NOTES

MEDICAL MALPRACTICE DAMAGE CAPS: NAVIGATING THE SAFE HARBORS

Since the initial recognition of the "tort crisis" in the mid 1970s, state legislatures have enacted a plethora of legislation designed to limit tort liability and reduce insurance premiums.[1] Much of the legislative reform has focused on medical malpractice liability.[2] In an effort to reduce medical malpractice litigation and minimize liability for health care institutions and professionals, states have enacted comprehensive statutes that employ various substantive and procedural modifications of the common law.[3] Several first generation statutes never survived initial judicial scrutiny.[4] Moreover, the effectiveness of statutes currently in place varies widely.[5]

Among the most frequently challenged provisions of these statutes are

1. Worker compensation schemes, no fault insurance, and medical malpractice statutes dominate the area of legislative responses to the "tort crisis." California and Florida, however, have enacted more comprehensive tort reform legislation.

2. In response to the mid-1970 crisis, 43 states enacted medical malpractice legislation. Bell, *Legislative Intrusions Into the Common Law of Medical Malpractice: Thought About the Deterrent Effect of Tort Liability*, 35 SYRACUSE L. REV. 939 n.1 (1984). "There has never been such dramatic and immediate response by the state legislatures to the pressure for any reform such as the reaction of all fifty state assemblies to the demands made by and on behalf of the medical profession in 1975." Fuller, *The Insurance Crisis in Medical Malpractice,* MEDICAL MALPRACTICE 10-1, 10-4 (Illinois Institute for Continuing Legal Education ed. 1975), *quoted in* Note, *Statutes Limiting Medical Malpractice Damages*, 32 FED'N INS. COUNSEL QU. 247 N.2 (1982) [hereinafter DAMAGES].

3. Some of the mechanisms employed include: screening panels, mandatory or non-binding arbitration provisions, abrogation of the collateral benefits rule, elimination of *ad damnum clause*, shortened statute of limitations, provisions clarifying informed consent, absolute damage limitations, modifications of *res ipsa loquitur*, limitations on attorney fees, damage limitations supplemented by state compensation funds, limitations on noneconomic damages, provisions requiring greater specificity in jury verdicts, periodic payments of damages and stricter physician licensing requirements. For a more complete discussion of legislative responses to the medical malpractice crisis, see Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, DUKE L.J. 1417 (1975); *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655 (1976).

4. *See e.g., infra* notes 74-106 and accompanying text.

5. In a six state case study of medical malpractice legislation by the United States General Accounting Office, only Indiana and California reported that their tort law modifications had helped to moderate insurance and general litigation costs. Certainly Indiana's scheme appears to be one of the more successful programs nationwide. United States General Accounting Office, *Medical Malpractice: Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reforms*, GAO/HRD-87-21 (December 1986).

those that limit damages recoverable in a medical malpractice action.[6] No consensus exists, though, among state courts regarding the constitutionality of these "caps" on damages.[7] One obvious reason for the inconsistency lies in different judicial perspectives regarding basic constitutional protections.[8] Special provisions unique to certain state constitutions, however, also play a role.[9] Another more basic reason for this lack of uniformity among state court decisions is that the capping methods employed in the statutes vary.[10] Hence, a capping provision that one state court finds unconstitutional may differ significantly from a damage limitation upheld in another state.

As more states enact comprehensive medical malpractice statutes[11] and other states scramble to fashion second generation statutes that will survive judicial scrutiny, the need to understand the constitutional parameters that state courts have set forth becomes paramount. This note focuses on the alternatives for limiting medical malpractice damages. Part I considers state court responses to the most frequently asserted challenges to medical malpractice damage caps: due process and equal protection violations. Part II evaluates the constitutionality of malpractice damage caps in light of a recent right of a jury trial challenge to the legislation. Part III then identifies the "safe harbors" remaining in the area of medical malpractice damage limitations and suggests which alternatives hold the greatest likelihood of surviving judicial scrutiny.

I. SCRUTINIZING MEDICAL MALPRACTICE DAMAGE CAPS UNDER DUE PROCESS AND EQUAL PROTECTION

State court cases dominate the decisions passing on the constitutionality of medical malpractice caps.[12] Although these decisions turn upon

6. For the purposes of this note, modifications of the collateral source rule and limitations on attorney's fees are omitted from the classification of "limitation on damages." Although such provisions ultimately affect a malpractice plaintiff's damage award, their inherent problems and operation are distinct from other more direct methods of damage limitation.

7. *See infra* text accompanying notes 52-106.

8. *Id.*

9. *See infra* notes 99-103 and accompanying text.

10. *See infra* notes 46-51 and accompanying text.

11. Missouri recently joined the ranks of states enacting comprehensive medical malpractice statutes. *See* MO. REV. STAT., §§ 334.102, 383.105, 383.110 *et. seq.*.

12. Federal court decisions in this area are rare. The Supreme Court dismissed Fein v. Permanente Medical Group for want of a substantial federal question. *See infra* notes 66-71 and accompanying text. Also, the Fourth Circuit recently struck down Virginia's cap on medical malpractice damages. *See infra* notes 104-122 and accompanying text.

equal protection and due process concerns of the federal Constitution, the state courts' analyses in these cases are not subject to federal appellate review.[13] State courts simultaneously base their decisions on state constitutional provisions analogous to the federal due process and equal protection provisions.[14] So long as the courts interpret state laws as offering *greater* protection than the federal Constitution, their decisions concerning equal protection and due process are not reviewable even by the Supreme Court.[15] This is true even if the analysis departs drastically from the due process and equal protection standards set forth by the Supreme Court. While a federal court may invalidate decisions upholding medical malpractice caps,[16] decisions finding caps unconstitutional are usually final. Consequently, state courts look to Supreme Court decisions for an analytical framework, but freely depart from traditional constitutional analysis when they wish to expand state constitutional protections.

A. Due Process: Framework and Analysis

Generally, state courts have adopted the Supreme Court's deferential approach[17] to economic regulation when reviewing malpractice caps. The Supreme Court has applied the "rational relationship" test to such legislation, holding that a provision's constitutionality depends on whether the means a legislature employs has a real and substantial relationship to the objective it seeks to attain.[18] Challenges to economic reg-

13. "The Supreme Court's jurisdiction over state cases is limited to the correction of errors related solely to questions of federal law. It cannot review state court determinations of state law even when the case also involves federal issues." Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 n.80 (1977) [hereinafter STATE CONSTITUTIONS].

14. Justice Brennan suggests that state courts may base their decisions solely on state law grounds in anticipation of contrary rulings by the Supreme Court. STATE CONSTITUTIONS, *supra* note 13 at 501.

15. STATE CONSTITUTIONS, *supra* note 13 at 501. Of course, the Supreme Court could conceivably grant certiorari to clarify a state court's interpretation of federal constitutional protections. A finding of unconstitutionality under a *state* constitution, however, would stand. Furthermore, states are free to extend greater constitutional protection than the federal constitution provides.

16. Of course, a federal court could only do so if a state court afforded *less* Constitutional protection than the federal court felt the federal Constitution provides.

17. The Supreme Court has not invalidated an economic regulation on substantive due process grounds since 1937 except in Morey v. Doud, 354 U.S. 457 (1957). The Court overruled that decision in New Orleans v. Dukes, 427 U.S. 297 (1976).

