

ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECT FILE 8672
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Periodic Payments

One of the most difficult tort reform statutes to draft and implement is the one designed to convert lump sum judgments into periodic payments. As a practical matter, the most beneficial effect of the legislation has been to force both plaintiff and defendant attorneys to work with the concept in the settlement process either pre-judgment or post-judgment. Our California experience has been that the results have been most effective from the point of view of both the injured plaintiff and the plaintiff's dependant as well as the insurers for the defendants.

The basic purpose is to design an award that meets the needs of the plaintiff and at the same time avoids a windfall to the plaintiff's heirs and thus more effectively utilize the resources available.

The arguments in favor of the approach are:

1. The jury award may overestimate or underestimate the true needs of the injured party. For example, the plaintiff may live longer or shorter than expected. The needs of the plaintiff as he or she advance from infant to a minor child and then to an adult status will change. An annuity can be designed to anticipate these needs whereas a jury has no discretion or expertise in which to act. On the other hand, the market place through specialized annuities can design an effective package which in most instances is far less expensive. When we started this program in California in the 1970s there was little or no expertise available. Now it is a very competitive and sophisticated market.

2. It is usually less costly to finance a judgment by debt paid on an installment basis than by lump sum.

3. The potential windfall is eliminated both ways as the cost of the annuity is paid up front and is set by the market.

4. Experience has indicated that the receipt of a lump sum all too often leads to a loss of the resources through unnecessary expenditures or poor investment, with the result that the permanently injured party becomes a public charge.

5. The total payments under a period payment award is treated as tax-exempt under Rev. Rul. 79-220, 1979 CB 74. On the other hand, investment income from a lump sum award may be fully taxable. A word of warning is appropriate as the application of the IRS ruling together with technical amendments in the 1986 Tax Reform Act must be followed. Drawing such an arrangement is no role for amateurs.

The arguments against the concept are:

1. There is no rational reason to treat medical malpractice plaintiffs any differently than other plaintiffs. This is the classic due process or equal protection argument. Also, the constitutional issue of trial by jury can be raised on the charge that the jury has been deprived of its full right to establish the damages.

2. There is no rational reason to deprive the plaintiff of the right to protection from run away inflation or to have sole discretion as to the administration of the fund.

3. There may be no provision for unforeseen circumstances or needs.

4. Future annuity payments are at risk because of possible problems of the annuity carrier, or the insurance carrier if the award is not funded by an annuity.

5. There is no justification for denying the plaintiff the right to assign future payments as is provided in some statutes.

The Uniform Laws Commission, through a committee, came up with such an administrative monster of a proposed statute that most interested parties opposed its adoption as being unworkable

and it has not been supported. I understand that the Commission is going to take another crack at it starting this fall.

The earliest appellate decision upholding the concept was State ex rel Strykowski v. Wilkie, 261 N.W.2d 474 (Wisconsin 1978).

In a comprehensive opinion thoroughly ventilating both sides of the argument the California Supreme Court, by a 4-3 vote, upheld the California statute in American Bank & Trust Co. v. Community Hospital, 687 P.2d 670 (1984). For an excellent discussion of this case see: "Medical Malpractice Statutes: A Retrospective Analysis," Annual Survey of American Law 1984, 700-704. For a contrary decision see: Carson v. Maurer, 424 A.2d 82 (N.H. 1980).

The California statute provides:

Section 667.7, Code of Civil Procedure:

667.7. [Medical malpractice actions.] (a) In any action for injury or damages against a provider of health care services, a superior court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than a lump-sum payment if the award equals or exceeds fifty thousand dollars (\$50,000) in future damages. In entering a judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments which will compensate the judgment creditor for such future damages. As a condition to authorizing periodic payments of future damages, the court shall require the judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages awarded by the judgment. Upon termination of periodic payments, of future damages, the court shall order the return of this security, or so much as remains, to the judgment debtor.

(b) (1) The judgment ordering the payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Such payments shall only be subject to modification in the event of the death of the judgment creditor.

(2) In the event that the court finds that the judgment debtor has exhibited a continuing pattern of failing to make the payments, as specified in paragraph (1), the court shall find the judgment debtor in contempt of court and, in addition to the required periodic payments, shall order the judgment debtor to pay the judgment creditor all damages caused by the failure to make such periodic payments, including court costs and attorney's fees.

(c) However, money damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately prior to his death. In such cases the court which rendered the original judgment, may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this subdivision.

(d) Following the occurrence or expiration of all obligations specified in the periodic payment judgment, any obligation of the judgment debtor to make further payments shall cease and any security given, pursuant to subdivision (a) shall revert to the judgment debtor.

(e) As used in this section:

(1) "Future damages" includes damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor.

(2) "Periodic payments" means the payment of money or delivery of other property to the judgment creditor at regular intervals.

(3) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500)k of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider.

(4) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the hearing agency or licensed hospital.

(f) It is the intent of the Legislature in enacting this section to authorize the entry of judgments in malpractice actions against health care providers which provide for the payment of future damages through periodic payments rather than lump-sum payments. By authorizing periodic payment judgments, it is the further intent of the Legislature that the courts will utilize such judgments to provide compensation sufficient to meet the needs of an injured plaintiff and those persons who are dependent on the plaintiff for whatever period is necessary while eliminating the potential windfall from a lump sum recovery which was intended to provide for the care of an injured plaintiff over an extended period who then dies shortly after the judgment is paid, leaving the balance of the judgment award to persons and purposes for which it was not intended. It is also the intent of the Legislature that all elements of the periodic payment program be specified with certainty in the judgment ordering such payments and that the judgment not be subject to modifications at some future time which might alter the specifications of the original judgment.

The trial courts as well as appellate courts have found considerable difficulty in implementing the statute. Included in the problems is the matter of pleading the section and at what point in the proceedings the defendant or plaintiff must elect to implement the section. We recommend that the defendant not only plead this section as well as all other tort reform sections in the answer and renew the request prior to the final entry of judgment. Also, necessary requests for special verdicts must be made to establish the distinction between past and future damages. The basis on which the jury establishes its

damage award as to the number of years it would anticipate the plaintiff would survive may be important. The defendant must be sure to provide adequate economic testimony to establish the economic basis for converting the award to periodic payments. This would include evidence as to differing needs for the individual initially as well as in the future.

Another problem that is currently being litigated on appeal, with the intermediate courts in California going both ways, is whether the periodic payments start to bear interest from the date of judgment or from the time each individual payment becomes due. The jury instructions become critical and the results can be well worth the effort.

Although plaintiff attorneys originally fought the concept, some are now seeing its merits and some are even deferring their own legal fees on a periodic basis as they get to the end of their tax year.

Because of the complexity of implementing the section the hospital malpractice program has arranged for special counsel to work with local trial counsel on all phases of implementation and has developed a special trial manual that is made available to both legal counsel and the judiciary.

The Kansas Supreme Court, in Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (June 3, 1988), as a part of its sweeping overturning of the Kansas tort reform statute, held the statutory requirement of an annuity payment of future malpractice

damages was unconstitutional as denying the injured plaintiff the right of full recovery.

Limits on Contingency Fees

Nothing raises the fury of the trial bar more than any attempt to limit the right to exact contingency fees from their clients. The first limits on contingency fees were applied by the rule of court by New York and New Jersey. These limits were applied to all tort personal injury cases. It was not until the crisis of 1975 that there was a concentrated move to bring malpractice contingency fees under controls or limits. Although some of the approaches were to increase the authority of the court, most were directed at specified statutory limits on a descending scale.

A typical statute is the one adopted by California in 1975 which provided:

Business and Professions Code, Section 6146:

6146. Limitations in amount

(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits: (1) Forty percent of the first fifty thousand dollars (\$50,000) recovered. (2) Thirty-three and one-third percent of the next fifty thousand dollars (\$50,000) recovered. (3) Twenty-five percent of the next one hundred thousand dollars (\$100,000) recovered. (4) Ten percent of any amount on which the recovery exceeds two hundred thousand dollars (\$200,000).

Such limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

(b) If periodic payments are awarded to the plaintiff pursuant to Section 667.7 of the Code of Civil Procedure, the court shall place a total value on these payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorneys' fees are calculated under this section.

(c) The Board of Governors of the State Bar of California shall report and make recommendations to the Legislature by July 1, 1976, on an equitable method for regulating compensation of defense counsel consistent with the policies embodied in this article regarding regulation of plaintiff's attorney's fees.

(d) For purposes of this section:

(1) "Recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges shall not be deductible disbursements or costs for such purpose;

(2) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;

(3) "Professional negligence" is a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

The only substantive change in the statute occurred in 1987 when the schedule was modified to provide:

40% of the first \$50,000
33-1/3% of the next \$50,000 25% of the next \$50,000
15% of all over \$600,000

Our experience would indicate that attorneys are screening cases more carefully but even for the risky cases

there has been no dearth of competent attorneys willing to take the risks.

The principal arguments challenging the contingent fee limitation are:

1. Deprivation of right to select legal counsel. The argument is based on the fact that medical malpractice cases are costly to prepare and try and that a low fee schedule will drive the most qualified attorneys from the market. Also, Harvard Law Professor Lawrence Tribe, the itinerant peddler of constitutional nostrums, has opined that there is a similar infringement on the First Amendment rights of freedom of speech.

2. The usual arguments on due process and equal protection as well as the question whether such a provision is subject to strict scrutiny.

3. The additional constitutional argument of separation of powers on the theory that regulation of attorneys is a matter for the courts and not the legislature.

4. The limit denies the right of both the attorney and client to bargain as to the amount of the fee, thus interfering with the right of contract. This argument is made by persons who have never dealt with a plaintiff attorney on fee matters.

5. The sliding scale creates a potential conflict of interest between attorney and client because it discourages the attorney from taking the additional risk of going for the larger judgment.

6. The most appealing argument is that the contingency fee system is the key to the court house for a class of plaintiffs who are particularly handicapped in their ability to finance their own litigation.

7. Because of the high loss ratio in medical malpractice cases the contingent fees must cover both the winners and the losers.

The principal contra arguments are:

1. That the equal protection argument is overridden by the legislative goals and social policy

to assure the availability of liability insurance as being critical to the availability of health care. Basically is there or is there not a crisis?

2. The contingent fee recovery is more reflective of the extent of injuries to the injured plaintiff than it is to the skill of the attorney and thus justifies the sliding scale to avoid a windfall to the attorney.

3. The limit will encourage settlements by discouraging attorneys from trying the speculative cases in hoping to reap newsworthy recoveries.

4. The contingent fee limit offsets the reduction of recovery by the injured plaintiff by other tort reforms such as a cap on pain and suffering or collateral sources. This can be dramatically diagrammed for box car recoveries in excess of \$1,000,000.

5. The contingent fee is negotiated without independent legal representation for the injured party and also encourages excessive referral fees at the client's expense.

6. The recoveries in medical malpractice cases for comparable injuries are two to three or four times as great as other tort recoveries for auto accidents and the like. A dramatic study on this has been published by the Rand Institute For Civil Justice, R-3466-ICJ, by M. Peterson, entitled, "Compensation of Injuries: Civil Justice verdicts in Cook County" (1984).

7. There is a pattern of legislative control over attorney fees in such areas as probate, workers compensation, veterans cases, etc.

As usual, the court results have been mixed. For an extended review of the cases see: "Medical Malpractice Statutes, a Retrospective Analysis," Annual Survey of American Law 1984, p. 707; "Medical Malpractice and Contingency Fee Controls: Is the Prescription Curing the Crisis or Killing the Patient?", Loyola of Los Angeles Law Review, vol. 19: 623 (1985). The only case to reach the United States Supreme Court,

with hearing denied, was Roa v. Lodi Medical Group, 695 P.2d 164, 37 Cal.3d 920 (1985). In Roa the California Supreme Court by a 4 to 3 decision upheld the California statute in an extraordinarily acrimonious decision. It is interesting to note that in the Roa case the appeals all the way up to the United States Supreme Court to upset the imposition of the fee limit were by the father of the injured minor in his capacity of guardian ad litem. In effect he was seeking to reduce the net award to his ward for the benefit of the attorney whose sole service was in negotiating a policy limit \$500,000 settlement and without trial.

In Heller v. Frankston, 464 A.2d 581 (1983) the Commonwealth Court of Pennsylvania refused to implement the Pennsylvania statutory limit on contingent fees on the ground that it violated the Pennsylvania constitutional separation of powers. In Carson v. Maurer, 424 A.2d 825 (1980), the New Hampshire Supreme Court as a part of a decision upsetting all statutory tort reforms, dumped the New Hampshire statute on the grounds that this specific limit denied access to the courts.

Now that the statute has been declared constitutional in California under Roa the plaintiff attorneys are seeking to avoid the statute by several different ploys that are now being litigated. One approach with some success at the lower court level is to claim that the statute does not apply to intentional torts, but only to negligence. By including a count on intentional tort the attorney then claims that in the event of a

settlement of the entire action that he can avoid the fee limits. Other attorneys are claiming that their fee agreements are not true contingent fee agreements, and others are claiming that the injured plaintiff can waive or consent to the additional fees. Although these approaches appear to be in clear conflict with both the language and the intent of the statute, one can never underestimate the sympathy that the judiciary has for legal fees. We also find that there is not only reluctance but outright opposition by our own defense counsel to aiding in the enforcement of the provision, claiming that it is not a proper matter for discovery, etc. As a result, the enforcement is rising through actions by former plaintiffs to recover the excessive fees they have paid. Within the past year the State Bar, some thirteen years after the statute was adopted, has initiated two disciplinary proceedings against attorneys who have flaunted the provision.

In anticipation of the claim by plaintiff attorneys that there was violation of the equal protection provisions of the Constitution, the fee provision of the California tort reform statute included the following language as to defense attorney fees:

6146(c) of the Business and Professions Code:

The Board of Governors of the State Bar of California shall report and make recommendations to the Legislature by July 1, 1976, on an equitable method for regulating compensation of defense counsel consistent with the policies embodied in this article regarding regulation of plaintiffs attorneys fees.

The Bar Association has taken the position that the Legislature has no constitutional right to direct such action and has summarily refused to consider the matter.

Joint and Several Liability

The development of the common law concept of joint and several liability has very special significance to health care providers. Not only the largest medical malpractice cases but also the most serious ones arise out of physician practice in the hospital. Most of these cases not only involve a joint action against both the hospital and the attending physician but also multiple physician as well as other health care practitioners, such as nurses, equipment suppliers, and now including HMOs, and other alternative delivery systems. The seriousness of the problem became apparent with the shift by the courts to both the elimination of the defense of contributory negligence and the application of joint and several liability, with the deep pocket defendant potentially subject to paying the total loss regardless of the share of liability.

In the health care field the hospital is usually the deep pocket defendant with high limits of insurance coverage and the physicians with much lower limits or sometimes uninsured. In those states where there was a true cap on either total recovery or at least a cap on pain and suffering the problem is not as acute. In the health care field a new problem is evolving as the result of the adoption of state and now federal requirement for reporting malpractice losses paid by physicians,

hospitals and other health care providers. Particularly when there is a dollar threshold for the reporting requirement the matter of allocating the loss becomes a major friction point. This will be a new issue for allocating paid losses between the hospital and an employed or contract physician when they are insured under the same insurance policy. When the reporting requirements under the Health Quality Improvement Act become effective there will be major problems over this issue of allocation of settlements in particular.

This is one area of tort reform in which other defendant groups, such as auto insurance carriers, products liability and the like, have taken a direct interest and even leadership in fighting for generic tort reform. As a result this is the one reform where the health care providers have not necessarily taken the lead, even though their support may be critical in making the case known to the public.

There has been no uniformity of action by the various state legislatures with the result determined by the makeup of the coalition and the compromises acceptable to the legislature. Some of the alternatives adopted are:

1. A modification of the joint and several liability to provide that each defendant's liability is limited to its percentage of liability. The plaintiff's contributing liability may or may not be included and the defense may or may not apply to the insurance carriers for certain classes of defendants.

