from the patient's compensation fund (§ 29[b]). A medical malpractice action may include multiple causes of action, such as parents' claims for medical expenses for an infant patient and spouses' claims for loss of consortium, or multiple plaintiffs with the same cause of action, such as wrongful death, and courts have also disagreed as to whether one cap (§ 30[a]) or more than one cap (§ 30[b]) should be applied. In this context, it has been held that a mother and her neonate were separate patients, for the purpose of determining the maximum recovery allowable under a statute limiting damages in a medical malpractice action, for injuries stemming from alleged malpractice at the time of the child's birth (§ 31).

Courts which have considered the issue have determined that if fault has been attributed to a medical malpractice plaintiff, the total verdict should first be reduced by the plaintiff's percentage of fault, before a statute limiting damages is applied (§ 32).

Another court found that veterans' benefits, paid to a medical malpractice plaintiff as a result of the injury sued upon, were properly characterized as advance payments under state law, and therefore were to be credited against the judgment after the application of the statutory cap (§ 33). When other state statutes limiting damages have been alleged to apply to a medical malpractice action, such as a statute limiting noneconomic damages in a civil action, or one limiting recovery against a charitable hospital, the courts have more often determined that the statute limiting medical malpractice damages applied (§ 34[a]), although in a medical malpractice action against a municipality, the court found the plaintiff's recovery limited instead by the state tort claims act (§ 34[b]).

As to actions under federal statutes, most courts agree that in medical malpractice actions against the United States under the Federal Tort Claims Act, the Federal Government is entitled to the benefit of state statutory limitations on damages recoverable from a health care provider (§ 35[a]). It has also been held, however, that the United States was entitled only to the application of the statutory cap on the total damages recoverable by a medical malpractice plaintiff, and not the lower cap on recovery against a health care provider (§ 35[b]). There is authority that the limitation applies in an action brought under the Emergency Treatment and Active Labor Act (§ 36[a]), but there is also authority to the contrary (§ 36[b]), and Federal District Courts in Virginia are divided on the issue (§ 36[c]).

In cases considering other questions of construction, it has been held that the term "future medical care and related expenses," as found in a statute limiting a medical malpractice recovery except for those items, referred to all medical expenses after the date of injury, and not only those incurred after the date of trial (§ 37). As to whether a patient's compensation fund must be joined as a party in a medical malpractice action, depending on the particular statute at issue, courts have held that it was (§ 38[a]) or was not (§ 38[b]) required that a plaintiff join the fund as a party in order for it to be liable for damages in excess of those recoverable from a health care provider, and it has also been held that it was not the defendant's duty to join the fund (§ 39). Under a statute which prescribed various methods by which a health care provider could

establish financial responsibility, so as to qualify for the benefit of a statutory cap on medical malpractice damages, the court said that, under a particular section, it was not necessary for the defendant to fund an escrow account with the full amount of recoverable damages for each claim pending against it (§ 40). As to interest and/or costs, courts have held that, while those pertaining to damages allowable under a statute limiting medical malpractice recoveries could be assessed against a patient's compensation fund (§ 41), there could be no award of interest on damages in excess of those specified by such a statute (§ 42).

[b] Practice pointers

Counsel for the defendant should be aware that courts have not taken consistent approaches to the question whether the failure to plead or otherwise raise a statute limiting damages in a medical malpractice action will result in a waiver of the statute's protection. It has been held that it was not necessary for a defendant health care provider to plead a statutory limitation as an affirmative defense under the state statute requiring such defenses to be pleaded. [FN8] The same result was reached in an action against the United States under the Federal Tort Claims Act, although for different reasons. [FN9] Although the statute may be considered an affirmative defense under state law, there is authority that, since the Federal Rules of Civil Procedure provide the manner and time in which defenses are raised and waiver may occur in Federal Court, a mere failure of technical compliance will not result in waiver. [FN10] Factors affecting resolution of the issue may be whether the plaintiff has been prejudiced by the failure to raise the issue, and whether there are any factual issues relating to the applicability of the statute, such as the portion of the verdict ascribable to a defendant's ordinary negligence, which may not be subject to the damage limitation. [FN11] The argument may be made that notice to the plaintiff was provided by other pleadings, whether or not the defendant has pleaded the statute as an affirmative defense. [FN12] On the other hand, it has also been held that a health care defendant should file a pleading alleging the facts on which its statutory protection depends, [FN13] and defense counsel should raise the issue early to avoid the possibility of alleged prejudice to the plaintiff, which at worst could result in the loss of the statute's protection. [FN14] Counsel should note, however, authority that no waiver of the statutory cap on damages occurred because a hospital defendant filed a motion in limine to restrict reference to the statutory limitation. [FN15]

As to jurisdictions in which a state compensation fund must be joined as a party in the medical malpractice action, counsel should be aware that it has been held necessary for the fund to be joined before the statute of limitations has run on the malpractice claim. [FN16]

Counsel should note that there is authority that payments made under the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) are not collateral to an award of damages under the Federal Tort Claims Act, in a state in which the collateral source rule was applied, and the benefits were credited against a malpractice victim's award, after the application of the statute limiting medical malpractice damages, to avoid an impermissible double recovery. [FN17]

Counsel should be alert for various issues relating to settlements and judgments which may be affected by the application of a statute limiting damages or mandating a structured settlement. Under a statute providing that when a plaintiff is awarded future damages above a certain amount, the court must, at the request of either party, enter a judgment ordering such future damages to be paid periodically rather than in a lump sum, although the jury's role was to designate the amount of future damages subject to periodic payment, the court reserved the right to fashion the details of the periodic payment schedule. Counsel in that situation should consider presenting the court with a proposed schedule to meet the client's needs. [FN18] Counsel should also be aware that periodic payments to be received by a plaintiff may be valued as reduced to present value for certain purposes, such as deciding whether the plaintiff received a larger

verdict than a settlement offer rejected by the defendant. [FN19] Similarly, there is authority that a tortfeasor against whom a judgment has been rendered was not entitled to a credit equal to the undiscounted sum of payments provided for by a settlement. [FN20] When there is more than one plaintiff settling with one defendant while going to trial against another, counsel should consider whether there may be a benefit in allocating the settlement among the plaintiffs, considering the effect of damage limitations on the probable verdicts, rather than leaving it to the court. [FN21] Counsel should note that an agreement between parties to waive apportionment of fault among joint tortfeasors by the jury may become problematic if it fails to specify sufficiently the details of the credit and the effect of different potential verdicts. [FN22] Finally, although a patient's compensation fund may resemble an insurance company in some respects, at least one court has held that the fund was not subject to a statute making insurance companies liable for punitive damages and attorney's fees for its alleged failure to timely evaluate and settle a claim. [FN23]

II. Validity of Statutes Limiting Damages in Medical Malpractice Actions

A. Validity of Statutes Limiting Only Noneconomic Damages

§ 3. Under equal protection clause

[a] Validity upheld

In the following cases, the courts held that a statute limiting the recovery of noneconomic damages in a medical malpractice action was not invalid under the equal protection clause.

