WISCONSIN STATE LEGISLATURE COMMITTEE HEARING RECORDS

2005-06
(session year)

Assembly
(Assembly, Senate or Joint)

Task Force on Medical Malpractice (ATF-MM)

Sample:

Record of Comm. Proceedings ... RCP
- 05hr_AC-Ed_RCP_pt01a
- 05hr_AC-Ed_RCP_pt01b
- 05hr_AC-Ed_RCP_pt02

- *Appointments* ... *Appt*
- **

- *Clearinghouse Rules* ... *CRule*
- **

- *Committee Hearings* ... *CH*
- **

- *Committee Reports* ... *CR*
- **

- *Executive Sessions* ... *ES*
- **

- *Hearing Records* ... *HR*
- **

- *Miscellaneous* ... *Misc*
- **05hr_ATF-MM_Misc_pt44b**

- *Record of Comm. Proceedings* ... *RCP*
- **

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

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

For an Indiana case determining the validity of a statutory limitation on the total amount of damages recoverable in a medical malpractice action under Ind. Const. Art. I, § 23, and Ind. Const. Art. IV, §§ 22 and 23, which prohibit special privilege legislation, together with validity under the equal protection clause of the Fourteenth Amendment, see Johnson v St. Vincent Hospital, Inc. (1980) 273 Ind 374, 404 NE2d 585, § 17[a].

Statutory cap on damages recoverable in medical malpractice action did not violate principles prohibiting "special legislation." (Per curiam, with three justices concurring and two justices concurring in result.) U.S.C.A. Article 3 § 18; Neb.Rev.St. §§ 44-2801, 44-2825(1). Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc., 265 Neb. 918, 663 N.W.2d 43 (2003).

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

not violate constitutional provisions prohibiting special legislation. The provision in Va. Const. Art. I, § 4, specifying that no one was entitled to exclusive or separate emoluments or privileges from the community except in consideration of public services, had no reference to action of the legislature, said the court, and was not applicable to the case. As to the claim that Va. Code § 8.01-581.15 violated Va. Const. Art. IV, § 14, providing that the general assembly shall not enact any local, special, or private law, the plaintiff argued that the statutory limitation on medical malpractice damages conferred special privileges and immunities upon a small segment of the population, namely, physicians and their insurers, while at the same time arbitrarily distinguishing between severely injured victims of medical malpractice and less severely injured malpractice claimants as well as all other tort plaintiffs. Laws may be made to apply to a class only, asserted the court, and that class may be in point of fact a small one, provided the classification itself be reasonable and not arbitrary, and the law be made to apply to all of the persons belonging to the class without distinction. If the classification bears a reasonable and substantial relation to the object sought to be accomplished by the legislation, the court continued, it will survive a special-laws constitutional challenge. After careful and deliberate study, the general assembly determined that health care providers faced increasing difficulty in obtaining affordable malpractice coverage in excess of the statutory limit and that the situation would tend to reduce the number of health care providers available to serve the state's citizens, said the court. The necessity for and the reasonableness of classifications were primarily questions for the legislature, the court added, pointing out that the limitation applied to all health care providers and to all medical malpractice plaintiffs. According the legislation the presumption of validity to which it was entitled, the court concluded that the classification was not arbitrary, bore a reasonable and substantial relation to the object sought to be accomplished, and that it applied to all persons belonging to the class without distinction and was not special in effect.
See Robinson v Charleston Area Medical Ctr., Inc. (1991) 186 W Va 720, 414 SE2d 877, § 3[a], in which the court, treating the analysis under the two constitutional provisions together, held that W. Va. Code § 55-7B-8, as amended, a statute limiting the amount of noneconomic damages recoverable by a plaintiff in a malpractice action, did not violate the right to equal protection under W. Va. Const. Art. III, § 10 (implied), and was not special legislation prohibited by W. Va. Const. Art VI, § 39.

§ 22.5. Under proscription against sovereign immunity

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

D. Statutes Limiting General Damages

§ 23. Validity not upheld

In the following cases, the courts held that a statute limiting the recovery of general damages in medical malpractice cases violated constitutional rights.
Patients' equal protection rights were not violated by legislature's omission of noneconomic damages cap of Health Care Availability Act (HCAA) from inflationary

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

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

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

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

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

E. Statutes Limiting Only Recovery From Health Care Provider

§ 24. Validity upheld

The courts upheld the constitutionality of a statute limiting only the amount of damages recoverable from a health care provider in a medical malpractice action, in the following cases.
The court rejected the contention that the legislature could not constitutionally limit the liability of a health care provider for damages recoverable in a medical malpractice action and transfer responsibility for the portion of the judgment in excess of that limit to a patient's compensation fund in Florida Patient's Compensation Fund v Von Stetina (1985, Fla) 474 So 2d 783, 10 FLW 286. The trial court had found the statutory section unconstitutional on the ground that it attempted to limit the court's inherent power to enforce judgments and violated both the equal protection and due process clauses of the Florida and United States Constitutions. The fund afforded medical malpractice liability coverage to health care providers for the benefit of both the health care providers and those members of the public who became victims of medical malpractice, observed the court. The concept of the fund and its assessment mechanism was upheld in Department of Ins. v Southeast Volusia Hospital Dist. (1983, Fla) 438 So 2d 815, app dismd 466 US 901, 80 L Ed 2d 149, 104 S Ct 1673, later proceeding (Fla App D1) 452 So 2d 91, review den (Fla) 456 So 2d 1181 and later proceeding (Fla App D1) 464 So 2d 1275, later proceeding (Fla App D1) 466 So 2d 379, 10 FLW 727, later proceeding (Fla App D1) 478 So 2d 820, 10 FLW 1250 and review den (Fla) 476 So 2d 676, the court continued, and the statutory scheme did not deny plaintiffs recovery of judgments, but was designed in part to insure that sufficient funds existed to pay substantial judgments to medical malpractice victims. Provision for the fund to be made a party to medical malpractice actions and responsible for portions of awards in excess of the limit of recovery against a health care provider did not substantially violate or change any of the plaintiffs' vested rights, said the court. The court went on, however, to caution that it did not address the constitutional right of a plaintiff to levy against a health care provider when the fund was fiscally incapable of or otherwise prohibited from paying validly entered judgments within a reasonable time because of inadequate rates and assessments.
Accord, Florida Patient's Compensation Fund v Tillman (1986, Fla) 487 So 2d 1032, 11 FLW 74, the court stating that it had upheld the constitutionality of the statute in Von

Stetina, and holding that the District Court erred in finding the limitation of liability provisions of Fla. Stat. § 768.54 unconstitutional.
In Mercy Hospital, Inc. v Menendez (1979, Fla App D3) 371 So 2d 1077, cert den (Fla) 383 So 2d 1198 and app dismd without op (Fla) 383 So 2d 1198 and appeal after remand (Fla App D3) 400 So 2d 48, petition den (Fla) 411 So 2d 383, more fully reported in § 38[a], the court, holding that medical malpractice plaintiffs had the burden of making the patient's compensation fund a party in any suit where recovery was sought against a health care provider in excess of the limit of damages recoverable against the provider, stated that the application of the statute was not given an unconstitutional effect by the requirement that the fund, which the plaintiff argued was like an insurance program, be joined in the suit, and the provision was not an invasion of the right of the court to establish rules of procedure.
In Garcia v Cedars of Lebanon Hospital Corp. (1984, Fla App D3) 444 So 2d 538, the court, stating it was adhering to its decision in Mercy Hospital, Inc. v Menendez (1979, Fla App D3) 371 So 2d 1077, cert den (Fla) 383 So 2d 1198 and app dismd without op (Fla) 383 So 2d 1198 and appeal after remand (Fla App D3) 400 So 2d 48, petition den (Fla) 411 So 2d 383, the previously reported case, held that Fla. Stat. § 768.54(2)(b), a provision limiting a judgment against qualified health providers in a medical malpractice action, was valid and enforceable.
Statutory cap on damages recoverable from state health care providers did not violate constitutional equal protection and access to courts provisions, although cap treated patients differently, as cap provided three benefits: (1) greater likelihood that offending health care provider has malpractice insurance, (2) greater assurance of collection from solvent fund, and (3) payment of all medical care and related benefits. LSA-Const. Art. 1, §§ 3, 22; LSA-R.S. 40:1299.39. Batson v. South Louisiana Medical Center, 727 So. 2d 613 (La. Ct. App. 1st Cir. 1998), writ granted, 741 So. 2d 1276 (La. 1999) and judgment rev'd on other grounds, 750 So. 2d 949 (La. 1999).
Monetary statutory limitation of $500,000 for claims against private hospitals, as set forth in Louisiana Medical Malpractice Act, was not unconstitutional, even though no statutory monetary limitations existed in claims against state health care providers sued for medical malpractice. Miller v. Southern Baptist Hosp., 806 So. 2d 10 (La. Ct. App. 4th Cir. 2001).
Malpractice Liability for State Services Act's (MLSSA's) $500,000 statutory cap on medical malpractice judgments against public health care providers is constitutional. LSA-R.S. 40:1299.39. Ruiz v. Oniate, 806 So. 2d 81 (La. Ct. App. 4th Cir. 2001).
Governmental Tort Claims Act providing that resident physicians can be sued individually, not withstanding their status as state employees, but limiting their liability to $100,000, recognizes special burdens (financial amongst other) faced by student physicians and makes some accommodations to protect them should they be called upon to defend against lawsuit. That legislature felt need to protect residents in this special manner indicates underlying intent to subject faculty and student physicians to individual liability for torts committed while practicing medicine. Anderson v Eichner (1994, Okla) 890 P2d 1329.

§ 24.5. Application generally

State hospital did not prove that its health care providers were entitled to statutory limit of liability in medical malpractice action, and thus hospital was not entitled to benefit of statutory cap, where hospital did not introduce evidence that its employees were acting pursuant to written employment contracts meeting the requirements of the Malpractice Liability for State Services Act. LSA-R.S. 40:1299.39, 40:1299.39, subd. A(1)(ii)(aa), 40:1299.39.1. Ruiz v. Oniate, 697 So. 2d 1373 (La. Ct. App. 4th Cir. 1997), reh'g denied, (Aug. 29, 1997) and writ granted, 707 So. 2d 45 (La. 1998).
Nursing home was a "qualified health care provider" for purpose of determining whether it was liable for malpractice only to extent provided in Medical Malpractice Act (MMA); letter from Medical Malpractice Insurance Director of Patient's Compensation Fund (PCF)

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

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

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

A. Generally

§ 25. Application to wrongful death claims [FN56]

[a] Held applicable

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

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

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

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

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

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

[b] Held not applicable

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

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

§ 26. Application to derivative claims

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

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

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

Medical Injury Compensation Reform Act (MICRA), the medical group could not be held vicariously liable for noneconomic damages in excess of the statutory damages cap of $250,000. West's Ann. Cal. Civ. Code § 3333.2. Lathrop v. Healthcare Partners Medical Group, 114 Cal. App. 4th 1412, 8 Cal. Rptr. 3d 668 (1st Dist. 2004).
Claim for loss of consortium that was brought by patient's wife was a derivative claim, and thus wife could not recover separate judgment on that claim or recover award of prejudgment interest in medical malpractice action that resulted in patient recovering statutory damages cap under Medical Malpractice Act; damages awarded to wife were included within cap applicable to patient's claim. West's A.I.C. 34-18-14-3(a)(2). Johnson v. Eldridge, 799 N.E.2d 29 (Ind. Ct. App. 2003).
See Descant v Administrators of the Tulane Educ. Fund (1994, La) 639 So 2d 246, § 40.
Patient's husband's award of noneconomic damages for loss of consortium was not subject to same statutory damages cap as was applied to noneconomic damages awarded to patient in medical malpractice action for failure to timely diagnose patient's ovarian cancer; although loss of consortium claim was derivative, spouse was not automatically entitled to damages for such claim, and thus, husband was separate plaintiff bringing separate personal injury action for loss of consortium. V.A.M.S. § 538.210, subd. 1. LaRose v. Washington University, 154 S.W.3d 365 (Mo. Ct. App. E.D. 2004), reh'g and/or transfer denied, (Jan. 5, 2005) and transfer denied, (Mar. 1, 2005).

§ 27. Retroactive effect

Statutory provisions limiting the amount of damages recoverable in a medical malpractice action, or amendments thereof, were construed in the following cases not to apply retroactively, the courts being in agreement that if a cause of action accrued before the effective date of the statute or amendment, the right thus vested could not be limited by subsequent legislation.
The trial judge did not err in refusing to apply the amended version of a statutory damages cap when reducing the jury's verdict in a malpractice action, the court held in Davis v Omitowoju (1989, CA3 VI) 883 F2d 1155, an action which was pending at the time the amended statute became law. The patient's cause of action had arisen, and she had filed her complaint with the Malpractice Review Committee and with the trial court, before the effective date of the amendment, which would reduce her total recovery further than the original malpractice damages limitation statute. The defendant argued that some provisions of the new statute were passed with a clause specifically limiting their application to actions arising after the amendment's effective date, but that no such clause was enacted with respect to the amendments involving the total amount of damages which could be awarded. The canon that statutes operate prospectively required the application of the original version of the statute, said the court, because the rule was applied when application of a new law would affect rights or obligations existing prior to the change. The patient sought the doctor's services at a time when her recovery was limited by the original statute, and thus the rights and obligations of the parties were predicated upon that statute, the court concluded, and there was no clear legislative indication that the amended statutory cap should be applied.
In Martino v Sumrall (1993, La App 1st Cir) 619 So 2d 87, cert den (La) 621 So 2d 821, the court held that an amendment to the public medical malpractice statute, providing that the statute, including its limitation of damages provisions, should apply to the state and any of its departments, including state hospitals, could not be applied retroactively to the cause of action of a plaintiff who had been injured before the amendment. The court observed that La. R.S. § 40:1299.39 limited the liability of the state of Louisiana in malpractice cases to a certain amount, exclusive of liability for medical expenses, but at the time of the plaintiff's injury, the legislation applied only to state-employed physicians and other professionals providing medical and related health care services. The supreme court had specifically held that the liability cap did not apply to judgment rendered against the

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

Louisiana medical malpractice cap, La Stat § 40:1299.39, was not made applicable to state and its hospitals until 1988; statute was not retroactively applicable to case filed in 1983 in connection with 1983 death of patient. Smith v Louisiana Health & Human Resources Admin. (1994, La App 4th Cir) 637 So 2d 1177, cert den (La) 644 So 2d 634.

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

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

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

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

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

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

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

B. Application of Statute to Multiple Claims or Defendants

§ 28. Multiple acts of malpractice

[a] Plaintiff(s) limited to one recovery

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

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

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

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

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

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

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

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

Under a statute limiting the recovery of an injured patient to a certain amount per occurrence of medical malpractice, the courts held in the following cases that a plaintiff was entitled to more than one recovery of the maximum amount allowed by statute.

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

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

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

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

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

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

Williams v. O'Neill, 813 So. 2d 548 (La. Ct. App. 4th Cir. 2002).
Statute capping noneconomic damages in medical malpractice actions at $280,000 did not apply in action in which defendant nursing home received $220,000 setoff against $300,000 verdict. M.C.L.A. § 600.1483. Markley v. Oak Health Care Investors of Coldwater, Inc., 660 N.W.2d 344 (Mich. Ct. App. 2003).

§ 29. Multiple defendants

[a] Application of one cap to each defendant

A statutory provision limiting the amount of damages recoverable in a medical malpractice action was construed in the following cases to apply to each defendant.
In action by shipowner against hospital for equitable indemnity based on plaintiff's $6 million settlement to satisfy foreign judgment in action by ship employee for injuries sustained due to improper medical treatment, trial court erred in entering judgment for $1.8 million against hospital, reflecting its proportional share of liability, where Medical Injury Compensation Reform Act (MICRA) limited recovery of noneconomic damages by injured party against health-care provider to $250,000, and health-care provider may invoke this limit in action for partial equitable indemnity based on professional negligence. Statute operates as limitation on liability, and to extent it precludes recovery for noneconomic damages against health-care providers in excess of $250,000, it concomitantly limits their joint liability irrespective of proportionate fault. Thus, concurrent tortfeasors have no right of indemnification beyond that amount. Western Steamship Lines, Inc. v San Pedro Peninsula Hosp. (1994) 8 Cal 4th 100, 32 Cal Rptr 2d 263, 876 P2d 1062, 94 CDOS 5854, 94 Daily Journal DAR 10626, reh den (Sep 22, 1994) and mod 8 Cal 4th 440c, 94 CDOS 7275, 94 Daily Journal DAR 13404.
See Romero v United States (1994, ED Mo) 865 F Supp 585 (applying Mo law), § 35[a].
In Vincent v Johnson (1992, Mo) 833 SW2d 859, the court remanded for a determination of whether a doctor sued for malpractice was insured as an employee of the codefendant hospital, for the purpose of deciding whether one or two caps applied to the judgments in favor of an infant injured at birth and her parents, under a statute limiting noneconomic damages recoverable in medical malpractice actions. The court said that under RS Mo § 538.210.2(1), the question turned on whether there were one or two defendants, which would be determined by whether the doctor was insured against malpractice as an employee of the hospital, as to which there was no evidence in the record. If he was so insured, there was one cap, said the court, and if not, there were two, and the share of the net settlement proceeds representing the hospital's noneconomic damages should be applied against the doctor's damages before the doctor's cap was considered.
In Rose v Doctors Hosp. (1990, Tex) 801 SW2d 841, rehg of cause overr (Jan 23, 1991), the court held that in a wrongful death action, the amount of damages under the statute limiting medical malpractice recoveries was to be calculated on a "per defendant" basis. The patient's widow and parents filed the wrongful death action against the hospital and another defendant after the patient received an allegedly fatal dose of morphine. Each of the claimants was awarded damages by the jury in an amount in excess of the limitation found in Tex. Rev. Civ. Stat. Ann. Art. 4590i, § 11.02 (Vernon Supp. 1991), for civil damages liability of a physician or health care provider in an action on a health care liability claim. After holding that the damages limitation in the Medical Liability Act, when applied to wrongful death actions, did not violate the Texas Constitution, [FN66] the court said that the damages cap should be calculated on a "per defendant" basis because the language of the provision clearly applied to the recovery against the individual defendant, and not the award to the individual plaintiff. Plaintiffs who recover against more than one defendant may therefore obtain a judgment in excess of the cap, the court continued, so long as the combined maximum statutory liability of all defendants is not exceeded.