2. Not including certain classes of cases in the tort reform proposal, such as products liability or environmental tort actions.

3. Elimination of joint and several liability only for losses below a certain maximum.

4. Elimination of joint and several liability only for defendants below a certain threshold of loss.

5. Elimination of joint and several liability only when the plaintiff is at fault, or is more at fault than the defendants.

The basic argument against these reforms is that the innocent injured party should be entitled to a full recovery for all losses regardless of the economic status of some of the defendants and that the defendants should be required to adjust their relative liability amongst themselves.

In 1986 the State of Washington legislature, in modifying the joint and several liability rule, pointed out that such a response was necessary to preserve the availability of liability insurance (1986 Wash.Legis.Serv. Ch. 305, par. 106, West).

In California, when the legislature failed to act a strong coalition was developed to pressure a generic reform by a voters initiative. It was agreed that the limit should apply only to noneconomic damages with the emphasis on the fact that the injured plaintiff would be assured of a full recovery for economic losses, but the deep pocket abuses of noneconomic losses should be limited. The matter was placed on the ballot as Proposition 51 and received an overwhelming favorable vote of over 60%. The changes in the law were incorporated in Sections 1431-1432 of the California Civil Code.

1431. Joint Liability. An obligation imposed upon several persons, or a right created in favor of

several persons, is presumed to be joint, and not several, except as provided in Section 1431.2, and except in the special cases mentioned in the title on the interpretation of contracts. This presumption, in the case of a right, can be overcome only by express words to the contrary.

1431.1. Findings and Declaration of Purpose. The People of the State of California find and declare as follows:

a) The legal doctrine of joint and several liability, also known as "the deep pocket rule", has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers.

b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People--taxpayers and consumers alike--ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.

c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums. Therefore, the People of the State of California declare that to remedy these inequities, defendants in tort actions shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable.

The People of the State of California further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.

1431.2. Several Liability for Non-economic Damages.

(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's

percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(b)(1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

(2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

1431.3. [Immunity] Nothing contained in this measure is intended, in any way, to alter the law of immunity.

1431.4. Amendment or Repeal of Measure.

This measure may be amended or repealed by either of the procedures set forth in this section. If any portion of subsection (a) is declared invalid, then subsection (b) shall be the exclusive means of amending or repealing this measure.

(a) This measure may be amended to further its purposes by statute, passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring and signed by the Governor, if at least 20 days prior to passage in each house the bill in its final form has been delivered to the Secretary of State for distribution to the news media.

(b) This measure may be amended or repealed by a statute that becomes effective only when approved by the electors.

1431.5. Severability.

If any provision of this measure, or the application of any such provision to any person or circumstances, shall be held invalid, the remainder of this measure to the extent it can be given effect, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and to this end the provisions of this measure are severable.

1432. Contribution between joint parties. Except as provided in Section 877 of the Code of Civil Procedure, a party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him.

During 1987 and 1988 more than half of the states enacted legislation to either limit or abolish the joint and several liability rule. An excellent discussion of these legislative developments appears in "Recent Legislative Response To the Rule of Joint and Several Liability," Tort and Insurance Law Journal, p. 486 (1988).

Punitive Damages

Although the matter of punitive damages was not considered a major medical malpractice problem prior to the crisis of 1975 and was given little attention in the two major national reports in the early 1970s, it has become an increasing economic problem as well as a highly charged emotional problem for health care providers as it manifests itself in new areas of liability. For example, hospitals in some states such as California are finding themselves subject to astronomical claims for punitive damages in employee wrongful termination cases. Also, the malpractice insurance carriers are being charged with unfair practices in their handling of third party claims which is creating conflict with their insureds. In approximately half of the states punitive damages are not insurable by law. There is a potential conflict between the health care insurer and each hospital or physician whenever punitive damages are alleged in a malpractice complaint.

Interestingly enough, the assessment of punitive or exemplary damages is one of our oldest legal doctrines going back to the Code of Hammurabi in 2000 B.C. and the Old Testament

of the Bible. In common law the doctrine appeared in the 1700s and in the United States in New Jersey in the case of Corvett v. Colbaugh, 1 N.J.L. 77 (1791).

Allegations of punitive damages have serious emotional impact upon health care providers for a variety of reasons, such as:

1. Operationally for physicians or nurses an allegation of punitive damages with the necessary legalese to support the allegation is a traumatic affront to their professional integrity accompanied by the astronomical claims alleged.

2. Such a complaint may result in a cold letter of reservation of rights by the insurance company that further aggravates the situation.

3. The claim may or may not be insurable and the defendant may be subject to extensive discovery as to assets and sources of income as well as inquiry as to other tort actions needed to show a course of conduct.

4. If the claim is not insurable, there is the problem of a real or perceived conflict between the insured and the insurer's carriers on the matter of trial tactics or settlements including the need to segregate the punitive damages from other damages in the judgment or the settlement. If the case is settled the punitive damages may be buried in the total settlement.

5. The health care providers are unsettled by the vagueness of the standards by which they are judged and the general lack of court effective monitoring of potential jury action.

6. From the viewpoint of the health care provider there is the potential of double jeopardy by the granting of punitive damages coupled with the potential challenge to licensure.

7. Punitive damages are a potential windfall to the plaintiff and plaintiff's attorney as they may bear no relationship to the true damages suffered by the plaintiff.

On the other hand, the plaintiffs' bar argues:

1. In fact punitive damages are rarely allowed and when they are it is in the grievous case.
2. To protect himself/herself from a legal malpractice claim the plaintiff's attorney must make the necessary allegations in the complaint and pursue discovery.
3. Damages are an inadequate punishment for the health care provider to assure a high standard of conduct.
4. Judges exercise appropriate supervision of the jury.
5. Punitive damages permit the plaintiff to fully recover his losses including attorney's fees.

Only recently has the American Bar Association taken any action on the matter of punitive damages. In the 1987 Report of the ABA Action Commission To Improve the Tort Liability System, the following recommendations were made:

"5. The scope of punitive damages in cases involving damage to person or property should be narrowed through the following measures:

- The standard of conduct. Punitive damages should be allowed only in cases where the defendant's conduct indicates substantially greater indifference to the safety of others than ordinary negligence, such as intentional action or conduct in conscious disregard of the rights or safety of others.

- The standard of proof. The standard of proof in awarding punitive damages should be higher than in awarding compensatory damages. The standard should be proof by 'clear and convincing evidence.'

- The process of decision. (1) Appropriate pretrial procedures should be routinely utilized to weed out frivolous claims for punitive damages prior to trial, with a savings mechanism available for late discovery of misconduct meeting the standard of liability. (2)

Evidence of net worth and any other evidence relevant only to the question of punitive damages ordinarily should be introduced only after the defendant's liability for compensatory damages and the amount of those damages have been determined.

- Multiple judgment torts. While the total amount of any punitive damages awarded should be adequate to accomplish the purposes of punitive damages, appropriate safeguards should be put in force to prevent any defendant from being subjected to punitive damages that are excessive in the aggregate for the same wrongful act.

- To whom award should be paid. After deducting costs and expenses, the court should determine what is a reasonable portion of the punitive damages award to compensate the plaintiff and counsel for bringing the action and prosecuting the punitive damages claim, with the balance of that award allocated to public purposes."

The Tort Policy Working Group, in its 1987 Update, made several recommendations, including:

1. Include any punitive damages within the overall limit on noneconomic damages with a single limit for both.
2. Limit the application to intentional torts.
3. Tie the limit to a multiple of the economic damages and use a substantial portion of the recovery for public purposes.
4. Limit the attorney fee contingency to 5% so that the attorney will not jeopardize the client's recovery in order to achieve a box car recovery.
5. Recognize that in actual practice 90% of the cases are settled so that the limit would be directly effective only in the litigated cases. However, it must be recognized that settlements are directly reflective of what is happening in the trial courts so, in fact, there is a direct correlation. Although as new litigations evolve there may be an incentive for the attorney to settle to avoid the impact of these limitations.

6. The Working Group pointed out that based upon its study the Group was skeptical of the value of changing the standard of proof. The report pointed out that even though there has been no doctrinal change in the law the courts have found ways of broadening the application in a geometric fashion. If the standard of proof is to be tightened then the change should provide that the plaintiff can only recover if there is clear and convincing evidence that the defendant acted with actual malice.

If punitive damages are to be continued, there can also be procedural changes which will somewhat alleviate the unnecessary burden of frivolous allegations. For example, there can be a requirement that the allegation be made only after certain discovery and be based upon an affidavit of probable recovery with the trial of the issue separate from and deferred until after the trial of the principal action, with no evidence of the economic status of the respective defendants until there has been a determination that such defendants are liable.

The plaintiffs' bar has claimed that there are relatively few punitive damage awards even though more than 70% of our malpractice complaints in California have included a claim for punitive damages. The Working Group quoted from a study of the Institute of Civil Justice that stated that the recovery of punitive damage awards in Cook County increased from three in 1960-64 to 75 in 1980-84 and in San Francisco from 14 in 1960-64 to 51 in 1980-84, with a punitive damage award in nearly one out of every seven plaintiffs' verdicts. Even more critical is the increasing size of the award. The Institute's data reported that in Cook County the average personal injury punitive damage award

grew from \$28,000 in 1970-74 to \$1,934,000 in 1980-84, an increase of some 6,900%.

A critical side effect of punitive damage awards is the impact on the availability of high risk drugs or procedures involving preventive measures such as the experience with the Salk vaccine.

Punitive damages was not a high priority issue when we negotiated our tort reform package in California in 1975. But by the mid-1980s it was at the top of our agenda as the next tort reform to be adopted. Although our efforts were unavailing for several years, continued preparation was made to organize a broad based coalition to support generic tort reform in this area. At the same time the California Trial Lawyers Association was raising funds to support an initiative that would repeal the malpractice tort reforms adopted in 1975. The legislative leaders were concerned that this continued battle would syphon off funds that they would otherwise enjoy for their reelection campaigns and forced a compromise which was literally negotiated and passed in a matter of hours at the end of the 1987 legislative session. The quid pro quo for the trial lawyers was an adjustment increasing their allowable contingent fee percentage. The trial lawyers got nothing for their clients as their prime concern was for their own fees. Included were changes in the law relating to exemplary damages applicable to all torts, not just those relating to medical malpractice. As a

result extensively amended Sections 3294 and 3295 were adopted to the Civil Code as follows:

3294. [When permitted] (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Section 377 of the Code of Civil Procedure or Section 573 of the Probate Code based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contain in Section 377 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by Chapter 1498 of the Statutes of 1987 apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

3295. [Protective order requiring plaintiff to produce evidence; Discovery] (a) The court may, for good cause, grant any defendant a protective order requiring the plaintiff to produce evidence of a prima facie case of liability for damages pursuant to Section 3294, prior to the introduction of evidence of:

(1) The profits the defendant has gained by virtue of the wrongful course of conduct of the nature and type shown by the evidence.

(2) The financial condition of the defendant.

(b) Nothing in this section shall prohibit the introduction of prima facie evidence to establish a case for damages pursuant to Section 3294.

(c) No pretrial discovery by the plaintiff shall be permitted with respect to the evidence referred to in paragraphs (1) and (2) of subdivision (a) unless the court enters an order permitting such discovery pursuant to this subdivision. However, the plaintiff may subpoena documents or witnesses to be available at the trial for the purpose of establishing the profits or financial condition referred to in subdivision (a), and the defendant may be required to identify documents in the defendant's possession which are relevant and admissible for that purpose and the witnesses employed by or related to the defendant who would be most competent to testify to those facts. Upon motion by the plaintiff supported by appropriate affidavits and after a hearing, if the court deems a hearing to be necessary, the court may at any time enter an order permitting the discovery otherwise prohibited by this subdivision if the court finds, on the basis of the supporting and opposing affidavits presented, that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294. Such order shall not be considered to be a determination on the merits of the claim or any defense thereto and shall not be given in evidence or referred to at the trial.

(d) The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and

found one or more defendants guilty of malice, oppression, or fraud.

(e) No claim for exemplary damages shall state an amount or amounts.

(f) The amendments to this section made by Senate Bill No. 241 of the 1987-88 Regular Session apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

So far these sections appear to have been beneficial.

For a series of articles expounding on this controversial issue see:

"Punitive Damages: Toward a Principled Approach," 31 Hastings Law Journal 639 (1980).

"Exemplary Damages As An Instrument of Social Policy: Is Tort Reform in the Public Interest." St. Mary's Law Journal, Vol. 18:797 (1987).

"Punitive Damages and The Tort System," University of Richmond Law Review, vol. 22:1 (1987).

"Awarding Punitive Damages in Medical Malpractice Arbitration," California Western Law Review, vol. 20:312 (1984).

Ultimately the issue of the extent of the constitutionality of the various proposed reforms of the right to punitive damages will be decided by the United States Supreme Court, perhaps at the current session. However, so far the Supreme Court has been very adept at ducking this controversial issue. My best guess is that the Court will affirm the principle of exemplary damages but require some objective standards both as to the application and the amount.

Ad Damnum Clause

A procedural tort reform that I promoted in the early 1970s was the elimination of the ad damnum clause in all medical malpractice actions. I had made an informal study of a

comparison of the ad damnum demands in a series of medical malpractice claims with the actual results by way of judgment or settlement. The study indicated that the claims versus the recovery were about 30 to 1. From the viewpoint of the health care providers, and particularly physicians, the fact that XYZ Hospital and Doctor A were sued for a million dollars was headline news but the fact that the ultimate recovery was a nominal amount was not news. This type of publicity obviously contributed to the public perception as well as influenced juries in their deliberations.

Plaintiffs' attorneys claim that they must ask the limit to protect themselves from a claim of legal malpractice. There is no penalty for asking too much. There is no question but that the outlandish demands have materially contributed to the antipathy of the medical profession for the legal profession.

The legislature found this one an easy one to grant and it has not been challenged. There is no way to quantify the result. Both the ABA Commission and the Secretary's Commission in the early 1970s included this concept as a favorable recommendation.

There are a few problems but these are relatively minor and can be resolved:

1. The question of establishing jurisdiction when there is a dollar threshold between trial courts.

2. The need for the defendant and the defendant's insurance company to know the amount of the claim for the purpose of deductibles, whether the claim exceeds

the amount of the primary coverage or the total coverage, etc.

3. Two Kentucky cases split on the constitutionality of the issue on whether the law violated the rule making power of the courts. The most recent case, Lewis v. Smathers, 663 S.W.2d 228 (Ky.App. 1984), upheld it.

The California statute provides:

Sections 425.10 and 425.11 of the California Code of Civil Procedure:

425.10. [Contents of complaint or cross-complaint.] A complaint or cross-complaint shall contain both of the following:

(a) A statement of the facts constituting the cause of action, in ordinary and concise language.

(b) A demand for judgment for the relief to which the pleader claims he is entitled. If the recovery of money or damages be demanded, the amount thereof shall be stated, unless the action is brought in the superior court to recover actual or punitive damages for personal injury or wrongful death, in which case the amount thereof shall not be stated.

425.11. [Demand for damages statement] When a complaint or cross-complaint is filed in an action in the superior court to recover damages for personal injury or wrongful death, the party against whom the action is brought may at any time request a statement setting forth the nature and amount of damages being sought. The request shall be served upon the plaintiff or cross-complainant, who shall serve a responsive statement as to the damages within 15 days thereafter. In the event that a response is not served, the party, on notice to the plaintiff or cross-complainant, may petition the court in which the action is pending to order the plaintiff or cross-complainant to serve a responsive statement.

If no request is made for such a statement setting forth the nature and amount of damages being sought, the plaintiff shall give notice to the defendant of the amount of special and general damages sought to be recovered (1) before a default may be taken; or (2) in the event an answer is filed, at least 60 days prior to date set for the trial.