The California statute limiting noneconomic medical malpractice damages did not violate the federal equal protection clause, the court held in Hoffman v United States (1985, CA9 Cal) 767 F2d 1431, reversing the trial court's denial of a motion to limit the damages of a catastrophically injured patient under the statute, in an action against the United States under the Federal Tort Claims Act. The court found that the statute did not involve a suspect classification, fundamental right, or classification requiring heightened scrutiny, and stated that validity depended on the legislation having a legitimate purpose, which it was rational to believe would be furthered by the classification. The damage limitation (Cal Civ. Code § 333.2) was part of a complex plan to reduce the dramatic rise in medical malpractice insurance premiums, observed the court, which were having an adverse effect on the quality of medical services to people of the state. The reduction of the rates was thus a legitimate state purpose, and the record clearly supported a finding that the legislature plausibly could believe the amount of settlement and verdict payments would directly affect insurance premiums, the court concluded. Treating the analysis of validity under the two constitutional provisions together, in Davis v Omitowaju (1989, CA3 VI) 883 F2d 1155, the court rejected a malpractice plaintiff's claim that a statutory limit on noneconomic damages recoverable in malpractice actions violated equal protection and due process. The patient had recovered a verdict stemming from surgery on her knee for an amount in excess of the damages cap, and the trial judge had reduced the award for noneconomic damages to the statutory limit under 27 V.I.C. § 166b (1975), which provided that the total amount recoverable for any injury of a patient could not exceed a certain amount plus actual expenses, not paid or payable or reimbursed from any other source, for reasonable and necessary medical or custodial care and/or rehabilitation services, and estimated future expenses not reimbursable or payable from any other source of the same kind, and lost earnings. [FN24] A limitation on a common-law measure of recovery did not violate a fundamental right or create a suspect classification, said the court, and the plaintiff

could not assert any fundamental right to an uncapped jury verdict, nor convincingly style herself and all malpractice claimants as a suspect class. Her claim must therefore be reviewed under the rational basis test, the court continued, and clearly the decision of the legislature to curb, through legislation, the high costs of malpractice insurance, and thereby promote quality medical care, provided a rational basis for capping the amount of damages that could be awarded in malpractice actions.

In Fein v Permanente Medical Group (1985) 38 Cal 3d 137, 211 Cal Rptr 368, 695 P2d 665, app dismd 474 US 892, 88 L Ed 2d 215, 106 S Ct 214, the court held that a statute placing a limit on noneconomic damages recoverable by a medical malpractice plaintiff did not violate the equal protection clause, apparently of the California constitution. The plaintiffs argued that application of the statute violated the equal protection clause because it impermissibly discriminated between medical malpractice victims and other tort victims, and discriminated within the class of medical malpractice victims, denying a complete recovery of damages only to those with noneconomic damages exceeding the statutory limit. With respect to the first contention, the court replied that the legislature limited the application of Cal Civ. Code § 333.2 to medical malpractice cases because it was responding to an insurance "crisis" in that particular area, and the statute was rationally related to the legislative purpose. As for the second claim, the court said the legislature clearly had a reasonable basis for drawing a distinction between economic and noneconomic damages, providing that the desired cost savings should be obtained only by limiting the recovery of noneconomic damage. The equal protection clause did not require the legislature to limit a victim's recovery for out-of-pocket medical expenses for lost earnings simply because it found it appropriate to limit damages for pain and suffering and other noneconomic losses, said the court. There was no merit in the contention that the particular monetary limit chosen violated equal protection, the court continued, because although the claim was made that the particular limit was more invidious than a complete abolition of noneconomic damages, falling most heavily on those with the most serious injuries, the court said that if that analysis were valid, a complete abolition of damages would be equally vulnerable to an equal protection challenge because abolition obviously also imposed greater monetary losses on those plaintiffs who would have obtained larger damages awards than on those who would have recovered lesser amounts. Just as the complete elimination of a cause of action has never been viewed as invidiously discriminating within the class of victims who have lost the right to sue, the statutory limit, applying to all malpractice victims, did not amount to an unconstitutional discrimination, the court explained. The court also rejected the argument that the limit was unconstitutional because the legislature could have realized the desired savings by mandating a fixed percentage reduction of all noneconomic damages awards. The choice between reasonable alternative methods for achieving a given objective was generally for the legislature, said the court, and there were a number of reasons that the legislature may have chosen as it did. It could reasonably have determined that an across-the-board limit would provide a more stable base on which to calculate insurance rates, observed the court, and the limit might have been perceived as promoting settlements by eliminating the possibility of phenomenal awards for pain and suffering which could make litigation worth the gamble. Finally, the court concluded, the legislature may have decided it was fair to malpractice plaintiffs in general to reduce only the very large noneconomic damages awards, rather than to diminish the more modest recoveries for pain and suffering and the like in the majority of cases, and any of those grounds provided a sufficient rationale for the particular limit, said the court.

Accord, Semsch v Henry Mayo Newhall Memorial Hosp. (1985, 2nd Dist) 171 Cal App 3d 162, 216 Cal Rptr 913.

Accord, Flores v Natividad Medical Center (1987, 1st Dist) 192 Cal App 3d 1106, 238 Cal Rptr 24, in which the court summarily rejected a malpractice plaintiff's equal protection challenge to several provisions of the Medical Injury Compensation Reform Act, including the limitation on noneconomic damages of Cal Civ. Code § 333.2, citing Fein v Permanente Medical Group (1985) 38 Cal 3d 137, 211 Cal Rptr 368, 695 P2d 665, app

dismd 474 US 892, 88 L Ed 2d 215, 106 S Ct 214.

Provision in wrongful death statute barring recovery of non-pecuniary damages in medical malpractice cases by surviving adult children was rationally related to state's interest in controlling healthcare costs and accessibility, and thus did not violate equal protection guarantees of either United States or Florida Constitutions. U.S.C.A. Const. Amend. 14; West's F.S.A. Const. Art. 1, § 2; West's F.S.A. § 768.21(8). Mizrahi v. North Miami Medical Center, Ltd., 761 So. 2d 1040 (Fla. 2000).

Equal protection guarantees of federal and state Constitutions were not violated by statute precluding recovery of nonpecuniary damages by decedent's adult children where cause of death was medical malpractice; statute did not implicate suspect class, and statute's disparate treatment of medical malpractice wrongful deaths bore rational relationship to legitimate state interest of curtailing skyrocketing medical malpractice insurance premiums. U.S.C.A. Const. Amend. 14; West's F.S.A. § 768.21(8). Mizrahi v. North Miami Medical Center, Ltd., 712 So. 2d 826 (Fla. Dist. Ct. App. 3d Dist. 1998).

Statutory cap on noneconomic damages did not deny equal protection or due process to patient in medical malpractice suit; cap was rationally related to legitimate governmental purpose of controlling increases in health care costs by reducing liability of medical care providers, reducing malpractice insurance premiums and maintaining affordable health care in state. U.S.C.A. Const. Amend. XIV; M.C.L.A. Const. Art. 1, § 2; M.C.L.A. § 600.1483. Zdrojewski v. Murphy, 254 Mich. App. 50, 657 N.W.2d 721 (2002).