18. Nebbia v. New York, 291 U.S. 502, 525 (1934). *See also* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) (restating the test as: reasonable in relation to subject and interest of the community).

ulation on traditional due process grounds have fared poorly before the Supreme Court. State courts generally have viewed due process challenges to medical malpractice caps on this theory with similar skepticism.[19]

State courts have not, however, swept away all challenges made through the peripheral due process theory of quid pro quo.[20] Under this theory, legislation that takes away a common law right without granting a reciprocal right or benefit is unconstitutional. Although the Supreme Court has never invalidated a statute on the quid pro quo theory,[21] state courts seem unwilling to summarily dismiss any quid pro quo challenge.[22] Several courts have concluded that medical malpractice caps do provide a "societal" quid pro quo.[23] Alternatively, other courts have rejected claims that damage limitations offer a "societal" quid pro quo, but have proceeded to invalidate a statute on other grounds.[24]

In *Baptist Hospital of Southeast Texas v. Baber*[25] the Texas Supreme Court suggested that although the absence of a quid pro quo does not render a statute unconstitutional, it is a factor to consider in determining a statute's validity.[26] Here, the court found no quid pro quo and invalidated the state's medical malpractice cap on equal protection grounds.[27] The New Hampshire Supreme Court, in *Carson v. Mauer*, noted that a limitation on medical malpractice damages lacks the quid pro quo found

19. *E.g.*, Johnson v. Saint Vincent Hospital, Inc., 273 Ind. 374, 404 N.E.2d 585, 598 (1980).

20. The *quid pro quo* theory originated in dicta by the Supreme Court in New York Central R.R. Co. v. White, 243 U.S. 188 (1917). In upholding a challenge to New York's worker compensation law, the Court intimated that due process requires a legislature to supply a "reasonably just substitute" whenever it abolishes a common law right, 243 U.S. at 200-01.

21. The Court avoids ruling on quid pro quo validity. Instead, it usually observes that the statute in question *does* provide a quid pro quo. DAMAGES, *supra* note 2 at 258.

22. *But see* Jones v. State Board of Medicine, 97 Idaho 859, 869, 555 P.2d 399, 409 (1976) (holding that *no* additional quid pro quo test applies to statutes altering common law doctrine); State ex rel. Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978) (refusing to adopt quid pro quo).

23. In Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977), the Court rejected the quid pro quo theory, yet found that promoting affordable malpractice insurance helped ensure that plaintiffs could collect judgments. 199 Neb. at 121. In Fein v. Permanente Medical Group, 38 Cal.3d 137, 695 P.2d 665 (1985) the California Supreme Court found that preserving "a viable medical malpractice insurance industry" was enough to satisfy quid pro quo if it were necessary. 38 Cal.3d at 160, n.18, 695 P.2d at 681-83.

24. *See* Wright v. Central Du Page Hospital Ass'n, 63 Ill.2d 313,328, 347 N.W.2d 736, 742 (1976); Simon v. St. Elizabeth Medical Center, 3 Ohio Op.3d 164, 172, 355 N.E.2d 903, 910 (1976).

25. 672 S.W.2d 296, 298 (Tex. App. 9 Dist. 1984).

26. *Id.* at 298.

27. *Id. See also infra* notes 74-78 and accompanying text.

in worker's compensation statutes.[28] The court, however, relied upon equal protection analysis to invalidate the state's cap.[29] This decision casts some uncertainty on the significance of the absent quid pro quo[30] under due process analysis.

Even though most courts do not totally disregard quid pro quo arguments, the questionable "emphasis" placed on the doctrine by the Texas and New Hampshire courts leaves the constitutional status of the quid pro quo in doubt. Hence, state courts will not likely strike down medical malpractice caps through quid pro quo due process analysis.[31]

B. Equal Protection

Equal protection challenges to medical malpractice caps generate the greatest debate. All but two courts that have struck down medical malpractice damage caps have relied primarily on equal protection analysis.[32] Although state courts employ the Supreme Court's framework for equal protection analysis, the courts that invalidate caps invariably engage in greater juridical scrutiny of economic or social welfare legislation than does the Supreme Court.[33]

1. The Supreme Court's Framework

When faced with an equal protection challenge to economic or social welfare legislation, the Supreme Court demands that legislation treat similarly those who are similarly situated with respect to the purpose of a law.[34] Generally, the Court applies a "rational basis" test. Using this highly deferential mode of analysis, the Court focuses solely on the

28. 120 N.H. 925, 943 (1980) (*quoting* Wright v. Central Du Page Hospital Ass'n 63 Ill.2d 313, 347 N.E.2d 736).

29. 120 N.H. at 943-44. The court intermingled its discussion of equal protection and quid pro quo in a manner that makes it difficult to determine *what* role quid pro quo played in its decision.

30. *See* DAMAGES, *supra* note 2 at 258 (indicating that the court did in fact apply quid pro quo analysis).

31. One commentator suggests providing a quid pro quo when designing a cap on damages. *See* Comment, *Medical Malpractice: Constitutional Implications of a Cap on Damages*, 6 N. ILL. U. L. REV. 61, 86-87 (1986).

32. Illinois struck down a medical malpractice cap on state constitutional grounds. *See infra* notes 99-103 and accompanying text. The Fourth Circuit struck down Virginia's medical malpractice cap as violative of the right to a jury trial. *See infra*, notes 108-121 and accompanying text.

33. "When social or economic legislation is at issue, the Equal Protection Clause allows the states wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process," City of Cleburne v. Cleburne Living Center, 473 U.S. 432, (1985).

34. Tussman and tenBroek, *The Equal Protection of Laws*, 37 CALIF. L. REV. 341, 346 (1949).

means a legislature uses to achieve a presumed legitimate goal.[35] Thus, if a legislature could rationally expect that the classifications a law creates will accomplish its goals, the legislation is constitutional.

If legislation classifies individuals through a "suspect" criterion[36] or affects a fundamental interest,[37] the Supreme Court subjects it to "strict scrutiny".[38] To survive strict scrutiny a statutory classification must be *necessary* to achieve a *compelling* state interest.[39] At this level of scrutiny, the Court examines not only the validity of a legislature's goals but also the means employed to achieve those goals.[40]

Between the extremes of the "rational basis" and "strict scrutiny" test the Supreme Court has occasionally utilized an "intermediate" level of review. Generally stated, intermediate scrutiny requires that a statutory classification be *substantially* related to an *important* government interest.[41] The test originally emerged in instances of sex based classifications,[42] and the Court has applied it in very narrow circumstances.[43] In effect, the means scrutiny of the rational relationship test is elevated to "substantially related", without subjecting the government's purpose to the demanding requirements of "strict scrutiny."

2. *Characteristics of Medical Malpractice Statutes*

Equal protection analysis ensures that a law does not unconstitutionally discriminate between classifications of individuals. Most often, parties challenge medical malpractice caps by asserting that the caps favor a

35. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

36. If a statute classifies by race, alienage, or national origin, the Court invokes the strict scrutiny test. *See City of Cleburne*, 473 U.S. at 440.

37. The interests that the Court has found "fundamental" are: voting, *see* Dunn v. Blumstein, 405 U.S. 330, 336 (1972); travel, *see* Shapiro v. Thompson, 349 U.S. 618, 629-30 (1969); and marriage, *see* Loving v. Virginia, 388 U.S. 1, 12 (1967).

38. *City of Cleburne*, 473 U.S. at 440.

39. Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L. J. 1071, 1074 (1974). Professor Gunther notes that the "strict scrutiny" standard is almost impossible to meet, characterizing it as " 'strict' in theory and fatal in fact," Gunther, The Supreme Court, 1971 Term—*Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

40. Commentators generally refer to this dichotomy as the "two-tier" approach. Gunther, *supra*, note 39 at 8.

41. Craig v. Boren, 429 U.S. 190, 197 (1976).

42. Frontiero v. Richardson, 411 U.S. 677 (1973).

43. The Court applied the test to gender, alienage, and illegitimacy cases. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-31, at 1090 (1978).

particular class in at least one of the following ways: (1) medical malpractice victims with moderate damages enjoy full recovery, while medical malpractice victims with damages above the cap do not; (2) plaintiffs in medical malpractice actions are entitled only to limited recovery, while plaintiffs in all other tort actions may receive full compensation for damages; or (3) defendants in medical malpractice actions enjoy limited liability, while defendants in all other tort actions do not receive such protection. Generally, courts have concentrated on the classification between low-damage victims and high-damage victims.[44] This disparity in treatment causes courts the most concern.[45]

The caps on damages that create these classifications take several different forms. The most extreme cap is an absolute limitation on the amount of damages a successful plaintiff can recover.[46] A variation on this scheme sets the maximum amount for which a health care provider may be held liable, and then supplements the jury verdict through a state patient compensation fund.[47] Some states also place a statutory limit on the amount payable to injured plaintiffs from the fund.[48] Under these circumstances, the effect of a damage limitation is no different than an absolute cap. Other legislatures, however, place no such limitation on

44. Courts may *recognize* inequities between other classifications, but the caps' constitutionality usually turn on the "high cost victim"—"low cost victim" dichotomy. *See* Fein v. Permanente Medical Group, 38 Cal.3d 137, 162, 695 P.2d 665, 683 (1985) (emphasizing *no* discrimination within victim class); Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 788 (Fla. 1985) (emphasizing *no* discrimination within victim class); Carson v. Maurer, 120 N.H. 925, 941, 424 A.2d 825, 837 (1980) (emphasizing distinction between patient classes); Arneson v. Olsen, 270 N.W.2d 125, 135 (N.D. 1978) (emphasizing distinction between patient classes); Baptist Hospital of Southeast Texas, Inc. v. Baber, 672 S.W.2d 296, 298 (Tex. Civ. App. 1984) (emphasizing distinction between patient classes), writ of error revoked, 717 S.W.2d 310 (Tex. 1986); State ex rel. Strykowski v. Wilkie, 81 Wis.2d 491, 513, 261 N.W.2d 434, 444 (1978) (emphasizing *no* distinction within patient class). *But see* Johnson, v. Saint Vincent Hospital, Inc., 273 Ind. 374, 400, 404 N.E.2d, 585, 601 (1980) (upholding classification between patient classes and tort-feasors); Prendergast v. Nelson, 199 Neb. 97, 114-115, 256 N.W.2d 657, 669 (1977) (upholding classification between patient classes *and* tort-feasors).

45. *See supra* note 42.

46. *See* IDAHO CODE § 39-4204 (1975) (repealed 1981); ILL. REV. STAT. ch. 70, para. 101 (1975); NEB. REV. STAT. § 44-2825 (1985). Texas' statute placed an absolute cap on damages, TEX. REV. CIV. STAT. ANN. art. 4590(i), § 11.01 (Vernon 1987), but also included a provision for a non-economic cap should the absolute cap be struck down. TEX. REV. CIV. STAT. ANN. art. 4590(i), § 11.03 (Vernon Supp. 1987). Also, the Texas provision did *not* cap past and future medical expenses.

47. *See* FLA. STAT. ANN. § 768.54 (West Supp. 1986).

48. *See* IND. CODE ANN. § 16-9.5-2-2 (Burns Supp. 1985). Wisconsin's patient compensation fund includes a cap in the event that the fund becomes depleted. WIS. STAT. § 655.27(6) (1977).

compensation fund reimbursements.[49] Thus, successful plaintiffs only suffer the inconvenience of payment under the compensation fund's terms rather than the hardship of incomplete compensation. Finally, some medical malpractice statutes limit only the amount of non-economic damages recoverable by a successful plaintiff.[50] This type of cap affects only the plaintiff's right to compensation for pain, suffering, and "intangible" losses.[51] Hence, the hardship a medical malpractice victim suffers because of damage caps varies significantly according to the type of cap implemented.

3. State Court Analysis Under Equal Protection

No court has employed strict scrutiny to invalidate a cap on medical malpractice damages.[52] The affected classes do not display the traditional suspect criterion that triggers the use of strict scrutiny. In addition, courts rely on the Supreme Court's pronouncement in *Munn v. Illinois*[53] that individuals have no property or vested interest in any rule of common law. Without such an interest, individuals cannot claim full recovery as a fundamental right. Caps on damages, therefore, do not affect a fundamental right. As a result, the lack of a suspect class or fundamental interest makes strict scrutiny inapplicable.

State courts have, however, applied both the "rational basis" test and intermediate scrutiny to medical malpractice caps. The test a court chooses often determines the statute's fate.[54] Applying the rational basis test generally results in a finding of constitutionality, while applying intermediate scrutiny often results in its constitutional demise.

a. rational basis

Every state court that has applied the rational basis test to medical malpractice caps has found them constitutional. In *Johnson v. Saint Vincent's Hospital*[55] the Indiana Supreme Court upheld a patient compensa-

49. *See supra* note 47.

50. CAL. CIVIL CODE § 3333.2 (Deering 1982).

51. Fein v. Permanente Medical Group, 38 Cal.3d 137, 157 n.13, 695 P.2d 665, 679 n.13 (1985).

52. *But see infra* text accompanying notes 74-78.

53. 94 U.S. 113, 134 (1877). Courts also invoke the *Munn* doctrine in due process analysis of medical malpractice caps.

54. DAMAGES, *supra* note 2 at 253. This statement, however merits qualification. *See infra* note 131.

55. 273 Ind. 374, 404 N.E.2d 585 (1980).

tion scheme that limited damages to $500,000.[56] The court found that the goal of preventing a reduction in health care services is rationally served by limiting damages, because victims' actual recoveries might be substantially less if health care providers are uninsured.[57]

Similarly, the Nebraska Supreme Court held in *Prendergast v. Nelson*[58] that malpractice caps are rationally related to the goals of ensuring the availability of health care and reasonably priced malpractice insurance.[59] The court emphasized that under common law a victim does not enjoy the assured $500,000 recovery fund that the state's malpractice act provides.[60] The courts' rationales in *Johnson* and *Prendergast* assume that medical malpractice costs drive health care providers into insolvency and leave successful plaintiffs with unenforceable judgments. Hence, these courts believed that preventing the reduction of health care services also serves the interests of potential medical malpractice victims.[61]

The Wisconsin, Florida, and California supreme courts also have applied the rational basis test to medical malpractice caps. The caps in these statutes, however, do not absolutely limit all damages recoverable. In *State ex rel Strykowski v. Wilkie*[62] the Wisconsin Supreme Court applied the rational basis test to a patient compensation fund that paid awards in excess of $200,000.[63] Because this statute only limited dam-

56. 273 Ind. at 401, 404 N.E.2d at 602. Indiana's statutory scheme limits health care provider liability to $100,000 per occurrence, IND. CODE § 16-9.5-2-2(b) and the total recovery for death or injury to a patient to $500,000. IND. CODE § 16-9.5-2-2.