Notice of Intent to Sue

One of the most unsuccessful tort reform proposals that has been developed is the requirement of a notice of intent to sue. As one of the principal proponents of this concept back in the 1970s, I have been most disappointed in not only its failure but the fact that it has often been counterproductive. I must confess that I was one of the early proponents of this concept and it was included as a recommendation in both the Secretary's Commission and the ABA Commission reports.

The social purpose behind the approach was an attempt to create a period of time between which the plaintiff determined to press a claim against a physician and the time a lawsuit was actually filed in order that there could be some dialogue between the prospective plaintiff and the physician which could either lead to a determination by the plaintiff that there was a satisfactory explanation of what had occurred or, in the alternative, a possibility of an immediate settlement for the benefit of all concerned.

This is more of a doctor problem than it is a hospital problem because a claim against a hospital does not have the emotional content as does a claim against a doctor. Our experience would indicate that prior to the 1975 statutory requirement in over 50 per cent of the cases against the doctor the first knowledge that the doctor had of the claim was the service of the summons and complaint upon him. In working with doctors my experience is that this is a devastating experience,

particularly as he reads the complaint and sees the amount of the demand if one is stated. Also, from the viewpoint of the plaintiff the execution of the complaint in itself raises the plaintiff's hopes and expectations, making it more difficult to settle the case if justified.

To understand the problems that developed the California statute is set forth as follows:

Sections 364 and 365 of the California Code of Civil Procedure:

364. [Notice required as condition precedent to bringing action] (a) No action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action.

(b) No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered.

(c) The notice may be served in the manner prescribed in Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(d) If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days from the service of the notice.

(e) The provisions of this section shall not be applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name, as provided in Section 474.

(f) For the purposes of this section:

(1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code, and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;

(2) "Professional negligence" means negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

365. [Failure to comply] Failure to comply with this chapter shall not invalidate any proceedings of any court of this state, nor shall it affect the jurisdiction of the court to render a judgment therein. However, failure to comply with such provisions by any attorney at law shall be grounds for professional discipline and the State Bar of California shall investigate and take appropriate action in any such cases brought to its attention.

Our first problem was that plaintiffs' attorneys chose to ignore the statute so we instructed our trial counsel to notify the California State Bar Association as to each violation. For a while we got no response at all from the Association. Then we were notified that it took the position that the statute violated the separation of powers between the judiciary and the legislative branch and therefore it chose to take no action.

However, as time went on the plaintiffs' attorneys began to use the statute for psychological purposes and filed the letter in a majority of the cases. It then appeared that the insurance claims representatives chose to ignore the notice and claimed that they needed more time for discovery and the usual bureaucratic folderol. So it had little impact on expediting settlements. Interestingly enough, we have seen recently greater interest by the claims people to use the time more effectively. This takes client pressure.

However, the unanticipated result was that the plaintiffs' attorneys were able to use the provision to extend the statute of limitations by another 90 days and sometimes by 180 days. Part of the problem arises from draftsmanship. There was no window created between the time of the required filing of the complaint and the expiration of the mandated deferral for filing the complaint. See Braham v. Severson, 119 Cal.App.3d 367 (1981); also, Lesko v. Superior Court, 127 Cal.App.3d 476 (1982), holding the statute was constitutional.

At this point if we had our druthers we would prefer to see the whole statute repealed.

Only a few states have adopted the concept and in New Hampshire in Carson v. Maurer, 424 A.2d 825 (1980), the Supreme Court held the law unconstitutional as having no substantial relationship to "any legitimate legislative objective." Perhaps on this one the New Hampshire Court was right--they can't be wrong all of the time.

The No-Fault Alternative to Tort Recovery

During the 1970s and 1980s there was much discussion of possible no-fault alternatives to the tort system of compensating plaintiff suffering for catastrophic injuries. These included such proposals as the availability of "trip insurance" under which the patient bought his own coverage, or a form of identified compensable events for which there would be payment without fault on the basis of a workers compensation type of schedule, and the like. Except for the action by the United

States Congress in dealing with the swine flu problem, there was little or no action on these proposals. The California Medical Association and the California Hospital Association in an indepth study of over 25,000 charts concluded that a no-fault approach across the board would be far more costly than the existing tort system and quietly dropped the concept. See "Medical Insurance Feasibility Study," published in 1977 by the California Medical Association, with Don Harper Mills, M.D., J.D., the principal editor and investigator.

However, in 1987 the State of North Carolina legislature adopted as Chapter 130A Public Health, of the General Statutes of North Carolina, a carefully drafted program to provide for compensation to parties suffering from specified vaccine related injuries. Under this program the fund created by general appropriations of state funds constitutes the sole source of compensation for such injuries, with the program being administered by the existing North Carolina Industrial Commission. The claim for damages may include, among other matters, actual and anticipated expenses of medical care, vocational and rehabilitation therapy, custodial care, and the like, that cannot be provided by the Department of Human Resources; also, loss of earnings and noneconomic damages from pain and suffering together with reasonable attorney's fees. However, there was a limit of \$300,000 or its present value on the total award and no damages were allowable to any person other than the one to which the designated vaccine was

administered. The Commission has the right to the extent of the award to recover back against any health care provider or manufacturer who had been negligent in the manufacture or administration of the vaccine. There were additional refinements in the statute made in 1987. This enactment has received little treatment in the literature.

However, when Virginia, in 1987, and Florida, in 1988, adopted no-fault legislation for compensation for neurologically impaired infants, there has been widespread discussion of the pros and cons of these two programs.

The Virginia Birth-Related Neurological Injury Compensation Act, Va. Code §38.2-5000, et seq., was adopted to meet the crisis in the availability of insurance for physicians practicing obstetrics, with it being anticipated that by the end of 1987 25% of the State's obstetricians/gynecologists expected to lose their coverage with no other source available. The act applied only to patients of physicians and hospitals that have voluntarily participated in the program by payment of \$50 per delivery with a \$150,000 maximum by a hospital and a \$5,000 annual fee by a physician whether an obstetrician or a general practitioner doing obstetrics. Although these payments are voluntary, all other physicians, as a condition of licensure, are assessed a \$250 fee. The bill nearly foundered when it was amended to include a \$1,000 annual assessment against all attorneys--a provision that was quickly deleted. If the Fund

falls short, there is an annual premium tax on all liability carriers in the State.

The Fund is to assure lifetime care of infants with severe neurological injuries sustained during labor, delivery, and resuscitation, and is to be the sole and exclusive remedy against those electing to participate.

In addition, both hospitals and physicians electing to participate also participate in a program to assist the State in developing a health program for low-income pregnant women and the participating physicians must agree in advance to submit to a review of their obstetrics practices in the event of a finding of substandard care.

The Fund is administered by the Industrial Commission of Virginia with the assistance of an expert panel of three impartial physicians with the duty of the State's medical schools to develop guidelines.

Immediately on passage of the bill the Virginia Insurance Reciprocal lifted its moratorium on new o.b. insureds and agreed to freeze its rates and grant a 10% reduction to physicians who participated in the Fund. The medical protective entered the market with the theretofore unavailable \$1,000,000 limits. Forty of the sixty Virginia hospital providers having obstetrical services have indicated their intent to participate.

For an excellent discussion of the Virginia legislation see Professor Nathan Hershey's "Hospital Law Newsletter," Volume 5, Number 5, March 1988, and The American

College of Obstetricians and Gynecologists Legisletter, Special Issue, Vol. 6, No. 2, May 1987.

Immediately following the Virginia action the Florida legislature passed a comprehensive malpractice reform package in 1988. Included in the package was a special no-fault State-run Fund to provide for the care and treatment of babies born with permanent, severe disabilities due to mechanical failure or malpractice. The Fund will be financed by an annual payment of \$5000 per year by each participating physician. In addition to the cost of care and rehabilitation the parents may recover up to \$100,000 for noneconomic damages. The Fund will be administered by the State Workers' Compensation Division.

For other cases the law sets \$250,000 and \$350,000 caps on noneconomic damages under certain circumstances. Either the doctor defendant or the injured plaintiff can request that an arbitration panel settle the case and limit the noneconomic damages. If arbitrated, the limit is \$250,000. If the physician refuses arbitration and the case goes to a jury trial, the limit is \$350,000, and if both parties refuse arbitration, there is no limit. Subsequently the Florida Medical Society attempted to reduce the cap on an overall basis for noneconomic damages to \$100,000 by a proposed constitutional amendment which was soundly defeated by the voters.

The total Florida legislation was some 114 pages in length and included many provisions that hospitals and physicians will find burdensome. For example, although the good

samaritan law of immunity for ordinary negligence was extended to hospital emergency rooms, now hospitals must get State permission before cutting back on emergency rooms and if groups of doctors withhold emergency room services they may be subject to penalties, including possible loss of licensure.

A new watchdog unit called the Medical Quality Assurance Division to Florida's Department of Professional Regulation is created with 89 positions and a \$3,300,000 budget. As a part of hospital peer review a hospital must report to the agency of any malpractice case which includes a doctor and also notify the agency as to the outcome. The Medical Quality Assurance Division can contract with hospital peer review panels or local professional groups to make disciplinary recommendations, including the limitation or revocation of hospital privileges. Since these panels will be a part of State action there should be antitrust immunity when acting with State agency authority. In addition, hospitals must notify Medical Quality Assurance of incidents that could trigger a malpractice lawsuit. Also, a patient or his attorney must include Medical Quality Assurance in its notice of intent to sue and a doctor must report to Medical Quality Assurance of any settlement in or out of court. Insurers must notify the Medical Quality Assurance if they drop a doctor's insurance or if the doctor does not renew. For gross and repeated malpractice the Medical Quality Assurance must investigate serious payouts and for three

judgments in excess of \$10,000 each in a five year period there is mandatory revocation of licensure.

There are additional provisions as to patient dumping and a provision requiring and protecting whistle blowing. As might be expected the American Medical Association has described these steps as "doctor bashing." On the other hand, hospital and physician leaders in Florida are quoted as being cautiously optimistic.

Arbitration and Screening Panels

Both arbitration and screening panels can perform an important role as alternative dispute resolution mechanisms in medical malpractice claims or suits. However, to properly analyze and discuss the wide variety of approaches and their results would require a paper almost as extensive as this total paper. The allotted time does not permit doing justice to the subject so only a few comments will be made.

The California Medical Association and the California Hospital Association jointly initiated a program of voluntary arbitration of patient claims about 1970 which was described in my article in Hospitals, Vol. 44, October 1, 1970. Although the program was initiated in over 100 hospitals, it gradually fell in substantial disarray by the continued attack upon it by the courts which gave lip service to the public policy favoring arbitration but seemed to always find good reason not to enforce it. Wheeler v. St. Joseph Hospital, 63 Cal.App.3d 345 (1977), is a good example of this attitude.

However, interestingly enough, the Supreme Court took a different attitude if the arbitration agreement was contained in the health insurance agreement provided by an HMO negotiated by the employer even without the knowledge of the plaintiff patient. Such agreements continue to be enforceable in California. See seminal Supreme Court case, Malden v. Kaiser Foundation Hospitals, 131 Cal.Rptr. 1178 (1976).

More recently we find that all of the major HMOs in California have put medical malpractice arbitration clauses in their health coverage contracts and those that are national, such as CIGNA and Kaiser, are putting them in their agreements in other states. Unfortunately, we do not have access to their actual experience but their conduct speaks for itself. The CMA and CAHHS have just completed a revision of the basic physician arbitration agreement and rules of arbitration. These will be published shortly. This is in response to a recent upsurge in interest in contract arbitration by at least one of the major physician carriers that is mandating physician participation.

The other major statewide experience is that of Michigan where a State Medical Society arbitration program implemented by State legislation is developing a public bank of data, which is most encouraging.

For an excellent review of the history and progress of the Michigan program see "Medical Malpractice Crisis The Second Time Around," Journal of Legal Medicine, Volume 8, Number 2, 1987. Also, the case of Morris v. Metrivakoul, 418 Mich. 423,

344 N.W.2d 736 (1984), in which the Michigan Supreme Court upheld the constitutionality of the Michigan act.

For a general discussion of alternative dispute resolution concepts see, "Alternative Dispute Resolution: Panacea or Anathema?" Harvard Law Review, Vol. 97:668.

The AMA Proposal

What is generally referred to as the AMA Specialty Society Medical Liability Project is primarily, if not specifically, directed as a mandatory alternative approach to the removal of all physician malpractice cases to a commission approach, with limitations on recovery but substantial legal support for the claimant in receiving justice. In its initial form, from a hospital point of view, it would create a serious problem as the physician would be handled in one forum and other joint defendants in another. Personally, I have great concern about the combination of the disciplinary function with that of victim compensation which is contemplated by the proposal. Although there is a threshold requirement of a finding of fault, it would be my anticipation that under any commission operation it would drift more and more into a no-fault threshold. In any event, the proponents are to be congratulated for doing a very thorough and innovative job. I just hope they keep it out of California until it is well tested elsewhere.

The New York Medical Association has come up with a somewhat comparable proposal and the Vermont Medical Association caused a prototype of the AMA proposal to be introduced into the

Vermont legislature in February. At this point it is too early to determine its fate.

Miscellaneous

It will not be the purpose of this section to discuss in detail all of the various approaches to special problems that cumulatively can have an important impact upon the cost of medical malpractice insurance. Many of these are directed toward solving particular problems of providing health care in addition to the liability problem.

One of the earliest was to provide for immunity of physicians and other health care providers who respond to an emergency under what are now described as Good Samaritan Laws. California pioneered this approach with a simple immunity statute applying to just the scene of the emergency. Since then the statute has been expanded to a series of sections in the Medical Practice Act, including Sections 2395, 2396, 2397, and 2398 of the California Business and Professions Code:

§2395. Care at scene of emergency

No licensee, who in good faith renders emergency care at the scene of an emergency, shall be liable for any civil damages as a result of any acts or omissions by such person in rendering the emergency care.

"The scene of an emergency" as used in this section shall include, but not be limited to, the emergency rooms of hospitals in the event of a medical disaster. "Medical disaster" means a duly proclaimed state of emergency or local emergency declared pursuant to the California Emergency Services Act (Chapter 7 (commencing with Section 8550) of Division 1 of Title 2 of the Government Code).

Acts or omissions exempted from liability pursuant to this section shall include those acts or omissions

which occur after the declaration of a medical disaster and those which occurred prior to such declaration but after the commencement of such medical disaster. The immunity granted in this section shall not apply in the event of a willful act or omission.

§2396. Emergency care for complications after prior care by another

No licensee, who in good faith upon the request of another person so licensed, renders emergency medical care to a person for medical complication arising from prior care by another person so licensed, shall be liable for any civil damages as a result of any acts or omissions by such licensed person in rendering such emergency medical care.

§2397. Duty to inform patient of possible consequences

(a) A licensee shall not be liable for civil damages for injury or death caused in an emergency situation occurring in the licensee's office or in a hospital on account of a failure to inform a patient of the possible consequences of a medical procedure where the failure to inform is caused by any of the following:

- (1) The patient was unconscious.
- (2) The medical procedure was undertaken without the consent of the patient because the licensee reasonably believed that a medical procedure should be undertaken immediately and that there was insufficient time to fully inform the patient.
- (3) A medical procedure was performed on a person legally incapable of giving consent, and the licensee reasonably believed that a medical procedure should be undertaken immediately and that there was insufficient time to obtain the informed consent of a person authorized to give such consent for the patient.

(b) This section is applicable only to actions for damages for injuries or death arising because of a licensee's failure to inform, and not to actions for damages arising because of a licensee's negligence in rendering or failing to render treatment.

(c) As used in this section:

- (1) "Hospital" means a licensed general acute care hospital as defined in subdivision (a) of Section 1250 of the Health and Safety Code.
- (2) "Emergency situation occurring in the licensee's office" means a situation occurring in an office, other than a hospital, used by a licensee for the examination or treatment of patients, requiring

immediate services for alleviation of severe pain, or immediate diagnosis and treatment of unforeseeable medical conditions, which, if not immediately diagnosed and treated, would lead to serious disability or death.