The limitation on noneconomic damages in a medical malpractice action in RS Mo § 538.210 (1986), was a rational response to the legitimate legislative purpose of maintaining the integrity of health care for citizens of the state, the court held in Adams v Children's Mercy Hosp. (1992, Mo) 832 SW2d 898, cert den (US) 121 L Ed 2d 446, 113 S Ct 511 and transf to, remanded (Mo App) 848 SW2d 535, and did not violate the equal protection clause of the Missouri Constitution, Mo. Const. Art. I, § 2. The statute provided that in any action against a health care provider for damages for personal injury or death arising out of the rendering of, or the failure to render, health care services, no plaintiff should recover more than a certain amount, per occurrence, for noneconomic damages from any one defendant. Rejecting the contention that the right to open courts and the right to a certain remedy were fundamental rights, and therefore the victims of medical malpractice were a suspect class for the purpose of equal protection analysis, the court said that the statutory classification would be upheld if any state of facts reasonably could be conceived to justify it, that is, if the classification were rationally related to a legitimate state interest. The statute purposely treated a restricted class of health care providers as prospective tortfeasors much differently from any other kind of tortfeasor who might be involved in a negligence lawsuit, observed the court. In addition to the noneconomic damages cap, other parts of the statute: allowed future damages to be paid in periodic or installment payments above a certain amount, altered the traditional joint and several liability rules, and provided for apportioned fault to include a percentage allocated for parties who had been released from liability. The evidence was conflicting on the existence of a crisis in medical malpractice insurance premiums, the alleviation of which was the purported goal of the legislation, the court continued, but any doubt as to the existence of the crisis must be resolved in favor of the legislature, whose province it was to determine socially and economically desirable policy. The preservation of public health and the maintenance of generally affordable health care costs were reasonably conceived legislative objectives which could be achieved, if only inefficiently, by the statutory provision under attack, added the court, and the legislature could rationally believe that the cap would work to reduce the amount of damages awards and thereby reduce malpractice insurance premiums paid by health care providers, reasoning that physicians would then be willing to continue high risk medical practices in the state and provide quality medical services at a less expensive level than would otherwise be the case. The cap did not take away from any economic or punitive damages award, the court concluded, and still allowed a significant recovery against each liable defendant, in addition to the sizeable amount awarded in economic damages.

In Vincent v Johnson (1992, Mo) 833 SW2d 859, the court summarily rejected the medical malpractice plaintiffs' argument that the statutes governing medical malpractice and limitations on recoveries in such actions violated various provisions of the Missouri Constitution, alleged to create constitutional rights to causes of action that existed at common law and to full recovery of damages, stating that the same issues were presented to the court in Adams v Children's Mercy Hosp. (1992, Mo) 832 SW2d 898, cert den (US) 121 L Ed 2d 446, 113 S Ct 511 and transf to, remanded (Mo App) 848 SW2d 535, and there was no need to repeat the same reasoning as found therein. Statutory cap on quality of life damages in medical malpractice actions was reasonable, and it substantially furthered and was reasonably necessary to the legislative goal of decreasing health care costs and ensuring the continued availability of health care, and thus, cap did not violate the uniform operation of laws provision of the state constitution, even though the cap discriminated against malpractice victims with the most severe noneconomic damages; the cap allowed sufficient quantification of quality of life damages to have a substantial impact on malpractice insurance rates. West's U.C.A. Const. Art. I, § 24; West's U.C.A. § 78-14-7.1. Judd v. Drezga, 2004 UT 91, 103 P.3d 135 (Utah 2004).

In Robinson v Charleston Area Medical Ctr., Inc. (1991) 186 W Va 720, 414 SE2d 877, the court 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. The court observed that the state constitution was a restriction of power rather than a grant thereof, under which the legislature had the authority to enact any measure not inhibited thereby, and that courts ordinarily presume that legislation is constitutional, requiring the negation of legislative power to be shown clearly. When economic rights are concerned, the court stated it must determine whether the classification alleged to violate equal protection is a rational one, based on social, economic, historic, or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally, but the judiciary could not judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. The challenge under the equal protection and special legislation provisions asserted impermissible discrimination between medical professional liability victims and other tort victims, said the court, and between malpractice victims with a noneconomic loss less than the statutory cap and those with a noneconomic loss exceeding it. The court adopted the reasoning of the court in Fein v Permanente Medical Group (1985) 38 Cal 3d 137, 211 Cal Rptr 368, 695 P2d 665, app dismd 474 US 892, 88 L Ed 2d 215, 106 S Ct 214 (this subsection), explaining that the first distinction did not violate state constitutional equal protection principles, because the legislature had responded to a liability insurance "crisis" in the particular area of medical malpractice, by means which were rationally related to the state purpose of furthering the collectability of judgments against tortfeasors who are health care providers and of promoting health care availability. The equal protection clause did not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all, the court explained. The second distinction challenged did not violate equal protection either, continued the court, because the legislature may have believed reasonably that it was fairer to medical malpractice plaintiffs in general to reduce only very large noneconomic damages awards, rather than to establish a lower limit and thereby diminish the more modest recoveries for noneconomic damages which occur in the great bulk of cases. The court pointed out that the statutory cap in question did not limit economic damages, and was the largest cap on noneconomic damages of which the court was aware, higher than almost every cap elsewhere on total damages, but emphasized that its holding that the statutory cap was reasonable was limited to the particular cap at issue.

Statutory \$1 million cap on noneconomic damage awards in medical malpractice actions did not violate state equal protection provision. Const. Art. 3, § 10; Code, 55-7B-8.

Verba v. Ghaphery, 552 S.E.2d 406 (W. Va. 2001).

Statutory cap on noneconomic damages for wrongful death caused by medical malpractice does not violate equal protection, under rational basis test; cap is rationally related to appropriate legislative objectives of assuaging the fear of huge awards of damages based on passion, and reining in insurance costs in the case of a victim's death. U.S.C.A. Const. Amend. 14; W.S.A. Const. Art. 1, § 1; W.S.A. 655.017, 893.55(4)(b, f), 895.04(4). Maurin v. Hall, 2004 WI 100, 682 N.W.2d 866 (Wis. 2004).

[b] Validity not upheld

It was a violation of the constitutional guaranty of equal protection for a statute to limit the noneconomic damages recoverable in a medical malpractice action, the courts held in the following cases.

A statute limiting noneconomic damages in medical malpractice actions violated the principle of equal protection of the Alabama Constitution, the court held in Moore v Mobile Infirmary Ass'n (1991, Ala) 592 So 2d 156, reh den, without op (Ala) 1992 Ala LEXIS 68. Stating that it was not necessary or useful to identify precisely which of the two lower levels of federal scrutiny corresponded with its standard of review in the equal protection analysis, the court noted that §§ 1, 6, and 22 of the Alabama Declaration of Rights prohibited class legislation arbitrarily discriminating against some and favoring others in like circumstances. Although the legislature may, in the exercise of its police power, create reasonable classifications in order to eradicate or ameliorate a perceived social evil, the function of the judiciary was to determine whether the legislation unreasonably encroached upon private rights vouchsafed by the constitution, said the court, and that depended upon whether the classifications created by the statute were reasonably related to the stated objective, and not whether the benefit sought to be bestowed upon society outweighed the detriment to private rights. The limitation on noneconomic damages in a medical malpractice action found in Ala. Code § 6-5-544(b) (1975), was prompted by a perceived "crisis" affecting the availability of health care as a result of the rising cost of malpractice insurance, and the limitation was calculated to reduce the size of claims, thereby making affordable insurance available to health care providers, the court explained. The court agreed with the plaintiff that the statute created a favored class of tortfeasors, based solely on their connection with health care, and also created favored subclasses within that favored class by shielding those health care providers whose actions were the most egregious; in addition, the statute precluded full recovery only for those most severely injured and thereby created classifications based upon the severity of the injury. The court then cited a study by the United States General Accounting Office (GAO) which suggested that the connection between damages caps and the total cost of health care was remote, pointing out that, despite statutory reform, including damages caps, in place for nearly 10 years in some states, total medical malpractice costs for physicians and hospitals rose by more than either the consumer price index or the medical care index in that period. Furthermore, said the court, the cost of malpractice insurance was the product of a number of elements, the size and frequency of claims resulting from damages awards or settlements being only two of those elements, and insurance costs made up only a small percentage of total professional expenses for self-employed physicians. The GAO's conclusions were corroborated by a number of other studies, continued the court, concluding that the correlation between the damages cap and the reduction of health care costs to state residents was, at best, indirect and remote. By contrast, the court pointed out, the burden imposed on the rights of individuals to receive compensation for serious injuries was direct and concrete, falling most heavily on those who were the most severely maltreated and thus most deserving of relief, and the statute operated to the advantage of those health care providers who were the most irresponsible. Thus, in balancing the direct and palpable burden placed upon catastrophically injured victims of medical malpractice against the indirect and speculative benefit that may be conferred on society, the court concluded that the damages cap represented an unreasonable

exercise of the police power.