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

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

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

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

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

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

resulting in cancer progressing to point that she lost her right breast and her chance of survival was down to 25% , was $500,000; trial court, which awarded more than that amount, erred by applying two damage caps, as patient's damage (Stage 2 breast cancer) could not be apportioned between two physicians because damage was indivisible; each physician's negligence was sufficient, in itself, to bring about result. Turner v Massiah (1995, La) 656 So 2d 636.

[c] Application of one cap to all defendants

In the following cases, the courts held that a statutory limitation on the amount recoverable in a medical malpractice action did not apply to each defendant sued, but applied to the total recovery against all defendants.

A state statute limiting the total damages recoverable in a medical malpractice action did not mean that a separate limitation applied to each person who might have acted to bring about the cause of action, 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 brought an action on behalf of their injured child, and on their own behalf for loss of consortium and emotional distress, against the United States under the Federal Tort Claims Act. The statute, SD CL § 21-3-11, provided that the total damages which could be awarded in an action for personal injury or death alleging malpractice could not exceed a certain sum. The court said that interpreting the statute to apply a separate cap for each defendant would be contrary to its clear language. Furthermore, there was only one tortfeasor in the action, the United States, and therefore, the court maintained, even if the statute could be construed to provide a separate cap for each actor, it would not apply under the facts of the case.

Health Care Availability Act (HCAA) allows for total recovery of $250,000 against all defendants, rather than against each defendant. West's C.R.S.A. § 13-64-302(1)(b). Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C., 95 P.3d 571 (Colo. 2004), as modified on denial of reh'g, (Aug. 16, 2004).

See Miller by Miller v Memorial Hosp. (1994, Ind App) 645 NE2d 631, reh den (Mar 1, 1995) and transfer granted (Jul 3, 1995), § 28[a].

In a medical malpractice action, a plaintiff's recovery is limited to one $500,000 damage cap, plus interest and costs, even if the liability of some defendants is controlled by the Louisiana Medical Malpractice Act (LMMA) and the liability of others is controlled by the Medical Liability for State Services Act (MLSSA), given that the cause of action arose out of only one single instance of negligence. LSA-R.S. 40:1299.39 et seq., 40:1299.41 et seq. Coleman v. Deno, 832 So. 2d 1016 (La. Ct. App. 4th Cir. 2002).

Statutory cap in medical malpractice statute that capped damages at $500,000 applied only once to the negligence of both physicians, who failed to diagnose and treat patient's dislocated hip which subsequently led to avascular necrosis, where there was no evidence that patient suffered more than one injury due to the failure to timely treat his dislocation. LSA-R.S. 40:1299.42. Hernandez v. Chalmette Medical Center, 869 So. 2d 141 (La. Ct. App. 4th Cir. 2004), writ denied, 870 So. 2d 277 (La. 2004) and writ denied, 870 So. 2d 279 (La. 2004).

In Etheridge v Medical Center Hospitals (1989) 237 Va 87, 376 SE2d 525, the court held that a statutory limitation on the total amount recoverable by a plaintiff in a malpractice action did not apply to each health care provider sued, and the plaintiff was not entitled to recover more than the statutory limitation in her action against a hospital and a doctor alleged to be jointly and severally liable for damages as a result of medical malpractice. The plaintiff claimed that within the language of the statute, providing that in any verdict returned against a health care provider the recovery was limited to a certain amount, the limit was addressed to "a health care provider." The court disagreed, pointing out that there was additional language in the statutory provision stating "the total amount recoverable for any injury to a patient" should not exceed the limit. The plaintiff's claim was for an indivisible injury, said the court, caused by the concurring negligence of each defendant, and giving Va. Code § 8.01-581.15 its plain

meaning, her damages were limited to a total of the maximum specified by the statute.

§ 30. Multiple plaintiffs or causes of action

[a] One statutory cap applied

In the following cases involving more than one plaintiff or cause of action against a health care provider based on injury to a patient, the courts construed a statute limiting the damages recoverable in a medical malpractice action to provide one recovery of the maximum statutory amount.

Under Medical Injury Compensation Reform Act (MICRA), a single plaintiff can recover a maximum of $250,000 in noneconomic damages, regardless of the number of claims the plaintiff alleges. West's Ann.Cal.Civ.Code § 3333.2(b). Colburn v. U.S., 45 F. Supp. 2d 787 (S.D. Cal. 1998).

In Yates v Pollock (1987, 2nd Dist) 194 Cal App 3d 195, 239 Cal Rptr 383, the court, construing a statutory limitation on the damages recoverable in medical malpractice actions to apply to wrongful death actions, rejected the contention that the limitation should be applied to each plaintiff individually and not to all plaintiffs in the aggregate. The court said it was evident from the terms of the statute that the maximum recovery permitted in any single malpractice action was a certain amount, regardless of the number of plaintiffs involved. Pointing out that the legislature was obviously aware of prior case authority holding that only one action could be brought for the wrongful death of a person, thereby preventing multiple actions by individual heirs and the personal representative, and that the cause of action for wrongful death has been consistently characterized as a joint, single, and indivisible one, the court concluded that use of the word "action" in Cal Civ. Code § 333.2 represented a conscious decision to limit the total recovery for noneconomic loss in such suits to the statutory amount. [FN67]

Medical Malpractice Act's (MMA) $250,000 per incident cap on noneconomic damages in voluntary arbitration applied in aggregate to include all potential Wrongful Death Act (WDA) beneficiaries named in complaint, rather than separately to each beneficiary. West's F.S.A. §§ 766.207, 768.19-768.22. Franzen v. Mogler, 744 So. 2d 1029 (Fla. Dist. Ct. App. 4th Dist. 1997).

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 under Indiana Medical Malpractice Act. 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).

The statutory cap on damages in medical malpractice actions must be interpreted as a limitation on the total amount recoverable for all malpractice claims for injury or death of a patient, the court held in LaMark v NME Hosp., Inc. (1989, La App 4th Cir) 542 So 2d 753, cert den (La) 551 So 2d 1334, rejecting a plaintiff's argument that the statute 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. [FN68] 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, but for the limitation of the statute, the plaintiffs' damages would exceed the statutory cap in total, exclusive of interest, costs, and medical expenses. In explaining the rational basis of the limitation under the equal protection clause analysis, the court said that with the statutory limit applicable, the amount of the surcharge medical providers pay to the compensation fund is calculated on a known risk, and the legislature could believe that the stabilized rates would retard increases in costs of medical care. For the same reason, the court said the statute should not be interpreted as a limitation on each separate claim for a single act of malpractice. Such an interpretation would inject instability into the computation of the surcharge levied against health care providers in funding the

compensation fund, the court explained, and furthermore, the language of LSA-R.S. § 40:1299.42(B)(1) was clear in that the limitation applied to all malpractice claims, for which the recovery was limited to the statutory cap in total, and that clear language could not be ignored.

Award of $200,000 to patient's spouse in medical malpractice action brought by patient against Patient's Compensation Fund, was extinguished, where patient had exhausted her per patient limit of $500,000 statutory cap for damages under the Medical Malpractice Act. LSA-R.S. 40:1299.43(D). Hall v. Brookshire Bros., Ltd., 831 So. 2d 1010 (La. Ct. App. 3d Cir. 2002), writ granted, 831 So. 2d 285 (La. 2002) and writ granted, 831 So. 2d 285 (La. 2002).

Damages awarded to patient's divorced mother would be reduced to $150,000, where trial court's award of $400,000 to mother, when combined with the Louisiana Patient's Compensation Fund's payment of $250,000 to father and the $100,000 that doctor paid to parents in settlement of their claims, exceeded the $500,000 statutory cap on medical malpractice damages. LSA-R.S. 40:1299.42, subd. B. Turner v. Southwest Louisiana Hosp. Ass'n, 856 So. 2d 1237 (La. Ct. App. 3d Cir. 2003).

In Knowles v United States (1993, DC SD) 829 F Supp 1147, affd, in part, ques certified (CA8 SD) 29 F3d 1261, a medical malpractice action against the United States under the Federal Tort Claims Act, the court held, applying South Dakota law, that the state limitation on the total damages that could be awarded in the medical malpractice action did not apply separately to each cause of action. The parent plaintiffs argued that one cap should apply to the cause of action brought on behalf of the injured child for damages, and a separate cap should apply to their actions as individuals for loss of consortium and emotional distress. The court said that based on the clear language of the statute, their argument must fail, noting that SD CL § 21-3- 11 expressly stated that in any action for damages for malpractice, the total damages which could be awarded could not exceed a certain sum. The use of the word "total" demonstrated the legislature's intent to limit all damages arising out of an act of malpractice, said the court. To hold that the limitation was not on the total amount of damages to be recovered, but was only a multiple of the amount of damages which could be received for each cause of action pleaded, would be inconsistent with a clear reading of the statute, the court concluded.

In Bulala v Boyd (1990) 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, answering certified questions as to the application of the statutory damages cap in medical malpractice actions to claims against a hospital for injuries to a mother and her child at birth, held that the total damages recoverable for injury to a "patient" were limited to the statutory amount, regardless of the number of legal theories upon which the claims were based. The claims consisted of the mother's and child's claims for compensatory and punitive damages, the claim of the father for damages due to emotional distress in witnessing the birth, and the joint claim of the parents for medical expenses until the child reached 18 years of age. The jury had rendered a verdict on each of the six claims for an amount in excess of the limit specified by the statute, Va. Code § 8-654.8 (1977 Repl. Vol.) (now, according to the court, § 8.01-581.15), which provided that in any verdict returned against a health care provider in an action for medical malpractice, the total amount recoverable for any injury to, or death of, a patient could not exceed a certain amount. The court observed that it had decided in Etheridge v Medical Center Hospitals (1989) 237 Va 87, 376 SE2d 525 (reported in § 29[c]), that a single limit applied to an indivisible injury to a plaintiff, even though it was caused by the concurring negligence of two or more defendants, and that any other construction would defeat the ability of the act to remedy the mischief at which it was directed. The court therefore construed the language of the statute to mean that the total damages recoverable for injury to a "patient" were limited to one statutory maximum, regardless of the number of causes of action stemming from that injury. Applying the limitation to the claims at issue, the court, after deciding that the mother and child were separate patients, [FN69] stated that the child's damage claim was

comprised of the usual elements of damage, if established, appropriate to any infant's personal injury action. Both the father's claim for emotional distress and the parents' joint claim for medical expenses fell within the child's statutory cap under the circumstances of the case, the court continued, noting that a parent's claim for emotional distress as the result of injury to a child was wholly derivative of the child's claim. [FN70] Although the father was not the defendant's patient within the meaning of the act, the emotional distress claim was subject to the statute because it was wholly derivative of the child's claim. However, the total damages recoverable for injury to the child, including derivative claims, were limited to the statutory amount, which had been exhausted by the child's damages, leaving nothing to allocate to the father's claim, and the same rationale applied to the parents' claim for medical expenses, the court ruled. Similarly, under the facts and circumstances of the case, there could be no amount recovered for punitive damages, added the court, as the plain meaning of the statute fixed the "total" amount recoverable at the statutory cap, which on the facts at bar extinguished the awards of punitive damages.

Applying Virginia law, the court held that the trial court erred in awarding an infant patient damages to the limit of those allowable under a statutory damages cap and making a further award to the parents for injuries derivative of the infant's claim, in Starns v United States (1991, CA4 Va) 923 F2d 34, cert den (US) 116 L Ed 2d 31, 112 S Ct 54, an action brought against the United States under the Federal Tort Claims Act for negligent care rendered at a federally operated hospital following the infant's birth. The cap applicable to any single patient's injury covers both compensatory and punitive damages claims of the patient and any claims by others that, by substantive law, were "derivative" of the patient's claim, said the court, adding that claims of emotional distress caused by injury to a single patient [FN71] and claims for medical expenses of a single patient were derivative. Damages awarded to the parents for the value of the mother's past services, for lost wages of the father, and for hospital travel expenses incurred on behalf of the child were also derivative, the court maintained, and, accordingly, the limit for all damages in the action was one statutory cap. Reduction of the award should occur in the following order, the court continued: first, awards based on derivative claims of others than the patient; next, punitive damages awards to the patient; last, compensatory damages awards to the patient. Since the compensatory claim of the child exceeded the statutory cap, the derivative claims of the parents must be annulled, the court concluded.

Following the court's decision in Bulala v Boyd (1990) 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, this subsection, the court in Lee v Adrales (1991, WD Va) 778 F Supp 904, applied the state's statutory damages cap on judgments in medical malpractice actions to reduce awards to a mother and daughter who had brought a malpractice action against a physician arising out of injuries suffered during the birth of the child, on the basis that the total recovery could not be increased by including the child's medical expenses in the mother's award. The mother argued that they should be included in her damages, rather than the child's, which would permit them together to recover an additional amount because the mother's damages award, including her own medical expenses, did not exceed the statutory cap provided by Va. Code Ann. § 8.01-581.15 (1950 and Supp. 1991). Unpersuaded by the plaintiff's attempt to distinguish Bulala, the court said that in that case, the Virginia Supreme Court reaffirmed that a parent's cause of action for medical and incidental expenses for the child's injury was derivative of the child's action, and the total damages recoverable for the child's injury, including the derivative claim, was limited to the statutory amount.

All three jury awards for noneconomic loss to a physically injured infant and his parents were subject to the same single cap under the statute limiting noneconomic damages awards in medical malpractice actions, the court held in Robinson v Charleston Area Medical Ctr., Inc. (1991) 186 W Va 720, 414 SE2d 877. The action involved the claim of an infant who had suffered brain damage at birth and who received compensatory damages for future medical care, future lost earnings, past, present, and future loss of

enjoyment of life and other noneconomic damages, and awards to the father and mother for noneconomic damages. The West Virginia Medical Professional Liability Act of 1986, W. Va. Code § 55-7B-8, as amended, provided that in any medical professional liability action against a health care provider, the maximum amount recoverable as damages for noneconomic loss should not exceed a certain amount. The court pointed out that the statutory language was phrased in terms of the maximum amount recoverable from a health care provider, and not in terms of the maximum amount recoverable by a plaintiff. In other words, the statutory cap was, with respect to each defendant, on a "per occurrence" basis, rather than on a "per person or per plaintiff" basis, said the court. Therefore, the limitation applied as one overall limit to the aggregated claims of all plaintiffs against a health care provider, rather than applying to each plaintiff separately, the court concluded, and the award in excess of the statutory cap by the jury for that type of loss must, under the statute, be set aside as a matter of law. In a footnote, the court said that awards in excess of the statutory cap should be set aside by eliminating awards to secondary claimants, such as that for consortium, prior to eliminating any excessive amount for the noneconomic loss incurred by the physically injured person. In the case at bar, this resulted in the setting aside of each of the parents' respective awards for noneconomic damages and so much of the infant plaintiff's award for noneconomic loss as exceeded the cap, leaving the infant alone a recovery of the maximum amount under the statute, ruled the court.
See Herman v Milwaukee Children's Hospital (1984, App) 121 Wis 2d 531, 361 NW2d 297, in which the court, while not considering how many recoveries might be had under a statute limiting damages in medical malpractice actions when there were multiple causes of action, found that a child's and her parents' claims for economic and noneconomic damages for a malpractice injury to the child were a single claim for the purpose of the application of Wis. Stats. § 655.27(5)(d), which provided that in the event the patient's compensation fund incurred liability exceeding a certain amount to any person under a "single claim," the fund should not pay more than a certain portion of that per year until the claim had been paid in full, and that attorney's fees would be similarly prorated. The court agreed with the fund that the statutory language was clear, and modified the judgment to reflect the statutory limitation.

[b] More than one statutory cap applied

In the following medical malpractice actions involving more than one plaintiff or cause of action against a health care provider based on injury to a patient, the courts held that damages were not limited to one recovery of the maximum amount allowed by statute. When a claim for loss of consortium is joined with a spouse's claim for physical injuries, in an action for medical malpractice, each spouse is entitled to recover up to the statutory limit for his or her separate noneconomic losses, the court held in Atkins v Strayhorn (1990, 4th Dist) 223 Cal App 3d 1380, 273 Cal Rptr 231. The defendant contended that the limitation on noneconomic damages of Cal Civ. Code § 333.2 related to a single injury-causing incident, the action for loss of consortium was a claim arising out of injury to another, and the purpose of the limitation could only be achieved by limiting the noneconomic damages recoverable for each act of professional negligence to the statutory amount regardless of the number of plaintiffs indirectly injured. The court observed that under the statute, the "injured plaintiff" was entitled to recover noneconomic losses up to the limitation in an action against a health care provider, and in addition to the patient being an injured plaintiff, the wife was an injured plaintiff, having been awarded damages for loss of consortium. Although the cause of action arose from bodily injury to her husband, the court continued, the injury suffered was personal to her. Moreover, said the court, although joinder in one action is the preferred method of asserting a claim of loss of consortium, the plaintiff wife would have been entitled to bring a separate action, and there would be no doubt of her entitlement to a separate statutory cap. The court rejected an analogy with the cap applying to a wrongful death action, stating that the cause of action for loss of consortium did not

resemble wrongful death because it had no statutory foundation, but was entirely of judicial origin. The cause of action for wrongful death had been consistently characterized as a joint, single, and indivisible one, the court pointed out, while loss of consortium was a separate and independent claim from a spouse's claim for personal injury. Furthermore, in wrongful death actions, the fault of the decedent was attributable to the surviving heirs, reducing their recovery by the same percentage, while in the spouse's action, damages were not proportionately reduced by the amount of comparative negligence attributable to the other spouse, said the court. The statute focused on the "injured plaintiff," who was entitled to recover damages not to exceed a certain amount, said the court, but nothing in the statute limited the defendant's liability to that amount. That interpretation did not defeat the goal of the limitation, the court concluded, because the purpose of insuring the availability of health care and the enforceability of judgments against health care providers by making medical malpractice insurance affordable could still be realized in the limitation of the amount of the damages for each injured plaintiff, thus precluding the unknown possibility of phenomenal awards for pain and suffering that make litigation worth the gamble. The court observed that a loss of consortium action could be brought by only one person, the spouse, and therefore noneconomic damages would not be less predictable. In a footnote, the court pointed out that there could be a situation when a single act by a health care provider negligently caused injury to multiple unrelated patients. To say that those plaintiffs were collectively entitled to one statutory damages cap because there was only one negligent act would be to render the statute an absurdity, said the court. [FN72]

Noneconomic damages cap of $250,000 "per incident" in the arbitration provisions of the Medical Malpractice Act limited the recovery of each claimant individually to $250,000, and did not limit total recovery of all claimants in the aggregate to $250,000; statute was ambiguous in that it also referred to a "claimant," and legislative history and equal protection concerns required an interpretation that cap applied individually to claimants. West's F.S.A. § 766.207(7)(b). St. Mary's Hospital, Inc. v. Phillipe, 769 So. 2d 961 (Fla. 2000).