(3) "Emergency situation occurring in a hospital" means a situation occurring in a hospital, whether or not it occurs in an emergency room, requiring immediate services for alleviation of severe pain, or immediate diagnosis and treatment of unforeseeable medical conditions, which, if not immediately diagnosed and treated, would lead to serious disability or death.

(d) Nothing in this article shall be construed to authorize practice by a podiatrist beyond that set forth in Section 2473.

§2398. Aid to participant in athletic event or contest
No licensee, who in good faith and without compensation renders voluntary emergency medical assistance to a participant in a community college or high school athletic event or contest, at the site of the event or contest, or during transportation to a health care facility, for an injury suffered in the course of such event or contest, shall be liable for any civil damages as a result of any acts or omissions by such person in rendering such voluntary medical assistance. The immunity granted by this section shall not apply to acts or omissions constituting gross negligence.

These sections have been well understood by our courts and applied in accordance with their provisions. In Burciaga v. St. John's Hospital, 232 Cal.Rptr. 75 (1986), the court applied the exemption to a pediatrician who was in the hospital and responded to an emergency request of an obstetrician. In the most recent case, Kearns v. Superior Court, 204 Cal.App.3d 1325 (1988), a physician was called in on an emergency basis to assist a surgeon who was faced with critical unexpected emergency in a cancer case. The defendant assistant was not a

consultant nor had any prior relationship to the patient and was granted a summary judgment by way of dismissal.

As a part of the increasing concern for the availability of obstetrical services the 1988 California legislature enacted Business and Professions Code Section 2395.5 intended to provide "incentive and protection" for physicians rendering on-call emergency obstetrical care. The immunity applies to liability for negligent acts provided that they did not constitute gross negligence and the service was without compensation nor a part of continued physician/patient relationship. If the physician was required by the hospital to serve on call and if the hospital agreed to accept liability for the physician's negligence, then the limitation on immunity does not apply even though the physician was not compensated.

For a similar result see:

Johnson v. Matuiune, 531 N.E.2d 970 (Ill.App.Ct.),
November 28, 1988.

Clayton v. Kelley, 357 S.E.2d 865 (Ga. 1987).

Henry v. Barfield, 367 S.E.2d 289 (Ga. 1988).

A requirement of a certificate of merit as a condition of filing a medical malpractice action is becoming increasingly popular. The purpose of requirements is to apply some discipline on the attorney to do at least some preliminary investigation of the matter and not simply rely on the request of his client that a suit be filed. These take several approaches from the minimal requirement that the attorney certify with no requirement that he

be made to substantiate the affidavit to actual requirement that an outside expert make the affidavit. Depending on the strength of the requirement, the plaintiff attorney may be subject to sanctions. As a matter of fact, the use of sanctions by either court rule or legislative action is a rapidly developing phenomena of applying sanctions for frivolous pleadings or conduct by either plaintiff or defense counsel. Such discipline has been long overdue. Similar application of pre- and post-judgment interest has been a part of the same process to expedite the resolution of cases.

For a case discussing the Illinois requirement of a certificate of merit see Harford v. O'Connor, 519 N.E.2d 66 (1988), holding the certificate adequate in that particular case.

During the crisis of the 1970s the doctors were strongly advocating a requirement that the prevailing party in a medical malpractice action should be entitled to reasonable attorney fees and costs. They thought that this would be a strong deterrent because obviously the doctors are always right and will win substantially all of the cases. What they did not realize is that although the defense may win a majority of the cases, when the plaintiff wins the win is a big one and then if the contingent fee is added to the judgment, it can be an even worse disaster. Furthermore, if the defendant wins, the ability to actually collect any substantial amount from the plaintiff is speculative at best because the attorney for the plaintiff is

not liable--only his client. It is my understanding that Florida actually adopted such a statute but after disastrous results it was repealed. In 1987 Colorado adopted a statute that would permit judges to allow attorneys' fees to defendants in wrongful death cases dismissed before trial.

As the locality rule has gradually disappeared there has been increasing concern by defense counsel for the threat of the itinerant witness who can be made available through the several major witness service organizations. The need to provide some discipline over the actual qualifications of these witnesses and to protect the defendants from the itinerant expert who has an impressive paper background, often with strong academic qualifications, has become apparent. The thrust has been to attempt to require that these individuals have current experience in actual patient care and in the specialty involved in the case.

Although the courts have been extremely reluctant to utilize judicial legislation for the benefit of the tort defendant, there is one glimmer of hope in a late Georgia Supreme Court case, Yost v. Torok, 256 Ga. 92, in which the Court created a new tort for asserting a frivolous claim or defense that is "substantially frivolous, substantially groundless or substantially vexatious." This decision was in part based upon the Georgia statute providing for the award of attorney's fees and court costs for specified abusive conduct by parties to litigation (Ga. Code Ann. Par. 9-15-14).

The Arizona legislature initiated a statute which prohibited medical malpractice litigants from presenting evidence that a witness was covered by the same professional liability insurance carrier as the defendant. In Barseman v. Sussong, 751 P.2d 969 (Ariz. 1988), the Arizona Supreme Court held that the statute was unconstitutional under the doctrine of separation of powers.

In Henning v. Thomas, 366 S.E.2d 109 (Va. 1988), the Virginia Supreme Court ruled that a party could cross-examine an expert witness concerning his relationship with a professional medical witness company. Also, as to extent of income as an expert witness, see Trower v. Jones, 520 N.E.2d 297 (Ill. 1988).

Under California Health & Safety Code, §§1797.5 and 1799.10, in cases against emergency care department physicians expert medical testimony may be admitted only if by physicians and surgeons with substantive professional experience within the last five years while assigned to provide such emergency medical coverage. This statute was upheld in Jutzi v. County of Los Angeles, 242 Cal.Rptr. 74 (1987). The Court relied on statement of policy in the statute of encouraging emergency medical services.

In 1987 Alabama adopted a statute establishing an expert witness qualification law in medical malpractice cases with the following requirements:

- a. Be licensed by the appropriate regulatory board of Alabama or another state.

b. Be trained and experienced in the same specialty as the defendant.

c. Have practiced the same discipline as the defendant during the year preceding the alleged act of malpractice.

d. Be certified by an appropriate American Board in the same specialty as the defendant.

Other states that have passed similar statutes include Colorado, Kansas, Maryland, Michigan, Rhode Island and West Virginia.

Included in the 1987 tort reform package adopted by North Carolina was a requirement that attorneys in medical malpractice cases agree to set a deadline for designating expert witnesses at a pretrial conference or be subject to dismissal or sanction. In California a similar result is achieved by a rule of court.

Although not a true tort reform in itself, an increasing number of states have mandated that hospitals and physicians institute peer review activities or including hospital risk management programs with a variety of requirements for reports to various state agencies dealing with physician or hospital licensure. Such requirements can be a part of a quid pro quo for other tort reforms. From the hospital point of view these requirements can be a mixed blessing. On the one hand, they validate the activities initiated by many hospitals and hopefully encourage physician cooperation. On the other hand,

they can be another bureaucratic intrusion into management that results in a blizzard of paper work and in some instances may jeopardize patient confidentiality. The most comprehensive program in this regard was included in the Massachusetts "Act Relative to Medical Malpractice Chapter 351 of the Laws of 1986." More important are the comprehensive regulations developed to clarify the ambiguities in the Act, entitled "Care Assessment Regulations, 243 Code of Massachusetts Regulations Starting at 3.00." For an excellent discussion of the Massachusetts and five other state enactments and an analysis of the pros and cons see "State Malpractice/Risk Management Statutes Raise Important Concerns" in the Spring 1988 issue of Perspectives in Healthcare Risk Management and "State Statutes Take Aim at Malpractice Insurance Crises" in the Summer 1987 issue of the same publication.

It is beyond the scope of this paper to discuss in detail the role of Joint Underwriting Associations. These are entities created by state law mandating that existing liability carriers join together in making available designated lines of insurance that may not be available. This is a mixed private and governmental effort to meet a crisis situation, and has been used for other lines of insurance, particularly auto insurance. Especially during the malpractice insurance crisis of the 1970s many states created special Joint Underwriting Associations as a stopgap measure and as a part of the quid pro quo burden placed on the insurers as a part of a tort reform package. Unfor-

Unfortunately, this device created for the crisis becomes addictive and becomes involved in politics and, as a result, is often seriously underfunded, thus only delaying the evil day of reckoning. For a discussion of the critical status of a number of JUAs see the March 13, 1989 issue of National Underwriter, at page 6.

A somewhat similar result is developing in the experience of the Catastrophic Loss Funds provided by many states as a part of the solution to the medical malpractice crisis. Such a fund is really a layer of insurance over a basic policy limit provided the individual physician or hospital and is triggered when the amount of the judgment or settlement exceeds the basic policy limit. The Fund is usually created by an assessment against the individual policy and starts out at a relatively low amount. However, as claims develop against the Fund, the Fund starts to fall short and as a result the annual assessment against the physicians and hospitals rapidly increase to the dismay of all concerned. Often applicants to the State Fund must agree to arbitrate their claim. For example, the Indiana Plan started with a 25% assessment and is now at 125% with no end in sight. There are many questions of the financial viability of the New York Fund as well as others. For a provocative discussion of this approach Medical Economics, in its November 21, 1988 issue, at page 101, suggests that "for some, the protection is worse than the risk." Again, this is an

example of a short term patchwork solution that appeals to a legislature seeking to avoid the need for true tort reform.

North Carolina in 1988 faced the problem of the availability of obstetrical services when the cost of liability insurance for obstetricians went from \$6,000 in 1935 to \$29,000 in 1988 and the available physicians providing obstetrical care dropped from 500 to 150. The State will provide \$6,500 or the added cost of insurance coverage, whichever is the higher, for service in non-urban areas. The M.D. must agree to accept all obstetrical patients regardless of income.

Although there have been sporadic efforts by the trial attorneys to repeal some of the tort reforms put into place in the mid-seventies and mid-eighties, the only major success occurred in 1937 in Connecticut when the legislature restored joint and several liability, eliminated the requirement for periodic payment, and increased the amount of allowable attorneys' fees. Unconfirmed rumor indicates that this unusual action was a part of a package deal with the Governor to obtain hospital and doctor relief under the State medicaid law.

Some states have passed laws providing for immunity from liability for free health care services. These states include Arizona, Georgia, Illinois, Maine, South Carolina and Virginia.

Conclusion

Perhaps the only conclusion we can reach is that there is no conclusion to this ongoing struggle to establish a fair

compensation system. Until there can be an effective integration of our duplicative and conflicting social programs such as workers compensation, health insurance in all of its manifestations, disability insurance, Social Security, and the like, the tort system will continue as an overlapping expensive anomaly.

If we are to assume that the justification for the tort system is based upon two separate components, to wit: punishment and compensation, then these should be analyzed separately as to their continued justification. For example, the punishment and deterrent component is rapidly being covered by other mechanisms, such as intensive peer review, strengthened licensure, PROs and PSROs, and intensive review of medical records for quality assurance purposes.* On the other hand, to an increasing extent the tort system as a compensation mechanism duplicates social insurance mechanisms which are funded and operated on a much fairer and universal basis. A system based on fault is of necessity arbitrary and capricious in its result.

As time passes the continued need by a relatively small component of the legal profession relying on medical malpractice cases for their financial sustenance remains as the main deterrent to a more effective solution in the public interest.

In the meantime the battle for true tort reform continues.

* See "Payment Systems, Cost Management, and Malpractice," Ludlam, Hospitals, November 1, 1984.

Table A.1

STATE TORT REFORM ENACTMENTS, 1986

STATE	CN	JSI	DAM	PUNI	AFMS	CSR	PPJ	INTX	DRAM	GOV	MMPL	MISC
Alabama										2		
Alaska		1	1	1		1	1	1			2	1
Arizona					1				2			1
California		1										
Colorado		1	3	1		1			2	2	2	3
Connecticut	1	1			1	1	1		2	2	2	
Delaware											2	
Florida		1	1	1		1	1					
Georgia					1					2		
Hawaii		1	1	1	3	1	2			2	2	1
Idaho					1				2			
Indiana					1	1		1	2		2	2
Illinois	1	1		1	1	1				2	2	
Iowa				3	1		1		2	2	2	3
Kansas			2		3		2				2	2
Louisiana									2			2
Maine					2		2		2	2	2	
Maryland			1				1				2	
Massachusetts			2		2	2					2	
Michigan		1	2		1	3	1	1	2	2	2	1
Minnesota			1	1	1	1		1				
Mississippi										2		
Missouri			2							2	2	
Montana			2							2		
Nebraska					1			1				
New Hampshire		3	3	1	1				2	2	2	1

Table A.1—continued

STATE	CN	JSL	DAM	PUNI	AFMS	CSR	PPJ	INTX	DRAM	GOV	MMPL	MISC
New Mexico			2		2				2			
New York		1			1	1	1				2	1
New Jersey												2
Ohio											2	2
Oklahoma				1	1			1				
Rhode Island					2	2					2	
South Carolina			2							2		
South Dakota		2	2	1			1			2	2	
Tennessee									2	2	2	2
Utah		1	2				2		2		2	
Virginia			2	2				2		2		
Washington		1	1		1		1			2	2	1
West Virginia		3	2		2					2	2	
Wisconsin			2		3						2	
Wyoming		1			1				2	2	2	2

NOTE: 1 - Applicable to most tort suits; 2 - applicable only to particular case types or parties; 3 - applicable to most tort suits and specifically to particular case types or parties.

ABBREVIATIONS:

CN - Comparative/Contributory
Negligence
JSL - Joint and Several Liability
DAM - Limits on Damage Awards
PUNI - Punitive Damages
AFMS - Attorney's Fees/
Miscellaneous Sanctions
CSR - Collateral Source
Rule Changes

PPJ - Periodic Payment of Judgments
INTX - Interest and Taxes on Judgments
DRAM - Dram Shop Liability
Reform Legislation
GOV - Government Liability
MMPL - Medical Malpractice and
Professional & Director's/
Officer's Liability
MISC - Miscellaneous Provisions

**Test Reforms Enacted in 1987
(As of September 1987)**

Alabama	- Itemized verdicts - Mandatory periodic payment of future damages - Cap on noneconomic damages, defined as including punitive damages, of \$400,000 - Introduction into evidence of payments from collateral sources - Burden of proof/standard of care guidelines - Expert witness qualifications - Establishment of cause of action for malicious prosecution - Cap of \$1 million on total award in actions for wrongful death	Nevada	Award of attorney fees where there has been a frivolous claim or defense
Arizona	Modification of joint and several liability rule	Nevada	Modification of joint and several liability rule
Arkansas	Award of attorney fees where there has been a frivolous claim or defense	New Mexico	Modification of joint and several liability rule
Colorado	- Certificate of merit - Pretrial screening panels for small claims	North Dakota	- Punitive damages guidelines - Modification of joint and several liability rule - Mandatory offset of payments from collateral sources - Periodic payment of future economic damages - Post-trial review of reasonableness of damages
Georgia	- Limited liability for medical students, physicians providing free services, and officers of nonprofit hospitals and associations - Introduction into evidence of payments from collateral sources - Punitive damages guidelines - Cap on punitive damages of \$250,000 - Special hearings as to inadequate or excessive damages - Modification of joint and several liability rule - Shortened statute of limitations for minors - Certificate of merit	Ohio	- Shortened statute of limitations - Certificate of merit - Ad damnum clause eliminated - Award of attorney fees where there has been a frivolous claim or defense - Itemized verdicts - Periodic payment of future damages
Hawaii	Ad damnum clause eliminated	Oklahoma	- Ad damnum clause eliminated - Award of costs and fees where there has been a frivolous claim or defense - Shortened statute of limitations for minors
Idaho	- Discretionary periodic payment of future damages - Cap of \$400,000 on noneconomic damages (all personal injury actions) - Modification of joint and several liability rule - Judicial discretion to increase or decrease awards - Award of attorney fees where there has been a frivolous claim or defense - Ad damnum clause eliminated	Oregon	- Punitive damages guidelines - Cap of \$500,000 on noneconomic damages (all personal injury actions) - Modification of joint and several liability rule - Guidelines for contingent fee agreements - Discretionary offset of benefits from collateral sources - Elimination of special injury requirement in actions for wrongful use of civil proceedings - Ad damnum clause eliminated - Certificate of merit
Illinois	Shortened statute of limitations for minors	South Carolina	Limited liability for physicians providing free services
Iowa	- Itemized verdicts - Punitive damages guidelines	South Dakota	Modification of joint and several liability rule
Maryland	- Shortened statute of limitations for minors - Court authority to grant new trial on damages to consider collateral sources	Texas	- Award of costs and fees where there has been a frivolous claim or defense - Punitive damages guidelines - Cap on punitive damages of \$200,000 or four times amount of actual damages
Montana	- Modification of joint and several liability rule - Discretionary periodic payment of future damages - Shortened statute of limitations for minors - Mandatory offset of payments from collateral sources - Punitive damages guidelines	Virginia	- Shortened statute of limitations for minors - Birth-related neurological injury compensation program - Cap on punitive damages of \$350,000 - Limited liability for physicians rendering emergency obstetrical care - Certificate of merit

Legislative information provided by the
AMA Department of Federal Legislation
and Department of State Legislation

**AMERICAN RE-INSURANCE COMPANY
1987 REPORT ON TORT REFORM**

The following is a series of quotes from the above Report:

Joint and Several Liability - "Some states currently retain this doctrine. Through 1987, however, 32 states have taken action to either abolish or modify it. Colorado, Utah and Wyoming have abolished it for all classes of damages as to all defendants. Proposition 51 in California eliminated it for all noneconomic damages. Twenty-eight other states have enacted partial modifications.