In Carson v Maurer (1980) 120 NH 925, 424 A2d 825, 12 ALR4th 1 (criticized by State v Brosseau, 124 NH 184, 470 A2d 869), [FN25] the court held that a statute imposing a limitation on the amount of noneconomic damages a medical malpractice plaintiff could recover violated the equal protection guaranty of the New Hampshire Constitution, N.H. Const. Pt. I, Arts. 2 and 12. Although the right to recover for personal injuries was not a fundamental right, and the classifications created by the statute, RSA § 507-C:7 II (Supp. 1979), did not involve a suspect classification, the court said that the rights involved were sufficiently important to require that the restrictions imposed be subjected to a more rigorous judicial scrutiny than the rational basis test. The classifications created must be reasonable and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, observed the court. Declining independently to examine the factual basis for the legislative justification for the statute, the court stated that the malpractice statute could be justified as a reasonable measure only if the restriction of private rights sought to be imposed was not so serious that it outweighed the benefits sought to be conferred upon the general public. The medical malpractice plaintiffs in the consolidated appeals challenged the constitutionality of the entire act purporting to address the problems of the medical injury reparation system, and the court invalidated many of its provisions, ultimately voiding the statute in its entirety because the legislature would not have passed the remaining portions of the act without the invalidated sections. The purpose of the damage limitation, the court observed, was to stabilize insurance risks and reduce malpractice insurance rates, and the plaintiffs contended that the provision created an arbitrary damage limitation and thereby precluded only the most seriously injured victims of medical negligence from receiving full compensation for their injuries. The court agreed, finding a weak relationship between the legislative goal and the means chosen to attain it, because paid-out damages awards constituted only a small part of total insurance premium costs, and few individuals suffered noneconomic damages in excess of the statutory cap. The limitation distinguished not only between malpractice victims and victims of other torts, the court continued, but also between malpractice victims with noneconomic losses exceeding the cap and those with less egregious noneconomic losses. Not only did the limitation of recovery prevent adequate compensation to patients with meritorious claims, but it did nothing toward the elimination of nonmeritorious claims, said the court, and while physicians might be encouraged to enter into practice and remain there, they did so at the expense of claimants with meritorious actions. It was unfair to impose the burden of supporting the medical care industry solely upon those persons most severely injured and most in need of compensation, asserted the court. Rejecting the argument that the damage ceiling should be upheld because it did not apply to economic loss, the court stated that it was only the award for noneconomic losses that compensated in some way for the pain, suffering, physical impairment, or disfigurement that the victim of malpractice endured. No mathematical formula could be permitted in computing such damages, and if there were an excessive verdict, the court pointed out, a remittitur was always available. The court distinguished between the statute at issue and another statute, imposing a limit on tort recovery against governmental subdivisions, which had been upheld, noting that there had been no common-law right to sue a municipality, that a governmental tortfeasor was different from other tortfeasors, and that, under the statute, payment was guaranteed to the tort victim. The defendants' reliance on the validity of a statute limiting recovery in actions for wrongful death was also misplaced, said the court, because such actions were unknown at common law, and furthermore, the statute did not limit recovery when the decedent was survived by any relative dependent on the deceased. Neither did the workers' compensation law support the claim of constitutionality, for that law provided a quid pro quo for potential tort victims whose common-law right of action was supplanted by the statute, the court observed, and a societal quid pro quo in the form of lower insurance premiums and lower medical care costs did not extend to the seriously injured medical malpractice victim and was not sufficient to offset the damage. Recovery of only a

limited portion of such damages cannot be equivalent to recovery of the damages in full, the court concluded.

Rational relationship did not exist between statutory classification and legislative objective of compensating victims fairly, as factor in favor of finding that statute placing \$350,000 cap, adjusted for inflation, on noneconomic damages in medical malpractice actions not involving wrongful death of the patient violated equal protection under rational basis test; classification prevented only the most severely injured from recovering their entire noneconomic damages, the greater the injury the smaller the fraction of noneconomic damages a victim subject to the cap would receive, and young people were affected the most because they suffered disproportionate share of serious injuries from medical malpractice and also because many could expect to be affected by their injuries for 60- or 70-year life expectancy. W.S.A. Const. Art. 1, § 1; W.S.A. 655.017, 893.55(4)(d). *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 2005 WI 125, 2005 WL 1639450 (Wis. 2005).

§ 4. Under due process clause

In the following cases the courts held that it was not a violation of due process for a statute to limit the amount of noneconomic damages recoverable by a malpractice plaintiff.

See *Knowles v United States* (1994, CA8 SD) 29 F3d 1261, § 35[a].

In *Davis v Omitowoju* (1989, CA3 VI) 883 F2d 1155, more fully reported in § 3[a], the court held that a statutory limit on noneconomic damages recoverable in malpractice actions did not violate due process, applying the same analysis used to determine the statute's validity under the equal protection clause.

A statute limiting noneconomic damages recoverable by a plaintiff in a medical malpractice action did not violate the due process clause, apparently of the California Constitution, the court held in *Fein v Permanente Medical Group* (1985) 38 Cal 3d 137, 211 Cal Rptr 368, 695 P2d 665, app dismd 474 US 892, 88 L Ed 2d 215, 106 S Ct 214. A malpractice plaintiff who had recovered a verdict in excess of the statutory limitation argued that reduction of the judgment under Cal Civ. Code § 333.2 denied due process in limiting the potential recovery of medical malpractice claimants without providing them an adequate quid pro quo. The court said it was well established that a plaintiff had no vested property right in a particular measure of damages, and the legislature possessed broad authority to modify the scope and nature of such damages. So long as the measure is rationally related to a legitimate state interest, policy determinations as to the need for, and the desirability of, the enactment are for the legislature, the court observed. It appeared obvious, said the court, that the statutory limit, by placing a ceiling on the recovery of noneconomic damages, was rationally related to the objective of reducing the cost of malpractice defendants and their insurers, and it was worth noting that in seeking a means of lowering malpractice cost, the legislature placed no limits on a plaintiff's right to recover for all economic losses. Commenting that serious questions as to the wisdom of awarding damages for pain and suffering in any negligence case had been raised by jurists and legal scholars, because of the inherent difficulties in placing a monetary value on such losses, because they are at best only imperfect compensation for intangible injuries, and because such damages were generally passed on to innocent consumers, the court said that no California case had ever suggested that the right to recover for noneconomic injuries was constitutionally immune from legislative limitation or revision. Referring to statutory provisions limiting damages in medical malpractice actions in other states, the court pointed out that, with only one exception, all of the invalidated statutes contained a ceiling which applied to both pecuniary and nonpecuniary damages, and several courts were apparently considerably influenced by the potential harshness of a limit that might prevent an injured person from even recovering the amount of his medical expenses. In a footnote, the court said that even if due process principles required some quid pro quo to support the statute, it would be difficult to say that the preservation of a viable medical

malpractice insurance industry in the state was not an adequate benefit in return for the detriment the legislation imposed on malpractice plaintiffs. The court explained that although it did not suggest that the legislature felt that the statutory limitations on damages alone or any other single provision of the medical malpractice reform legislation was essential to the survival of the medical malpractice insurance system, there was surely nothing in the due process clause which prevented a legislature from making a number of statutory changes which, in combination, provided the requisite benefit to justify the enactment.