The statute limiting damages recoverable in a malpractice action was properly read to place a cap on an injured party's common-law personal injury action, and to place a separate cap on each wrongful death action brought by each statutory beneficiary entitled to bring such an action, the court held in Sander v Geib, Elston, Frost Professional Ass'n (1993, SD) 506 NW2d 107. After the death of the patient who was the alleged victim of malpractice, her cause of action for personal injury was continued by a personal representative, and was tried in conjunction with her husband's and children's' causes of action for wrongful death. Reversing the determination of the trial court that the statute did not apply separately to each cause of action, the court observed that SDCL § 21-3-11 provided for a limitation of damages in any action for damages for personal injury or death alleging malpractice. Medical malpractice gave rise to only two types of actions, said the court, the first of which was a common-law action brought by the injured party or the party's representative, for personal injuries and medical expenses, the recipient of which would be the injured party or the estate, and the statute clearly intended to cap an award of those damages at the statutory limit. The second cause of action arising from medical malpractice was a legislatively created wrongful death action, entitled to be brought by the statutory beneficiaries among whom any wrongful death damages would be apportioned in such a manner as was fair and equitable, the court continued, and the patient's surviving husband and her surviving children in this case could have each brought a separate wrongful death action at a different time (within the statute of limitations), each of those individuals being entitled to his or her own statutory cap on wrongful death damages for medical malpractice. The possible plaintiffs in these causes of action were distinct, as were the remedies, the recipients of any damages awarded, and the distributions of the awards. The legislature used the disjunctive "or" in referring to these possible actions, and although it was likely that a trial court would order multiple actions consolidated, that did not alter the

separate damages cap applicable to each action and each party, the court concluded.

§ 31. Multiple patients

In the following cases, the courts held that a mother and her newborn child were separate patients for the purpose of determining the maximum recovery allowable under a statute limiting medical malpractice damages, for injuries incurred at the time of the child's birth.
See Lee v Alleghany Regional Hosp. Corp. (1991, WD Va) 778 F Supp 900 (criticized on other grounds by Power v Arlington Hosp. (ED Va) 800 F Supp 1384), more fully reported in § 36[c], for another case holding that a mother and her newborn child were separate patients for the purpose of determining the maximum amount recoverable under a statute limiting medical malpractice damages.
See Lee v Adrales (1991, WD Va) 778 F Supp 904, § 30[a], for a case involving two separate awards under a statute limiting malpractice damages to a mother and daughter who had brought actions against a physician for injuries suffered during the birth of the child. The court held that a parent's cause of action for medical and incidental expenses for a child's injury was derivative of the child's action, and the total damages recoverable for the child's injury, including the derivative claim, were limited to the statutory amount, citing Bulala v Boyd (1990) 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 (this section and § 30[a]).
An obstetrical patient and her neonate were each patients within the meaning of a statute limiting the damages recoverable in a medical malpractice action, and each was entitled to a separate cap under the statute for her injury and the claims deriving from it, the court held in Bulala v Boyd (1990) 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, answering certified questions as to the application of the statute to claims against a hospital for injuries to the mother and child at birth. The claims consisted of the mother's and child's claims for compensatory and punitive damages, the claim of the father for damages due to emotional distress in witnessing the birth, and the joint claim of the parents for medical expenses until the child reached 18 years of age. The jury had rendered a verdict on each of the six claims for an amount in excess of the limit specified by the statute, Va. Code § 8-654.8 (1977 Repl. Vol.) (now, according to the court, § 8.01-581.15), which provided that in any verdict returned against a health care provider in an action for medical malpractice, the total amount recoverable for any injury to, or death of, a patient could not exceed a certain amount. A single limit applied to an indivisible injury to a plaintiff, even though it was caused by the concurring negligence of two or more defendants, [FN73] and the total damages recoverable for injury to a "patient" were limited to one statutory maximum, regardless of the number of causes of action stemming from that injury, [FN74] observed the court. Applying the limitation to the claims at issue, the court said it focused on the meaning of "patient," defined by the statute as "any natural person who receives or should have received health care from a licensed health care provider" (Va. Code § 8.01-581.1(3)). The mother was clearly a "patient" within the meaning of the act and entitled to the benefit of one statutory cap for her compensatory damages claim, the court continued, the elements of that claim encompassing recovery for her own physical injury during the birth, and the effect on her health according to its degree and probable duration, recovery for physical pain, mental suffering, and medical expenses connected with that physical injury, and in addition, recovery for mental suffering resulting from the birth of a defective child. [FN75] As to the child's compensatory damages claim, the court said that a tortfeasor who caused harm to an unborn child was liable to the child, or to the child's estate, for a harm to the child if born alive, and so the child had a claim against the defendant and would be entitled to a separate statutory cap, if she were the defendant's "patient" within the meaning of the act. The court concluded that at the moment of live birth, the child became a patient of the defendant obstetrician-

gynecologist because she was a "natural person" who, at the instant of birth, received or should have received health care from him. It was compatible with the relationship in the birthing process between the obstetrician on the one hand and the pediatrician on the other, reasoned the court, to conclude that at the moment of live birth, and until the pediatrician assumed responsibility for the care of the newborn, the infant was the obstetrician's patient, noting that the child's damage claim was comprised of the usual elements of damage, if established, appropriate to any infant's personal injury action. The father's claim for emotional distress and the parents' joint claim for medical expenses were derivative of the child's claim and fell within the child's statutory cap, the court explained, but, the statutory amount having been exhausted by the child's damages, nothing could be allocated for them, nor for the punitive damages which had been awarded.

In Fairfax Hosp. System, Inc. v McCarty (1992) 244 Va 28, 419 SE2d 621, the court held that the trial court did not err in refusing to reduce a mother's recovery for her claim of emotional distress resulting from the birth of a defective child, pursuant to a statutory limitation on noneconomic damages, although the infant's recovery had exhausted the statutory damage limit for a claim. A mother who has given birth to an impaired child is entitled to recover, as a part of her individual claim, for mental suffering resulting from the birth, said the court. Furthermore, because the mother was a "patient," within the meaning of Va. Code § 8.01-581.15, placing a cap on the total amount recoverable for any injury to "a patient," she was entitled to the benefit of one statutory cap for her compensatory damage claim.

C. Application of Statute in Conjunction With Other Statutes or Tort Principles

§ 32. Comparative fault

In the following cases, the courts held that a verdict for medical malpractice damages was to be reduced by the percent of comparative fault attributable to the plaintiff before the application of a statute limiting damages in medical malpractice actions.

Although an earlier case resolved the situation differently [FN76] the court held in McAdory v Rogers (1989, 2nd Dist) 215 Cal App 3d 1273, 264 Cal Rptr 71, that when a percentage of fault has been attributed to a malpractice plaintiff, the jury's verdict should be reduced by the percentage of fault attributable to the plaintiff before the statutory limitation on damages is applied, reversing the trial court's entry of judgment for less than the statutory limit for noneconomic damages, because it applied the comparative fault percentage to the amount of damages as capped by the statute. The defendant health care provider argued that public policy required defendants in tort actions to be held financially liable in close proportion to their degree of fault. [FN77] To determine the application of that principle in conjunction with Cal Civ. Code § 333.2(b), the provision for the limitation of damages recoverable in a malpractice action, the court said it must be determined whether the damages referred to in that section described the damages award before the cap was applied or after. The plaintiff argued that an injured person could suffer more than the statutory limitation in noneconomic damages, but was precluded from recovering any more than that amount, while the defendant said that the section limited the monetary value of noneconomic losses to the statutory amount. Referring to the definition of "damages" as loss, injury, or deterioration, caused by negligence, the court said that legislative fiat alone could not limit the extent to which a medical malpractice victim was damaged. Noting that the defendant did not argue that there was insufficient evidence to support the award of damages or that prejudicial error occurred, the court said it was bound by the determination at trial that the plaintiff actually suffered noneconomic damages in accordance with the jury's verdict. Limiting the damages recoverable did not cause the noneconomic damages suffered by the patient to vanish, observed the court, but reflected a policy decision to

bar the recovery of no more than the statutory amount. The defendant contended that, depending upon the amount of damages awarded, a plaintiff to whom no comparative fault was attributed could recover no more than a plaintiff who was found at fault. The court said that this argument rested on the mistaken notion that the purpose of comparative fault was to punish the partially negligent plaintiff. Rather, the goal of the comparative fault system was to maximize recovery to the injured party for the amount of his injury to the extent fault of others had contributed to it, said the court. The disparity in treatment between the plaintiffs in the defendant's example was the result solely of the section limiting damages, the court continued, and the plaintiff partially at fault in the example was already recovering an amount less than the amount that the jury determined he or she should recover for the damage done by the tortious conduct of others due to the operation of the statute. No purpose would be served by further reducing that award, said the court. The court also rejected the argument that since the legislature enacted medical malpractice reform to reduce insurance premiums by, in part, limiting recoveries in malpractice actions, applying comparative fault to lower recovery was more in accord with legislative intent. The legislature intended to accomplish its cost-cutting goal in a reasonable manner, said the court, and the application of the defendant's approach would not fulfill this goal. The court also rejected an analogy with a process by which a good-faith settlement is set off in cases where the plaintiff is comparatively at fault, which involved setting off a good-faith settlement after the verdict had been reduced by the plaintiff's fault by the jury. The court said that if the good-faith settlement was set off before the verdict was reduced by the plaintiff's comparative fault, it would allow the plaintiff to recover damages which the jury found were caused by him. The same risk did not exist when a verdict was reduced by comparative fault before the statute limiting the recoverable damages was applied, because as long as the entire verdict was reduced by the plaintiff's comparative fault, there was no chance that the plaintiff would recover damages which the factfinder determined were self-caused, said the court.

In Atkins v Strayhorn (1990, 4th Dist) 223 Cal App 3d 1380, 273 Cal Rptr 231, the court held that the trial court properly applied the jury's comparative-fault finding before reducing the noneconomic damages awarded to a medical malpractice plaintiff whose recovery was limited by statute. [FN78] The defendant argued that the trial court's approach offended both comparative fault principles and the policies underlying the Medical Injury Compensation Reform Act of 1975 (MICRA), Cal Civ. Code § 333.2(b), which provided that the amount of damages for noneconomic losses in medical malpractice actions could not exceed a certain amount. The jury had awarded an amount well in excess of the statutory cap, but had found the medical malpractice plaintiff 45-percent negligent, observed the court. Interpreting the language of the statute as limiting the recovery, rather than the value, of noneconomic damages as a means of protecting the insurability of health care providers, the court said that that result was consistent with the legislature's power to control the measure of damages a plaintiff was entitled to receive, while accomplishing its cost-cutting goal in a reasonable manner. The statute did not cause noneconomic damages suffered by a plaintiff in excess of the statutory cap to vanish, continued the court, but reflected a legislative policy barring the recovery of more than a certain amount of those damages.

Disagreeing with the defendant that comparative fault principles were violated, the court explained that under the statutory limitation, the plaintiff was already receiving an amount less than the jury determined was his damage by the defendant's tortious conduct, and no purpose would be served by further reducing the award. If the comparative fault percentage were applied after damages were reduced to the statutory limit, the jury's damages finding in most instances would be meaningless, the court concluded, and the statutory limit could have no bearing on the jury's factfinding function, but affected only the final judgment.

Under the damages-cap statute for medical malpractice and comparative-fault statute, trial court was to reduce award to patient by amount of patient's and pharmacist's fault before applying $500,000 cap. LSA-R.S. 40:1299.42, subd. B(1); LSA-C.C. art. 2323.

Hall v. Brookshire Bros., Ltd., 848 So. 2d 559 (La. 2003).
See Rineck v Johnson (1990) 155 Wis 2d 659, 456 NW2d 336, cert den Johnson v Rineck, 498 US 1068, 112 L Ed 2d 849, 111 S Ct 787 and (superseded by statute as stated in Jelinek v St. Paul Fire & Casualty Ins. Co., 182 Wis 2d 1, 512 NW2d 764), [FN79] fully reported in § 34[a], in which the court stated that, under the medical malpractice law, the percentage of the victim's fault was applied to the verdict before reduction to the statutory limit of damages recoverable.

§ 33. Advance payments

Veteran's benefits received as a result of injury to a veteran by a physician's malpractice were advance payments under state law, the court held in the following case, and therefore to be deducted from the judgment in a medical malpractice action after the application of the limitation on damages in the medical malpractice action provided by state statute.
Characterizing the increase in benefits which a veteran received as advance payments under Indiana law, after his disability rating went from 10 percent to a 100-percent, allegedly as a result of Veteran Administration's physicians' medical malpractice, the court in Carter v United States (1992, CA7 Ind) 982 F2d 1141, held that the value of those payments must be deducted from the malpractice victim's prospective maximum recovery under the Indiana medical malpractice statute after the application of the damages cap, affirming the District Court's dismissal of the action because the patient had already received more than that amount in payments. The plaintiffs argued that the court should offset damages and benefits before applying the statutory cap, although conceding that the present value of the incremental benefits exceeded that amount. The court said that Indiana law settled the question of who received the benefit of the advance payments, citing a statute providing that advance payments should inure to the exclusive benefit of the defendant or his insurer who had made the payment, Ind. Code § 16-9.5-2-4. If victims received the benefit of the advance payments, said the court, the maximum liability would be exceeded, and injurers would have little reason to make voluntary payments. Because the judicial process takes a long time to resolve the litigation, the court continued, interim payments are on the whole highly beneficial to victims, and only tortfeasors who can recoup the value of these payments were likely to make them. Rejecting the plaintiffs' argument that allowing the United States to have the benefit of the veterans' benefits was inconsistent with congressional intent to assist veterans, the court said that veterans' benefits could not be analogized to payments from a third party, which cumulate with tort awards under the collateral source rule. The VA was both tortfeasor and the source of incremental benefits, so that payments made in the two capacities must be netted to produce a single recovery, the court maintained. Having assumed for purposes of the opinion that the victims could prove both a tort and damages at or above the statutory cap, the court reckoned that because damages for loss of consortium were included in the cap under Ind. Code § 16-9.5-1-1(c), their suit had been properly dismissed because their aggregate recovery was less than the value of the federal benefit. The court went on to explain that its conclusion did not mean it had decided the question whether the projected value of ongoing veterans' benefits was an advance payment for purposes of Indiana law. The value of future benefits was a speculation and not a fact, the court pointed out, in that Congress could change the law, or other plaintiffs might renounce receipt of the benefits. After noting the possibility that a malpractice victim who recovered a judgment might elect cash or a stream of future payments, the court remarked that it did not need to decide whether that approach would produce the best approximation of the treatment of private persons under state law because the plaintiffs had not requested such a decision.
When the Legislature capped at $250,000 a health care provider's liability for an injured plaintiff's noneconomic losses in an action based on professional negligence, it meant the limit to apply to a lump sum paid at the time of the judgment, or to the present value of periodic future payments, but not to the gross sum of such future payments.

West's Ann. Cal. C.C.P. § 667.7; West's Ann. Cal. Civ. Code § 3333.2. Salgado v. County of Los Angeles, 19 Cal. 4th 629, 20 Cal. 4th 22a, 80 Cal. Rptr. 2d 46, 967 P.2d 585 (1998), as modified, (Feb. 17, 1999).
Under the damages-cap provision of Medical Malpractice Act, after health care provider had admitted liability by paying maximum statutory amount of $100,000, jury was allowed to consider pharmacist's and patient's percentage of fault. LSA-R.S. 40:1299.44, subd. C(5); LSA-C.C. art. 2323. Hall v. Brookshire Bros., Ltd., 848 So. 2d 559 (La. 2003).

§ 33.5. Choice of law issues

The following authority considered choice of law issues in determining the applicability of state statutory provisions limiting the amount of recovery in medical malpractice claims.
District of Columbia law, rather than Virginia law, applied to defendants' request to reduce the ad damnum clause in complaint in medical malpractice action; although plaintiff was a Virginia resident, defendants conducted business in the District of Columbia, litigation arose from health care treatment provided pursuant to a plan obtained through plaintiff's District of Columbia employer, and application of Virginia's $1 million cap on medical malpractice claims would contravene the District of Columbia's interest in protecting its workers and promoting corporate accountability. West's V.C.A. § 8.01-581.1. Bucci v. Kaiser Permanente Foundation Health Plan of Mid-Atlantic States, Inc., 278 F. Supp. 2d 34, 2003 WL 21998951 (D.D.C. 2003).