57. 273 Ind. at 398, 404 N.E.2d at 600. The court noted that it could only deal with probabilities in evaluating the rationality of limiting medical malpractice recoveries. It noted that if insurance were unavailable, health care providers would have to pay, and the likelihood that they could pay more than $500,000 was doubtful. Furthermore, even if insurance is available, sky-rocketing rates may cause a health care provider to forgo the risk of a lawsuit and not obtain insurance. They suggested that even an *insured* health care provider may carry limited coverage, and there is always the chance that the *insurer* could go bankrupt. Hence, the Indiana Supreme Court concluded that even without the statute, a malpractice victim encounters tremendous uncertainty as to whether he or she will be compensated fully. *Id.*

58. 199 Neb. 97, 256 N.W.2d 657 (1977).

59. 199 Neb. at 112, 256 N.W.2d at 667.

60. 199 Neb. at 115, 256 N.W.2d at 669. Nebraska's damage cap is substantially the same as Indiana's (*see supra* note 48). NEB. REV. STAT. § 44-2825.

61. This must be the assumption if the courts' reasoning is to be persuasive. Otherwise, the courts' rationale only explains the rationality of the caps in relation to a goal of protecting medical malpractice victims rather than the stated goals. *See supra* text accompanying note 59.

62. 81 Wis.2d 491, 261 N.W.2d 434 (1978).

63. 81 Wis.2d at 508, 261 N.W.2d at 442.

ages in the event that the fund fell below a certain level,[64] the compensation fund easily satisfied the rational basis test.[65] The Florida Supreme Court applied a similar rationale to its state compensation fund in *Florida Patient Comp. v. Von Stetina*.[66] As the statutory scheme merely *transferred* liability for judgments over $100,000 from individual health care providers to a patient compensation fund, it satisfied the rational relationship test.[67]

In *Fein v. Permanente Medical Group*, the California Supreme Court held that a cap on noneconomic medical malpractice damages was rationally related to the goals of reducing insurance costs and eliminating nonmeritorious claims.[68] Since noneconomic damages often offer an incentive to pursue frivolous actions, the court reasoned, limiting noneconomic damages would prevent nonmeritorious claims from depleting the resources available for the most needy victims.[69] By sacrificing noneconomic damages, insurance costs are reduced, health care providers can obtain adequate coverage, and victims of medical malpractice face less difficulty in collecting damages.[70]

The United States Supreme Court enforced the California Supreme Court's decision in *Fein* by dismissing the case for want of a substantial federal question.[71] This strengthens the claim that noneconomic damage caps "sufficiently the same" as California's are valid under the federal constitution.[72] The Supreme Court's ruling does not, of course, necessarily govern the constitutionality of such a cap under *state* law.[73]

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64. This provision would have taken effect if the fund fell below a $2,500,000 level in any one year, or below a $6,000,000 level for any 2 consecutive years. WIS. STAT. ANN. § 655.27(6).

65. 81 Wis.2d at 511, 261 N.W.2d at 444. The court refrained from addressing whether a $500,000 cap on awards would be constitutional *if* the fund were depleted, since the plaintiff had no standing to raise the issue. *Id.*

66. 474 So.2d 783 (Fla. 1985).

67. 474 S.2d at 788-89. The court noted that it was not passing on the question of the plaintiff's rights should the fund fall into insolvency, or place a limit on recovery. 474 So.2d at 789.

68. 38 Cal.3d 137, 695 P.2d 665 (1985).

69. 38 Cal.3d at 159-163, 695 P.2d at 680-83.

70. 38 Cal.3d at 163, 695 P.2d at 683.

71. 106 S.Ct. 214 (1985).

72. The Supreme Court considers such a dismissal to be an adjudication on the merits, although its precedential effect only applies to subsequent issues that are "sufficiently the same." Hicks v. Miranda, 422 U.S. 332 (1975). *See also* Comment, *California's Statutory Limit on Recovery of Noneconomic Damages in Medical Malpractice Actions Does Not Violate Equal Protection*, 64 WASH. U.L.Q. 645 (1986).

73. *See supra* notes 12-15 and accompanying text.

b. intermediate scrutiny

State courts that have invalidated medical malpractice caps on equal protection grounds have generally applied some heightened standard of review. It is not always apparent, however, exactly what level of scrutiny a court is applying. It is simply not clear, for example, what test the Texas Supreme Court applied in *Baptist Hospital of Southeast Texas v. Baber*.[74] Although the court recognized that equal protection analysis usually involves strict scrutiny or the rational basis test,[75] the court struck down the state's $300,000 cap without clarifying which test it was applying. The court concluded the limit[76] did nothing to compensate seriously injured victims or eliminate frivolous claims.[77] While apparently applying what appears to be a rational basis test, however, the court adopted the North Dakota Supreme Court's *intermediate scrutiny* rationale.[78]

In *Simon v. St. Elizabeth Medical Center*,[79] the Ohio Supreme Court applied some brand of heightened scrutiny to a cap on medical malpractice damages—its analysis bordering on strict scrutiny. In *Simon* the court relied on its earlier decision in *Graley v. Satayatham*[80] to strike down an absolute cap on damages. The court objected to the statute's special protection of the medical profession and reduction of accountability for health care providers.[81] It concluded that "no compelling governmental interest" existed that could legitimize withholding full compensation from an injured party.[82] The search for a "compelling governmental interest," however, is traditionally limited to strict scrutiny analysis.[83] Thus, like the Texas Supreme Court, the Ohio Supreme

74. 672 S.W.2d 296 (Tex. Civ. App. 1984), *writ of error revoked*, 717 S.W.2d 310 (Tex. 1986).

75. 672 S.W.2d at 298.

76. The cap limited all but medical and custodial damages. TEX. REV. CIV. STAT. ANN. art. 4901, § 11.02 (Vernon 1984).

77. 672 S.W.2d at 298.

78. Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978). "[T]he limitation of recovery does not provide adequate compensation to patients with meritorious claims; on the contrary, it does just the opposite for the most seriously injured claimants. It does nothing toward the elimination of nonmeritorious claims." *Id.* at 135-36.

79. 3 Ohio Op.3d 164, 355 N.E.2d 903 (Ct. Com. Pl. 1976).

80. 74 Ohio Op.2d 316 (Ct. Comm. Pl. 1976).

81. 3 Ohio Op.3d at 172, 355 N.E.2d at 911 (quoting Graley v. Satayatham, 74 Ohio Op.2d at 320).

82. 3 Ohio Op.3d at 172, 355 N.E.2d at 911.

83. *See* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1088-90 (1969).

Court emphasized the seeming inequity of limiting full recovery rather than applying a formal framework of equal protection analysis.

The North Dakota and New Hampshire supreme courts, however, have clearly articulated an intermediate level of scrutiny for analyzing medical malpractice caps. In *Arneson v. Olson*[84] the North Dakota Supreme Court concluded that the state's $300,000 limitation on overall medical malpractice damages failed to provide compensation for meritorious claims and was ineffective in limiting nonmeritorious claims.[85] The court also implied that no medical malpractice crisis existed in North Dakota,[86] and noted how low the cap was in comparison to other states.[87] Given these considerations, the statute could not "bear a reasonable relationship to a legitimate government interest."[88]

In *Carson v. Maurer*[89] the New Hampshire Supreme Court looked to whether the state's medical malpractice cap bore a "fair and substantial relation" to legitimate legislative objectives. The court applied North Dakota's rationale for striking down the absolute cap in *Olson*[90] to invalidate a cap on noneconomic damages. Apparently, the New Hampshire Supreme Court considered noneconomic damages an integral part of the "adequate compensation"[91] the *Olson* court sought to ensure.[92]

One state court that had used intermediate scrutiny to analyze a cap on medical malpractice damages appears to have reconsidered the propriety of employing heightened constitutional analysis. In *Jones v. State Board of Medicine*[93] the Idaho Supreme Court utilized a "means focus"[94] test to examine a $300,000 cap on medical malpractice damages.[95] The court seriously questioned whether a medical malpractice crisis existed in

84. 270 N.W.2d 125 (N.D. 1978).