The state constitutional guaranty of due process was not violated by a statutory limit on noneconomic damages recoverable in medical malpractice actions, the court held in Adams v Children's Mercy Hosp. (1992, Mo) 832 SW2d 898, cert den (US) 121 L Ed 2d 446, 113 S Ct 511 and transf to, remanded (Mo App) 848 SW2d 535. Observing that the analysis required under the due process clause was the same as the analysis under the challenge to the provisions as violative of the open courts guaranty in the constitution, [FN26] the court said that both clauses insure no more than that a claimant was entitled to whatever process was constitutionally mandated or permitted under the law at the time of the claim, and the plaintiffs received all the process due to them under law. Statutory cap on quality of life damages in medical malpractice actions was rationally related to a legitimate government interest in combating rising health care costs and fears about continued availability of health services by reducing malpractice insurance, and thus, cap did not violate the due process clause of the state constitution. West's U.C.A. Const. Art. I, § 7; West's U.C.A. § 78-14-7.1. Judd v. Drezga, 2004 UT 91, 103 P.3d 135 (Utah 2004).

In Robinson v Charleston Area Medical Ctr., Inc. (1991) 186 W Va 720, 414 SE2d 877, more fully reported in § 3[a], the court 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 state constitutional guaranties of due process, W. Va. Const. Art. III, § 10, and "certain remedy," W. Va. Const. Art. III, § 17. The "certain remedy" provision of the constitution was violated when a legislative enactment either substantially impaired vested rights or severely limited existing procedural remedies permitting court adjudication of cases, said the court. Legislation will be upheld if a reasonably effective alternative remedy is provided, the court continued, or, if the purpose of the alteration or repeal of an existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, the legislative action is a reasonable method of achieving the purpose. The guaranty is qualified by the words "by due course of law," thereby extending considerable latitude to the legislature, and it is also recognized, the court pointed out, that the general authority of the legislature to alter or repeal the common law is expressly conferred by Article VII, § 13. The plaintiffs asserted that there was no clear evidence that a medical malpractice insurance "crisis" existed, and, even if one did, the statutory limit was not a reasonable method of dealing with the problem, as the legislature could only speculate as to its effect on medical malpractice insurance premiums. However, the court said it ordinarily would not re-examine the factual justification for a statute, but would inquire whether the legislature reasonably could conceive to be true the facts on which the statute was based. The legislature must be free to attempt a remedy even when the results were uncertain, and policy must frequently be made on the basis of incomplete or even conflicting information, said the court.

Statutory cap on noneconomic damages for wrongful death caused by medical malpractice does not violate substantive due process; while legislature had adjusted the underlying cap on noneconomic wrongful death damages from time to time, such periodic changes suggested legislative attention and thoughtfulness, not arbitrary action. U.S.C.A. Const. Amend. 14; W.S.A. Const. Art. 1, § 1; W.S.A. 655.017, 893.55(4)(b, f), 895.04(4). Maurin v. Hall, 2004 WI 100, 682 N.W.2d 866 (Wis. 2004).

§ 5. Under right to jury trial

[a] Validity upheld

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

The Seventh Amendment to the United States Constitution, providing that no fact tried by a jury shall be otherwise re-examined in any court, did not render unconstitutional a statutory cap on noneconomic damages provided by 27 V.I.C. § 166b (1975), the court held in Davis v Omitowoju (1989, CA3 VI) 883 F2d 1155. The malpractice plaintiff contested the reduction of a jury verdict in her favor by the trial judge, claiming a violation of her right to a trial by jury, because the court in effect re-examined the jury's factual determination of the extent of her damages. The court said it understood the language of the amendment to operate as a guaranty of the integrity of the judicial process generally, and as a check on the powers of the trial judge specifically, because, unlike the first clause of the Seventh Amendment, which in broad terms preserved the right to a trial by jury, the second clause spoke exclusively of the role of the court. The district judge was merely implementing a policy decision of the legislature in applying the law when it predetermined the extent and amount of damages allowed in a malpractice action, and because the second clause of the Seventh Amendment was not read as limiting the exercise of such legislative authority, the trial court was not re-examining a fact tried by a jury within the meaning of the constitutional provision, the court explained. This understanding of the text of the amendment was supported by the Supreme Court's decision in Parklane Hosiery Co. v Shore (1979) 439 US 322, 58 L Ed 2d 552, 99 S Ct 645, CCH Fed Secur L Rep ¶ 96713, 26 FR Serv 2d 669, in which the court decided that the application of the doctrine of collateral estoppel did not involve the re-examination of any fact decided by a jury, but rather rested on the premise that once an issue had been resolved in a prior proceeding, there was no further factfinding function to be performed. The court also noted that if, instead of reducing the damages award after the jury had rendered its verdict, the trial court had instructed the jury prior to its deliberations that damages could only be awarded up to the maximum amount permitted by statute, no reduction would have been necessary and no Seventh Amendment question would have arisen. Furthermore, its reading was bolstered by the historical underpinnings of the Seventh Amendment and the right to a jury trial, which provided evidence that the amendment was aimed at protecting against the abuse of judicial, as distinct from legislative, power, and judicial bias, the court concluded. In Yates v Pollock (1987, 2nd Dist) 194 Cal App 3d 195, 239 Cal Rptr 383, the court held that the statute limiting the recovery of noneconomic damages in a medical malpractice action did not unconstitutionally abridge the right to a jury trial under Cal Const. Article 1 § 16. After construing the statute, Cal Civ. Code § 333.2, to apply to the plaintiffs' wrongful death action arising from medical malpractice, [FN27] the court said that the contention that the limitation abridged the right to a jury trial was an indirect attack upon the legislature's power to place a cap on damages. Although the application of the statute would in some cases result in the recovery of a lower judgment than would have been obtained before the enactment of the statute, the court said, it is well established that the legislature retain broad control over the measure as well as the timing of damages that a defendant is obligated to pay, and it may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest. There was no authority that the right to recover for such noneconomic injuries was constitutionally immune from legislative limitation or revision, the court concluded. For a case holding that a statute limiting noneconomic damages in a medical malpractice action under certain circumstances did not violate the right to jury trial, see Santelli v Arean (1993, Fla App D2) 616 So 2d 1154, 18 FLW D 1012, reported in full (Fla App D2) 1993 Fla App LEXIS 4252, review den (Fla) 624 So 2d 268, § 7.

The principal purposes of the Medical Malpractice Act are to limit the liability of health care providers who qualify under the Act and to provide compensation to medical

malpractice victims who have been injured by qualified health care providers. LSA-R.S. 40:1299.41 et seq. Tucker v. Lain, 798 So. 2d 1041 (La. Ct. App. 4th Cir. 2001).

Statutory cap on noneconomic damages recoverable in medical malpractice action did not violate right to trial by jury as guaranteed by State Constitution. M.C.L.A. Const. Art. 1, § 14; M.C.L.A. § 600.1483(1). Wiley v. Henry Ford Cottage Hosp., 257 Mich. App. 488, 668 N.W.2d 402 (2003), appeal denied, 678 N.W.2d 439 (Mich. 2004).