§ 34. Other statutory damages limitations

[a] Malpractice damages limitation applied

In the following medical malpractice actions, the courts held that a statute limiting damages in such actions would be applied to limit the judgment, rather than another statute limiting damages alleged to apply under the circumstances.
Limitation on damage recoveries for noneconomic loss or injury contained in Colorado Health Care Availability Act (HCAA) applied to damages for physical impairment or disfigurement, which were excepted from general limitation on damages for noneconomic loss or injury under general damage statute; plain language of HCAA prevailed over potentially inconsistent language of previously-enacted general statute. West's C.R.S.A. §§ 13-21-102.5, 13- 64-101 to 13-64-503. Ledstrom By and Through Ledstrom v. Keeling, 10 F. Supp. 2d 1195 (D. Colo. 1998).
In Kock v Government of Virgin Islands (1984, CA3 VI) 744 F2d 997, later proceeding (CA3 VI) 811 F2d 240, 6 FR Serv 3d 1122, the court held that a malpractice plaintiff in an action against a government-operated hospital was not limited to the damages available under the Tort Claims Act, but was limited to the higher amount specified by the Virgin Islands Healthcare Providers Malpractice Act. The court observed that the limit in the malpractice act, 27 V.I.C. § 166(b), which specified that the total amount recoverable for any injury of the patient could not exceed a certain sum, did not foreclose the possibility that lower limits might apply in actions against particular defendants, and it would examine the act or other legislation to determine what limits, if any, applied in malpractice actions against the government. The plaintiff argued alternatively that he could recover to the extent the malpractice act required the government to purchase malpractice insurance. The act stated that the commissioner of health was authorized and directed to purchase malpractice liability insurance for all health care providers required to be licensed, 27 V.I.C. §§ 166e(a) and 166(c), and public hospitals were included within the definition of health care providers, observed the court. The insurance policy must provide minimum coverage of a certain sum, less than the statutory limit on damages in medical malpractice actions, for each injured patient, the court continued, and the government paid the premiums for this insurance

for providers exclusively employed by the government on a full-time basis. The legislature, by enacting this statute, intended to expand the waiver of governmental immunity set forth in Tort Claims Act § 3411(c), said the court, for there was no other reasonable explanation for the inclusion of public hospitals within the definition of health care providers required to have insurance protection. If public hospitals could never be liable for that amount in damages, the insurance requirement would be meaningless, the court pointed out. The court rejected the government's argument that because the plaintiff had sued the government rather than a public hospital, the insurance requirement was irrelevant, stating that the legislature did not intend to draw a distinction between the government and public hospitals. There was no necessity to treat the government and its public hospitals as distinct entities, the court continued, as the government was not deprived of any defenses it would have if it were sued in the guise of the hospital, and its ultimate exposure to liability under the act was not increased, since the plaintiff's recovery would be from government-purchased insurance in any event. Also rejecting the argument that the government's consent to be sued must be express and exceptions to its immunity were not to be implied, the court said there were sufficient indications of legislative consent in the mandatory insurance provisions for public hospitals. Although there was authority to the effect that there was no waiver of governmental immunity based on a government's purchase of liability insurance, the court noted that when there was an express general waiver of immunity coupled with a statutory mandate to purchase a particular type of liability insurance, courts have held that there was a waiver. The defendant also argued that a provision of the malpractice act which stated that recovery in an action for wrongful death of a patient should be as provided in the wrongful death statute, 27 V.I.C. § 166b, and authority that a plaintiff's overall recovery against the Government of the Virgin Islands in a wrongful death action was limited to the amount of the Tort Claims Act, compelled the conclusion that the limit be that of the latter statute. However, the court replied that the recovery was limited against the government in a wrongful death action in that case, not by construing the wrongful death statute, which contained no limitation on the amount of recovery, but based on the Tort Claims Act. The effect of the medical malpractice act on the recovery was not considered because the death was not the result of medical malpractice, and if the wrongful death statute contained no limitation on recovery, then it followed that the reference to that statute in the medical malpractice act could not impose any limitation on the amount of recovery in malpractice actions against the government, the court explained. Its decision was based entirely on the legislature's intent in enacting the medical malpractice act to amend the Tort Claims Act and raise the limit on recoveries in malpractice actions against the government, the court concluded.

The court did not err in refusing the apply a statute pertaining to the recovery of damages for noneconomic loss or injury in a civil action to a medical malpractice judgment, the court held in Scholz v Metropolitan Pathologists, P.C. (1993, Colo) 851 P2d 901, reh den (Colo) 1993 Colo LEXIS 502, but correctly applied a different statute limiting both the total and noneconomic recovery available to a medical malpractice plaintiff. The statute applying in civil actions, 6A C.R.S. § 13-21-102.5(3)(a) provided that, upon a showing of clear and convincing evidence, a damages award for noneconomic injury or loss could be increased to an amount which exceeded the recovery provided for in medical malpractice actions. The court said that that statute differed from the statute limiting malpractice damages, 6A C.R.S. § 13-64- 302 (Supp. 1992), in two significant ways, the first of which was that the first statute was much broader in scope, while the malpractice statute applied only in certain types of civil actions against particular types of defendants. Secondly, the malpractice statute contained no provision analogous to the section allowing an increase in damages on a showing of clear and convincing evidence, observed the court. The statute applying to any civil action was a statute of general application and was passed prior to the statute applying to medical malpractice actions, the court pointed out, and as a general rule a special or specific statutory provision prevails over a general provision unless the

general provision was later in time and the legislature manifested a clear intent that the general provision should prevail. Furthermore, if two statutes conflict, later statutes prevail over earlier ones, and the trial court did not err in refusing to increase the award of damages for noneconomic loss, as no provision for doing so was contained in the malpractice statute, concluded the court.

Damages for physical impairment and disfigurement are subject to the one million dollar statutory limitation on total damages recoverable in a medical malpractice action, even though such damages are not subject to the $250,000 noneconomic damages limitation. West's C.R.S.A. § 13-64-302(1). Wallbank v. Rothenberg, 74 P.3d 413 (Colo. Ct. App. 2003), cert. granted in part, 2003 WL 21689230 (Colo. 2003).

The Medical Malpractice Act (MMA), imposing a statutory cap on damages, applies only to "malpractice"; all other tort liability on the part of a qualified health care provider is governed by general tort law. LSA-R.S. 40:1299.41, subd. A(8), 40:1299.42; LSA-C.C. art. 2315. Coleman v. Deno, 813 So. 2d 303 (La. 2002).

A statute limiting the total recovery of a malpractice plaintiff against a health care provider was applicable to a malpractice plaintiff's verdict, the court held in Etheridge v Medical Center Hospitals (1989) 237 Va 87, 376 SE2d 525, and that statute controlled rather than a law applying to charitable hospitals in general. At all times pertinent to the case, Va. Code § 8.01- 38 (1984 Repl. Vol.), a charitable immunity statute, provided that a hospital which was insured against liability for negligence or other tort in an amount not less than a certain sum for each occurrence should not be liable for damage in excess of the limits of the insurance, the court observed. The plaintiff asserted that that language should be interpreted to allow her to recover against a charitable hospital an amount up to the maximum of the hospital's liability insurance coverage, irrespective of the limitation on recovery imposed by Va. Code § 8.01-581.15, which imposed a limit on recovery in malpractice actions generally. The hospital contended that the latter statute controlled because it specified the recoverable amount in a medical malpractice action against any health care provider. The court stated that, although the charitable immunity statute was passed before the legislation limiting damages in a malpractice case against any health care provider, the general assembly amended the former statute as the result of a report pointing out the potential ambiguity in the application of the two provisions and recommending an amendment to § 8.01-38 to clarify that the cap imposed pursuant to the malpractice statute did not apply to hospitals, that of the hospital liability statute being controlling. The amendment which resulted provided that a hospital insured against liability for negligence or other tort in an amount not less than a certain amount for each occurrence should not be liable for damage in excess of the limits of the insurance, or in actions for medical malpractice pursuant to the statute limiting the total amount recoverable in a malpractice action, the lesser of the limits of the insurance or the statutory damage limitation found in the medical malpractice limitation statute. The plaintiff argued that § 8.01-38 was enacted earlier in time and was more specific in nature, so it operated as an exception to the later and more general statute, and that the amendment would be superfluous if that were not so. The hospital argued that the medical malpractice limitation statute controlled because it applied to any health care provider and that the amendment was intended not to change the substantive effect of the statute but merely to clarify its application. The court concluded that the medical malpractice statute controlled, because although the other statute was first in time, it was not more specific in nature. The medical malpractice statute was more specific in nature, the court decided, because it dealt specifically with medical malpractice actions while the earlier statute dealt generally with charitable hospitals' liability for negligence or other tort. The court also agreed that the amendment merely clarified the application of the statute which was amended.

In Rineck v Johnson (1990) 155 Wis 2d 659, 456 NW2d 336, cert den Johnson v Rineck, 498 US 1068, 112 L Ed 2d 849, 111 S Ct 787 and (superseded by statute as stated in Jelinek v St. Paul Fire & Casualty Ins. Co., 182 Wis 2d 1, 512 NW2d 764), [FN80] the court held that in a medical malpractice action involving death, the limitation on recovery for noneconomic damages imposed by the statute applicable by its terms to

medical malpractice actions superseded the lower limit contained in the wrongful death statute. The trial court had entered judgment on the claim of the husband of the deceased patient for loss of consortium in an amount in excess of the allowable recovery under the wrongful death statute, Stats. § 895.04(4), but the appellate court had reversed. The medical malpractice law, Stats. ch. 655, established an exclusive procedure for the prosecution of malpractice claims against a health care provider, said the court, which set malpractice claims apart from other tort claims in response to specific economic and social needs, and which, like workers' compensation law, modified the general civil law as applied to its subject matter. The malpractice statute expressly delineated the damage limitations in that type of action, the court continued, and also identified several types of noneconomic loss recoverable in such actions involving injury or death, including loss of society and companionship. Rejecting the defendants' argument that the damages attributable to the loss were limited by the wrongful death statute, the court stressed that the malpractice statute did not state that damages were also subject to that limitation, and expressed the opinion that, had the legislature intended to incorporate the more restrictive limits, it would have provided so explicitly, as it had in other instances. The court also pointed out that the incorporation of the limits found in the wrongful death statute would create an anomaly in the computation of damages when comparative fault was a factor, since a wrongful death verdict was reduced to the statutory limit before the victim's comparative fault was applied, while in malpractice cases, the percentage of the victim's fault was applied to the verdict before reduction to the statutory limit. If the wrongful death statute's procedure were used in medical malpractice wrongful death actions, different substantive rights would be created in cases involving death from those in cases involving injury, contrary to the express legislative intention to treat all medical malpractice claims in the same manner, explained the court.

[b] Other damages limitation applied

A statute limiting damages against the government would be applied to a medical malpractice judgment, the court held in the following case, rather than the medical malpractice damage limitation statute.
See Power v Arlington Hosp. (1992, ED Va) 800 F Supp 1384, § 36[b], in which the court held that neither a state statute limiting damages in medical malpractice actions generally, nor one limiting damages against a charitable hospital in such actions, applied to the recovery of a plaintiff in a federal "patient dumping" action under the Emergency Treatment and Active Labor Act.
In Houston v Arney (1984, Tex App Houston (1st Dist)) 680 SW2d 867 (disapproved on other grounds by University of Tex. Medical Branch v York (Tex) 871 SW2d 175, rehg of cause overr (Mar 30, 1994)), the court held that in a medical malpractice action in which a default judgment was entered against a municipality, the medical malpractice plaintiff was entitled to damages only as limited by the Texas Tort Claims Act (TTCA), Art. 6252-19, § 3(b) (Vernon Supp. 1984), and not as limited by the higher statutory cap on damages in medical malpractice actions generally. The plaintiff contended that because a default judgment was entered, the city was denied its defenses, including that of sovereign immunity, and its liability for damages was thus increased according to the provisions of the Medical Liability and Insurance Improvement Act (MLA). It was undisputed that, by definition of the health care facilities covered, the MLA expressly included municipal hospitals within its scope, said the court, but that did not increase the limits of a municipal hospital's liability to the amount otherwise available. Although the MLA was enacted later in time than the TTCA, it did not supplant the latter's provisions limiting a governmental unit's liability in the performance of a governmental function, because it is well settled that when the law makes a general provision for all cases and a special provision for a particular class of cases, the general must yield to the special insofar as the particular class is concerned, the court observed. Waiver of sovereign immunity could not be effected by implication, the court continued, and there

was no express waiver of the limits of liability of the TTCA in the provisions of the Medical Liability and Insurance Improvement Act. The plaintiff had a cause of action only by virtue of the waiver of sovereign immunity and she had to accept the act's limits on liability along with its benefits, the court concluded.

D. Application to Actions Under Federal Statutes

§ 35. Federal Tort Claims Act

[a] Application of limit on recovery from health care provider

A statutory provision limiting the amount of damages recoverable against a health care provider in a medical malpractice action was construed in the following cases to apply to medical malpractice claims brought against the United States under the Federal Tort Claims Act.

United States shared in protection afforded individuals by medical malpractice statute limiting damage awards to $1 million, to same extent as private parties sued directly, even though United States is not natural person, where United States, under Federal Tort Claims Act, is held liable to same extent as private party. In this case, United States is standing in shoes of hospital, doctor, two nurses and several military medical service specialists (MSS's). All of these actors, save MSS's, are clearly covered by damage cap statute. Knowles v United States (1994, CA8 SD) 29 F3d 1261.

In Taylor v United States (1987, CA9 Cal) 821 F2d 1428, 8 FR Serv 3d 674, cert den 485 US 992, 99 L Ed 2d 510, 108 S Ct 1300, 10 FR Serv 3d 714, the court held that the California statutory limitation of the damages recoverable against a health care provider by a malpractice plaintiff, Cal Civ. Code § 333.2, applied in an action against the United States under the Federal Tort Claims Act. The wife of a patient who suffered brain damage when his ventilator became disconnected claimed that her action was based on ordinary and not professional negligence, and that the United States was not a health care provider within the meaning of the California statute because it was not licensed by the state. After rejecting the argument that the limitation statute did not apply to the action because it was based on "ordinary" negligence, [FN81] the court said that the only reason the Army hospital and its staff were not licensed under state law was that the state lacked the power to require licensing of federal health care providers and physicians. The United States had, by virtue of the Supremacy Clause, U.S. Const. Art. IV, cl. 2, deemed the hospital and staff fit to provide health care in California, and to hold that the statute limiting damages did not apply would contravene Congress' directive that the United States shall be liable in the same manner and to the same extent as a private individual in like circumstances under 28 U.S.C.A. § 2674, the court concluded.

The situation of military medical officers who had treated a medical malpractice plaintiff was most similar to that of private physicians under the state malpractice reform statute, and the United States was thus entitled to the benefit of the statute's limit on noneconomic damages recoverable against a health care provider, the court held in Fetter v United States (1986, SD Cal) 649 F Supp 1097. The government sought a partial summary judgment on the issue of the applicability of the damage limitation of Cal Civ. Code § 333.2 in the action under the Federal Tort Claims Act (FTCA), relying on the implied finding of applicability in Hoffman v United States (1985, CA9 Cal) 767 F2d 1431, [FN82] on the fact that state workers' compensation and recreational use statutes apply to the actions under the FTCA, and on prior authority applying a statute abrogating the collateral source rule in such an action. The court agreed, rejecting the plaintiffs' arguments that the application of the statute would not further its legislative purpose, and that military medical officers were not within the definition of "health care

providers" in the statute. Neither was the court persuaded that the statute should not apply because the doctors were not subject to the state's licensing authority. In some contexts, the identification of a private person in like circumstances may depend on licensing, but it need not always be the predominant factor, said the court.

In Garcia v United States (1988, DC Colo) 697 F Supp 1570, a case considering various other issues in a medical malpractice action against the Federal Government under the Federal Tort Claims Act, the court observed in a footnote that, since state damages limitations apply to such actions, the plaintiffs' noneconomic damages were limited under Colo. Rev. Stat. § 13-21- 102.5(3).

Conceding that Louisiana's malpractice liability cap differed from those in Texas and California statutes, the court 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, applying Louisiana law, nevertheless held that the United States was entitled to the benefit of the protections of LRS § 40:1299.42 in a medical malpractice action under the Federal Tort Claims Act. The state could not by its law make the United States liable, the court observed, and it was liable only to the extent it waived sovereign immunity under the Federal Tort Claims Act, which provided that the government would be liable in the same manner and to the same extent as a private individual under like circumstances, 28 U.S.C.A. § 2674. The question of what defendants in the state scheme were in like circumstances to a federal defendant was a federal question, said the court, and like some other state statutes limiting damages recoverable in medical malpractice actions, the Louisiana statute defined health care providers to include only state-licensed persons and facilities, and its protection was available only to defendants who had filed proof with the state insurance commissioner of financial responsibility, and contributed to a patient's compensation fund. The United States is clearly a sovereign defendant, but it has never contributed to the compensation fund, the court continued, and although it has offered to pay damages up to the statutory limit plus necessary expenses, a private health care provider could not, after the fact, gain the benefit of the statute by such an offer. Noting that the "like circumstances" inquiry was not overly stringent, the court found it significant that state, as opposed to private, health care providers did not contribute to the compensation fund in Louisiana, but a separate provision, § 40:1299.42, limited their liability. Like state providers, the Federal Government did not contribute to the compensation fund, but neither did it drain the fund, the court concluded, and because of the Federal Government's relative solvency, it had met the objectives of the statute limiting damages, and was in that way similar to private individuals who contributed to the fund and therefore enjoyed capped liability.

In Kennedy v United States (1990, WD La) 750 F Supp 206, the court held, based on the authority of Taylor v United States (1987, CA9 Cal) 821 F2d 1428, 8 FR Serv 3d 674, cert den 485 US 992, 99 L Ed 2d 510, 108 S Ct 1300, 10 FR Serv 3d 714, this subsection, and 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, this subsection, that the liability of the United States in a medical malpractice action against it under the Federal Tort Claims Act was limited by La. Rev. Stat. § 40:1299.42(B)(1).

Missouri statutory cap on recovery from health-care providers, Mo Rev Stat § 538.210, would be construed to provide two caps, where two different acts of malpractice, by two different physicians, occurred. Romero v United States (1994, ED Mo) 865 F Supp 585 (applying Mo law).