"Modification or elimination of this rule will reduce both awards and settlements, particularly in cases where liability is tenuous but the injury substantial. Insurers envision reduced losses resulting from this legislation."

Damage Award Caps - "In 1986, 23 states passed legislation capping damages in some form, and 1987, 10 additional states passed such bills. Although the majority limit 'caps' to specific tort areas such as medical malpractice, dram shop/liquor liability, and governmental liability, eight states now have noneconomic damage 'caps' applicable to all tort actions.

"These limitations on recoverable damages, particularly noneconomic damages, will make settlement values and damage awards more predictable. This enhanced predictability can eventually be translated into more accurate calculation of risk and permit companies to offer coverage in all lines of business."

Collateral Source Rule - "Modification of this rule is gaining popularity. Supporters of change argue that if one of the purposes of our tort system is to compensate injured plaintiffs, then it is reasonable to consider contributions to such compensation from sources other than the defendant.

"In 1986 and 1987, 24 states modified their rule. The most common approach has been to provide an offset or reduction of a jury award for compensation from other sources. Such offsets or reductions should favorably impact settlements or jury awards."

Punitive Damages - "Twelve states enacted some reform in this area in 1986 and 14 additional states took action in 1987. Some approaches taken by the states were to place caps on such awards, to raise the standard of conduct a plaintiff must prove in order to obtain an award, to limit the type of case in which punitive damages are available, or to require that punitive awards bear some reasonable relationship to the compensatory award.

"This legislation will reduce catastrophic awards. In those states where punitive damages are insurable it will allow insurers to reserve and settle claims and rate risks for premium purposes with more accuracy."

Periodic Payment of Judgments - "The mid-1970s saw an increase in large jury awards and resulting insurance premium increases for certain types of coverages. These increases, coupled with a perceived need to protect plaintiffs from squandering such awards, induced several state legislatures to create statutory exceptions, initially for medical malpractice cases, to the time honored principle that a single recovery of money was the only permissible mode of distribution of a Judgment. Thereafter, other states began to allow for periodic payment of Judgments in other types of cases.

"In 1986 and 1987, 20 states enacted some type of reform in this area. Generally, these statutes allow for the spreading of all or a portion of plaintiff's Judgment over a period of time. Some require that the parties elect to have the case tried so as to result in a periodic payment Judgment. Others allow periodic payments at the Court's discretion where the Judgment is in excess of a threshold dollar amount.

"These statutes affect both small and large cases. They will reduce total claim payments by allowing insurers the benefit of interest accrued on payments due in the future while still providing the plaintiff with his/her total award and guaranteeing the plaintiff's future financial security."

June 1, 1988

TORT REFORMS ENACTED IN 1988

Colorado

- Cap of \$1 million on total damages
- Mandatory periodic payment of future damages exceeding \$150,000
- Voluntary binding arbitration
- Introduction into evidence payments from collateral sources
- Mandatory liability insurance
- Statute of repose

Florida

- Certificate of merit
- Mandatory presuit investigation by the parties
- Voluntary binding arbitration
- No-fault birth-related neurological injury compensation system
- Good Samaritan immunity for emergency room medical treatment

Kansas

- Cap of \$250,000 on noneconomic damages [all personal injury actions]
- Introduction into evidence payments from collateral sources [all personal injury actions]
- Punitive damages guidelines [all personal injury actions]

Kentucky

- Modification of joint and several liability rule
- Punitive damages guidelines
- Introduction into evidence payments from collateral sources
- Certificate of merit
- Court review of adequacy of award
- Penalties for frivolous lawsuits

Minnesota

- Periodic payment of future damages
- Modification of joint and several liability rule

Mississippi

- Award of costs and fees where there has been a frivolous claim or defense

South Carolina

- Shortened statute of limitations for minors
- Punitive damages guidelines
- Award of costs and fees where there has been a frivolous claim or defense
- Limited liability for state-employed physicians

- American Medical Association -
Department of State Legislation, Division of Legislative Activities

Tort Reform Provision	Total States Enacting	Held Constitutional by State Supreme Court	Held Unconstitutional by State Supreme Court
Ad Damnum Clause	38	IN, LA	NH*, WY
Arbitration	15	MI	—
Attorney Fee Regulation	26	CA, IL, IN, NE	NH*
Awarding Costs	27	MA	NH*
Collateral Source Rule	30	AZ, CA, FL, IA, IL, NE	KS*, NH, ND*
Joint & Several Liability Rule	26	—	—
Limits on Recovery	29	CA, IN, NE	FL, IL, KS*, NH*, ND, TX
Periodic Payments	30	CA, FL, IL	KS, NH
Pretrial Screening Panels	29	AK, AZ, IN, LA, MA, MT, NE, NJ, NY, OH	FL*, IL, MO, PA, WY
Punitive Damages Guidelines	24	—	—

Note: Chart does not include statutes that have been repealed or that have sunset. Chart is current as of June 15, 1998.

*State has enacted a new tort reform provision since court decision.

*Legislative Information provided by the
AMA Department of State Legislation,
Division of Legislative Activities*

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

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May 2, 1989

The Honorable Dave Donley
Chair
House Labor and Commerce Committee
P.O. Box V
Juneau, AK 99811

Re: Constitutional concerns raised
by HB 166
Our file: 663-89-0459

Dear Representative Donley:

You have asked for our opinion on whether HB 166 or any part of HB 166 raises constitutional concerns. In addition you have requested a "report as to whether any courts have overturned any of the 'tort reform' measures addressed in HB 166, the reasons for the ruling and the ultimate outcome of the cases."

In general, any time the legislature acts there is a possibility that constitutional boundaries will be involved. When legislative action centers on individual rights within our justice system, concern about the constitutionality of the measure is heightened. General concerns about equal protection, due process, and the right to have a jury decide a claim are all presented by HB 166.

Specifically, there are two major areas of concern presented by HB 166. These are the sections dealing with the statute of repose (section 2) and the "cap" on noneconomic damages (section 15).

This memo will focus on the general state of the law concerning statutes of repose and caps on noneconomic damages.

STATUTE OF REPOSE

House Bill 166 proposes in section 2 to enact a six-year "statute of repose" that would limit a person's right to bring a cause of action for personal injury, death, or property damage to six years from the earliest of: the date of purchase

of a product; 1/ the date of substantial completion of construction; or the date of the last act alleged to have caused the injury, death, or property damage.

Statutes of repose are quite different than statutes of limitation. As one court defines the difference:

A statute of limitation bars enforcement of an accrued cause of action whereas a statute of repose not only bars an accrued cause of action, but will also prevent the accrual of a cause of action where the final element necessary for its creation occurs beyond the time period established by the statute

A second distinction may be made with reference to the event from which time is measured. A statute of limitation runs from the date the cause of action arises; that is, the date on which the final element (ordinarily damages, but it may also be knowledge or notice) essential to the existence of a cause of action occurs. The period of time established by a statute of repose commences to run from the date of an event specified in the statute, such as delivery of goods, closing on a real estate sale or the performance of a surgical operation. At the end of the time period the cause of action ceases to exist.

Carr v. Broward County, 505 So. 2d 568, 570 (Fla. 4 Dist. Ct. App. 1987).

The Utah Supreme Court, in describing the difference between a statute of repose and a statute of limitations, noted:

Statutes of repose . . . are different from statutes of limitations, although to some extent they serve the same ends. See McGovern, The Variety, Policy and Constitutionality of Product Liability Statutes of Repose, 30 Am.U.L.Rev. 579, 582-87 (1981) (discussing the two types of

1/ House Bill 166 does not clarify if the "date of purchase" is the "initial" date of purchase or some other date of purchase. Since products are often resold, this could become an issue if not clarified.

statutes and variations of statutes of repose). A statute of limitations requires a lawsuit to be filed within a specified period of time after a legal right has been violated or the remedy for the wrong committed is deemed waived. A statute of repose bars all actions after a specified period of time has run from the occurrence of some event other than the occurrence of an injury that gives rise to a cause of action. . . .

To be constitutional, a statute of limitations must allow a reasonable time for the filing of an action after a cause of action arises. Horn v. Shaffer, 151 P. 555 (1915); Saylor v. Hall, Ky., 497 S.W.2d 218 (1973). In Wilson v. Iseminger, 185 U.S. 55, 62, (1902), the United States Supreme Court stated:

It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions.

Since a statute of repose begins to run from a date unrelated to the date of an injury, it is not designed to allow a reasonable time for the filing of an action once it arises. Therefore, a statute of repose may bar the filing of a lawsuit even though the cause of action did not even arise until after it was barred and even though the injured person was diligent in seeking a judicial remedy. . . . Indeed, a statute of repose may cut off a cause of action even though it is filed within the period allowed by the relevant statute of limitations.

Berry v. Beach Aircraft, 717 P.2d 670, 672 (Utah 1985) (some citations omitted). Thus, the major difference between a statute of repose and a statute of limitations is that a statute of repose can cut off a cause of action before a person even

recognizes he or she has one. A statute of limitations begins to "run" after the cause of action arises.

There has been one Alaska Supreme Court decision concerning a statute of repose. In Turner Construction Co. v. Scales, 752 P.2d 467 (Alaska 1988), the Alaska Supreme Court ruled that Alaska's six-year statute of repose on suits against design professionals was unconstitutional. In so doing, the supreme court followed an equal protection analysis. Although the court found that the "interest in redressing wrongs through the judicial process is a significant one" under Wilson v. Municipality of Anchorage, 669 P.2d 569, 572 (Alaska 1983), the court held that no fundamental interest was at stake. 752 P.2d at 471.

Because no fundamental constitutional right was involved under State v. Erickson, 574 P.2d 1 (Alaska 1978) (see also Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269 (Alaska 1984), for a helpful explanation of equal protection analysis in Alaska), 2/ all that was necessary to justify the statute was a fair and substantial relationship between the means and the ends of the statutory requirement. The court found that the goal of avoiding "state claims by shielding certain defendants from potential future liability" was a legitimate

2/ Under Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264 (Alaska 1984), the state supreme court outlined the following three-step analysis in equal protection cases. I include it as a guide to consider in analyzing equal protection issues.

1. First ask what the weight of the constitutional interest impaired is. Depending on the primacy of the interest involved the state will have a lesser or greater burden in justifying its legislation.

2. Next ask what purpose the statute serves. Depending upon the level of review, the state may be required to show purposes that at the low end of the scale are simply "legitimate objectives" all the way to a "compelling state interest" at the upper end.

3. Finally, question what the state's interest is in the particular means employed to further its goals. The state's burden differs in accordance with the determination of the level of scrutiny and goes from a "substantial relationship between the means and ends" to a much closer fit.

government purpose, but that there was no "substantial relationship" between the means and the ends of the statute, and that the statute was thus unconstitutional. 752 P.2d at 472.

The court noted in its decision that it was "not persuaded" by a number of rationales presented by other courts to justify a distinction between design professionals and others. The court rejected the reasoning that a distinction is valid because design professionals do not have continuing control over access to and maintenance of property while owners, tenants, and others in possession do. The court also rejected distinctions based upon who may sue design professionals (a large group) versus landlords and tenants (a smaller group). Finally, the court did not accept distinctions based on the theory that design professionals have special expertise and their work cannot be completely tested, unlike standard goods manufactured by "standard processes." 752 P.2d at 471.

After rejecting the above rationale the court found the six-year statute of repose unconstitutional. However, in its final statement, the court noted that the statute of repose eliminated the statutory right of contribution among tortfeasors. Therefore, under joint and several liability one defendant could end up liable for 100 percent of the damage. The court noted, "the statute of repose . . . does not entirely abrogate liability for defective design work, but shifts it. Thus, the potential interest of joint tortfeasors in obtaining contribution, in addition to the claimant's interest in suing a particular party, must be considered." 752 P.2d at 472. The court further noted that because of this "shift" in responsibility there was no substantial or rational relationship between the means and the ends of the statute. The court found that there would even be a disincentive for owners not to finance construction projects which might "be greater than their proportional measure of liability shift, because they may be liable for a product over which they have no control," Id.

It is the mention of the joint tortfeasor act and the effect of joint and several liability on it that calls the Turner decision into some question. In the fall of 1988 Alaskan voters passed Ballot Proposition #2, which abolished joint and several liability in Alaska (except for environmental torts, see, e.g., 1988 Inf. Op. Att'y Gen. (Nov. 2; 661-89-0172) in Alaska. Because Alaska no longer has joint and several liability, there would no longer be the "shift" of responsibility found in Turner. What would exist, however, is a shift of liability from tortfeasors back onto the victim. What the court would decide given this situation is not certain, but the same analysis

applied in Turner disapproving the shift of liability onto other tortfeasors would most likely be applied to a shift onto a victim.

Turner dealt with design professionals, not products liability or medical malpractice, but the equal protection analysis applied would be the same. Thus, if HB 166 became law, the court would use the same equal protection analysis used in that case to determine the constitutionality of the statute of repose in section 2 of the bill.

Because there is no fundamental right involved (even though there is a "significant interest") the standard of review concerning the statute of repose in HB 166, should it become law, would still be whether or not there is a "fair and substantial relationship" between the means and the ends of the statute. Although this is a low standard of review, a court would also ask what the legislative goal was in enacting the statute. If the court found a legitimate goal, then the court would analyze whether or not the means utilized by the statute fit the ends, or the goal, of the statute. While it is not possible to be completely certain what the state supreme court would hold concerning the statute of repose suggested by HB 166, as mentioned above it is unlikely that the court would approve of such a drastic shift of liability back onto a victim.

OTHER STATES

Other states have split in their decisions on the constitutionality of statutes of repose. One commentator notes that

vigorous legal challenges to such statutes have brought mixed results. Claims of the unconstitutionality of such statutes have failed, as some courts have been prepared to accept remarkable arguments that the challenged statutes of repose do not offend the equal protection clause because they are rationally related to some legitimate state purpose.