85. *See supra* note 78.

86. 270 N.W.2d at 136.

87. *Id.* at 135.

88. *Id.* (setting forth the appropriate standard for equal protection review).

89. 120 N.H. 925, 424 A.2d 825 (1980).

90. *See supra* note 78.

91. 270 N.W.2d at 135.

92. 120 N.H. at 942, 424 A.2d at 837. The court emphasized that non-economic damages are the only vehicle through which courts may compensate medical malpractice victims, "for the pain, suffering, physical impairment or disfigurement that the victim must endure until death." *Id.*

93. 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977).

94. *Id.* The court borrowed Professor Gunther's "means focus" test of whether the legislative means substantially furthers some specifically identifiable legislative end. Gunther, *In Search of Evolving Doctrine on the Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

95. IDAHO CODE § 39-4204 (1975) (repealed 1981).

Idaho, but refrained from passing on the cap's constitutionality. Rather, the court remanded with instructions to scrutinize the cap in light of a heightened standard of review.[96] A later ruling by the Idaho Court of Appeals, however, departed from the *Jones* ruling. In *Packard v. Joint School District No. 171*[97] the Idaho Court of Appeals announced that the rational basis test was the appropriate level of scrutiny for evaluating a $100,000 damage cap under the Idaho Tort Claims Act.[98] Hence, the exact status of intermediate scrutiny in Idaho remains unclear.

Only one state court has invalidated medical malpractice caps on grounds other than equal protection.[99] In *Wright v. Central Du Page Hospital Association*,[100] the Illinois Supreme Court found a $500,000 cap on damages in medical malpractice actions violative of a state constitutional provision against "special legislation."[101] Although a lower court had declared that the cap violated equal protection,[102] the Illinois Supreme Court based its decision almost exclusively on state constitutional grounds.[103]

Although courts do not adhere to a uniform level of equal protection scrutiny in striking down malpractice caps, their objections to damage limitations are quite consistent. Several courts are concerned that medical malpractice can subsidize health care providers at the expense of severely injured malpractice victims.[104] The harshness of allowing empirically ascertainable injury to pass unredressed offends the sensibilities of many courts.[105] Furthermore, state courts often voice skepticism

96. 97 Idaho at 870, 555 P.2d at 410. On remand, the district court found the limitation unconstitutional. Jones v. State Board of Medicine, Nos. 55527 and 55586 (4th Dist. Idaho, Nov. 3, 1980).

97. 104 Idaho 604, 661 P.2d 770 (Idaho App. 1983).

98. 104 Idaho at 607, 661 P.2d at 773. The court felt that *Jones* "unduly narrowed the 'rational basis' standard of equal protection in Idaho." *Id.* Significantly, the court held that the $100,000 cap on recovery for personal injury or wrongful death actions was constitutional. 104 Idaho at 609, 661 P.2d at 775.

99. A *federal* district court, however, recently invalidated a medical malpractice damage cap on jury trial grounds. *See infra* notes 107-126 and accompanying text.

100. 63 Ill.2d 313, 347 N.E.2d 736 (1976).

101. ILL. CONST. art. IV, § 13.

102. 63 Ill.2d at 330, 347 N.E.2d at 744.

103. 63 Ill.2d at 321. The court discussed whether the malpractice cap provided a *quid pro quo*, but did not rely on this analysis in its holding.

104. *See* Carson v. Mauer, 120 N.H. at 942, 424 A.2d at 837; Arneson v. Olson, 270 N.W.2d at 136; Simon v. St. Elizabeth Medical Center, 3 Ohio Op.3d at 172, 355 N.E.2d at 911 (quoting Graley v. Satayatham, 74 Ohio Op.2d at 320).

105. *See* Arneson v. Olson, 270 N.W.2d at 135; Simon v. St. Elizabeth Medical Center, 3 Ohio Op.3d at 172, 355 N.E.2d at 911 (quoting Graley v. Satayatham, 74 Ohio Op.2d at 320); *Baber*, 672 S.W.2d at 298.

as to whether a medical malpractice crisis even *exists* in their state.[106] As a result, damage limitations that minimize these concerns and avoid the disparities noted under equal protection analysis display a much greater potential for surviving judicial scrutiny.

II. SCRUTINIZING MEDICAL MALPRACTICE DAMAGE CAPS UNDER THE RIGHT TO A JURY TRIAL

A novel approach to scrutinizing medical malpractice caps involves the examination of their effect on a plaintiff's right to a jury trial. In *Boyd v. Bulala*[107] the United States District Court for the Western District of Virginia announced that an absolute cap on medical malpratice damages interfered with a plaintiff's federal and state right to a jury trial and was, therefore, constitutionally invalid.[108] Not only is *Boyd* the first case to invalidate a statute on this basis,[109] but it is also the only federal case speaking to the issue of caps on medical malpractice damages.[110]

The District Court in *Boyd* rejected due process and equal protection challanges to Virginia's $750,000 cap on medical malpractice damages.[111] The court, however, did not so easily dismisss the plaintiff's jury trial challenge to Virginia's malpractice cap. The court noted that the

106. *See* Jones v. State Board of Medicine, 97 Idaho at 871-76; Arneson v. Olson, 270 N.W.2d at 136. *But see* Wright v. Central Du Page Hosp. Ass'n, 63 Ill.2d at 334, 347 N.E.2d at 746 (Underwood, J., dissenting) ("Theory, fact and fiction are well-nigh inextricably intermingled. Despite this, it is clear that serious problems do exist."); Simon v. St. Elizabeth Medical Center, 3 Ohio Op.3d at 172, 355 N.E.2d at 911 ("There is no doubt that the plethora of medical malpractice suits represents a crisis situation.")

107. 647 F. Supp. 781 (W.D. Va. 1986), *reh'g denied*, 672 F. Supp. 915 (W.D. Va. 1987) (motion for reconsideration brought by Commonwealth of Virginia).

108. *Id.* at 789.

109. In Johnson v. Saint Vincent's Hospital the Indiana Supreme Court disregarded a plaintiff's jury trial challenge. The court reasoned that an absolute cap on patient compensation fund reimbursement does not interfere with the jury's determination of damages. Rather, the cap simply apportions the verdict as to how much the compensation fund will pay. 273 Ind. 374, 400-01, 404 N.E.2d 585, 601-02. The court also noted that the cap does not purport to predetermine factually what damages are appropriate; the *policy* of the act limits awards to $500,000. *Id.*

110. Of course, the Supreme Court's dismissal of *Fein* for want of a substantial federal question, 106 S.Ct. 214 (1985) does carry some precedential weight, but *Boyd* is the first case to develop the issue in detail.