In Lozada v United States (1992, CA8 Neb) 974 F2d 986, the court held that the statutory cap on damages recoverable from a health care provider under the Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2825(1), was applicable to a malpractice plaintiff's action against the United States under the Federal Tort Claims Act, for professional medical negligence by various Air Force doctors and medical personnel in connection with injuries incurred during a birth. The plaintiff argued that the Air Force Hospital had not complied with the state's requirements for becoming a "qualified health

care provider" under the Act, in failing to file proof of financial responsibility, pay surcharges levied by the excess liability fund, or post notice of such qualification, as required by Neb. Rev. Stat. § 44-2821(4) (Reissue 1988) and § 44-2824 (Supp. 1990). The court noted that the Federal Tort Claims Act, 28 U.S.C.A. § 2674, provided that the government should be liable in the same manner and to the same extent as a private individual under like circumstances, and that liability was to be determined in accordance with the law of the place where the negligent acts or omission occurred. Although the government hospital did not fully comply with the Act, said the court, it was willing to perform the functional equivalent of formal compliance, so that it was in "like circumstances" to a hospital which had technically qualified. The government had offered to pay the plaintiff's damages up to the statutory limit, and there would be no drain on the state's excess liability fund, the court pointed out, concluding that the Federal Government had met the objectives of the statute and was therefore in like circumstances with qualified health care providers. The court also rejected the plaintiff's contention that the government was not like qualified health care providers because participation in the statutory scheme was voluntary. Because the Federal Government was willing to meet the objectives of the Act, the court decided, the most appropriate analogy was to those health care providers who had chosen to participate.

Questions whether (1) South Dakota's statutory damages cap for malpractice was unconstitutional as violating right to jury trial, due process, equal protection, and open courts; and (2) statutory limitation applied separately to each of three plaintiffs and each of two separate causes of action stated, was certified to South Dakota Supreme Court. Knowles v United States (1994, CA8 SD) 29 F3d 1261.

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 Texas limitation of liability statute [FN83] for damages recoverable in medical malpractice actions applied to a federally operated hospital in an action under the Federal Tort Claims Act. The plaintiff argued that the government hospital was not a "health care provider" or "hospital" within the meaning of the statute. The court replied that the source of the government's liability was the Federal Tort Claims Act and not the Texas limitation of liability provision. Since the federal act assured the Federal Government of the same treatment accorded private parties in Texas, and since hospitals and health care providers licensed in Texas are subject to the limit, it also applied to a federally operated hospital, the court determined.

In Starns v United States (1991, CA4 Va) 923 F2d 34, cert den (US) 116 L Ed 2d 31, 112 S Ct 54, the court held that Virginia's statutory limitation on the amount of damages recoverable for any injury to or death of a patient applied to a judgment rendered in a suit against the United States under the Federal Tort Claims Act (FTCA). In an unpublished opinion, the Supreme Court of Virginia had held that the malpractice cap did not apply to federally operated hospitals not licensed by the state, observed the court. The argument was made that the damage limitation found in § 8.01-581.15 did not apply because the statute, Va. Code Ann. § 8.01-581.1(1) (1984), defined a "health care provider" as a person, corporation, facility, or institution licensed by the commonwealth to provide health care. However, said the court, the source of the government's liability was the Federal Tort Claims Act and not the state's damage limitation statute. A plaintiff may only recover against the government to the extent the government has waived its sovereign immunity, the court continued, and Virginia law was incapable of determining to what extent the Federal Government had done so. The FTCA provided that the government would be liable to the same extent as a private individual under like circumstances, 28 U.S.C.A. § 2674 (1988), and that its liability was to be determined in accordance with the law of the place where the negligent act or omission occurred under 28 U.S.C.A. § 1346(b) (1988). Since private health care providers in Virginia would in like circumstances be entitled to the benefit of the statutory limitation, the court concluded, so is a federally operated hospital in that state.

[b] --Exception as to limit on recovery against health care provider

In the following case, the court held that the United States was entitled only to the benefit of the statutory cap on the total damages recoverable by a medical malpractice plaintiff in an action under the Federal Tort Claims Act, and not to the lower cap on recovery against a health care provider.
In an action under the Federal Tort Claims Act, the court held in Carter v United States (1992, CA7 Ind) 982 F2d 1141, that the United States was entitled to the benefit of the limit on damages recoverable in a medical malpractice action under Ind. Code §§ 16-9.5-2-1 and 16-9.5-2-2, but was not entitled to the lesser limit on liability available to a health care provider who had established its financial responsibility and paid an annual fee. The court noted that Indiana limited recoverable damages only if the defendant were a "qualified provider" of medical care, which involved furnishing proof of financial responsibility and contributing to the pool of funds which financed the recovery of damages by a malpractice victim exceeding the limit which could be recovered from such providers. The United States was not a "qualified provider," observed the court, being immune from the taxation of the state, and the state did not request the Federal Government to make voluntary contributions to the fund. Neither did the Veterans' Administration use any of the other devices available under the statute to establish financial responsibility, said the court. However, whether the United States was itself a "qualified provider" was not the question, the court continued, but finding the best interpretation of the government's responsibility according to the mandate of the Federal Tort Claims Act, 28 U.S.C.A. § 2674, that it should be liable in the same manner and to the same extent as a private individual under like circumstances. The reference to private liability was a form of vicarious protection, the court explained, preventing states from adopting rules in order to enrich their own citizens at the expense of the deepest pocket. The Federal Government was financially responsible in the sense that it could and would pay any judgment entered against it, and since a private individual would receive the benefit of the cap, the United States should also, the court decided. However, the cap for the United States must be derived from the victim's maximum entitlement rather than the lesser amount that a private tortfeasor would pay, the court concluded, because the Federal Government has saved the expense of contributing to the state's insurance pool.

[c] Held not applicable

A state statute limiting recovery of damages in a medical malpractice action has been held inapplicable to an action by members of an Indian tribe brought under the Federal Tort Claims Act and involving treatment rendered on tribal land.
Under law of Acoma Tribe, New Mexico Medical Malpractice cap did not apply in medical malpractice action by tribal members against United States under Federal Tort Claims Act (FTCA) for actions that occurred in hospital run by United States on tribal land. N.M.S.A. § 41-5-6(A, B). Cheromiah v. U.S., 55 F. Supp. 2d 1295 (D.N.M. 1999).
Liability cap set out in the New Mexico Medical Malpractice Act was not arbitrary and capricious in limiting deserving plaintiffs from deserved relief, and was rationally related to legislative goal of ensuring a source of recovery for victims of medical malpractice and curbing runaway costs of healthcare. NMSA 1978, § 41-5-6. Federal Express Corp. v. U.S., 228 F. Supp. 2d 1267 (D.N.M. 2002).

§ 36. Emergency Medical Treatment and Active Labor Act

[a] Held applicable

A statutory provision limiting the amount of damages recoverable in a medical

malpractice action was construed in the following case to apply to claims arising under the Emergency Medical Treatment and Active Labor Act.

A federal statute designed to deter "patient dumping," 42 U.S.C.A. § 1395dd, incorporated the state's substantive limitation on the maximum amount recoverable for personal injury from a health care provider, Ind. Code § 16- 9.5-2-2, the court held in Reid v Indianapolis Osteopathic Medical Hospital, Inc. (1989, SD Ind) 709 F Supp 853 (disapproved on other grounds by Cleland v Bronson Health Care Group, Inc. (CA6 Mich) 917 F2d 266, reh den, en banc (CA6) 1990 US App LEXIS 22085). In response to the defendant health care provider's motion to dismiss the medical malpractice complaint on the ground that the plaintiff had not complied with other provisions of the state malpractice reform statute, the plaintiff argued that since the federal statute expressly incorporated the state's measure of damages for "personal injury," the general term should not be read as meaning "personal injury due to medical malpractice." The legislative history of the federal statute was completely silent on the question whether the reference to damages available for personal injury under the law of the state in the federal statute should be read as including state limitations on medical malpractice damages, observed the court. However, the court continued, the plaintiff was unable to cite a single state with a statute that generally limited personal injury damages, and wanted the court to read the damages limitation clause as in fact providing no limitation whatsoever. When Congress drafted the federal statute, it was clearly aware of a growing concern in some states that excessive damages awards were fueling a medical malpractice "crisis," the court pointed out, and a number of such states had recently enacted ceilings on the amount of damages that could be recovered, ceilings that Congress apparently wished to preserve through the incorporation clause of the federal statute. Such an interpretation was also consistent with the intention of the statute that individual plaintiffs could only obtain those damages available for personal injury under the law of the state, which, in those states with restrictive medical malpractice statutes, would be only those damages available under the medical malpractice limitation statute itself, the court concluded.

Virginia $1 million statutory cap on medical malpractice damages barred patient who had recovered $1 million in damages from hospital in action under federal EMTALA from recovering additional damages from professional corporation under contract with hospital and its physician for injuries arising out of same emergency room visit; by its plain language, statute precludes patient from recovering more than $1 million from injuries arising from one malpractice event, and such principles holds whether patient sues one defendant or many, whether she files one action or separate ones, or whether she proceeds under more than one legal theory. Power v Alexandria Physicians Group (1995, ED Va) 887 F Supp 845, 48 Soc Sec Rep Serv 290, affd (CA4 Va) 91 F3d 132 and cert den (US) 136 L Ed 2d 403, 117 S Ct 514 (applying Va. law).

[b] Held not applicable

A statutory provision limiting the amount of damages recoverable in a medical malpractice action was construed in the following case not to apply to claims arising under the Emergency Medical Treatment and Active Labor Act.

Damages cap in California's Medical Injury Compensation Reform Act (MICRA), applicable to tort actions against health care provider "based on professional negligence," did not apply to strict liability claims brought under Emergency Medical Treatment and Active Labor Act (EMTALA). Social Security Act, § 1867, as amended, 42 U.S.C.A. § 1395dd; West's Ann.Cal.Civ.Code § 3333.2(a); West's Ann.Cal.C.C.P. § 667.7(e)(4); West's Ann. Cal. Health & Safety Code § 1317. Burrows v. Redbud Community Hosp. Dist., 188 F.R.D. 356 (N.D. Cal. 1997).

In Cooper v Gulf Breeze Hosp. (1993, ND Fla) 839 F Supp 1538, 43 Soc Sec Rep Serv 339, the court denied a motion to dismiss a patient's claim under the Emergency Medical Treatment and Active Labor Act on the ground, inter alia, that the patient had failed to comply with the pre-suit procedures of Florida's medical malpractice act, because it was

improper to assume that the federal statute incorporated state medical malpractice law, including damage limits on medical malpractice actions. The defendant hospital argued that compliance with the presuit procedures was necessary to determine the amount the plaintiff was entitled to recover under state law on the federal cause of action, because under Florida's scheme, the damage limits in a medical malpractice action were contingent on what presuit procedures the parties followed. However, the court said this argument misconstrued the nature of the EMTALA action, which, rather than constituting a new federal cause of action for medical malpractice, provided a remedy for two narrowly defined situations when a hospital has "dumped" a patient. The federal statute permitted the recovery of the damages recoverable for personal injury under state law, stated the court, and did not specifically incorporate limits on medical malpractice actions. The court rejected the reasoning of the court in Reid v Indianapolis Osteopathic Medical Hospital, Inc. (1989, SD Ind) 709 F Supp 853 (disapproved on other grounds by Cleland v Bronson Health Care Group, Inc. (CA6 Mich) 917 F2d 266, reh den, en banc (CA6) 1990 US App LEXIS 22085) (§ 36[a]), stating that it did not follow from the fact that Congress was aware of state law limits on medical malpractice damages that Congress intended to incorporate them in the federal statute, and the plain language of 42 U.S.C.A. § 1395dd(d)(2)(A) did not support the assumption. Citing Power v Arlington Hosp. (1992, ED Va) 800 F Supp 1384 (§ 36[c]), with approval, the court agreed that medical malpractice actions and EMTALA actions were separate and distinct, as they focused on different conduct and sought different goals. Furthermore, it was unclear whether the Reid court's further holding, that EMTALA did not incorporate the state's medical malpractice procedural requirements, would support the defendant's position, noted the court, since the statutory damage limits in that case were not tied to pretrial procedures as they were in Florida.

[c] Virginia cases

Federal District Courts in Virginia have reached different results in determining the applicability of the state statute limiting damages recoverable in medical malpractice actions to a claim under the Emergency Medical Treatment and Active Labor Act (EMTALA). In the following case, the court held that the plaintiffs' damages were limited by the statute.

However, in Power v Arlington Hosp. (1992, ED Va) 800 F Supp 1384, the court held that damages recoverable by a plaintiff in a federal "patient dumping" action against a participating hospital were not limited by Virginia's medical malpractice damages cap under Va. Code § 8.01-581.15, also determining that the limitation on recovery in actions for medical malpractice against certain charitable hospitals under Virginia law did not apply. Granting the plaintiff's motion in limine before trial as to the application of the statutes, the court observed that she had asserted claims based on the Emergency Medical Treatment and Active Labor Act of 1986 (EMTALA), 42 U.S.C.A. §§ 1395dd et seq. (1988, as amended), based on violation of the hospital's obligation under the statute to provide for appropriate medical screening to determine whether a patient has an emergency medical condition, and the obligation to transfer a patient with an emergency medical condition only when the condition has been stabilized. The federal law provided for a private right of action to enforce those obligations in 42 U.S.C.A. § 1395dd(d)(3)(A), specifying that an individual who suffered personal harm as a result of the violation could recover in a civil action against the participating hospital those damages available for personal injury under the law of the state in which the hospital was located, and such equitable relief as was appropriate. The plain language of the statute was that damages were available for "patient dumping" according to the state's personal injury damages, the elements of which were well defined under Virginia law, which placed no limit on their amount, said the court, and there was a conspicuous absence from the EMTALA provision of any limiting language. The court pointed out that the provision did not say "damages for personal injury except as may be limited in certain states by medical malpractice statutes," and added that had Congress desired to

enact a more restrictive statute, presumably it would have done so. The court found support for this interpretation in the statutory purposes underlying the federal provisions and the Virginia malpractice cap, which differed in that the federal act sought to deter covered hospitals from engaging in the proscribed behavior and to compensate the victims of the behavior, while the malpractice cap was not deterrent in its objective, but was enacted to combat medical malpractice insurance availability and affordability problems. That difference in statutory purposes militated firmly against engrafting the malpractice damages cap onto the federal act, particularly when the act's plain language did not invite it, said the court. Authority to the contrary was unpersuasive, the court continued, finding no evidence for the conclusion that Congress apparently had wished to preserve the application of state malpractice damages limitations. However, there was authority, supportive by analogy, that courts had declined to import into the federal statute the requirement that a claim be brought before a malpractice review panel before being brought in court, a procedural obstacle which would be directly at odds with the purpose of the structure and language of the federal act, said the court, and the same reasoning applied to the malpractice damages cap. Under the other statute which limited medical malpractice damages against a charitable hospital, Va. Code § 8.01-38, a hospital which had certain insurance coverage for malpractice liability had its exposure limited to the lesser of the limits of its insurance or a certain amount. The statute was inapplicable, said the court, because an action under the Emergency Medical Treatment and Active Labor Act (EMTALA) was neither negligence nor a tort action, but was a sui generis federal statutory action unrelated in any way to fault or negligence. Furthermore, said the court, the operation of the statute was barred by the pre-emption doctrine, as it conflicted directly with the intent, scope, and application of EMTALA. One criteria for a finding of pre-emption by federal law was whether the state law obstructed the accomplishment of the congressional objective, noted the court, and application of the statute would impede the purposes of the federal act, because limitation of malpractice damages caused by charitable immunity statutes would frustrate the achievement of its deterrent and compensatory objectives. Having also held that the malpractice damages cap did not apply to the action, the court concluded that it would be inconsistent to find that the charitable immunity statute limited the hospital's financial exposure.

In Lee v Alleghany Regional Hosp. Corp. (1991, WD Va) 778 F Supp 900 (criticized by Power v Arlington Hosp. (ED Va) 800 F Supp 1384), this subsection, the court granted the motion of a defendant hospital to limit the ad damnum clause in a plaintiffs' complaint to reflect the application of the state's cap on medical malpractice damages, in a suit brought under the Emergency Medical Treatment and Active Labor Act (EMTALA) alleging negligence in connection with the premature birth of a child. Stating that it had been unable to discover any state statute generally limiting all personal injury damages, the court said that if the plaintiffs' contention were accepted and the personal injury clause of the federal statute, specifying that the Federal Government would be liable in the same manner and to the same extent as a private individual in like circumstances, were applied only to state statutes that apply to all personal injury recoveries, and not to those applying only to medical malpractice recoveries, the provision would be inapplicable in all 50 states. The statutes may not be construed in a manner which renders certain provisions meaningless or insignificant, said the court, and so that interpretation of the act must be rejected. Following Bulala v Boyd (1990) 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 also held that a mother and her newborn child were separate patients, and thus each could recover a maximum amount under the malpractice damages limitation statute.

E. Other Matters

§ 37. Construction of "future" medical expense

A statute limiting damages recoverable in a medical malpractice action except for "future" medical care and related expenses was construed by the court in the following case to allow recovery for all medical expenses after the date of the plaintiff's injury.
Affirming the trial court's award of general damages in the amount of the statutory limit recoverable in medical malpractice actions, plus an additional amount for medical expenses, the court in Castillo v Montelepre, Inc. (1993, CA5 La) 999 F2d 931, 26 FR Serv 3d 794, reh den (CA5 La) 1993 US App LEXIS 27100, held that a statute limiting medical malpractice damages except for future medical care and related benefits allowed for the additional award. Under the statute, future medical care and related expenses were defined as those incurred after the date of the injury under LRS § 40:1299.43(B)(1), the court continued, and it was well established that the term included not only those expenses incurred after the date of trial but also those incurred after the date of injury but before the date of trial. Therefore, under appropriate circumstances, a court could award the statutory limit on general damages plus all medical expenses incurred from the date of malpractice without exceeding the limit of recovery set forth in LRS § 40:1299.42, the court concluded.
Settlement agreement between hospital and patient's estate whereby hospital would pay $75,000 immediately and $1 one week later did not satisfy provision of state Medical Malpractice Act that allows health care provider to discharge its liability by spending more than $75,000 on sum of immediate payment and cost of periodic payments agreement, and thus estate could not access Patient's Compensation Fund; Act required hospital to obtain commitment from third party to make available money for use as future payment, and payment of $1 was to be made directly from hospital to estate. West's A.I.C. 34-18-14-1, 34-18- 14-4(b). Patient's Compensation Fund v. Hicklin, 823 N.E.2d 705 (Ind. Ct. App. 2005).
Award of future medical expenses in patient's medical malpractice action was not to be aggregated with other elements of damages; future expenses were not covered by $500,000 damages cap. LSA-R.S. 40:1299.43. Hall v. Brookshire Bros., Ltd., 848 So. 2d 559 (La. 2003).
Funeral, cemetery, and burial expenses were not future medical and related benefits and could not be awarded in addition to Medical Malpractice Act's statutory cap in survivor's medical malpractice action against physician. LSA-R.S. 40:1299.42, subd. B(1). Monistere v. Engelhardt, 896 So. 2d 1105 (La. Ct. App. 5th Cir. 2005).