M. Madden, Products Liability 209 (2d ed. 1988). While, as Professor Madden notes, many courts find statutes of repose constitutional, many also find them unconstitutional. A denial of equal protection is often the main reason courts find statutes of repose unconstitutional, but due process and the "open courts" requirement (granting access to the courts and remedies for all

injuries) of some states are also major issues in determining constitutionality. 3/

One of the more comprehensive cases outlining issues concerning statutes of repose comes from North Dakota. In Hanson v. Williams County, 389 N.W.2d 319 (N.D. 1986), the North Dakota Supreme Court did an exhaustive study of its statute of repose and found it unconstitutional. Hanson involved a products liability statute of repose. In Hanson, a young man was killed when an earth mover "jumped backwards" upon start and ran over him. The earth mover had been purchased 19 years earlier, and North Dakota's statute of repose barred a cause of action unless brought within 10 years of purchase. Thus, the wrongful death action brought by the young man's mother was barred by the statute of repose. In analyzing its statute, the North Dakota Court used an equal protection analysis similar to the Alaska Supreme Court in Turner (although the court called their standard of review "intermediate" scrutiny, it was actually very similar to the Alaskan standard in Turner). It is important to note that one of the reasons the North Dakota Court found its statute unconstitutional was that the court found the purpose the statute of repose sought to achieve, i.e., controlling insurance rates, might not be achieved by the statute. This suggests that unless statutes of repose can actually be shown to control rates, they will be less likely to be found constitutional. Among the stated goals in HB 166 is the goal to "increase the availability and affordability of insurance" and "to reduce costs associated with the tort system." Hanson suggests that unless the statute of repose included in HB 166 can be shown to actually result in these goals the measure may be unconstitutional.

As noted in Hanson, many other courts have found their statutes of repose to be unconstitutional. Among states finding statutes of repose unconstitutional are Alabama, Lankford v. Sullivan, Long and Hagerty, 416 So. 2d 996 (Ala. 1982); Utah, Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985); Rhode Island, Kennedy v. Cumberland Engineering Co., Inc., 471 A.2d 195

3/ "Open courts" provisions are contained in 37 state constitutions. These provisions allow access to courts and sometimes allow for a remedy for every injury. Alaska does not have an "open courts" provision in its constitution, but to a certain extent a combination of due process rights and the right to trial grant the same rights as an "open courts" provision. See, Lucas v. U.S., 757 S.W.2d 687, 690 (Tex. 1988).

(R.I. 1984); New Hampshire, Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983); Wyoming, Phillips v. ABC Builders Inc., 611 P.2d 821 (Wyo. 1980); Kentucky, Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973); South Dakota, Daugaard v. Baltic Coop Bldg. Supply Assoc., 349 N.W.2d 419 (S.D. 1984); and Ohio, Gaines v. Preterm-Cleveland, 514 N.E.2d 709 (Ohio 1987). See Hanson, 389 N.W.2d at 321.

As Hanson notes:

Courts which have declared statutes of repose unconstitutional have done so on the bases of different constitutional rights. Some courts have relied at least in part on "open courts" provisions in state constitutions. Berry; Daugaard; Lankford. Courts have also relied in part on the due process clauses of state constitutions. Berry. Statutes of repose have also been declared violative of equal protection provisions of Federal and State constitutions. Heath. Some courts have used a combination of these constitutional provisions along with state wrongful death constitutional provisions to invalidate statutes of repose. Berry, Kennedy, and Saylor.

389 N.W.2d at 321, 322 (citations omitted).

On the other side of the issue, Florida, North Carolina, Oregon, Massachusetts, Tennessee, Colorado, Indiana, Illinois, New Jersey, Wisconsin, and Nebraska have all upheld statutes of repose. Courts upholding statutes of repose have reasoned that there is a necessity to be able to predict an end to liability, thereby reducing the "tail" of liability actions; thus, it is hoped, reducing insurance rates. In Hanson, the court noted these cases and their reasonings:

Pullum v. Cincinnati, 476 So.2d 657 (Fla. 1985) [statute of repose does not violate equal protection clause]; Tetterton v. Long Mfg. Co., Inc., 332 S.E.2d 67 (N.C. 1985) [statute of repose does not violate equal protection or State constitutional provision on open courts!]; Davis v. Whiting Corp., 674 P.2d 1194 (Ore. App. 1984), cert. denied, 679 P.2d 1367 (Or. 1984) [statute of repose does not violate due process, equal protection, or access to court provisions of the constitution]; Stutts v. Ford Motor Co., 574 F.Supp. 100 (M.D.Tenn. 1983) [statute of repose does not

violate open court provisions of State constitution]; Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (Colo. 1983) [statute of repose does not violate due process or equal protection]; Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1982) [statute of repose does not violate State open court provision]; Thornton v. Mono Mfg. Co., 54 Ill.Dec. 657, 425 N.E.2d 522 (Ill.App. 1981) [statute of repose does not violate due process]; Rosenberg v. Town of North Bergen, 293 A.2d 662 (N.J. 1972) [statute of repose does not violate equal protection clause of Federal Constitution].

389 N.W.2d at 322 n.7 (some citations omitted).

In one illustrative case, Gaines v. Preterm-Cleveland, 514 N.E.2d 709 (Ohio 1987), the issue was the constitutionality of a medical malpractice statute of repose. The facts involved a woman who brought suit against a health care organization. A doctor for the organization had told her that her IUD had successfully been removed when in actuality it had not. Three and one-half years later, the IUD had perforated her uterus and was embedded in her left ligament. Pain and permanent damage resulted. Relying on Ohio's four-year statute of repose, the lower court granted summary judgment against the plaintiff.

The Ohio court had previously held that a four-year statute of repose could not constitutionally bar claims of minors or plaintiffs who in exercise of reasonable diligence discovered their injury after the four-year period. Mominee v. Schebarth, 503 N.E.2d 717 (Ohio 1986); Hardy v. Ver Meulen, 512 N.E.2d 626 (Ohio 1987). In Gaines, the plaintiff was not outside the four-year period, but she had less than one year left in which to pursue her claim. The court held that the legislature had intended there to be at least one year allowed in which a person could bring a claim. 514 N.E.2d at 717.

The Ohio court in Gaines focused on the "reasonableness" of the period allowed in which to bring a claim. If less than a year was allowed, the court noted:

This person is unique in the law of medical malpractice. [S]he has the misfortune of belonging to the only class of litigants who do not have a reasonable period for seeking legal recourse . . . A person in this class of persons is not any less injured than other malpractice victims nor has he been less vigilant in monitoring the

quality of his medical care. Yet his legal rights are abridged and even cut off completely for no other reason than the fortuity of timing. We fail to discern any rational basis for distinguishing such a person from other medical malpractice litigants. The injury suffered is no less real, nor is the claim necessarily less meritorious

No reasonable grounds can be conceived which would justify denying a full year for filing a claim to a single class of litigants based solely on when they were able to discover the existence of a claim.

514 N.E.2d 709 at 715.

The court held that the statute of repose also denied due process, and said:

Although it may be stated that this severance of rights might conceivably bear 'a real and substantial relation to the . . . general welfare of the public' by decreasing the sheer numbers of medical malpractice claims, thereby reducing malpractice insurance premiums and lessening the cost of health care, no evidence of such an effect has been brought forward. However, even assuming [the Ohio statute] has actually achieved this end, we find the means of achieving it are unreasonable and arbitrary, and violative of due process.

. . . the severance of an individual's right to pursue a claim based on when he discovers the existence thereof is not justified by any distinguishing feature of such a person or of his claim. The fact that he did not discover his claim until after three years had passed does not necessarily indicate that he 'slept on his rights' since in many cases he will be unaware that he had any rights . . . Nor does the relative delay in his discovery suggest that the injury is trivial or the claim unbounded. In sum, we can envision no reason for cutting off the rights of such persons that is not unreasonable or arbitrary.

Id.

In Gaines, although Ohio (unlike Alaska) has an "open courts" provision, the Ohio court also clearly focused on the equal protection and due process problems presented by statutes of repose. As the Utah Supreme Court noted in Berry v. Beech Aircraft, 717 P.2d 670, 678 (Utah 1985), there are quite a few cases based solely on equal protection analysis that find statutes of repose unconstitutional:

For cases holding statutes of repose unconstitutional on equal protection grounds, see, e.g., Shibuya v. Architects Hawaii Ltd., 647 P.2d 276 (Hawaii 1982) (architects and builders statute of repose); Fujioka v. Kam, 514 P.2d 568 (Hawaii 1973) (architects and builders statute of repose); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977) (architects and builders statute of repose); Broome v. Truluck, 241 S.E.2d 739 (S.C. 1978) (architects and builders statute of repose); Kallas Millwork Corp v. Square D Co., 225 N.W.2d 454 (Wis. 1975) (architects, engineers, and designers statute of repose).

CONCLUSION

This letter has outlined the issues involved and the general bases courts have used in analyzing the constitutionality of statutes of repose. As I have noted, the Alaska Supreme Court has found one statute of repose unconstitutional. In Turner Construction Co. v. Scales, the Alaska Supreme Court disapproved of the shift of liability caused by Alaska's statute of repose. Although Proposition #2 has removed joint and several liability from most torts, under HB 166 the shift of liability would still occur, but now it would be back onto the victim. While we cannot be certain of the outcome of a new Alaskan case concerning a statute of repose, the analysis used in Turner would be the same.

CAP ON NONECONOMIC DAMAGES

In 1986, the Alaska Legislature enacted a cap in all personal injury cases of \$500,000 for noneconomic damages, except in cases of disfigurement or severe physical impairment. AS 09.17.010. In section 15, HB 166 seeks to limit noneconomic damages to \$50,000 in wrongful death cases. In other personal injury cases, the \$500,000 limit, with exceptions, stands.

Caps on economic damages in other states appear to apply across the board rather than just to wrongful death. I have been told that a committee substitute for HB 166 will

probably extend the limit on noneconomic damages to situations other than wrongful death.

A recent ABA journal article noted that among other states, Florida, Idaho, Illinois, New Hampshire, North Dakota, Ohio, Texas, and Virginia have struck statutory limits on noneconomic damages. The article also notes that "constitutional challenges to caps on noneconomic damages have been based on federal and state rights to equal protection, substantive due process, access to courts, and to a trial by jury." 74 A.B.A.J. 24 (1988).

I have attached an article concerning caps on noneconomic damages from the Washington Law Review. Silva, Washington's Noneconomic Damages Limit, 63 Wash. L. Rev. 658 (1988). This article contains a table of reported decisions on the constitutionality of medical malpractice and tort reform damage limits. As the table notes, (at least) 12 courts have found damage limits unconstitutional while seven have upheld them. Id. at 675.

In Lucas v. U.S., 757 S.W.2d 687 (Tex. 1988), the Texas Supreme Court, in a case certified to it by the Fifth Circuit, found a \$500,000 cap on medical malpractice damages unconstitutional. In so doing, the Texas court compiled an exhaustive description of other U.S. courts and their actions. As the Texas court noted:

At least thirteen states other than Texas have enacted damage limitation provisions into their medical malpractice statutes. Each statute has different characteristics, and the state courts have divided on the constitutionality of the various caps. See, e.g., Smith v. Department of Insurance, 507 So.2d 1080, 1087-89 (Fla.1987) (\$450,000 limit on noneconomic damages violated "open courts" provision of Florida Constitution); Wright v. Central Du Page Hospital Ass'n, 63 Ill.2d 313, 347 N.E.2d 736, 743 (1976) (\$500,000 cap constituted "special law" in violation of Illinois Constitution); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825, 836-38 (1980) (\$250,000 limit on noneconomic damages violated equal protection guaranteed by New Hampshire Constitution); Arneson v. Olson, 270 N.W.2d 125, 135-36 (N.D.1978) (\$300,000 ceiling violated equal protection clause of North Dakota Constitution); Duren v. Suburban Community Hospital, 24 Ohio Misc.2d 25, 482 N.E.2d

1358, 1361-63 (C.P.1985) (\$200,000 limit on general damages violated Ohio and Federal constitutions); Fein v. Permanente Medical Group, 38 Cal.3d 137, 211 Cal. Rptr. 368, 695 P.2d 665, 679-84 (1985) (\$250,000 ceiling on noneconomic damages held constitutional); Johnson v. St. Vincent Hospital, Inc., 273 Ind. 374, 404 N.E.2d 585, 598-601 (1980) (\$500,000 cap upheld); Sibley v. Board of Supervisors, 462 So.2d 149, 154-58 (La.1985) (\$500,000 cap upheld) modified on reh'g, 477 So.2d 1094, 1109-10 (La.1985) (latter opinion ordering conditional remand on state equal protection challenge); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657, 668-69 (1977) (\$500,000 cap upheld in plurality opinion joined by only three judges, with three others dissenting as to constitutionality, and one judge declining to reach constitutional issues because opinion was merely advisory). Compare Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399, 410-16 (1976), cert. denied, 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 233 (1977) (case remanded for fact findings pertinent to constitutional attacks on damage caps).

757 S.W.2d at 689.

Lucas involved a fourteen-month-old boy who was paralyzed for life due to the negligent administration of a penicillin shot. As you can see from Lucas's list, the reasons for finding caps unconstitutional parallel the reasons for finding statutes of repose unconstitutional. "Open courts" and equal protection are again called into question.

The cases noted concern caps on noneconomic damages in general, not just for wrongful death. The same concerns apply, but there is less argument in support of noneconomic damages when the victim is deceased. At least one court has upheld the constitutionality of a wrongful death statute that limited recovery for all damages to \$45,000 for a decedent who left no dependents. Pollock v. City & County of Denver, 572 P.2d 828 (Colo. 1977).

The plaintiffs in Pollock lost their five-year-old child. They were not dependent on the child, and thus the \$45,000 limit applied. The parents attacked the limit on equal protection grounds, arguing that it was illogical to allow dependants to recover unlimited damages, while parents could recover

Honorable Dave Donley, Chair
663-89-0459

May 2, 1989
Page 14

only up to \$45,000. The court held that since a dependent would have to show actual damages to recover more than \$45,000, and since nondependents can survive without the money better than dependents, there was a legitimate societal interest in limiting recovery.

The same arguments could extend to HB 166's cap on noneconomic damages in wrongful death cases. However, it is possible that the Alaska Supreme Court could consider the limit a violation of equal protection. If the cap is extended to all noneconomic damages, the constitutionality will be even more questionable.

CONCLUSION

The cap on noneconomic damages in the current version of HB 166 would affect only wrongful death cases. I have been told that this cap may be extended to other noneconomic damages, so I have attached the Washington Law Review article cited herein for your information. This article covers the state of the law concerning caps on noneconomic damages in general, and as you can see, the courts split on the constitutionality of caps on noneconomic damages.

We hope that this memo is of use to you. There may be other constitutional issues raised by HB 166, and this memo is simply an outline of two major areas of concern. If you have further questions, please let us know.

Sincerely,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By:


Elizabeth J. Kerttula
Assistant Attorney General

EJK:prm

Attachments

cc: Robert Evans
Legislative Liaison

Art Peterson
Regulations Attorney

Caps

IEW

CONSTITUTIONAL CHALLENGES TO WASHINGTON'S LIMIT ON NONECONOMIC DAMAGES IN CASES OF PERSONAL INJURY AND DEATH

In 1986 the Washington legislature passed a tort reform act¹ to ameliorate a perceived crisis in the availability and cost of liability insurance.² One of the act's provisions limits the amount of noneconomic damages recoverable in personal injury and wrongful death actions.³ Cases to which this damages limit applies began coming to trial only in the past few months. In October 1987, one judge applied the limit to reduce a jury verdict by over one million dollars.⁴

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1. Tort Law Revisions (Tort Reform Act), ch. 305, 1986 Wash. Laws 1354 (codified as amended in scattered titles of WASH. REV. CODE (1987)).

2. *Id.* § 100.

3. *Id.* § 301 (codified at WASH. REV. CODE § 4.56.250 (1987)). The section provides in relevant part as follows:

[(1)] (b) "Noneconomic damages" means subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship.

(2) In no action seeking damages for personal injury or death may a claimant recover a judgment for noneconomic damages exceeding an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages, as the life expectancy is determined by the life expectancy tables adopted by the insurance commissioner. For purposes of determining the maximum amount allowable for noneconomic damages, a claimant's life expectancy shall not be less than fifteen years. The limitation contained in this subsection applies to all claims for noneconomic damages made by a claimant who incurred bodily injury. Claims for loss of consortium, loss of society and companionship, destruction of the parent-child relationship, and all other derivative claims asserted by persons who did not sustain bodily injury are to be included within the limitation on claims for noneconomic damages arising from the same bodily injury.