111. 647 F. Supp. at 787-88. The District Court rejected the notion that quid pro quo provides a basis for stricter due process scrutiny. 647 F. Supp. at 786. The court also felt that the Supreme Court's decision in Duke Power v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978), that damage caps do not violate equal protection controlled. 647 F. Supp. at 786.

right to a jury trial prevails in federal diversity cases.[112] Because the seventh amendment of the U.S. Constitution prohibits any interference with a jury's ultimate determination of factual questions,[113] the Court has held that it is solely the jury's province to decide questions of liability and the extent of injury by assessing damages.[114]

The district court assumed that a court can only enforce a damage limitation by instructing the jury of the limitation,[115] or by refusing to enter a judgment that exceeds the statutory limit.[116] Either method, the court concluded, infringes on the fact finding role that the jury serves in assessing damages.[117] The damage cap therefore, infringes on the seventh amendment right to a jury trial.[118] Because the Virginia constitution's right to a civil jury[119] is substantially the same as the federal right, the district court also invalidated Virginia's medical malpratice cap under the state constitution.[120]

The *Boyd* court objected to Virginia's medical malpractice damage cap primarily because it resulted in a "judgment predetermined by the legislature" that damages could not exceed $750,000.[121] Unlike a court applying the doctrine of *remittitur* or the power to set aside a verdict and order a new trial, a court enforcing an absolute cap on damages applies no "proper legal standard." Rather, an absolute cap on damages creates the *presumption* that damages do not exceed the statutory limit.[122]

The district court qualified its holding, however, by noting that a legislature may establish rules governing the *type* of damages recoverable and

112. 647 F. Supp. at 788 (*quoting* Byrd v. Blue Ridge Rural Electric Coop., Inc., 356 U.S. 525 (1958)).

113. 647 F. Supp. at 788 (citing Ex parte Peterson, 253 U.S. 474 (1935)).

114. 647 F. Supp. at 788 (citing Dimick v. Schiedt, 293 U.S. 474 (1935)).

115. Such a measure would also involve ordering a reduction of the *ad damnum* of the complaint. 647 F. Supp. at 788.

116. 647 F. Supp. at 788.

117. The court decided that instructing the jury of the cap prohibits the jury from considering damages above the cap. Likewise, refusing to enter a jury's verdict effectively invalidates its findings. 647 F. Supp. at 788.

118. 647 F. Supp. at 789.

119. VA. CONST. art. 1, § 11.

120. 647 F. Supp. at 789. The District Court complied with Byrd v. Blue Ridge Rural Electric Coop., Inc., 356 U.S. 525 (1978), when it considered whether the results would be the same under both the federal and state constitutions. Because the court reached the same conclusion under the state and federal constitutions, the *Byrd* test played no role in its decision. 647 F. Supp. at 789.

121. 647 F. Supp. at 789.

122. *Id.*

the method for payment.[123] Likewise, it is clearly within a legislature's province to set forth procedural mechanisms that limit jury discretion.[124] The court also suggested that legislatures are free to replace common law rights of action with compensation schemes.[125] Hence, the *Boyd* court appears to have limited its holding to absolute medical malpractice caps similar to the Virginia scheme.

Despite the limited nature of the *Boyd* court's holding, its rationale leads to anomalous results. Through strict adherence to the *Boyd* holding, a legislature may abolish the common law right of action for medical malpractice, yet it cannot take the less drastic course of limiting damages.[126] Similarly, a legislature could eliminate categories of damages,[127] which would affect a plaintiff's recovery virtually the same as an absolute damage cap. Merely by modifying its statutory mechanism, therefore, a legislature could circumvent the jury trial problems cited in *Boyd* and still severely curtail a plaintiff's recovery in medical malpractice actions.[128]

III. THE REMAINING "SAFE HARBORS" FOR LIMITING MEDICAL MALPRACTICE DAMAGES

As the examination of state courts' equal protection analyses and the Fourth Circuit's jury trial analysis indicates, the constitutional validity of medical malpractice damage caps hinges on the nature of the cap in question.[129] The courts striking down medical malpractice damage caps have

123. *Id.* The court noted Florida's statutory scheme of a state compensation fund with periodic payments. 647 F. Supp. at 789, n.7.

124. "The legislature may prescribe rules of procedure and evidence, create legal presumptions, allocate burdens of proof, and the like." 647 F. Supp. at 789.

125. *Id.* The court cited Duke Power v. Carolina Environmental Study Group, Inc., 438 U.S. 59 at 88, in support of this proposition. 647 F. Supp. at 789, n.6.

126. "[T]he legislature may abolish a common law right of action and, *if it desires*, replace it with a compensation scheme," 647 F. Supp. at 789 (emphasis added).

127. For instance: wrongful death damages, future earnings, pain and suffering, health care costs, lost earnings.

128. The District Court also assumed that a limit on medical malpractice damages creates a statutory presumption that damages *could not* exceed the statutory limit. *See supra* notes 121-122 and accompanying text. This characterization is not necessarily true. A statutory limit on damages merely subordinates a plaintiff's right to enforce a jury's finding of damages to the legislature's policy that it will not endorse awarding damages to medical malpractice victims over a set amount. The jury's finding of fact, therefore, remains undisturbed. A cap on damages only affects the *enforceability* of a jury verdict. *See* Johnson v. St. Vincent's Hospital, 273 Ind. at 400-01, 404 N.E.2d at 601-02.

129. *See supra* notes 104-06 and 123-24 and accompanying text.

not precluded legislatures from adopting alternative means of limiting damages in medical malpractice actions. Many state courts that have struck down medical malpractice caps as unconstitutional may hold otherwise, if presented a less drastic limitation. Certainly the Fourth Circuit's decision in *Boyd* left vast areas open to statutory damage limitations.[130] Of course, it is impossible to unequivocally predict a state court's reaction to medical malpractice caps.[131] Nevertheless, close examination of judicial objections to various damage caps illuminates "safe harbors" that remain for legislatures. This section will consider the continuing viability of absolute caps, non-economic caps, patient compensation funds, and Illinois' particularized verdict requirement in light of judicial objections to malpractice caps.[132]

A. Absolute Caps

Statutes that place an absolute limit on damages recoverable in medical malpractice actions are most vulnerable to judicial invalidation.[133] Of the five damage caps upheld, only Indiana's[134] and Nebraska's[135] actually placed a ceiling on the total amount of economic *and* non-economic damages. Conversely, of the seven medical malpractice caps struck down, only two were not absolute limits on over-all damages.[136]

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130. *See supra* notes 123-24 and accompanying text.

131. One commentator suggests that the level of equal protection analysis a court employs determines what decision the court will reach on a cap's constitutionality. In turn, another commentator suggests that looking to the level of scrutiny a court has applied to its state's automobile guest statute gives a reliable indication of what equal protection test a court will apply to medical malpractice caps. *"Constitutionality of Recent Malpractice Legislation,"* 13 FORUM 312, 330 (1977). Such an analysis, however, seems to "place the cart before the horse." Most state courts rely on the facial inequity of statutory classifications to determine which level of equal protection scrutiny they will employ. *E.g.*, Jones v. State Board of Medicine, 97 Idaho 859, 867. Hence, the nature of the classification in question determines what test a court applies and what outcome it reaches.

132. *See infra* notes 171-183 and accompanying text for a discussion of the Illinois particularized verdict requirement.

133. This classification includes direct limits on total damages recoverable and patient compensation funds that pay only a limited amount. It does *not* include patient compensation funds that *may* establish a cap if the fund falls below a given level, (*see infra* note 139) nor does it include patient compensation funds that pay up to a set amount, at which point responsibility for paying the excess reverts back to the health care provider (*see infra* note 138).

134. IND. CODE § 16-9.5-2-2 (1985) (absolute limit on the patient compensation fund).

135. NEB. REV. STAT. § 44-2825 (1985) (absolute limit on damages recoverable).

136. These two were: New Hampshire's $250,000 cap on noneconomic damages, N. H. REV. STAT. ANN. 507-c:7 II (Supp. 1979); and Texas' $500,000 cap on all damages except past and future medical, hospital, and custodial treatment, TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon 1984).