§ 37.5. Calculation of damage awards

The following authority calculated damage awards under state statutory provisions limiting the amount of recovery in medical malpractice claims.
Evidence supported determination that patient's medical malpractice damages exceeded statutory cap of $500,000; patient presented uncontroverted evidence of past medical expenses totaling $108,596, future medical costs estimated at $310,401, and testimony of an economist who estimated her past lost wages, loss of earning capacity, and loss of household services was in excess of $450,000. LSA-R.S. 40:1299.42, subd. B(1). Unkel v. W.O. Moss Regional Hosp., 862 So. 2d 487 (La. Ct. App. 3d Cir. 2003).
Damages awarded to patient's divorced mother would be reduced to $150,000, where trial court's award of $400,000 to mother, when combined with the Louisiana Patient's Compensation Fund's payment of $250,000 to father and the $100,000 that doctor paid to parents in settlement of their claims, exceeded the $500,000 statutory cap on medical malpractice damages. LSA- R.S. 40:1299.42, subd.B. Turner v. Southwest Louisiana Hosp. Ass'n, 2003-237 La. App. 3 Cir. 10/1/3, 2003 WL 22240659 (La. Ct. App. 3d Cir. 2003).
Award of $770,000, reduced to $500,000 by Medical Malpractice Act mandatory cap, to patient and her children was not excessive in medical malpractice action, where as a result of surgeon's deviating from the standard of care, patient suffered many

complications resulting in a subsequent reconstructive surgery; multiple hospital stays; nausea; severe vomiting; cirrhosis of the liver; a life-threatening infection; large scars from two corrective surgeries; and many other ailments and medical problems. LSA-R.S. 40:1299.42. Williams v. Louisiana Medical Mut. Ins. Co., 866 So. 2d 306 (La. Ct. App. 4th Cir. 2004).
Claims that hospital failed to promptly provide patient with echocardiogram and transfer patient to another hospital equipped to handle his needs, constituted health-care claims, and thus, fell under statutory damages cap of Medical Liability and Insurance Improvement Act (MLIIA); claims complained of a lack of treatment, which was an inseparable part of medical services provided to patient. Vernon's Ann. Texas Civ.St. art. 4590i, § 11.02(a) (Repealed). Columbia Medical Center of Las Colinas, Inc. v. Hogue, 132 S.W.3d 671 (Tex. App. Dallas 2004), reh'g granted, (May 6, 2004).

§ 38. Requirement that patient's compensation fund be joined as a party--by plaintiff

[a] Held required

Under a statute limiting damages recoverable against a health care provider in medical malpractice actions, the court in the following cases held that no additional recovery could be allowed against the patient's compensation fund unless the plaintiff joined the fund as a party in the action against a health care provider.
A malpractice plaintiff's failure to join the Patients' Compensations Fund as a party defendant in a medical malpractice action limited her recovery against the fund member health care provider to the maximum amount set forth in the statute limiting the provider's damages, under Fla. Stat. § 768.54(2)(b) (1979), the court held in Tallahassee Memorial Regional Medical Center, Inc. v Meeks (1990, Fla) 560 So 2d 778, 15 FLW S 171, reh den (Fla) 1990 Fla LEXIS 663. Disagreeing with the trial court's ruling that the defendant health care provider must "join" the fund as a defendant to entitle itself to the cap on liability provided by the statute, the court said that the statute creating the fund did not create a relationship solely between the fund and its member health care provider. Rejecting the theory that the failure to join the fund only prevented the plaintiff's recovery against the fund and had no effect on her ability to recover the total amount of the judgment from the defendant hospital, the court explained that the fund secured health care providers from medical malpractice liability damages in excess of the specified amount and provided for the payment of such damages to those members of the public who became victims of medical malpractice. Furthermore, observed the court, Fla. Stat. § 768.54(3)(e)(1) (1979) precluded a plaintiff from recovering against the fund unless the fund were named as a defendant. The court went on to hold, contrary to the plaintiff's contention, that if the hospital qualified for the limitation of liability, so did its employees acting within the scope of their employment, and since the record did not determine whether the hospital had fulfilled the requirements necessary to limit its liability as set forth in the statute, the case was remanded to the trial court for that determination.
Accord, Gup v Cook (1991, Fla) 585 So 2d 926, 16 FLW S 505, also reported in § 40.
In Mercy Hospital, Inc. v Menendez (1979, Fla App D3) 371 So 2d 1077, cert den (Fla) 383 So 2d 1198 and app dismd without op (Fla) 383 So 2d 1198 and appeal after remand (Fla App D3) 400 So 2d 48, petition den (Fla) 411 So 2d 383, the court held that medical malpractice plaintiffs had the burden of making the patient's compensation fund a party in any suit where recovery was sought against a health care provider in excess of the limit of damages recoverable against the provider, and that when the plaintiff failed to make the fund a party, the trial court could, within an appropriate time, enter an order for limitation of the judgment under Fla. Stat. § 768.54(2)(b) (1977). Neither the plaintiffs nor the defendant pleaded the terms of the statute during the trial of the action, observed the court, but after the entry of the jury's verdict in excess of the recovery allowable against a health care provider, the defendant filed a motion for limitation of

judgment and an affidavit of one of its officers alleging that the hospital had complied with the conditions of the statute limiting its liability. The court entered an amended final judgment providing for a recovery of the excess from the patient's compensation fund, which then argued that it was not a party to the proceeding and therefore a judgment could not be entered against it. Rejecting the plaintiffs' argument that they were entitled to the full amount of the judgment against the hospital because it had failed to plead the statute and its compliance therewith as a defense to the suit, the court said that was not supported by the language of the statute, which was one of limitation of judgment upon the performance of condition specified. Neither, ruled the court, was the application of the statute given an unconstitutional effect, as an invasion of the right of the court to establish rules of procedure, by the fact that the fund, which the plaintiffs argued was like an insurance program, be joined in the suit. The court said it was apparent from a reading of the Medical Malpractice Reform Act that the legislature did not set up an insurance fund with obligations to the health care provider, but with obligations to the plaintiff in the medical malpractice action, and therefore it was reasonable to require that the fund be joined in any suit to enforce those obligations, and have a right to defend.

[b] Held not required

In the following case, the court held, under a statute limiting damages recoverable in medical malpractice actions, that a medical malpractice plaintiff could recover damages from a patient's compensation fund, even though the fund was not joined as a party in the action against a health care provider.
In Forstall v Hotel Dieu Hospital (1983, La App 4th Cir) 429 So 2d 213, cert den (La) 433 So 2d 1054, the court held that the patient's compensation fund did not have to be a party to the lawsuit in order to be cast in damages for medical malpractice in excess of the statutory limitation for a health care provider. The fund argued that since it was never a party to the lawsuit it could not be held liable. The court observed that the statute, LRS § 40:1299.44B, provided the procedure by which funds would be disbursed, specifying that upon receipt of a certified copy of a final judgment in excess of the statutory limit against a health care provider, the fund should issue a warrant in the amount of the claim. There was no doubt that the defendant doctor was a health care provider as defined under the statute, said the court, and the fund did not need to be made a party to the suit because it did not have to be cast in judgment under the statute to disburse its funds. However, the court continued, the trial court erred in ordering the fund to pay any part of the judgment before receipt by the commissioner of insurance of the certified copy of the judgment.

§ 39. --By health care provider

The court in the following cases held that it was not the duty of a defendant health care provider, against whom medical malpractice damages were limited by statute, to join the patient's compensation fund as a party in a malpractice action.
The trial court erred in holding that a health care provider must join the patient's compensation fund as a defendant in order to be eligible for the cap on liability provided by statute in medical malpractice actions, the court held in Tallahassee Memorial Regional Medical Center, Inc. v Meeks (1990, Fla) 560 So 2d 778, 15 FLW S 171, reh den (Fla) 1990 Fla LEXIS 663. There were only three requirements which a health care provider must fulfill to limit its liability as provided in the statute, said the court: (1) pay the annual fees for fund membership, (2) provide an adequate defense for the fund, and (3) pay at least the initial statutory specified amount or the maximum limit of the

underlying coverage it maintained when the incident occurred, whichever was greater. Nor was the trial court correct in ruling that the health care provider's failure to raise the statute as an affirmative defense in its answer waived the right to raise it following rendition of the verdict, said the court, declining to create any such requirements in light of the statute's plain and unequivocal language. A malpractice plaintiff's failure to join the patients' compensation fund as a party defendant in a medical malpractice action limited recovery against the fund member health care provider to the maximum amount set forth in the statute limiting the provider's damages, under Fla. Stat. § 768.54(2)(b) (1979), the court concluded.
See Forstall v Hotel Dieu Hospital (1983, La App 4th Cir) 429 So 2d 213, cert den (La) 433 So 2d 1054, § 38[b], in which the court held that the patient's compensation fund did not have to be a party to the lawsuit in order to be cast in damages for medical malpractice in excess of the statutory limitation for a health care provider.

§ 40. Requirement that health care provider establish financial responsibility

The court held that a health care provider had established financial responsibility within the meaning of a statute limiting medical malpractice damages recoverable against those health care providers who had satisfied statutory requirements in the following case.
In Gup v Cook (1991, Fla) 585 So 2d 926, 16 FLW S 505, the court held that a statutory limitation on damages recoverable from a health care provider in a medical malpractice action, applicable if the provider established financial responsibility, did not require that the provider fund an escrow account sufficient to satisfy each malpractice claim pending against it. Among other means of establishing financial responsibility listed in the statute, one section, Fla. Stat. § 768.54(2)(b)(1)(b), allowed the provider, by the establishment of an appropriate escrow account, to prove to the satisfaction of the board of governors of the patient's compensation fund that it was financially responsible for any claims filed against it. The plaintiff, who was limited to her recovery against the health care provider because she had failed to join the fund as a party in the malpractice action, [FN84] argued that the doctor and clinic against whom she brought suit were in violation of the rule and were not entitled to the benefit of the statutory limitation because at the time of their negligence, three other malpractice claims were pending against them, and they had placed a total of less than the statutory amount for each claim in escrow. The court observed that, unlike other means of establishing financial responsibility found in other sections of the statute, the plain language of the subsection did not require the actual posting of a set amount in the form of a bond or insurance policy. The standard was discretionary rather than objective, said the court, and the account need not contain the statutory limit of damages per claim unless, in the opinion of the board, such amount was necessary to establish financial responsibility for a particular provider. It was undisputed that the defendants had established their responsibility to the board's satisfaction, the court concluded, quashing that portion of the appellate court's decision affirming the denial of the defendant's motion to limit liability.
Limitation of liability found in Medical Malpractice Act differs from traditional immunities that have been deemed personal defenses. First, limitation does not automatically apply to all health-care providers. Provider must first "qualify" for benefit by showing proof of financial responsibility and by paying surcharge. Second, limitation is triggered only by negligent care and treatment of patient. Were provider to commit intentional tort against patient or negligently injure patient in manner unrelated to medical treatment, limitation of liability would not be available. Finally, limitation provided by act is not personal defense, but rather one that arises from nature of the obligation and can be raised by insurer. Descant v Administrators of the Tulane Educ. Fund (1994, La) 639 So

2d 246.

§ 40.5. Requirement that health care provider have malpractice liability insurance

The following authority adjudicated whether a health care provider had established malpractice liability insurance within the meaning of a statute limiting medical malpractice damages recoverable against those health care providers who had satisfied such statutory requirements

Insurance policy issued to hospital was malpractice liability policy, and thus, pursuant to statute providing that, to be qualified under Medical Malpractice Act, health care provider shall have malpractice liability insurance, hospital was a qualified health care provider, which subjected patient to "cap" of Medical Malpractice Act with respect to patient's negligence claim against hospital; certificate of enrollment indicated that insurer provided "claims made" policy for hospital, hospital's policy contained assurances commonly found in liability policy, and addition of indemnity agreement and contractual provision entered into between hospital and insurer did not detract from insurer's obligation to service the policy. LSA-R.S. 40:1299.42, subd. E(1). Scott v. Dauterive Hosp. Corp., 851 So. 2d 1152 (La. Ct. App. 3d Cir. 2003), writ denied, 857 So. 2d 487 (La. 2003).

§ 41. Interest and costs on allowable recovery

Interests and costs on the allowable damages awarded to a medical malpractice plaintiff, in excess of the damages recoverable against a health care provider as limited by statute, could be assessed against a patient's compensation fund, the court held in the following case.

Prejudgment interest is deemed to be a part of the damages awarded in a medical malpractice action and is included within the $250,000 limit on noneconomic damages and the one million dollar limit on total damages. West's C.R.S.A. § 13-64-302(2). Wallbank v. Rothenberg, 74 P.3d 413 (Colo. Ct. App. 2003), cert. granted in part, 2003 WL 21689230 (Colo. 2003).

Award of costs and attorney fees to prevailing medical malpractice plaintiff does not constitute award for an occurrence of medical negligence, or amount recovered for an injury or death, and thus does not implicate damages cap of Indiana Medical Malpractice Act. IC 27-12-14-3 (1993 Ed.) Emergency Physicians of Indianapolis v. Pettit, 718 N.E.2d 753 (Ind. 1999).

In Herman v Milwaukee Children's Hospital (1984, App) 121 Wis 2d 531, 361 NW2d 297, the court held that when a medical malpractice judgment exceeded the statutory limitation for damages recoverable from a health care provider of Wis. Stats. § 655.23, the costs and interest to which the plaintiffs were entitled were properly assessed against the patient's compensation fund under Wis. Stats. § 655.27, which provided that the fund would pay that portion of a claim which was in excess of the limit on a health care provider's liability. The fund argued that that statutory section made no provision for assessing costs or interest, and that it could have no liability other than that created by statute. The court disagreed, stating that the relevant statute provided for costs and interest to be assessed in trials following panel hearings, but that no provision was made for a health care provider to incur liability exceeding that provided for in Wis. Stats. § 655.23(5). It would be illogical if costs could be incurred after a panel procedure but not after a Circuit Court trial de novo, said the court, and it would ignore Wis. Stats. § 655.27(5)(a), which provided in relevant part that in a trial de novo for damages likely to exceed the limitation on the liability of a health care provider, the fund could retain counsel and pay from the fund attorney's fees and expenses, including court costs, incurred in defending itself. The court also observed that Wis. Stats. § 655.19 permitted the prevailing party in a trial subsequent to a formal panel hearing to recover actual court costs and reasonable attorney's fees in excess of statutory limitations. The rules of civil procedure were applicable to Circuit Court civil actions, said the court, and they

could not be disregarded simply because the Circuit Court action was preceded by a panel proceeding. Since the fund was responsible for liability incurred by a health care provider in excess of the statutory limits, the fund was responsible for costs and interest awarded to a party whose claim against a health care provider resulted in a judgment in excess of the statutory limit. Furthermore, said the court, not to apply to the fund the punitive provisions of Wis. Stats. § 807.01(4) would be to condone its unreasonable failure to settle and to invite unnecessary litigation in the future, and the trial court therefore correctly assessed costs and interest against the fund.

§ 42. Interest on damages exceeding statutory limit on recovery

When a plaintiff's damages exceeded the amount recoverable against health care providers by statute, the court held in the following case, there could be no award of interest on the damages exceeding the statutory cap.
Medical Malpractice Act and Medical Liability for State Services Act, which placed comprehensive $500,000 cap on damages and mandated medical review before trial must be strictly construed since they grant immunities or advantages to special classes in derogation of general rights available to tort victims. Moreover, because cap on damages imposed by each act harshly impacts most severely injured victims, mitigating benefits or advantages provided for them by the laws must be liberally construed, and any disparity of treatment between such claimants by either act will be given careful scrutiny; in absence of showing that classification substantially furthers important state interest, it shall be stricken or reformed as denial of equal protection of the laws. Beaucoudray v Brumfield (1994, La) 633 So 2d 1210, reh den (La) 635 So 2d 247.
Interest on damages in excess of the statutory limit on medical malpractice damages recoverable against employees of the state who render health care services could not be awarded, the court held in Allen v State (1988, La App 2d Cir) 535 So 2d 903, cert den (La) 536 So 2d 1201. The malpractice victim conceded that he could not recover damages beyond the statutory cap, but requested legal interest on the total of his proven damages, which exceeded the cap. The plaintiff relied on an analogy with the recovery of such interest under certain insurance policies, which obligated the insurer to pay interest on the entire amount of any judgment accruing after entry of a judgment and before the company has paid or tendered an amount equal to its policy limits. The court observed that the purpose of such policy language was to relieve the insured of its obligation to pay legal interest on the excess award during appellate delays caused by the insurer who had control of the litigation. The purpose of LRS § 40:1299.39 was to benefit the state and its employees by limiting the damages awardable to a patient for medical malpractice, said the court, but the statute was clear that no judgment should be rendered in excess of the statutory limitation plus interest and costs. Although another section provided "coverage" for state employees and spoke of them as "named insureds," the statutory language must be distinguished from the language of a liability insurance policy, said the court. The statute was not ambiguous with respect to the limitation and there was no language allowing an interpretation which would limit the judgment to the statutory cap and yet award interest on damages in excess thereof, said the court.