(3) If a case is tried to a jury, the jury shall not be informed of the limitation contained in subsection (2) of this section.

4. *Sofie v. Fibreboard Corp.*, No. 87-2-00407-6 (Wash. Super. Ct. Oct. 30, 1987). In *Sofie* the jury awarded the plaintiff \$1,345,833, of which the jury allocated \$1,154,592 to noneconomic damages. Special Verdict Form at 2, *Sofie v. Fibreboard Corp.*, No. 87-2-00407-6 (Wash. Super. Ct. Oct. 30, 1987). The court reduced noneconomic damages to \$125,136 and granted the plaintiff a judgment of \$316,377, in conformity with the statutory cap. *Sofie v. Fibreboard Corp.*, No. 87-2-00407-6, slip op. at 2-3 (Wash. Super. Ct. Oct. 30, 1987).

Some trial courts have held the Washington limit unconstitutional. *E.g.*, *Carter v. Fibreboard Corp.*, No. 87-2-03555-7 (Wash. Super. Ct. order on pre-trial motion Feb. 19, 1988) (defense of Section 4.56.250 damages limit struck down as violative of equal protection and jury trial guarantees of Washington constitution); *Foster v. Fibreboard Corp.*, No. 87-2-05629-5 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987) (defense of Section 4.56.250 struck down on equal protection and jury trial grounds).

Similar damages limits have been challenged in other states on numerous federal and state constitutional grounds, including substantive due process,⁵ equal protection,⁶ a right of trial by jury,⁷ special legislation,⁸ special privilege,⁹ and a right of access to the courts.¹⁰ By a slight majority, courts have declared the limits unconstitutional.¹¹

This Comment considers the constitutionality of the Washington cap on noneconomic damages. The Comment briefly reviews the recent legislation of medical malpractice and tort reform damages ceilings and judicial decisions on the constitutionality of such ceilings. The Comment then analyzes the constitutionality of the Washington limit under the substantive due process and equal protection guarantees of the federal and state constitutions.¹² Because under the federal constitution a court should give the statute only minimal scrutiny, the statute probably does not offend fourteenth amendment protections. Under the Washington Constitution, however, a court should give the statute intermediate scrutiny. Under intermediate scrutiny a court probably will hold that the limit violates the state equal protection guarantee, but a court probably will not hold the limit violative of substantive due process. Under the right of trial by jury guarantee of the state constitution, the statute also is unconstitutional.¹³

5. *E.g.*, *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 157, 695 P.2d 665, 679, 211 Cal. Rptr. 368, 382, *appeal dismissed*, 474 U.S. 892 (1985).

6. *E.g.*, *Arneson v. Olson*, 270 N.W.2d 125, 129 (N.D. 1978).

7. *E.g.*, *Boyd v. Bulala*, 647 F. Supp. 781, 788 (W.D. Va. 1986).

8. *See, e.g.*, *Wright v. Central DuPage Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736, 743 (1976) (citing ILL. CONST. art. IV, § 13 prohibition of special legislation).

9. *E.g.*, *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657, 668-69 (1977).

10. *E.g.*, *Smith v. Department of Ins.*, 507 So. 2d 1080, 1087 (Fla. 1987). For an annotated list of many of the recent decisions in this area, see Table: Reported Decisions on the Constitutionality of Medical Malpractice and Tort Reform Damages Limits [hereinafter Table], *infra* p. 675. For citations to these decisions, see *infra* notes 38-49.

11. *See infra* Table p. 675.

12. Federal and Washington constitutional challenges are considered separately here because the proper standard of review in substantive due process and equal protection challenges of the damages limit should be higher under the Washington Constitution than under the federal constitution. *See infra* notes 106-28 and accompanying text.

13. For additional commentary on the constitutionality of the Washington noneconomic damages limit, see Wiggins, Harnitiaux & Whaley, *Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 GONZ. L. REV. 193 (1986/87); Development in the Law, *The 1986 Washington Tort Reform Act: Noneconomic Damages Cap* (RCW 4.56.250), 23 WILLAMETTE L. REV. 215 (1987).

I. BACKGROUND

A. Insurance Crises and Damages Limits

Many damages limits now in effect are part of state medical malpractice legislation of the mid-1970's.¹⁴ During that period, state legislatures perceived that medical malpractice insurance had become widely unavailable and increasingly expensive.¹⁵ Virtually all legislatures responded to this insurance crisis by enacting laws to control medical malpractice litigation.¹⁶ In at least one-fifth of the states, these laws included provisions to limit recoverable damages.¹⁷ The provisions limit either the liability of each defendant,¹⁸ the recovery of each plaintiff,¹⁹ or both.²⁰ Nearly all the limits are flat figures²¹ that apply either to noneconomic damages only,²² nonmedical damages only,²³ or all damages.²⁴

A different insurance crisis arose in the mid-1980's. During that period, the cost of liability insurance increased not only health care providers²⁵ but also for day care centers, architects, commercial fishermen, and other businesses and professions.²⁶ Many businesses and local governments found liability insurance difficult to obtain.²⁷ In

14. See, e.g., statutes cited *infra* notes 18-24.

15. See Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 759-60 (1977); Note, *Fein v. Permanent Medical Group: Future Trends in Damage Limitation Adjudication*, 80 NW. U.L. REV. 1643, 1649 n.49 (1986).

16. See, e.g., Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH L. REV. 419, 419 (1979).

17. See Bell, *Legislative Intrusions into the Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability*, 35 SYRACUSE L. REV. 939, 945 (1984).

18. E.g., TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1988).

19. E.g., OHIO REV. CODE ANN. § 2307.43 (Anderson 1981).

20. E.g., IND. CODE ANN. § 16-9.5-2-2 (Burns 1983); NEB. REV. STAT. § 44-2825 (Supp. 1986).

21. E.g., OHIO REV. CODE ANN. § 2307.43 (Anderson 1981) (\$200,000 limit on general damages); W. VA. CODE ANN. § 55-7B-8 (Michie Supp. 1987) (\$1,000,000 limit on noneconomic damages).

22. E.g., CAL. CIV. CODE § 3333.2 (West Supp. 1988).

23. E.g., LA. REV. STAT. ANN. § 40:1299.42 (West 1977 & Supp. 1988); TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1988).

24. E.g., IND. CODE ANN. § 16-9.5-2-2 (Burns 1983); NEB. REV. STAT. § 44-2825 (Supp. 1986).

25. Bell, *supra* note 17, at 939; Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 OKLA. L. REV. 195, 195 n.1 (1985), reprinted in 35 DEF. L.J. 359 (1986).

26. *Newsday*, Oct. 29, 1985, at 11, col. 3.

27. Sugarman, *Taking Advantage of the Torts Crisis*, 48 OHIO ST. L.J. 329, 333-34 n.19 (1987) (citing U.S. ATTY'S GEN. TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 6-14 (1986)).

Washington State, a legislative committee formed to study the crisis found that it had been caused by a combination of poor management practices in the insurance industry and rising litigation costs and awards.²⁸

Washington was one of a number of states to respond to the crisis by enacting tort reform legislation²⁹ that included a limit on the recovery of noneconomic damages.³⁰ Under the Washington statute, the limit varies with the plaintiff's life expectancy and the average annual state wage.³¹ The limit at present ranges from \$125,136 for a male aged sixty-four or older to \$632,606 for a newborn female.³²

Washington imposes no other statutory ceiling on damages recoverable in personal injury and wrongful death actions. Other states have limited recovery of damages in common-law causes of action by such legislation as automobile accident victim compensation acts³³ and in statutory causes of action by such legislation as dram-shop acts,³⁴ governmental tort claims acts,³⁵ and wrongful death

28. JOINT STUDY COMMITTEE ON INSURANCE AVAILABILITY AND AFFORDABILITY, REPORT TO THE LEGISLATURE (Nov. 13, 1985) (copy on file with the *Washington Law Review*).

29. Sugarman, *supra* note 27, at 347. Among other things, Washington's act limits noneconomic damages, provides for review of plaintiffs attorneys fees, modifies joint and several liability, modifies the statute of limitations for malpractice cases, and permits structured awards or periodic payments of future economic damages over \$100,000. Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 WASH. L. REV. 233, 233 n.3 (1987).

30. Sugarman, *supra* note 27, at 348 & n.115 (citing a \$500,000 limit in Alaska that does not apply to "disfigurement or severe physical impairment," a \$450,000 limit in Florida, a \$350,000 limit in Maryland, a \$400,000 limit in Minnesota that does not apply to "pain, disability or disfigurement," and an \$875,000 limit in New Hampshire); Reistrup, *The Final Frontier*, NAT'L L.J., Dec. 7, 1987 at 13, col. 1 (citing a \$400,000 limit in Idaho, a \$250,000 limit in Kansas, a review of the reasonableness of awards over \$250,000 in North Dakota, and a \$500,000 limit in Oregon).

31. WASH. REV. CODE § 4.56.250(2) (1987).

32. See *id.*; 6 WASH. SUP. CT. COMM'N ON JURY INSTRUCTIONS, WASH. PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS, App. B ("Life Expectancy Table [Revised]") (2d ed. Supp. 1984) (based on WASH. STATE INS. COMM'R, COMMISSIONERS STANDARD ORDINARY TABLE OF MORTALITY (1980)); WASH. STATE EMPLOYMENT SEC. DEPT LABOR MKT. & ECON. ANALYSIS BRANCH, AVERAGE ANNUAL STATE WAGE (1986). The limit for a 64-year-old or older male is calculated by multiplying 0.43 (the statutory factor) by a life expectancy of 15 years (the statutory minimum life expectancy) by \$19,401 (the average annual state wage).

33. See, e.g., the Illinois statute cited in *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972) (recovery for certain noneconomic loss tied to amount of medical expenses).

34. E.g., ILL. ANN. STAT. ch. 43, para. 135 (Smith-Hurd Supp. 1987) (\$15,000 to \$40,000 limits on recovery from liquor supplier for injuries inflicted by intoxicated person).

35. E.g., MD. CTS. & JUD. PROC. CODE ANN. § 5-403 (Supp. 1987) (liability of local government may not exceed \$200,000 per individual claim and \$500,000 per total claims arising from same tortious occurrence); N.H. REV. STAT. ANN. § 507-B:4 (Supp. 1987) (limits of \$150,000 per claimant and \$500,000 per occurrence on amount recoverable in personal injury action against governmental subdivision).

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Washington's Noneconomic Damages Limit

acts.³⁶ Under the federal Price-Anderson Act, Congress imposes a limit of \$560,000,000 on the liability of a federally-licensed nuclear power plant for damages arising from a nuclear accident.³⁷

B. Judicial Response to Damages Limits

Several reported decisions address the constitutionality of medical malpractice and tort reform damages limits. The medical malpractice limits of California,³⁸ Indiana,³⁹ and Nebraska⁴⁰ have been upheld. The tort reform limit of Florida⁴¹ and the medical malpractice limits of Illinois,⁴² New Hampshire,⁴³ North Dakota,⁴⁴ Ohio,⁴⁵ and Virginia⁴⁶ have been invalidated. Courts had split as to the constitutionality of the Texas medical malpractice damages cap, but the Texas Supreme Court recently held the limit invalid.⁴⁷ The constitutionality of the medical malpractice limits of Idaho⁴⁸ and Louisiana⁴⁹ have been considered but not fully decided in reported decisions; those courts remanded the issue to the trial level. Damages limits in state automo-

36. E.g. ILL. ANN. STAT. ch. 70, § 2 (Smith-Hurd 1959) (recovery for wrongful death limited in some instances to from \$20,000 to \$30,000).

37. Price-Anderson Act, 42 U.S.C. § 2210 (1983 & Supp. 1986).

38. *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, appeal dismissed, 474 U.S. 892 (1985); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985).

39. *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980).

40. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977).

41. *Smith v. Department of Ins.*, 507 So.2d 1080 (Fla. 1987).

42. *Wright v. Central DuPage Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

43. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980).

44. *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).

45. *Duren v. Suburban Community Hosp.*, 24 Ohio Misc. 2d 25, 495 N.E.2d 51 (Ohio C.P. 1985); *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Ohio C.P. 1976) (dictum).

46. *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986).

47. *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986) (constitutional under federal constitution; court certified to Texas Supreme Court whether cap was valid under Texas constitution); *Waggoner v. Gibson*, 647 F. Supp. 1102 (N.D. Tex. 1986) (unconstitutional); *Rose v. Doctors Hosp. Facilities*, 735 S.W.2d 244 (Tex. Ct. App. 1987) (constitutional), *overruled*, *Lucas v. United States*, No. C-6181 (Tex. May 11, 1988) (WESTLAW, Allstates database); *Detar Hosp. v. Estrada*, 694 S.W.2d 359 (Tex. Ct. App. 1985) (unconstitutional); *Malone & Hyde, Inc. v. Hobrecht*, 685 S.W.2d 739 (Tex. Ct. App. 1985) (unconstitutional); *Baptist Hosp. v. Baber*, 672 S.W.2d 296 (Tex. Ct. App. 1984) (unconstitutional).

In *Lucas* the certified question of whether the cap was constitutional under the Texas Constitution was answered in the negative by the Texas Supreme Court in May 1988. The Texas court held that the damages limit violated the open courts provision of the Texas Constitution. *Lucas v. United States*, No. C-6181 (Tex. May 11, 1988) (WESTLAW, Allstates database).

48. *Jones v. State Bd. of Medicine*, 97 Idaho 839, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977). On remand, the limit was held unconstitutional. *Boyd v. Bulala*, 647 F. Supp. 781, 785 n.2 (W.D. Va. 1986) (citing *Jones v. State Bd. of Medicine*, Nos. 55527, 55586 (4th Dist. Idaho Nov. 3, 1980)).

49. *Sibley v. Board of Supervisors*, 477 So. 2d 1094 (La. 1985).

bile accident victim compensation acts,⁵⁰ dramshop acts,⁵¹ governmental tort claims acts,⁵² and wrongful death acts⁵³ also have been challenged on constitutional grounds.

The United States Supreme Court validated two damages ceilings under the federal constitution. In *Duke Power Co. v. Carolina Environmental Study Group*⁵⁴ the Court upheld the federal Price-Anderson Act limit on nuclear power plant liability.⁵⁵ In *Fein v. Permanente Medical Group*⁵⁶ the Court dismissed the appeal from the California Supreme Court's ruling that California's medical malpractice noneconomic damages limit was constitutional. The Court dismissed the appeal for want of a substantial federal question.⁵⁷

50. *E.g.*, *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972) (Illinois auto accident victim recovery limit unconstitutional).

51. *E.g.*, *Cunningham v. Brown*, 22 Ill. 2d 23, 174 N.E.2d 153 (1961) (Illinois dramshop act damages cap constitutional); *McGuire v. C & L Restaurant*, 346 N.W.2d 605 (Minn. 1984) (Minnesota dramshop act damages cap unconstitutional).

52. *E.g.*, *White v. State*, 203 Mont. 363, 661 P.2d 1272 (1983) (holding unconstitutional a statute that denied recovery of noneconomic damages and limited recovery of economic damages from state and its subdivisions, but upholding a statute that denied recovery of punitive damages); *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 406 A.2d 704 (1979) (statutory limit of \$50,000 per claimant in recovery against governmental subdivisions for bodily injury constitutional), *appeal dismissed*, 445 U.S. 921 (1980).

53. *E.g.*, *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958) (wrongful death act recovery limit of \$25,000 constitutional).

54. 438 U.S. 59 (1978).

55. The Court held that the limit did not deny fifth amendment due process because the limit was supported by the need to encourage private industry to participate in the development of nuclear energy resources and by the federal government's commitment to protect the public from the consequences of a nuclear disaster. *Id.* at 84-87. The limit did not deny equal protection because the differing treatment of those injured in nuclear accidents and those injured in other types of accidents was justified by the "general rationality" of the Act. *Id.* at 93-94.