Significantly, in rejecting due process and equal protection challenges to a cap on *non*-economic damages, the California Supreme Court indicated that its cap was not nearly as harsh as an absolute cap.[137] Likewise, the Florida Supreme Court qualified its validation of an absolute limit on health care provider liability by noting that the legislature had *not* modified the total dollar amount recoverable.[138] Hence, even in state courts that have upheld limitations on medical malpractice damages, an absolute cap curries very little judicial favor.[139]

The U.S. Supreme Court's decision in *Duke Power v. Carolina Environmental Study Group Inc.*,[140] however, supports the validity of absolute damage caps under the federal constitution. In *Duke Power* the Supreme Court upheld an absolute damage cap limiting recovery in case of a nuclear accident to $560 million. The Indiana Supreme Court suggested that the dilemma of the health care industry is analogous to that of the nuclear power industry, and that *Duke Power* implies constitutionality for malpractice caps.[141]

The North Dakota Supreme Court, however, distinguished the *Duke Power* cap from a malpractice cap. In *Duke Power*, damages above the limit were unlikely, and Congress had committed to paying damages above the limit, thus justifying the damage limitation.[142] *Duke Power*'s significance therefore is arguable at best. In addition, even if *Duke Power* is applicable, it does not save absolute caps from invalidation under state constitutions.[143] Given the hostile reaction to absolute caps by a majority of state courts, such damage limitations would provide the more precarious course for a legislature to follow.

B. Noneconomic Caps

Statutes that limit only noneconomic damage recovery in medical malpractice actions stand an excellent chance of passing judicial scrutiny.

137. *Fein*, 38 Cal.3d at 161.

138. 747 So.2d at 789. The Florida statute places a cap on health care provider liability, but no limit is placed on its patient compensation fund.

139. In State ex rel. Strykowski v. Wilkie, 81 Wis.2d 491, 261 N.W.2d 434 (1978) the Wisconsin Supreme Court upheld a patient compensation fund wherein awards would be limited to $500,000 if the fund fell below a certain level. The court reserved its judgment on the validity of the "conditional cap" for such time when the cap became effective. *Id.* at 444.

140. 438 U.S. 59 (1978).

141. 273 Ind. at 395-96; 404 N.E.2d at 599.

142. 270 N.W.2d at 135, n.6.

143. *See supra* notes 12-15 and accompanying text.

Only the California[144] and New Hampshire[145] supreme courts have passed on the constitutionality of caps on noneconomic damages in a medical malpractice action. New Hampshire is the only state whose supreme court has invalidated a medical malpractice noneconomic damage cap. The New Hampshire court objected to the cap because it considered pain and suffering "a very material element of damages in tort cases."[146]

The decisions of other state courts do not reflect the concerns that the New Hampshire Supreme Court voiced. Many courts fret over the prospect that victims with meritorious claims receive no compensation for some injuries.[147] Likewise, courts striking down statutes conclude that medical malpractice caps prove ineffective in eliminating nonmeritorious claims.[148]

The conclusions of the California Supreme Court, however, demonstrate that noneconomic caps minimize these concerns.[149] Reducing the prospects for inflated noneconomic damages hedges against nonmeritorious claims by eliminating "the unknown possibility of phenomenal awards for pain and suffering that can make litigation worth the gamble."[150] Likewise, the California Court alluded to the highly tentative relationship between noneconomic damages and compensating malpractice victims for losses.[151]

The arbitrary nature of awards for pain and suffering further mitigates in favor of a legislature limiting such damages. New Hampshire's concern that victims' noneconomic harm would go uncompensated is unfounded. A cap on noneconomic damages does not *eliminate* noneconomic damages, but rather limits the amount recoverable for noneconomic harm.[152]

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144. 39 Cal.3d 137, 695 P.2d 665 (1985). *See supra* notes 68-70 and accompanying text.

145. 120 N.H. 925, 424 A.2d 825.

146. 120 N.H. at 942, 424 A.2d at 837.

147. *See* Arneson v. Olson, 270 N.W.2d at 135; Simon v. St. Elizabeth Medical Center, 3 Ohio Op.3d at 172, 355 N.E.2d at 911; Baptist Hosp. of Southeast Texas, Inc. v. Baber, 672 S.W.2d at 298.

148. *See supra* note 147.

149. 38 Cal.3d at 159-63, 695 P.2d at 680-83.

150. 38 Cal.3d at 163, 695 P.2d at 683.

151. 38 Cal.3d at 159, n.16, 695 P.2d at 681.

152. For example, if a state places a $500,000 cap on pain and suffering, a jury can consider the cap amount as a reference point for determining noneconomic harm. The most heinous instances of pain and suffering would merit a verdict for $500,000. Less shocking examples of noneconomic harm would result in reducing the verdict proportionately. (A negligently severed finger might only

Federal courts should not object to a cap on noneconomic damages. The Supreme Court essentially placed its imprimature of approval on *Fein* when it dismissed the appeal for want of a substantial federal question.[153] Likewise the *Boyd* court specifically noted that legislatures are free to determine the *types* of damages a plaintiff may recover.[154] Thus, it is clear that legislatures should seriously consider imposing caps on noneconomic damages as an alternative or supplement to other damage limitations.[155]

C. *Patient Compensation Funds*

Patient compensation funds provide another "safe harbor" for legislatures that wish to limit the liability of health care providers.[156] No state court has specifically invalidated a patient compensation fund as unconstitutionally limiting damages.[157] In fact, two courts have upheld funds that *could* limit a medical malpractice victim's recovery. The Indiana Supreme Court upheld a patient compensation fund that limited a plaintiff's recovery to $500,000.[158] Likewise, the Wisconsin Supreme Court upheld a fund that placed a conditional cap on plaintiff recovery.[159] The Florida Supreme Court upheld a patient compensation fund that did not limit recovery, but the court refused to address whether the fund would be constitutional in the event that it became insolvent.[160] Given, how-

merit a $1,000 verdict for pain and suffering.) The legislature simply provides a "spectrum of pain and suffering" to which a jury can refer in rendering its verdict.

153. 106 S.Ct. 214 (1985). *See supra* notes 71-73 and accompanying text.

154. 647 F. Supp. at 789.

155. Of course, this alternative is foreclosed to states with special constitutional provisions that govern damage caps. Certainly Illinois could not impose a noneconomic damage cap after its supreme court's decision in *Wright*. *Supra*, notes 99-103 and accompanying text. Likewise, other state constitutions have provisions that may bar setting noneconomic damage caps. *See e.g.*, ARIZ. CONST. art. 18, § 6; KY. CONST. § 54; OKLA. CONST. art. XXIII, § 7 (provisions barring imposition of damage caps in personal injury actions).

156. For a thorough discussion of patient compensation funds and how they operate see Note, *Patients' Compensation Fund and the Bad Faith Cause of Action: Two Proposed Amendments to the Medical Liability and Insurance Improvement Act of Texas*, 17 TEX. TECH. L. REV. 1603 (1986) [hereinafter COMP. FUND.].

157. The North Dakota Supreme Court, however, struck down a patient compensation fund in Arneson v. Olson, 270 N.W.2d 125, since it was an integral part of medical malpractice legislation that was unconstitutional as a whole. 270 N.W.2d at 137-38. Also, the Kentucky Supreme Court struck down a patient compensation fund in McGuffey v. Hall, 557 S.W.2d 401 (Ky. 1977) as violative of a constitutional provision restricting the extension of state credit. *Id.* at 416.