§ 43. Punitive damages

It has been held that statutory limitations on damages for medical malpractice were, under the particular statute at issue, inapplicable to awards of punitive damages.
Supreme Court would decline, on hospital's appeal from punitive damages award, to revive provision of Alabama Medical Liability Act (AMLA), previously declared by Supreme Court to be unconstitutional, that placed $400,000 cap on noneconomic damages that could be awarded in medical malpractice case because Legislature, with knowledge of Supreme Court's holding, subsequently enacted new general cap on punitive damages in civil actions that clearly encompassed claims brought pursuant to

AMLA. Code 1975, §§ 6-5-544(b), 6-11-21(d). Mobile Infirmary Medical Center v. Hodgen, 884 So. 2d 801 (Ala. 2003).
Statutory $500,000 cap on "damages" assessed against physician or health care provider, on a health care liability claim, covers only compensatory damages, aside from the expenses of necessary medical, hospital, and custodial care received before judgment, and does not apply to punitive damages. 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).

§ 44. Jury instructions

The following authority adjudicated whether jury instructions on a medical malpractice damages cap was warranted.
Physician was not entitled to jury instruction on medical malpractice damages cap imposed by Massachusetts statute, prohibiting award of over $500,000 for pain and suffering and related damages, absent finding of permanent impairment or substantial disfigurement, in medical malpractice action arising out of failure to diagnose breast cancer; physician failed to request instruction, even after trial judge reminded counsel of statutory cap, affidavits of attorneys experienced in medical malpractice actions stated that defense attorneys generally avoid mention of statutory cap for fear that it would increase damages award, and patient suffered substantial disfigurement as result of loss of her breast due to mastectomy, as would justify exceeding statutory cap. M.G.L.A. c. 231 § 60H. Primus v. Galgano, 187 F. Supp. 2d 1 (D. Mass. 2002).

§ 45. Construction of term "health care provider"

The following authority addressed the issue of who is a "health care provider: within the meaning of a statute limiting damages awards in medical malpractice cases.
Statutory cap on noneconomic damages in actions against health care providers did not apply to medical malpractice claim against unlicensed first-year medical resident; resident was not a health care provider for purposes of statutory chapter governing medical malpractice claims against health care providers. W.S.A. 655.001(8, 10m), 655.002(1)(a), 893.55(4)(b). Phelps v. Physicians Ins. Co. of Wisconsin, Inc., 2005 WI 85, 698 N.W.2d 643 (Wis. 2005).
Unlicensed first-year medical resident was not "health care provider" for purposes of statute limiting noneconomic damages awards against health care providers in medical malpractice cases, in medical malpractice brought by patient resulting from death of unborn child while being treated by resident; definition of "health care provider" applicable to statute included only licensed physicians. W.S.A. 655.001(8), 893.55. Phelps v. Physicians Ins. Co. of Wisconsin, Inc., 2004 WI App 91, 681 N.W.2d 571 (Wis. Ct. App. 2004).

Research References

Total Client-Service Library References

The following references may be of related or collateral interest to a user of this annotation.

Annotations

Encyclopedias and Texts

61 Am Jurisprudence 2d, Physicians, Surgeons, and Other Healers § 373.
31 Federal Procedure, L Ed, Actions Under Federal Tort Claims Act §§ 73:323 et seq..

Practice Aids

8 Am Jur Pl & Pr Forms (Rev), Damages Forms 1 et seq..
13A Am Jur Pl & Pr Forms (Rev), Hospitals Forms 71, 91.
19A Am Jur Pl & Pr Forms (Rev), Physicians, Surgeons, and Other Healers Forms 421, 422.
8A Am Jur Legal Forms 2d, Federal Tort Claims Act §§ 113:1 et seq..
9A Am Jur Legal Forms 2d, Hospitals and Asylums §§ 136:101-136:103.
16 Am Jur Legal Forms 2d, Releases §§ 223:103-223:108.
15A Federal Procedural Forms, L Ed, Tort Claims Against United States §§ 63:82-63:84, 63:101, 63:142.
Establishing an Adequate Foundation for Medical Expenses, 23 Am Jur Proof of Facts 3d 243.
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L Ed Digest Damages §§ 97-101.
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Research Sources

The following are the research sources that were found to be helpful in compiling this annotation.

West Digest Key Numbers

Constitutional Law ⇦80(1), 106, 205(1, 2), 245(1, 3), 249(1), 301(1), 305(1), 321, 328.
Damages ⇦127.
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Physicians and Surgeons ⇦2, 18.110.
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Statutes ⇦64(7), 85(1), 242, 243.
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Encyclopedias

61 Am Jurisprudence 2d, Physicians, Surgeons, and Other Healers § 373.
70 CJS, Physicians and Surgeons § 105.

Texts

Charfoos and Christensen, Personal Injury Practice: Technique and Technology, §§ 21.4, 21.6, 21.7.
2 Speiser, Kraus, and Gans, The American Law of Torts, § 8.2.

Law Review Articles

Note, Equal Protection and Medical Malpractice Damage Caps, 28 Idaho L Rev 396 (1991-92).
Note, Following Doctor's Orders--Caps on Noneconomic Damages in Medical Malpractice Cases, 22 Rutgers L J 173 (1990).
Cleckley and Hariharan, A Free Market Analysis of the Effects of Medical Malpractice Damage Cap Statutes: Can We Afford To Live With Inefficient Doctors? 94 W Va L Rev 11 (1991).

[FN1]. This annotation supersedes §§ 3-7 of 80 ALR3d 583, which need no longer be consulted.

[FN2]. For a discussion of immunity from liability for damages in tort of state or governmental unit or agency in operating a hospital, see the annotation at 25 ALR2d 203. The validity and construction of a statute or ordinance limiting the kinds or amount of actual damages recoverable in tort action against a governmental unit are considered in 43 ALR4th 19. The validity of state statutes providing for periodic payment of future damages in medical malpractice actions is the subject of the annotation at 41 ALR4th 275.

[FN3]. See "Validity and construction of state statute abrogating collateral source rule as to medical malpractice actions," 74 ALR4th 32.

[FN4]. In this regard, see "Medical malpractice: who are 'health care providers,' or the like, whose actions fall within statutes specifically governing actions and damages for medical malpractice," at 12 ALR5th 1.

[FN5]. This issue is the subject of "What patient claims against doctor, hospital, or similar health care provider are not subject to statutes specifically governing actions and damages for medical malpractice," at 89 ALR4th 887, and "What nonpatient claims against doctors, hospitals, or similar health care providers are not subject to statutes specifically governing actions and damages for medical malpractice," at 88 ALR4th 358.

[FN6]. 61 Am Jurisprudence 2d, Physicians, Surgeons and Other Healers § 367; 22 Am Jurisprudence 2d, Damages § 20.

[FN7]. This statute was part of a medical malpractice reform scheme which included the imposition of noneconomic damage limitations when the parties chose to have their dispute arbitrated, or when the plaintiff refused the defendant's offer to arbitrate (see § 7).

[FN8]. See Sander v Geib, Elston, Frost Professional Ass'n (1993, SD) 506 NW2d 107, in which the court gave three reasons: (1) the plaintiff had notice before trial that the defendant intended to seek the benefit of the statute; (2) the statute involved only legal questions, and did not raise any issue of fact rebuttable by a plaintiff at trial; and (3) the defenses enumerated as affirmative in the statute might or might not be applicable in a particular case, but the medical malpractice damages cap applied in every such case.

[FN9]. See Taylor v United States (1987, CA9 Cal) 821 F2d 1428, 8 FR Serv 3d 674, cert den 485 US 992, 99 L Ed 2d 510, 108 S Ct 1300, 10 FR Serv 3d 714, in which the court held that there was no waiver of a statutory damage limitation in a medical malpractice action by failure to raise the issue before judgment, remarking that the statute limited but did not bar recovery for noneconomic damages, and if the Federal Rules of Civil Procedure did not require plaintiffs to plead the extent of damages sought, defendants should not be required to plead a limitation of damages. Although considering the question as one of state law, the court said it was not bound by an opinion of an intermediate state court, and FRCP 8(d) specified that averments as to the amount of damage which a defendant did not deny were not deemed admitted.

[FN10]. See 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, in which the court said that, while failure to set forth an affirmative defense in a defendant's responsive pleading frequently resulted in waiver, when the matter was raised in the trial court in a manner that did not result in unfair surprise, the technical failure to comply was not fatal. So long as the plaintiff was not prejudiced in its ability to respond, and since the issue of the applicability of the statutory cap on damages was purely a legal issue which could be resolved without the need for factual proof, the issue was not waived and was properly before the trial court.

[FN11]. See Taylor v United States (1987, CA9 Cal) 821 F2d 1428, 8 FR Serv 3d 674, cert den 485 US 992, 99 L Ed 2d 510, 108 S Ct 1300, 10 FR Serv 3d 714, in which the court recognized that application of a statutory damage limitation might in some instances require resolution of factual issues, and the plaintiff might be prejudiced if defendants did not raise the statute prior to judgment, mentioning that the application of a statutory damage limitation might depend on the portion of noneconomic damages awarded to the plaintiff attributable to professional negligence compared to a portion attributable to some other cause not limited by the statutory cap.

[FN12]. See 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, in which the United States, as a defendant in an action for medical malpractice under the Federal Tort Claims Act, both pleaded the cap in its second amended answer as a defense and set forth the cap as one of its contentions in a pretrial order. The court ruled that the plaintiffs had sufficient notice that the United States would rely on the state limitation of damages provision, and it did not matter that the cap was listed as a contention and not a disputed issue in the pretrial order.

[FN13]. Mercy Hospital, Inc. v Menendez (1979, Fla App D3) 371 So 2d 1077, cert den (Fla) 383 So 2d 1198 and app dismd without op (Fla) 383 So 2d 1198 and appeal after remand (Fla App D3) 400 So 2d 48, petition den (Fla) 411 So 2d 383, in which the plaintiffs were not provided with a pleading alleging the facts upon which the limitation of a statute limiting their recovery in a malpractice action was to be enforced, and the court said that on remand the defendant should file a pleading alleging the fact that it was a health care provider covered by the limitation and directly alleging the acts it had performed to meet the statutory conditions. The plaintiffs then had the right to respond within 10 days with an admission or denial, as in an answer to a complaint, and any issues thus raised would be determined by the court.

[FN14]. See Ingraham v United States (1988, CA5) 808 F2d 1075, 6 FR Serv 3d 1329, in which the court held that the benefit of a statutory limitation on medical malpractice damages was waived when the United States, defendant in a medical malpractice action under the Federal Tort Claims Act, failed to raise the statute until 3 months after

judgment. The court concluded that the plaintiffs would be prejudiced by the assertion of the statute at that time because they would have made a greater effort to prove medical expenses not limited by the statute, and to introduce evidence to support a constitutional attack, had it been raised at trial. The statute limiting medical malpractice damages at issue was later held invalid as applied to catastrophically injured plaintiffs (see § 14).

[FN15]. St. Anthony Medical Center, Inc. v Smith (1992, Ind App) 592 NE2d 732, transfer den (Aug 27, 1992).

[FN16]. See Taddiken v Florida Patient's Compensation Fund (1985, Fla) 478 So 2d 1058, 10 FLW 571, in which the malpractice plaintiff could not recover damages from the fund, deemed by the court to be in privity with the health care provider for the purpose of the statute of limitations applicable to medical malpractice actions.

[FN17]. Mays v United States (1986, CA10 Colo) 806 F2d 976, cert den 482 US 913, 96 L Ed 2d 673, 107 S Ct 3184; Kennedy v United States (1990, WD La) 750 F Supp 206.

[FN18]. See Atkins v Strayhorn (1990, 4th Dist) 223 Cal App 3d 1380, 273 Cal Rptr 231, in which the court said that it was proper to find that anticipated expenses and losses in the future would be incurred in a shorter period of time than the plaintiff's projected life expectancy as found by the jury, taking into account an immediate need for psychiatric care and for prosthesis, and the fact that mental suffering would probably be more acute in the initial years following the verdict.

[FN19]. See Atkins v Strayhorn (1990, 4th Dist) 223 Cal App 3d 1380, 273 Cal Rptr 231, involving a statute which provided that a plaintiff is entitled to prejudgment interest and may be entitled to a discretionary award of expert witness' fees and other costs when an offer of settlement is rejected by the defendant and the plaintiff obtains a more favorable judgment. For that purpose of that determination, periodic payments awarded to the plaintiff had to be reduced to present value, the court stating that the settlement offer, which was for a lump sum, must be compared to the present lump-sum monetary equivalent of what the plaintiff was awarded at trial.

[FN20]. See Fairfax Hosp. System, Inc. v McCarty (1992) 244 Va 28, 419 SE2d 621 (Va. Code § 8.01-35.1(A)), in which the court applied the rules determining the reduction of a judgment by a previous settlement with a joint tortfeasor to a structured settlement in which the minimum to be paid was beneath the statutory cap on damages recoverable in a medical malpractice action, but the total amount to be paid could exceed it.

[FN21]. See Bulala v Boyd (1990) 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, in which the court determined that when a mother and a child, each of whom had separate claims for medical malpractice subject to separate statutory caps, which had been settled as to one defendant but gone to trial against another, the amount of the credit against the judgments must be divided equally, and each judgment, after being reduced according to the statutory cap, should then be reduced in an equal amount by the settlement amount.

[FN22]. For example, see Vincent v Johnson (1992, Mo) 833 SW2d 859, decided under a statute limiting noneconomic damages recoverable for medical malpractice and providing that a verdict be reduced by the equitable share of the total obligation attributable to the settling party, specifying that apportionment by the jury was automatic, unless otherwise agreed to by the parties. The appellate court held that a trial court should not accept an agreement by the parties to waive apportionment by the jury unless there was agreement on all relevant matters, in an action including claims by an injured minor and her parents. There were actually two verdicts and two settlements, the court stating that the requirement that fault be apportioned by the court created chaos when the minor's

settlement had yet to be approved, and one of the defendants had already been released.

[FN23]. See LaMark v NME Hosp., Inc. (1989, La App 4th Cir) 542 So 2d 753, cert den (La) 551 So 2d 1334; Williams v Kushner (1988, La App 4th Cir) 524 So 2d 191, amd (La) 549 So 2d 294, where the court noted that although attorney's fees were owed under another statute, when it was proved that the patient's compensation fund failed to pay future medical care and related benefits, the fund was not governed by the insurance code, and the statute providing for punitive damages and attorney's fees on that basis was not applicable.

[FN24]. In a footnote, the court stated that in 1986 the statute was amended to limit both economic and noneconomic verdicts to a certain amount, but that the discussion and analysis with respect to the original statute was equally applicable to the amended statute.

[FN25]. In Brosseau, a case involving the issue of whether the state had waived its immunity to suit by the civilly committed mentally ill and the developmentally disabled for negligent care in state mental health facilities, the statement in Carson that there is a per se difference between governmental and private tortfeasors, referred to later in the report of the case, was questioned by two justices in a special concurrence.

[FN26]. For the court's analysis of the validity of the statute under the open courts guaranty, see § 6.

[FN27]. For the court's discussion of this issue, see § 25.

[FN28]. See Williams v Kushner (1989, La) 549 So 2d 294 (§ 9).

[FN29]. This holding was later reversed by statute, as stated in Martino v Sumrall (1993, La App 1st Cir) 619 So 2d 87, cert den (La) 621 So 2d 821 and Hampton v Greenfield (1991, La App 4th Cir) 576 So 2d 630, cert den (La) 581 So 2d 686, later proceeding (La App 4th Cir) 602 So 2d 327, affd in part and revd in part on other grounds (La) 618 So 2d 859, the legislature having amended the Public Malpractice Act so that the definition of persons covered by the Act included the state and any of its departments, including state hospitals. In another case decided before the statute was amended, Felice v Valleylab, Inc. (1987, La App 3d Cir) 520 So 2d 920, CCH Prod Liab Rep ¶ 11819, cert den (La) 522 So 2d 562 and cert den (La) 522 So 2d 563, the court held, based on the decision in Sibley, that a recovery against the LSU Medical School, which had been found directly and independently negligent in a medical malpractice action against several defendants, would not be subject to the limitation of the statute.

[FN30]. 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 (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 court upheld the constitutionality of a prior version of the statute, which limited all damages without an exception for medical expenses. Another earlier case, Williams v Lallie Kemp Charity Hospital (1983, La App 1st Cir) 428 So 2d 1000, cert den (La) 434 So 2d 1093, also upheld the constitutionality of that statute, finding that it did not violate the equal protection clauses of the state or federal constitution, and did not violate due process. The court also stated that the statute applied to actions against the state itself, although pointing out that the defendant charity hospital was not alleged nor found to be independently negligent, but was held liable for the unintentional torts of its health care provider employees.

[FN31]. The court noted that the legislature had amended the limitation of liability for the acts of persons who provide health care services on behalf of the state, La. R.S. § 40:1299.39, to provide that the limitation would not apply to reasonable medical and related expenses, and created a fund for the payment of those expenses, and as a means of satisfying a judgment or compromise, including an award of such expenses, and other related matters. The provisions of the act were expressly made applicable to pending litigation and pending claims, so that even if the malpractice plaintiff failed in avoiding or invalidating the statutory limitation, she was entitled to an amendment of the judgment awarding medical expenses in accordance with the statute.

[FN32]. The Louisiana Supreme Court had upheld the portion of the statute limiting recovery from the compensation fund in Williams v Kushner (1989, La) 549 So 2d 294, § 9, but had not yet upheld the validity of the limitation on recovery from a health care provider 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, § 8, at the time of decision.

[FN33]. Williams v Kushner (1989, La) 549 So 2d 294, § 9.

[FN34]. The action was denoted a medical malpractice case by the court, however, it involved a deceased patient. Later, the Texas Supreme Court, although it had invalidated the statute limiting medical malpractice damages at issue as applied to catastrophically injured malpractice victims 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 (§ 14), held that it could be validly applied in a wrongful death action in Rose v Doctors Hosp. (1990, Tex) 801 SW2d 841, rehg of cause overr (Jan 23, 1991) (§ 15).