56. 474 U.S. 892 (1985).

57. *Id.* at 892. Justice White dissented to the dismissal on the grounds that the appeal raised the unresolved issue of whether due process requires a statutory compensation scheme to be a quid pro quo for the common-law or statutory remedy it replaces. *Id.* at 894-95 (White, J., dissenting).

Because *Fein* was a summary disposition, its precedential value is unclear. See *Anderson v. Celebrezze*, 460 U.S. 780, 784-85 n.5 (1983) ("A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment."); *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) ("[T]he lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not.' " (brackets original) (quoting *Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir.), *cert. denied*, 414 U.S. 1096 (1973))). Indeed, subsequent decisions by federal courts on the federal constitutionality of state medical malpractice damages limits have not recognized the *Fein* dismissal as precedential or persuasive. See, e.g., *Waggoner v. Gibson*, 647 F. Supp. 1102 (N.D. Tex. 1986) (Texas medical malpractice damages cap unconstitutional under federal and state equal protection guarantees); *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986) (Virginia cap unconstitutional under jury trial right of state and federal constitutions).

II. CONSTITUTIONALITY OF THE WASHINGTON LIMIT

A. United States Constitution: Due Process and Equal Protection

The fourteenth amendment to the United States Constitution provides in part that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."⁵⁸ Under these clauses, Washington's damages cap is subject to attack on the grounds that it denies substantive due process by depriving personal injury plaintiffs of property without providing an adequate benefit in return⁵⁹ and denies the equal protection of the laws by discriminating against or among injured plaintiffs. These challenges are considered, first, by determining the appropriate standard of review, and second, by applying the appropriate standard to the statute. Because the federal constitution requires only minimal scrutiny of the statute, the statute probably does not offend either due process or equal protection.

1. Standard of Review

The United States Supreme Court currently subjects legislation challenged on substantive due process and equal protection grounds to three standards of review.⁶⁰ The Court applies the same standard whether the legislation is challenged on substantive due process or equal protection grounds.⁶¹ Strict scrutiny is applied where the effect of legislation is either to create a suspect classification⁶² or to infringe

58. U.S. CONST. amend. XIV, § 1.

59. Since the 1930's the United States Supreme Court has more often applied equal protection than substantive due process analysis to legislation challenged on fourteenth amendment grounds, and has rarely declared state legislation unconstitutional on substantive due process grounds. *Johnson v. Hassett*, 217 N.W.2d 771, 775 (N.D. 1974); J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 352 (3d ed. 1986). The Washington Supreme Court has become similarly disenchanted with substantive due process. See *Aetna Life Ins. v. Washington Life & Disability Guar.*, 83 Wash. 2d 523, 533-34, 520 P.2d 162, 169 (1974); *Seattle Times v. Tielsch*, 80 Wash. 2d 502, 512, 495 P.2d 1366, 1371 (1972) (Finley, J., dissenting) ("the now dormant specter of substantive due process"). Nevertheless, the United States and Washington Supreme Courts still recognize a substantive due process barrier to unreasonable state regulation. See, e.g., *Roe v. Wade*, 410 U.S. 113, 164 (1973) (state criminal abortion statute violates due process); *State v. Santos*, 104 Wash. 2d 142, 148, 702 P.2d 1179, 1183 (1985) (substantive due process requires accuracy in establishing paternity).

Although a number of courts have considered substantive due process challenges of statutory damages caps, no reported decisions have invalidated medical malpractice or tort reform damages ceilings on substantive due process grounds. See *infra* Table p. 675.

60. See 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 323-26 (1986).

61. *Id.* at 323.

62. E.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (classification based on race).

on a fundamental right.⁶³ Legislation is unconstitutional under strict scrutiny if it is not necessary to the promotion of a compelling state interest. The Court recently has applied intermediate scrutiny to review legislation that creates classifications based on gender, alienage, or legitimacy.⁶⁴ Under the intermediate standard, legislation is unconstitutional if it does not both serve important governmental objectives and bear a substantial relationship to the accomplishment of those objectives.⁶⁵ Rational basis, or minimal, scrutiny is applied to most economic and social welfare legislation. Under the rational basis test there is a strong presumption of constitutionality,⁶⁶ and legislation is invalid only if the classification created by the legislation is not rationally related to any conceivable legitimate legislative purpose.⁶⁷

The federal constitution requires only minimal scrutiny of the Washington damages ceiling. Strict scrutiny is inappropriate because the ceiling neither creates suspect classifications nor affects fundamental rights. The limit creates only economic⁶⁸ and age⁶⁹ classifications. The Court has not held such classifications suspect.⁷⁰ Further, the right to compensation for personal injuries is not fundamental under

63. E.g., *Roe v. Wade*, 410 U.S. 113 (1973) (right to privacy).

64. 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 326-27 (1986). The intermediate standard is known also as "means-focus," "means scrutiny," and the "substantial relationship" test. See *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399, 407 (1976), *cert. denied*, 431 U.S. 914 (1977); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825, 831 (1980). The Court does not appear to have applied intermediate scrutiny to legislation challenged on substantive due process grounds under the federal constitution, nor has any other court in a reported decision applied intermediate scrutiny to a federal substantive due process challenge of a medical malpractice or tort reform damages cap.

65. See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

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

67. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). At least one commentator suggests that the Court should give the rational basis test "teeth" such that a court would consider whether a basis exists in reality rather than merely in the court's imagination. G. GUNTHER, *CONSTITUTIONAL LAW* 604-05 (11th ed. 1985).

68. Washington's limit creates the following economic classifications: First, it classifies according to whether damages are economic or noneconomic and discriminates in the case of the latter, and second it classifies according to whether damages are above or below the limit and discriminates in the case of the former.

69. Washington's limit classifies according to age by permitting plaintiffs with shorter life expectancies less recovery than plaintiffs with longer life expectancies. For example, Plaintiff A, a newborn male, has a life expectancy of 70.83 years. WASH. SUP. CT. COMM'N ON JURY INSTRUCTIONS, *supra* note 32. Plaintiff B, a 63-year-old male, has a life expectancy of 15.38 years. *Id.* The average annual state wage is \$19,401. WASH. STATE EMPLOYMENT SEC. DEPT LABOR MKT. & ECON. ANALYSIS BRANCH, *supra* note 32. The statute limits Plaintiff B's noneconomic damages to \$128,307. However, Plaintiff A's limit is \$590,894.

70. See *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 82 (1978) (economic classification not suspect); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (age classification not suspect); 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON*

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the federal constitution.⁷¹ A fundamental right is one explicitly or implicitly guaranteed by the constitution.⁷² The right to recover in tort is not so guaranteed.⁷³

Intermediate scrutiny also is inappropriate under the federal constitution. The United States Supreme Court has applied the intermediate standard only to classifications based on gender,⁷⁴ alienage,⁷⁵ and legitimacy.⁷⁶ The Court recently gave minimal rather than intermediate scrutiny to classifications based on age⁷⁷ and on the type and degree of personal injury where the affected right was the right to collect full damages.⁷⁸ The statute's age-based classification does incidentally create a gender-based classification, because women generally have longer life expectancies than men.⁷⁹ The gender-based classification, however, is only incidental to the age-based classification and does not reflect invidious gender-based discrimination. It therefore should not trigger intermediate scrutiny.⁸⁰ The apparent purpose of the age-based classification is to increase the potential recovery as the potential life span increases.⁸¹ It is consistent with this purpose that if women live longer, they suffer greater noneconomic loss and should be allowed greater recovery.

Minimal scrutiny also is proper under the 1978 decision of the United States Supreme Court to apply minimal scrutiny to a damages

CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 335 (1986) (age classification not suspect).

71. *Hoffman v. United States*, 767 F.2d 1431, 1435 (9th Cir. 1985); see *Duke Power Co.*, 438 U.S. at 83-84.

72. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973).

73. *Boyd v. Bulala*, 647 F. Supp. 781, 787 (W.D. Va. 1986).

74. *E.g.*, *Craig v. Boren*, 429 U.S. 190, 197 (1976).

75. *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 224 (1982).

76. *E.g.*, *Lalli v. Lalli*, 439 U.S. 259, 268, 275-76 (1978).

77. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

78. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 83-84 (1978).

79. Between birth and age 98, women have greater life expectancies than men. For example, Plaintiff B, a 63-year-old male, has a life expectancy of 15.38 years. WASH. SUP. CT. COMM'N ON JURY INSTRUCTIONS, *supra* note 32. However, Plaintiff C, a 63-year-old female, has a life expectancy of 18.86 years. *Id.* Assuming an average annual state wage of \$19,401, Plaintiff B's noneconomic damages are limited to \$128,307, while Plaintiff C might recover noneconomic damages of up to \$157,338.

80. See *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979).

81. The legislature's reasoning might have been that pain and suffering damages should be greater for a plaintiff who will have to endure pain and suffering longer. This "assumes that in all cases the injured victim will have ongoing injuries and ongoing future suffering, which is clearly not the case. . . . [Not] all injured victims will continue to suffer for the future." *Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 9 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987) (granting motion to strike defense of noneconomic damages cap on equal protection and right to jury trial grounds).

limit similar to the Washington cap. In *Duke Power Co. v. Carolina Environmental Study Group*⁸² the Court found that the Price-Anderson Act's \$560,000,000 nuclear power plant liability limit was "a classic example of an economic regulation—a legislative effort to structure and accommodate 'the burdens and benefits of economic life.'"⁸³ In the Price-Anderson Act, Congress encouraged the availability of nuclear power by reducing the liability of nuclear power plants.⁸⁴

Washington's noneconomic damages limit seems to have arisen out of a similar legislative effort. The Washington legislature sought to encourage the availability and affordability of liability insurance for governmental, professional, and other entities by reducing the awards of some personal injury plaintiffs. Particularly because the Court in *Duke Power Co.* considered a damages limit, *Duke Power Co.* is strong authority that a damages cap should not be given more than minimal scrutiny under the federal constitution.⁸⁵

2. Application of Review

Under a rational basis standard of review, Washington's noneconomic damages limit probably does not violate the federal constitutional guarantee of substantive due process. The test is whether the challenged law is rationally related⁸⁶ to a valid state objective.⁸⁷ This suggests two inquiries: First, whether there is a valid state objective, and second, whether the statute has a rational relation to that objective.

Any conceivable legitimate state objective satisfies the first requirement. The stated purpose of the Washington Tort Reform Act was to "create a more equitable distribution of the cost and risk of injury and

82. 438 U.S. 59 (1978).

83. *Id.* at 83 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).

84. *Id.* at 84.

85. A majority of recent decisions supports this conclusion. See *infra* Table p. 000. In *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980), the New Hampshire Supreme Court concluded that heightened scrutiny of New Hampshire's recovery limit was not required under the federal constitution, since the United States Supreme Court had applied heightened scrutiny only in "cases involving classifications based upon gender and illegitimacy." *Id.* at 831. Instead, the *Carson* court went on to apply heightened scrutiny—the substantial relationship test—under the state constitution. *Id.*

86. The dictionary definitions of the key components of this test might be useful references, since courts sometimes have little guidance in applying the test other than the plain meaning of these words. "Rationally" means reasonably or sensibly. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1885 (1981). "Related" means "connected by reason of an established or discoverable relation." *Id.* at 1916. Compare the key component of the substantial relationship test: "Substantial" means materially, importantly, or essentially. See *id.* at 2280.

87. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955).

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Washington's Noneconomic Damages Limit

increase the availability and affordability of insurance."⁸⁸ The legisla-
ture determined that a serious liability insurance problem existed
within the state. Insurance unavailability and unaffordability had
caused some entities either to cease operating, for want of insurance,
or to operate without insurance. Without insurance, many entities
might be unable to pay tort judgments due injured plaintiffs. Under
these facts, making liability insurance more available and affordable
seems a valid legislative objective.

Moreover, the damages limit appears rationally related to the legis-
lature's purpose. The limit is arbitrary to the extent that it relies on
the product of an individual's age, the average annual state wage, and
the figure 0.43.⁸⁹ However, the Court in *Duke Power Co.* did not find
this kind of arbitrariness fatal to the constitutionality of the statute.⁹⁰
Limiting recoverable noneconomic damages could rationally be
related to a reduction in insurer uncertainties and liabilities. This
reduction could rationally be related to an increase in insurance avail-
ability and a reduction in insurance rates. Because there appears to be
a rational relation between the damages limit and a valid state objec-
tive, the limit probably is not unconstitutional on federal substantive due
process grounds.

Under rational basis review, Washington's limit similarly does not
appear to violate the federal equal protection guarantee.⁹¹ The proper
test is whether the challenged classification is rationally related to a
conceivable legitimate governmental purpose.⁹² This test is virtually
identical to the substantive due process test and is equally deferential
to the legislature. The legislature's desire to make liability insurance
available and affordable to governmental, professional, and other enti-
ties is a legitimate governmental purpose.⁹³ The economic⁹⁴ and age⁹⁵
classifications created by the damages cap seem rationally related to
that purpose, because it is rational to believe that these classifications

88. 1986 Wash. Laws ch. 305, § 100.

89. See WASH. REV. CODE § 4.56.250(2) (1987).

90. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 86 (1978).

91. *Contra Foster v. Fibreboard Corp.*, No. 87-1, 05-29-5, slip op. at 9 (Wash. Super. Ct. order on pre-trial motion (Sept. 18, 1987) (Washington's noneconomic damages cap denies equal protection under rational basis test).

92. *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981) (pertinent inquiry is whether classification advances legitimate legislative goals in a rational fashion); *Allied Stores v. Bowers*, 358 U.S. 522, 530 (1959) (legislative classification valid if based upon a state of facts that reasonably can be conceived to constitute a distinction or difference in state policy).

93. See *supra* text accompanying note 88.

94. See *supra* note 68.

95. See *supra* note 69.

will reduce tort judgments, insurer liability, and insurance rates.⁹⁶ The age classification, for example, is rationally related to the legitimate objective of allowing relatively greater compensation for noneconomic loss to plaintiffs who will endure their intangible losses over a longer period of time.⁹⁷ Because these classifications are rationally related to a legitimate governmental purpose, they do not unconstitutionally deny equal protection under the federal constitution.

B. Washington Constitution: Due Process and Equal Protection

A court should apply a higher standard of review to substantive due process and equal protection challenges to the statute under the Washington Constitution than under the federal constitution. The United States Supreme Court acknowledges the authority of state courts to interpret state constitutional guarantees to be more protective of individual rights than the federal counterparts.⁹⁸ Washington courts in a number of cases have exercised this authority.⁹⁹

The Washington Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law."¹⁰⁰ Although this adopts verbatim the federal due process guarantee,¹⁰¹ Washington courts have held that federal case law interpreting the federal due process clause does not bind judicial interpretation of the state due process clause.¹⁰² The Washington Constitution provides further that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."¹⁰³ While the Washington Supreme Court has held that this provision and the federal equal protection provision are substan-

96. It is irrelevant that the cap is not the most direct or complete means by which the legislature could achieve its objective, because the legislature is free to attack perceived problems one step at a time. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

97. *Contra Foster v. Fibreboard Corp.*, No. 87-2-05629-5, slip op. at 9 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987) ("There is no rational relationship for distinguishing between two individual victims otherwise similarly situated with respect to injury simply because of age.").

98. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

99. *Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 493 (1984).

100. WASH. CONST. art. I, § 3.

101. Compare *id.* with U.S. CONST. amend. XIV, § 1, cl. 3.

102. *Petstel, Inc. v. County of King*, 77 Wash. 2d 144, 153, 459 P.2d 937, 942 (1969). However, federal case law is given great weight and prevails to the extent it affords greater protection. *Id.*; *Olympic Forest Products v. Chaussee Corp.*, 82 Wash. 2d 418, 422, 511 P.2d 1002, 1005 (1973) (procedural due process challenge).

103. WASH. CONST. art. I, § 12. This section is entitled, "Special Privileges and Immunities Prohibited."