There was no substantive right under the common law to a jury determination of damages under the Seventh Amendment, the court said in Adams v Children's Mercy Hosp. (1992, Mo) 832 SW2d 898, cert den (US) 121 L Ed 2d 446, 113 S Ct 511 and transf to, remanded (Mo App) 848 SW2d 535, and therefore, a statute limiting the noneconomic damages recoverable in a malpractice action did not violate the right to jury trial. The malpractice plaintiffs argued that under Mo. Const. Art. I, § 22(a), they were entitled to have a jury determine all damages without interference by the legislature. Noting that the right to a jury trial protected by the constitution was the same as that which existed at common law before the adoption of the first constitution, the court said that a jury's primary function was factfinding, including determination of a plaintiff's damages, but when the assessment of liability and the determination of damages was accomplished, the jury had completed its constitutional task. The court's job was to apply the law to the facts, and the statute, RS Mo § 538.210 (1986), established substantive, legal limits to the plaintiffs' damage remedy, the court explained. The permissible remedy was a matter of law, not fact, and because the limit was not applied until after the jury had completed its constitutional task, it did not infringe upon the right to jury trial, concluded the court, pointing out that since the legislature had the right to abrogate a cause of action cognizable under the common law completely, it thus also had the power to limit recovery in those causes of action. Statutory cap on quality of life damages in medical malpractice actions did not violate plaintiff's right to a jury trial under the state constitution; the jury was allowed to determine the facts in the first instance, and then the court applied the statutory cap to the jury's award. West's U.C.A. Const. Art. I, § 10; West's U.C.A. § 78-14-7.1. Judd v. Drezga, 2004 UT 91, 103 P.3d 135 (Utah 2004).

In Robinson v Charleston Area Medical Ctr., Inc. (1991) 186 W Va 720, 414 SE2d 877, the court 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 jury trial guaranteed by W. Va. Const. Art. III, § 13. The limit on the recoverable amount of noneconomic loss in a medical professional liability action did not violate the "re-examination" clause of the jury trial provision because that language did not apply to the legislature, explained the court, which may fix in advance the amount of recoverable damages in all cases of the same type. The clause applied only to judicial action in any particular case, the court maintained, and the legislature was not acting as a factfinder in a legal controversy, but was acting within its legislative power to create and repeal causes of action.

Statutory cap on noneconomic damages for wrongful death caused by medical malpractice does not violate the constitutional right to trial by jury. W.S.A. Const. Art. 1, § 5; W.S.A. 655.017, 893.55(4)(b, f), 895.04(4). Maurin v. Hall, 2004 WI 100, 682 N.W.2d 866 (Wis. 2004).

Statutory cap on noneconomic damages for wrongful death caused by medical malpractice does not violate the constitutional right to trial by jury. W.S.A. Const. Art. 1, § 5; W.S.A. 655.017, 893.55(4)(b, f), 895.04(4). Maurin v. Hall, 2004 WI 100, 682 N.W.2d 866 (Wis. 2004).

[b] Validity not upheld

In the following case the court held that a statute limiting the amount of noneconomic damages recoverable in a malpractice action violated the constitutional right to jury trial. In Moore v Mobile Infirmary Ass'n (1991, Ala) 592 So 2d 156, reh den, without op (Ala) 1992 Ala LEXIS 68, the court held that the portion of Ala. Code § 6-5-544(b) (1975),

imposing a limitation on damages for noneconomic loss in medical malpractice actions, represented an impermissible burden on the right to trial by jury as guaranteed by § 11 of the Constitution of Alabama. The trial court had reduced a medical malpractice plaintiff's noneconomic damages, the final verdict exceeding the cap by an amount representing economic damages for lost earnings and medical expenses. Under Ala. Code § 6-5-544(b) (1975), the amount of recovery for noneconomic losses, including punitive damages, either to the injured plaintiff, the plaintiff's spouse, or other lawful dependents, or any of them together, could not exceed a certain sum. "Noneconomic loss" was defined as that intended to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, and other nonpecuniary damage. Noting that the analysis and conclusions reached were based entirely on adequate and independent state law grounds, the court said it was undisputed that juries had been employed in Alabama since the writing of the constitution to assess "quality of life" damages in actions alleging negligent personal injury. The hospital defendant contended that the legislative imposition of a damages cap did not impair the right to a jury trial any more than traditional forms of judicial supervision of damage assessments, such as remittitur. However, the authority to interfere with the jury's findings on the amount of damages was one to be exercised with great caution, said the court, and particularly in cases involving damages not susceptible of precise measurement, a jury's assessment may be disturbed only when it is so flawed by bias, passion, prejudice, corruption, or improper motive as to lose its constitutional protection. As a corollary to that principle, the soundness of a jury's findings on the issue of damages must be evaluated on a case-by-case basis, the court explained. To the extent that the assessment of a jury exceeds the predesignated ceiling found in the statute, no consideration for the exigencies presented by each case was allowed, said the court, and the requirement was patently inconsistent with the doctrines of remittitur or new trial as they had been applied. Pointing out that it was not relevant, under an analysis of the right to jury trial, that the statute had not entirely abrogated the right to empanel a jury in a malpractice case, the court asserted that the relevant inquiry was whether the function of the jury had been impaired. Because the statute capped the jury's verdict automatically and absolutely, the jury's function, to the extent the verdict exceeded the damages ceiling, assumed less than an advisory status and was insufficient to satisfy the mandate of the constitutional right to jury trial, the court concluded.

§ 5.5. Under separation of powers

The following authority considered the validity of statutes limiting only noneconomic damages in medical malpractice actions under the constitutional doctrine of separation of powers.

Statutory cap on quality of life damages in medical malpractice actions did not violate the separation of powers under the state constitution; the damages cap represented law that was to be applied by a jury, not an improper usurpation of jury prerogatives. West's U.C.A. Const. Art. V, § 1; West's U.C.A. § 78-14-7.1. Judd v. Drezga, 2004 UT 91, 103 P.3d 135 (Utah 2004).

§ 6. Under guaranty of open courts

Under the constitutional guaranty of access to the courts or redress for injury, the courts held in the following cases that a statute limiting noneconomic damages recoverable by a malpractice plaintiff was valid.

See Knowles v United States (1994, CA8 SD) 29 F3d 1261, § 35[a]. In Adams v Children's Mercy Hosp. (1992, Mo) 832 SW2d 898, cert den (US) 121 L Ed 2d 446, 113 S Ct 511 and transf to, remanded (Mo App) 848 SW2d 535, the court held that a statutory cap on noneconomic damages in medical malpractice actions did not violate the open courts provision of the Missouri Constitution, Mo. Const. Art. I, § 14.

That section provided that the courts shall be open to every person, and certain remedy afforded for every injury, observed the court, and the malpractice plaintiffs claimed that the damages cap violated the provision by permitting the legislature to intrude impermissibly upon the judicial process. Observing that there had always been a distinction between statutes that impose procedural bars to access to the courts, and statutes that change the common law by the elimination or limitation of a cause of action, the court said that the former were impermissible, while the latter were a valid exercise of a legislative prerogative. The statutory damages cap, and other provisions of the statute relating to medical malpractice actions, modified the common law, but did not erect a condition precedent or any other procedural barrier to access to the courts, the court explained, and the plaintiff was not denied a lawful remedy, but noneconomic damages were limited by modification of the substantive law. The plaintiffs argued that without a quid pro quo for the limitation or abolition of a cause of action, the statute arbitrarily denied full compensation to the injured plaintiff. The court replied that in Missouri the open courts provision had never been interpreted to mean more than its original, textually implicit, purpose of assuring citizens procedural due process. Rejecting the requirement imposed by other courts of a reasonable substitute for an abolished or limited cause of action, the court stated that such a requirement arbitrarily and unnecessarily limited the legitimate lawmaking role of the legislative branch in a manner not intended by the constitution. The common law was in force in Missouri only to the extent that it had not been subsequently changed by the legislature or judicial decision, the court concluded, doubting the wisdom of a rule which limited the legislature's ability to respond statutorily to changing societal concerns or to correct previous policy positions upon receipt of better information.