[FN35]. A federal court held to the contrary 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, certifying the question of the validity of the statute under the state constitution to the Texas Supreme Court. Under the rational basis test, applicable because there was neither a suspect class nor a fundamental right at issue, there was a rational basis for the limitation of damages, said the court, and the legislature enacted the statute in an attempt to accomplish a legitimate purpose. The plaintiff failed to prove that there was no reasonable basis for the state legislature to conclude that the ceiling on recovery from certain institutions was not conceivably related to the availability and cost of malpractice insurance, and that such insurance and the distribution of medical care were not conceivably linked, the court concluded.

[FN36]. In a later case, the Texas Supreme Court, although it had invalidated the statute at issue limiting medical malpractice damages as applied to catastrophically injured malpractice victims 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 (§ 14), held that it could be validly applied in a wrongful death action in Rose v Doctors Hosp. (1990, Tex) 801 SW2d 841, rehg of cause overr (Jan 23, 1991) (§ 15).

[FN37]. Discussion of this issue is found in § 15.

[FN38]. See § 14.

[FN39]. See report of this case in § 9.

[FN40]. See 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, § 14.

[FN41]. In Brownsville Medical Center v Gracia (1985, Tex App Corpus Christi) 704 SW2d 68, writ ref n r e (Jul 16, 1986), the court held that the trial court did not err in refusing to reduce a wrongful death judgment based on medical malpractice pursuant to the Texas statute and in holding the damages limitation therein unconstitutional, observing that it had recently been held that the damages limitation was unconstitutional in Detar Hospital, Inc. v Estrada (1985, Tex App Corpus Christi) 694 SW2d 359 (§ 10[b]), however, Detar was not a wrongful death action. In Wheat v United States (1986, WD Tex) 630 F Supp 699, aff'd in part and rev'd in part on other grounds, 860 F2d 1256, the court refused to apply the Texas statute to limit a wrongful death action based on medical malpractice because it predicted that the statute would not be upheld by the Texas Supreme Court. That decision was upheld on appeal, the court relying on the invalidation of the statute in a catastrophically injured patient's medical malpractice action by the Texas court 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 (§ 14). In Mercy Hospital of Laredo v Rios (1989, Tex App San Antonio) 776 SW2d 626, writ den (Jun 13, 1990) and reh overr (Sep 6, 1990) and later proceeding (Oct 3, 1990), a medical malpractice action based on the wrongful death of a child, the court held that the trial court did not err in denying a motion for remittitur because the damages awarded by the jury were in excess of the statutory limit prescribed by Tex. Rev. Civ. Stat. Ann. art. 4590i, §§ 11.02, 11.03, and 11.04, also stating that the court in Lucas held that the limitation on medical malpractice damages was unconstitutional.

[FN42]. For a report of this case, see § 14.

[FN43]. On rehearing, 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 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 court observed that at the time the case was briefed and argued, there was a discrepancy between the treatment of medical expenses under the statute affecting health care providers acting on behalf of the state and their treatment under the statute governing qualified private health care providers. The judgment ceiling of the first statute, which was at issue in the case, formerly applied to medical expenses as well as other damages, whereas the judgment limitation of the private statute did not apply to medical expenses. The plaintiff argued, said the court, that cloaking the state with immunity from liability, when private tortfeasors were exposed to unlimited liability for medical costs, violated the prohibition of state immunity. Since the statute was amended after the case was submitted for decision, retroactively to exempt medical expenses from the limitation on general malpractice damages in suits against the state, that argument was rendered moot, the court concluded.

[FN44]. Since it was apparent from the face of the legislation in question that a discriminatory classification was created based on the degree of injury and damage suffered as a result of medical malpractice, the court declared that this intermediate test, a more stringent judicial inquiry than the reasonable basis test employed by the trial court, was called for.

[FN45]. The court stated that the sole evidentiary record was an affidavit by the state's director of insurance, which was conclusory in stating that the limitation provision was a response to the medical malpractice crisis indicated by increased premium rates and the unavailability of insurance carriers, and that the legislation was designed to stabilize the insurance market by providing a predictable level of recovery, while other matters contained in the affidavit cast considerable doubt on these conclusions. These included

the indication that although two insurance carriers were withdrawing from the malpractice field in the state, seven remained, one of which was offering to insure physicians left uninsured by the withdrawing insurers, and that medical malpractice insurance was available on a reasonably competitive basis. Other declarations in the affidavit, as to the problems of the primary malpractice insurance market vis-a-vis the reinsurance market which were due to extremely high losses from malpractice liability claims coupled with abnormally low earnings from investments, troubled the court by their clear implication that the "crisis" to which the legislation was a response resulted in part from economic fluctuations and resultant unsuccessful investment practices. The court was also troubled by the problem posed by the affidavit's statement that no malpractice judgment in the state had ever exceeded the recently enacted statutory limitation on medical malpractice claims.

[FN46]. An action for declaratory judgment, the case was brought by several health care providers against the director of insurance for the state, who had refused to implement the act on the basis that it was special legislation, and the granting of the credit of the state in aid of an individual, association, or corporation. The court stated that because the health care provider plaintiffs were entitled to the relief they sought (a declaration of the statute's validity), and because the defendant had standing to question some portions of the act, in order to avoid further litigation, an exception would be made to the rules of standing in favor of review of all the questions of constitutionality raised by the Director.

[FN47]. The statute also provided for the creation of a patient's trust fund, which could be sued by a medical malpractice claimant who had settled a claim with an insured health care provider for its policy limit in an amount less than the total recovery allowable. The court held that the provision for suit against the fund without a jury violated the state constitutional right to a jury trial, N.D. Const. § 7. The court also held that although some of the statute's provisions individually would not violate due process, the cumulative effect of the limitation of the application of the act to only one category of health care professionals, the arbitrary requirement of consent under conditions of duress, and statutory imposition of consent in emergencies, the limitation on the use of the doctrine res ipsa loquitur, and the near abolition of the collateral source doctrine, were violations of the right of medical patients to due process of law. The statute was, in respect to those matters, arbitrary, unreasonable and discriminatory, and the methods adopted had no reasonable relation to the attainment of the results desired, said the court.

[FN48]. See the report of this case in § 17[a].

[FN49]. In Reuwer v Hunter (1988, WD Va) 684 F Supp 1340, the court refused the malpractice defendant's motion to reduce the verdict in accordance with Va. Code § 8.01-581.15, stating that under the historical test traditionally applied in Seventh Amendment cases, the determination of damages was the role of the jury at common law, and history justified no distinction between the liability and remedy phases of the trial of a common-law action.

[FN50]. In Bair v Peck (1991) 248 Kan 824, 811 P2d 1176, the court considered the validity of an amendment to the medical malpractice reform statute abolishing the vicarious liability of covered employer health care providers, under the state constitutional right to a remedy by due course of law, Section 18 of the Kansas Bill of Rights. Holding that when legislation required modification, the proper test was whether the substitute remedy would have been sufficient if the modification had been a part of the original act, and if so, no additional quid pro quo was necessary to sustain it, the court said that statements to the contrary in Bell were disapproved. For the discussion in Bell of the validity of the statute limiting damages under Section 18 of the Kansas Bill of Rights, see § 20[b].

[FN51]. Bair v Peck (1991) 248 Kan 824, 811 P2d 1176 and Samsel v Wheeler Trans. Servs. (1990) 246 Kan 336, 789 P2d 541, 1990 Kan LEXIS 57 and (ovrld as stated in McKissick v Frye, 255 Kan 566, 876 P2d 1371, 1994 Kan LEXIS 100), which are not within the scope of this annotation.

[FN52]. In Mote ex rel. Mote v Satchell (1992, F DC Kan) 1992 US Dist LEXIS 20329, the court granted the motion of malpractice plaintiffs for a determination of law in advance of the settlement conference in the action that the Kansas Health Care Stabilization Fund was liable for malpractice damages up to $3 million per defendant, pursuant to the statements 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) (this subsection). The court observed that in Todd v Kelley (1992) 251 Kan 512, 837 P2d 381 (a case not within the scope of this annotation), the supreme court recognized that, pursuant to K.S.A. § 40-3403(e), the maximum liability of the fund for any one health care provider was $3 million.

[FN53]. In Bair v Peck (1991) 248 Kan 824, 811 P2d 1176, the court, considering the validity of an amendment to the medical malpractice reform statute abolishing the vicarious liability of covered employer health care providers, decided that the amendment did not diminish the substitute remedy to such a degree that it was no longer sufficient. Holding that when legislation required modification, the proper test was whether the substitute remedy would have been sufficient if the modification had been a part of the original act, and if so, no additional quid pro quo was necessary to sustain it under § 18 of the Kansas Bill of Rights, the court said that statements to the contrary in Bell were disapproved.

[FN54]. For the discussion in Wright, in which the court struck down a statutory provision which imposed a limitation on all damages recoverable in medical malpractice actions, as creating an arbitrary classification amounting to special legislation in violation of the equal protection provision of the Illinois Constitution, see § 17[b].

[FN55]. Some earlier cases had held to the contrary. In Jeanne v Hawkes Hosp. of Mt. Carmel (1991, Franklin Co) 74 Ohio App 3d 246, 598 NE2d 1174, motion gr, stay gr 61 Ohio St 3d 1401, 573 NE2d 676 and cause dismd 62 Ohio St 3d 1437, 579 NE2d 210, in addition to finding that the statute limiting the amount of noneconomic damages recoverable by a medical malpractice plaintiff violated the right to trial by jury guaranteed by Ohio Const. Art. I, § 5 (this section), the court held that the limitation violated equal protection under Ohio Const. Art. I, § 2, and the Fourteenth Amendment to the United States Constitution, in that it created a statutory classification without furthering a legitimate legislative objective, conferring a benefit on medical malpractice defendants and their insurers which was unavailable to other defendants in other tort cases, distinguished between living and deceased medical malpractice victims, the latter not being limited by the statute, and in imposing the cost of an intended public benefit entirely upon that fraction of individuals most severely injured by medical malpractice. In Duren v Suburban Community Hospital (1985) 24 Ohio Misc 2d 25, 495 NE2d 51, the court also held the Ohio statute unconstitutional, under both the equal protection and due process (this section) clauses of the state and federal constitutions, stating that the legislative scheme of shifting the responsibility for loss from one of the most affluent segments of society to those who are horribly injured or maimed was shocking to the conscience of the court. And in Simon v St. Elizabeth Medical Center (1976, CP) 3 Ohio Ops 3d 164, 355 NE2d 903 (disapproved on other grounds by Holaday v Bethesda Hospital (Hamilton Co) 29 Ohio App 3d 347, 29 Ohio BR 475, 505 NE2d 1003, the court declared in dicta that the provision of the Ohio Medical Malpractice Act limiting general damages in medical malpractice claims was violative of the equal protection guaranties of the United States and Ohio Constitutions, agreeing with the equal protection analysis of the Act made in Graley v Satayatham (1976, CP) 74 Ohio Ops 2d 316, 343 NE2d 832

(disapproved on other grounds by Holaday v Bethesda Hospital (Hamilton Co) 29 Ohio App 3d 347, 29 Ohio BR 475, 505 NE2d 1003, which the court said had held the provision of the act abolishing the collateral source rule unconstitutional in conferring benefits on the medical malpractice defendant that were unavailable to defendants in other tort cases, and rejecting the societal quid pro quo argument that some must give up their rights to damages so that all can achieve cheaper medical care.

[FN56]. See §§ 11 and 15 for treatment of the validity of a statute limiting recovery of medical malpractice damages as applied to wrongful death claims.

[FN57]. See Morris v Savoy (1991) 61 Ohio St 3d 684, 576 NE2d 765, § 23, for the court's decision that the statute was unconstitutional under the due process clause of the Ohio Constitution.

[FN58]. See § § 28-31 for cases considering the application of statutes limiting medical malpractice damages in these circumstances; see § 30 for California cases.

[FN60]. 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 held that while the statute would apply to bar a judgment for damages in excess of the statutory maximum based on either the malpractice of an individual health care provider or the vicarious liability of the Louisiana State University Hospital's Board of Governors, it did not bar more complete recovery based directly on the board's own negligence.

[FN59]. 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 (superseded by statute as stated in Martino v Sumrall (La App 1st Cir) 619 So 2d 87, cert den (La) 621 So 2d 821 (also reported in this section)), the court held that the liability cap did not apply to judgments rendered against the state itself.

[FN61]. See § 23 for the Ohio court's determination of the invalidity of the statute under the due process clause of the state constitution.

[FN62]. See § 23 for the Ohio court's determination of the invalidity of the statute under the due process clause of the state constitution.

[FN63]. See § 23 for the Ohio court's determination of the invalidity of the statute under the due process clause of the state constitution.

[FN64]. The court cited Kock v Government of Virgin Islands (1984, CA3 VI) 744 F2d 997, later proceeding (CA3 VI) 811 F2d 240, 6 FR Serv 3d 1122, § 34[a], for these propositions.

[FN65]. The previously reported case, Wiltshire v Government of Virgin Islands (1990, CA3 VI) 893 F2d 629.

[FN66]. See §§ 11 and 15 for the court's discussion of this issue; see § 14 for the court's invalidation of the statute as applied to the claims of the catastrophically injured under the open courts provision of the Texas constitution.

[FN67]. See Atkins v Strayhorn (1990, 4th Dist) 223 Cal App 3d 1380, 273 Cal Rptr 231, § 30[b], for a California case in which the court held that a patient alleging medical malpractice and his spouse alleging loss of consortium resulting from the injury to the patient were each entitled to recover the statutory maximum.

[FN68]. For the court's discussion of the equal protection issue, see § 10[a].

[FN69]. For the court's discussion of this issue, see § 31.

[FN70]. But see the court's discussion in § 31 as to the independent claim of a mother for mental suffering caused by the birth of a defective or stillborn child.

[FN71]. But see § 31 for Virginia cases holding that a mother's claim for mental suffering at the birth of a defective or stillborn child is not derivative of the child's claim.

[FN72]. But see Yates v Pollock (1987, 2nd Dist) 194 Cal App 3d 195, 239 Cal Rptr 383, § 30[a], for a California wrongful death action based on medical malpractice in which the court held that recovery for wrongful death was limited to the statutory limitation regardless of the number of wrongful death plaintiffs.

[FN73]. See Etheridge v Medical Center Hospitals (1989) 237 Va 87, 376 SE2d 525, § 29[c].

[FN74]. For the court's discussion of this issue, see the report of this case in § 30[a].

[FN75]. In support of the last element of damages recoverable by the mother, the court cited Modaber v Kelley (1986) 232 Va 60, 348 SE2d 233, 7 ALR5th 985, a case not within the scope of this annotation, stating that the case held that injury to a fetus under Virginia law constituted injury to the mother, and allowing recovery for mental suffering associated with stillbirth.

[FN76]. In Semsch v Henry Mayo Newhall Memorial Hosp. (1985, 2nd Dist) 171 Cal App 3d 162, 216 Cal Rptr 913, the court, without discussion, applied the percentage of comparative fault attributed to a malpractice plaintiff after reducing the verdict for noneconomic damages to the statutory limit. In McAdory, the court pointed out that in the Semsch Case, the court relegated its method of application of the statutory limitation to a footnote, indicating that the court may not have fully considered the ramifications of the approach it took, and in any event, the opinion would not be binding on the court.

[FN77]. For a case decided before comparative fault was adopted, see Flores v Natividad Medical Center (1987, 1st Dist) 192 Cal App 3d 1106, 238 Cal Rptr 24, in which the court held that when the state was found liable for failure to summon medical aid for a prisoner who had sued both the state and the doctors responsible for his care, the latter for medical malpractice, the state was liable to pay the entire balance of the damages after the application of the statutory limitation on damages recoverable against the health care providers, and its liability would not be limited to its proportionate share of the damages as found by the jury. The state argued that it was unfair to hold it liable for the entire balance when the exposure of the remaining medical defendants was limited by the Medical Injury Compensation Recovery Act, Cal Civ. Code § 333.2. The court pointed out that, under the principle of joint and several liability, the state's plight was no worse than that of any other nonmedical joint tortfeasor when concurrent defendants might be medical personnel able to claim the benefits of the statutory limitation on damages, and any unfairness resulting was similar to that faced by a defendant found proportionately responsible for a small percentage of the damages when joint tortfeasors were as a practical matter judgmentproof.

[FN78]. An earlier case, Semsch v Henry Mayo Newhall Memorial Hosp. (1985, 2nd Dist) 171 Cal App 3d 162, 216 Cal Rptr 913, applied comparative fault differently. Without discussion, the court deducted the percentage of comparative fault attributed to a malpractice plaintiff after reducing the verdict for noneconomic damages to the statutory limit. In Strayhorn, the court questioned whether the relationship between the statutory limitation and comparative fault principles was an issue squarely before the court in

Semsch, and also disagreed with the court's method of computing damages in that case, choosing to follow the holding in McAdory v Rogers (1989, 2nd Dist) 215 Cal App 3d 1273, 264 Cal Rptr 71, also reported in this section.

[FN79]. In Jelinek v St. Paul Fire & Casualty Ins. Co. (1994) 182 Wis 2d 1, 512 NW2d 764, the court noted that the statutory limitation on damages recoverable in a medical malpractice action found in Wis. Stats. §§ 655.017 and 893.55(4) had expired.

[FN80]. In Jelinek v St. Paul Fire & Casualty Ins. Co. (1994) 182 Wis 2d 1, 512 NW2d 764, the court noted that the statutory limitation on damages recoverable in a medical malpractice action found in Wis. Stats. §§ 655.017 and 893.55(4) had expired.

[FN81]. For a discussion of what patient claims against doctor, hospital, or similar health care provider are not subject to statutes specifically governing actions and damages for medical malpractice, see 89 ALR4th 887; for a discussion of what nonpatient claims against doctors, hospitals, or similar health care providers are not subject to statutes specifically governing actions and damages for medical malpractice, see 88 ALR4th 358.

[FN82]. Hoffman, in which the court applied the damages limitation but was not called upon to address the issue of its applicability, is reported in § 3[a].

[FN83]. See § § 10[b], 11, 14, and 15 for cases treating the validity of the Texas statute limiting damages recoverable in medical malpractice actions under the state constitution.

[FN84]. For discussion of the requirement of joining a patient's compensation fund as a party, see § 38.

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