158. *See supra* notes 53-55 and accompanying text.

159. *See supra* notes 60-63 and accompanying text.

160. *See supra* notes 64-65 and accompanying text.

ever, the general opposition to absolute caps[161] and the reservations of the Florida and Wisconsin supreme courts,[162] patient compensation funds that absolutely limit plaintiffs' recoveries may risk invalidation.

Patient compensation funds need not, however, place an absolute cap on recovery. For example, Florida's patient compensation fund places no cap on plaintiff recovery.[163] Recently, however, Florida and other states have encountered difficulty in maintaining a solvent compensation fund.[164] In response to this problem, one commentator has suggested placing a statutory maximum on the amount recoverable from patient compensation funds.[165] This proposal avoids the infirmity of absolute caps, however, by shifting the burden for payment of damages above the statutory limit back to the health care provider.[166] Such a scheme would eliminate state courts' concern that victims of malpractice will go uncompensated for damages beyond the statutory limit.[167]

Patient compensation funds with no cap or modified caps minimize the problem of insurance availability for health care providers without depriving victims with meritorious claims of full compensation.[168] The *Boyd* court voiced no objection to compensation funds, and approved compensation schemes that replace common law rights of action.[169] Patient compensation funds, therefore, exhibit an excellent potential for surviving judicial scrutiny.[170] Given the solvency difficulties that some state compensation funds have recently encountered, however, legisla-

161. *See supra* text accompanying notes 129-39.

162. *See supra* notes 134 and 135.

163. FLA. STAT. ANN. § 768, 54 (West 1986).

164. Florida's fund became insolvent in 1983. United States General Accounting Office, *Medical Malpractice: Six State Case Studies Show Claims and Insurance Cost Still Rise Despite Reforms*, GAO/HRD - 87-21, page 28 (December 1986). Likewise, even though Indiana's patient compensation fund has a $500,000 cap, state officials still express concern about the fund's solvency. *Id.* at 31. Twelve states still utilize patient compensation funds. COMP. FUND, *supra* note 153 at 1615.

165. TEX. MEDICAL PROFESSIONAL LIABILITY STUDY COMMISSION FINAL REPORT TO THE 65TH LEGISLATURE: MINORITY REPORT OF PAGE KEETON, at 50 (1976), *cited in* COMP. FUND, *supra* note 153 at 1609, n.44.

166. For example, under this type of compensation fund, health care provider liability is limited to $100,000. The compensation fund pays up to $500,000 of damages above $100,000. If, however, a portion of the jury verdict remains unsatisfied, it is the health care provider's responsibility to pay damages in excess of the cap.

167. *See supra* notes 133-43 and accompanying text.

168. *See supra* note 147 and accompanying text.

169. *See supra* note 125 and accompanying text.

170. As is the case with noneconomic caps, however (*see supra* note 155), state constitutional provisions may stand in the way of legislatures' intent on enacting patient compensation funds. *See* COMP. FUND, *supra* note 157 at 1620-21.

tures should consider supplementing such funds with caps on noneconomic damages.

D. The Illinois System

Illinois has instituted a system of particularizing jury verdicts as an alternative to monetary limitations on medical malpractice awards. In response to the decision in *Wright v. Central Du Page Hospital*[171] the Illinois legislature amended its medical malpractice statute.[172] These amendments leave less room for inflated jury verdicts, and make it easier for courts to review the propriety of damage awards.

Under the Illinois system, a jury must itemize the distribution of its verdict between economic and noneconomic loss.[173] In addition, the jury must specify what damages it awards for past injury, and what damages it awards for future injury.[174] The jury must further specify what portion of its award covers medical and health care costs[175] and what portion includes lost wages or loss of earning capacity.[176] Punitive damages are not recoverable under *any* action for medical malpractice.[177] After the jury enters its verdict, the court is free to consider the propriety of each itemized finding and apply appropriate set-offs and remittiturs.[178]

The Illinois system provides an attractive alternative for legislatures that fear negative judicial reaction to medical malpractice damage caps. Certainly no burden other than the ordinary burden of proof inures to medical malpractice victims. Parties to medical malpractice actions, therefore, are treated no differently than parties in other tort actions.[179] Likewise, this approach establishes no classification between malpractice victims with different damage levels.[180] Thus, courts that have invalidated damage caps on the basis of equal protection should approve the

171. 63 Ill.2d 305, 347 N.E.2d 736 (1976).

172. 1985 Ill. Laws 211.

173. ILL. REV. STAT. ch. 110, para. 2-1109 (1985).

174. ILL. REV. STAT. ch. 100, para. 2-1706 (1985).

175. *Id.*

176. ILL. REV. STAT. ch. 110, para. 2-1109 (1985).

177. ILL. REV. STAT. ch. 110, para. 2-1115 (1985).

178. ILL. REV. STAT. ch. 110, para. 2-1708(1) (1985). Also, § 2-1205 outlines specific considerations for reducing judgments. ILL. ANN. STAT. ch. 110, para. 2-1205 (Smith-Hurd Supp. 1986). Given the specificity this act requires of juries, it should be much easier for a court to determine exactly what portion of a jury verdict is questionable, and modify it accordingly.

179. *See supra* notes 44-45 and accompanying text. The one exception is that punitive damages are not available under the Illinois system, while these awards may be available in some tort actions.

180. *See supra* note 44 and accompanying text.

Illinois system.[181] Finally, a system requiring greater specificity in jury verdicts does not violate the jury trial concerns highlighted in *Boyd v. Bulala.* The Illinois approach is precisely the type of procedure that the *Boyd* court suggested is within a legislator's province to invoke.[182]

The Illinois system guards against arbitrary damage awards, and facilitates the court's review of verdicts that appear excessive. It does not, however, offer the predictability for health care provider liability that more direct limitations provide. Also, the system's effectiveness depends largely on how zealously courts insist on jury compliance and to what extent they are willing to question excessive verdicts. Hence, a system for particularizing jury verdicts would serve as an excellent *supplement* to a cap on noneconomic damages or a patient compensation fund. Of course, for a state whose judiciary has invalidated noneconomic damage caps or patient compensation funds,[183] the Illinois system provides a very attractive alternative.

IV. CONCLUSION

Many avenues remain by which legislatures may limit liability in medical malpractice actions. Patient compensation funds, caps on noneconomic damages, and requirements for particularized jury verdicts all offer constitutionally viable alternatives to absolute damage caps. In light of state courts' concerns for fairness, the perceived malpractice insurance crisis, and the lack of firm guidance from the Supreme Court on the constitutionality of absolute damage caps,[184] the most prudent course for legislatures may lie in these "safe harbors."[185]

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181. *See supra* notes 104-07 and accompanying text.

182. *See supra* notes 123-24 and accompanying text.

183. *See supra* note 125 and note 157.

184. Until the Supreme Court decides whether absolute limitations on medical malpractice caps are constitutional, the book remains open on their validity. The Supreme Court may *never* decide this issue, especially in view of *Fein*, where the Court specifically dismissed for lack of a substantial federal question. *But see* Fein v. Permanente Medical Group, 474 U.S. at 898 (White, J., dissenting) (finding such controversy surrounding the import of Duke Power Co. v. Carolina Environmental Study Group., 438 U.S. 59 (1978), that he felt the case *did* present a substantial federal question).

185. Among these "safe harbors" the most *attractive* alternative might be to limit noneconomic damages as well as require particularized jury verdicts, given the solvency problems that have arisen with patient compensation funds. *See supra* note 164 and accompanying text.