See Robinson v Charleston Area Medical Ctr., Inc. (1991) 186 W Va 720, 414 SE2d 877, § 4, in which the court, treating the analysis of the validity of a statute limiting noneconomic damages in malpractice actions under the two provisions together, held that W. Va. Code § 55-7B-8, as amended, did not violate the state constitutional guaranties of due process, W. Va. Const. Art. III, § 10, and "certain remedy," W. Va. Const. Art. III, § 17.

§ 7. --When claim is arbitrated or plaintiff refuses arbitration

Under a statute providing for a statutory cap on noneconomic damages recoverable by a malpractice plaintiff when the claim was arbitrated, or when the plaintiff refused the defendant's offer of arbitration, the court held that there was no violation of the right to access to the courts.

In University of Miami v Echarte (1993, Fla) 618 So 2d 189, 18 FLW S 284, 26 ALR5th 831, cert den (US) 126 L Ed 2d 252, 114 S Ct 304, the court held that statutory provisions which provided a monetary cap on noneconomic damages in medical malpractice claims when the claim was arbitrated or when the plaintiff refused arbitration did not violate a medical malpractice claimant's right of access to the courts, reversing and remanding the trial court's declaratory judgment to the contrary. The statutory scheme to address the medical liability insurance crisis provided for a presuit investigation process to eliminate frivolous claims and a voluntary arbitration process to encourage settlement of claims. If the claimant established reasonable grounds for the medical negligence claim at the completion of the presuit investigation, either party could request that a medical arbitration panel determine the amount of damages under Fla. Stat. § 766.207(2) (Supp. 1988). The other party's agreement to participate in arbitration bound both parties to the arbitration panel's decision and precluded other remedies by the claimant against the defendant, but pursuant to § 766.207(7), the claimant's noneconomic damages were limited to a maximum per incident, calculated on a percentage basis with respect to capacity to enjoy life. The statute also provided for prompt payment of the award to the claimant, § 766.211, including interest, and the defendant was required to pay the claimant's reasonable attorney's fees and costs, and all arbitration costs. Under § 766.211(h), each defendant participating in the arbitration

proceeding was jointly and severally liable for all damages assessed by the panel. However, § 766.209(3) provided that if the defendant refused arbitration, the claimant could proceed to trial without any limitation on damages and was entitled to receive reasonable attorney's fees up to 25 percent of the award. If the claimant refused a defendant's offer to arbitrate, the claimant could proceed to trial, but noneconomic damages were capped at a certain sum per incident under § 766.209(4). The court said that the statute must be tested against the principle that the legislature had the power to abolish a right of access to the courts for redress of a particular injury only if it provided a reasonable alternative to protect the rights of the people of the state to redress for injuries, unless the legislature could show an overpowering public necessity for the abolishment of the right, and no alternative method of meeting the public necessity could be shown. The initial question was whether the arbitration statutes, which included the noneconomic damages caps found in § § 766.207 and 766.209, provided claimants with a "commensurate benefit" for the loss of the right fully to recover noneconomic damages, explained the court. Noting that a claimant's right was only limited after a defendant agreed to submit to arbitration, the court said that the defendant's offer to arbitrate provided the claimant with the opportunity to receive prompt recovery without the risk of uncertainty of litigation or having to prove fault in a civil trial. The defendant or the defendant's insurer was required to conduct an investigation to determine liability within 90 days of receiving the claimant's notice to initiate a malpractice claim, observed the court, and the defendant had to provide a verified written medical expert opinion to corroborate an assertion of lack of reasonable grounds to show a negligent injury. The claimant benefited from the quick determination, the court continued, and also saved the cost of attorney and expert witness fees which would be required to prove liability. Furthermore, a claimant who accepted an offer to have damages determined by an arbitration panel received the additional benefits of a relaxed evidentiary standard for arbitration proceedings as set out by Fla. Stat. § 120.58 (1989), joint and several liability of multiple defendants in arbitration, prompt payment of damages after the arbitration panel's determination, or interest penalties against the defendant for failure to promptly pay an award, and limited appellate review of the arbitration award requiring a showing of "manifest injustice." Rejecting the District Court's finding that because the medical malpractice arbitration statutes did not provide a no-fault basis for recovery or mandatory insurance coverage to assure recovery, like workers' compensation laws, they did not provide a commensurate benefit, the court pointed out that the task force appointed by the legislature to study the problem specifically considered and rejected other methods to control increases in medical malpractice insurance rates. The legislature had made factual findings that if the present crisis were not abated, persons subject to civil actions would be unable to purchase liability insurance, and injured persons would therefore be unable to recover damages for either their economic losses or their noneconomic losses, said the court, which constituted the legislature's conclusion that the current crisis was an "overpowering public necessity." Moreover, the court continued, the legislature's factual and policy findings were supported by the task force's report, which also supported the conclusion that no alternative or less onerous method existed, because the task force considered different solutions to the complex problem and concluded that all were necessary to address it. Stating that the plan as a whole must be considered in deciding whether no alternative means existed to meet the public necessity, the court said it was clear that both the arbitration statute, with its conditional limits on recovery of noneconomic damages, and the strengthened regulation of the medical profession were necessary, and no alternative or less onerous method of meeting the crisis had been shown. Without discussion, the court also held that the statutes did not violate the right to trial by jury (Fla. Const. Art. I, § 22), equal protection guaranties (Fla. Const. Art. I, § 2; U.S. Const. Amend. XIV, § 1), substantive or procedural due process rights (Fla. Const. Art. I, § 9; U.S. Const. Amend. XIV, § 1), the single subject requirement (Fla. Const. Art. III, § 6), the taking clause (Fla. Const. Art. X, § 6(a)), or the nondelegation doctrine (Fla. Const. Art. II, § 3).

In HCA Health Servs., Inc. v Branchesi (1993, Fla) 620 So 2d 176, 18 FLW S 291, the court reversed and remanded the appellate court's decision that Fla Stat §§ 766.207 and 766.209 (1989) violated the right of access to the courts, based on University of Miami v Echarte (1993, Fla) 618 So 2d 189, 18 FLW S 284, 26 ALR5th 831, cert den (US) 126 L Ed 2d 252, 114 S Ct 304, this section.

The court affirmed the trial court's order granting the defendant doctors' motion to compel arbitration in Santelli v Areean (1993, Fla App D2) 616 So 2d 1154, 18 FLW D 1012, reported in full (Fla App D2) 1993 Fla App LEXIS 4252, review den (Fla) 624 So 2d 268, rejecting the malpractice plaintiffs' contention that the arbitration provisions of Fla Stat §§ 766.207 and 766.209 (1989) were unconstitutional in that the noneconomic damages caps and other limitations imposed when arbitration was elected violated their rights of access to the courts and the constitutional right to jury trial. The court found that the statutes in question were not unconstitutional as applied to the specific facts of the case, because the plaintiffs actually requested voluntary binding arbitration and voluntarily subjected themselves to the limits, even though nothing in the statute required them to do so.

B. Statutes Limiting All Damages Except Medical Care and Related Expenses

§ 7.5. Other grounds

In action by shipowner against hospital for equitable indemnity based in plaintiff's settlement to satisfy foreign judgment in action brought under Federal Maritime Act by ship employee for injuries sustained due to improper medical treatment, determination that hospital could invoke state law limiting recovery of noneconomic damages by injured party against health care provider to \$250,000 in order to limit amount by which plaintiff could be indemnified did not contravene or even implicate supremacy clause. Allowing hospital to invoke limitation, even though its proportional share of liability was \$1.8 million, did not impair plaintiff's rights or interests under federal maritime law; it simply left one concurrent tortfeasor to pay more of loss than its proportionate fault. 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.

Statutory cap on awards of noneconomic damages was not an arbitrary, capricious, or unreasonable method for addressing legitimate interest in protecting availability of liability insurance, and thus did not constitute impermissible special legislation in violation of State Constitution. Const. Art. 3, § 19; I.C. § 6-1603. Kirkland v. Blaine County Medical Center, 4 P.3d 1115 (Idaho 2000).

Statutory \$1 million cap on noneconomic damage awards in medical malpractice actions did not violate state separation of powers doctrine. Const. Art. 5, § 1; Code, 55-7B-8. Verba v. Ghaphery, 552 S.E.2d 406 (W. Va. 2001).

Statute putting a cap on the recovery of noneconomic damages in medical malpractice actions did not violate right-to-remedy clause of State Constitution. W.S.A. Const. Art. 1, § 9; W.S.A. 655.017. Guzman v. St. Francis Hosp., Inc., 240 Wis. 2d 559, 2001 WI App 21, 623 N.W.2d 776 (Ct. App. 2000).

§ 8. Generally, recovery from health care provider

Under a statute limiting the damages recoverable by a malpractice plaintiff, except for medical care and related expenses, the court held that the portion of the statute limiting recovery from a health care provider was not constitutionally infirm.

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, the court held that a statutory limitation on medical malpractice judgments against health care providers, applying to all damages

except those for past and future medical expenses, did not violate the state or federal constitution, even as applied against multiple defendants. The cap had been challenged by a plaintiff who had settled with a hospital and its employee for the amount equal to the statutory cap on recovery available from a covered health care provider, and received judgment against the Louisiana Patient's Compensation Fund for the balance of the recovery allowable under the statute. The patient then filed suit against other health care providers, and appealed a summary judgment granted to the defendants because of the plaintiff's receipt of the maximum allowable recovery under LSA-R.S. § 40:1299.42(B)(1). The court noted that the Louisiana Constitution mandated equal protection of the laws under Art. I, § 3;

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prohibited arbitrary, capricious, or unreasonable discrimination because of physical condition under Art. I, §§ 3 and 12; and guaranteed open courts which must provide an adequate remedy for injury under Art. I, § 22. Under the state's medical malpractice law, said the court, the liability of multiple health care providers, aggregating a sum exceeding the cap allowable against any one health care provider, did not inure to the victim but reduced the excess due from the compensation fund, LSA-R.S. § 40:1299.42(B)(3)(a), and the total amount paid by multiple health care providers could not exceed the maximum allowable recovery. Noting that the cap on general damages from the fund had been held valid, [FN28] but the validity of limiting payment by an individual health care provider had not been determined, the court pointed out that since the statute did not affect fundamental rights, the constitutional test was whether its provisions were reasonably related to furthering general social interests. Many courts invalidating damages caps did so because of a state constitutional right to jury trial in civil cases, the court observed, but such a provision was lacking in the Louisiana Constitution. The statutory cap on medical malpractice judgments in excess of a certain amount distinguished between classes of persons according to their physical condition, continued the court, those with injuries evaluated below the cap being fully compensated, and those with damages above the statutory cap being fully compensated only for their medical expenses and related benefits. As to whether that discrimination was arbitrary, capricious, and unreasonable, the court pointed out that the state offered those most severely injured by medical malpractice three benefits to offset the limitation: (1) greater likelihood that the offending physician or other health care provider had malpractice insurance; (2) greater assurance of collection from a solvent fund; and (3) payment of all medical care and related benefits. Compensation and full medical care for those grossly injured by medical malpractice were legitimate social interests furthered by the malpractice legislation, said the court. The discrimination in the act against those with excessive injuries was accompanied by a quid pro quo, a reasonable alternative remedy having been provided, and since the statutory solution to the medical malpractice problem furthered the state's purpose of compensating victims, it did not offend the constitution, the court concluded.

Because the Medical Malpractice Act limits the liability of health care providers in derogation of the general rights of tort victims, any ambiguities in the Act should be strictly construed against coverage. LSA-R.S. 40:1299.41 et seq. Richard v. Louisiana Extended Care Centers, Inc., 835 So. 2d 460 (La. 2003).

Issue of whether medical malpractice victim's recovery against health care provider can be constitutionally limited has been addressed by state supreme court and answered affirmatively. Turner v Massiah (1994, La App 5th Cir) 641 So 2d 610.

[§ 9. --Recovery from patient's compensation fund](#)

The limitation on the liability of a patient's compensation fund, established by a statute limiting recovery for medical malpractice damages, except for medical care and related expenses, was not constitutionally invalid, the court held in the following case. In Williams v Kushner (1989, La) 549 So 2d 294, the court held that there was no constitutional infirmity in the state's providing for payment of a certain limited amount in noneconomic damages from the state's patient's compensation fund to a malpractice plaintiff who had settled with a defendant health care provider, after the trial court had reduced the damages granted in a jury trial to the statutory limit and entered judgment in that amount against the fund. The limitation was part of a statutory scheme which limited overall damages in malpractice actions, limited the recovery against any one health care provider, with the balance, if any, recoverable from the state fund, and provided for payment of future medical expenses, if appropriate, from the state fund. The malpractice plaintiff had settled with the attending doctor for the damages allowable by statute against a qualified health care provider before trial, and the court said the issue of the constitutionality of that damage limitation was thus moot. The legislature had the power to establish the patient's compensation fund and provide a supplemental recovery for those more seriously injured by medical malpractice, said the court, and the limitation on recovery from the fund was not subject to the same constitutional analysis as that which would apply to a negligent party. The court said that because the fund was a state-run insurance company, the state was free to limit its liability in any amount it wished, and the plaintiff had no constitutional claim for a greater amount.

In patient's medical malpractice action against two emergency room physicians after patient's left arm was amputated following transfer from one hospital's emergency room to another hospital, patient's damages were limited by the Louisiana Medical Malpractice Act's \$500,000 cap, and thus, as physician's liability was limited to \$100,000 plus interest pursuant to Act, Patient's Compensation Fund was required to pay remainder of amount under the \$500,000 cap minus \$11,000 credit for settled claims against hospitals. LSA-R.S. 40:1299.42, subd. B(3)(a); LSA-C.C. art. 1803. Coleman v. Deno, 832 So. 2d 1016 (La. Ct. App. 4th Cir. 2002).

§ 10. Under equal protection clause

[a] Validity upheld

The validity of a statute limiting medical malpractice damages except for medical and related expenses was upheld or deemed supportable in the following cases, against the contention that it violated the right to equal protection.

In Sibley v Board of Supervisors of La. State Univ. (1985, La) 477 So 2d 1094, on remand (La App 1st Cir) 490 So 2d 307, cert den (La) 496 So 2d 325, the court, on rehearing, after holding that a statute limiting the recovery of a malpractice plaintiff in an action against the state did not apply to liability for the alleged independent negligence of the Louisiana State University Medical Center Board of Governors, [FN29] directed that, in the event no liability was found of the board and the plaintiff's damages exceeded the statutory limitation, the case be remanded to the trial court for determination of its constitutionality under the guaranty of equal protection. In an earlier opinion, [FN30] the court had upheld the statutory malpractice damages limitation against an equal protection challenge, employing the three-level system of scrutiny developed by the United States Supreme Court. The court said it was called upon, in guiding the determination of the statute's validity, to decide whether the federal system of scrutiny was appropriate in interpreting the state constitution's right to individual dignity, La Const. Art. I, § 3 (1974), which included the right to equal protection of the laws and prohibited arbitrary or unreasonable discrimination against a person because of physical condition. Concluding that the federal model was not appropriate for interpreting Louisiana's equal protection clause, the court ruled that

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, ctfd 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 Omitowaju (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 irrebuttable 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.