Volume 35 | Issue 3 Article 10

1990

Constitutional Law - The Effect of a Statutory Medical Malpractice Damage Cap on Seventh Amendment Right to a Jury Trial

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CONSTITUTIONAL LAW—THE EFFECT OF A STATUTORY MEDICAL MALPRACTICE DAMAGE CAP ON SEVENTH AMENDMENT RIGHT TO A JURY TRIAL

Davis v. Omitowoju (1989)

By the mid-1970s, an insurance crisis had developed in the medical malpractice arena.[1] In an effort to combat the escalating cost of malpractice insurance and thereby promote high quality medical care for its constituents, the legislature of the Virgin Islands enacted a statute that placed a $250,000 cap on medical malpractice verdicts for noneconomic damages.[2] Similar statutes in other jurisdictions have been challenged on due process, equal protection, and seventh amendment constitutional grounds.[3] The varying treatments among the jurisdictions has

1. For a discussion of the insurance crisis of the mid-1970s and the legislative responses to the spiraling insurance costs, see Bell, *Legislative Intrusions into the Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability*, 35 SYRACUSE L. REV. 939 (1984); White, *Tort Reform in the Twentieth Century: An Historical Perspective*, 32 VILL. L. REV. 1265 (1987).

2. V.I. CODE ANN. tit. 27, § 166b (1975). Section 166b provides in pertinent part:

> The total amount recoverable for any injury of a patient may not exceed two hundred and fifty thousand dollars ($250,000) plus actual expenses up to the time of trial, not paid or payable or reimbursed from any other source for reasonable and necessary medical care, custodial care and/or rehabilitation services, and estimated future expenses . . . .

Id.

This statute was enacted to deter the cessation of medical practice in the Islands. Practitioners were leaving because of the unavailability of professional liability insurance. Davis v. Omitowoju, 883 F.2d 1155, 1158 n.5 (3d Cir. 1989). In 1986, V.I. CODE ANN. tit. 27, § 166b was amended to limit the combined economic and noneconomic verdicts to $250,000 and noneconomic damages alone to $75,000. V.I. CODE ANN. tit. 27, § 166b (Supp. 1989) (added 1975, amended 1986).

Noneconomic damages relate to the pain and suffering, inconvenience, loss of consortium, humiliation and other nonpecuniary damages the plaintiff incurs. Note, *Challenging the Constitutionality of Noneconomic Damage Caps*: Boyd v. Bulala *and the Right to a Trial by Jury*, 24 WILLAMETTE L. REV. 821, 822 (1988). Economic damages include the out-of-pocket medical costs that the malpractice victim incurs as well as other concrete damages such as loss of wages. *See Davis*, 883 F.2d at 1157.

3. For a discussion of the constitutional challenges to legislative medical malpractice damage caps, see Turkington, *Constitutional Limitation on Tort Reform: Have the State Courts Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Insurance Crisis?*, 32 VILL. L. REV. 1299, 1303-22 (1987) (addressing attacks on damage caps under both state and federal constitutional provisions); Wagner & Reiter, *Damage Caps in Medical Malpractice: Standards of Constitutional Review*, 1987 DET. C.L. REV. 1005, 1006-11 (most challenges based on equal protection grounds); Note, *supra* note 2, at 831 (key to constitutional validity is type of damages capped); Note, *Medical Malpractice Damage Caps: Navigating the Safe Harbors*, 65 WASH. U.L.Q. 565 (1987).

created confusion and inconsistency concerning the constitutional validity of medical malpractice caps.[4]

The United States Court of Appeals for the Third Circuit addressed the constitutionality of medical malpractice caps for the first time in *Davis v. Omitowoju*.[5] Consistent with the holdings of the other federal circuit courts,[6] the Third Circuit held that the legislation imposing the damage cap did not violate either due process or equal protection rights.[7] Furthermore, the Third Circuit concluded that the legislation did not violate the seventh amendment, but this conclusion was based on grounds uniquely different from those of the other circuits that have addressed this issue.[8]

The plaintiff, Theresa Davis, injured her knee when she slipped and fell at her place of employment.[9] She was treated by Dr. Omitowoju who suggested arthroscopic surgery to correct the injury.[10] Davis testified that she had agreed to undergo arthroscopic surgery but that she

4. *See* Boyd v. Bulala, 877 F.2d 1191, 1194 (4th Cir. 1989) (upholding Virginia statute placing $750,000 cap on medical malpractice damages); Lucas v. United States, 807 F.2d 414, 422 (5th Cir. 1986) (upholding Texas statute placing $500,000 cap on nonmedical damages); Coburn v. Agustin, 627 F. Supp. 983, 995-97 (D. Kan. 1985) (Kansas medical malpractice statute held violative of equal protection clauses in state and federal constitutions); Fretz v. Keltner, 109 F.R.D. 303 (D. Kan. 1985) (abrogation of collateral source rule in malpractice reform legislation held unconstitutional as violative of state and federal equal protection clauses); Condemarin v. University Hosp., 775 P.2d 348, 352-56, 365-66 (Utah 1989) (cap on amount recoverable against uninsured governmental entity violative of state constitution on both equal protection and jury trial grounds).

One commentator suggested that statutory malpractice damage caps comply with the Constitution and were only vulnerable to state constitutional challenges. Turkington, *supra* note 3, at 1304, 1317. He stated that this is obvious to constitutional scholars and is evidenced by the fact that no federal circuit court has labeled a statutory malpractice damage cap as being violative of the Constitution. *Id.* at 1304.

5. 883 F.2d 1155, 1157 (3d Cir. 1989). The panel consisted of Circuit Judges Hutchinson, Cowen and Garth. *Id.* at 1156. Judge Garth authored the opinion. *Id.* at 1157.

6. *Bulala*, 877 F.2d at 1196-97 (economic regulation survived scrutiny of rational basis review); *Lucas*, 807 F.2d at 422 (rational basis test complied with as statute enacted for legitimate government purpose); Hoffman v. United States, 767 F.2d 1431, 1436-37 (9th Cir. 1985) (upheld statute applying rational basis test); Continental Ins. Co. v. Illinois Dep't of Transp., 709 F.2d 471, 475 (7th Cir. 1983) (rational basis test should be used to determine constitutionality of capping non-motor vehicle accident tort claims). For a further discussion of the rational basis test, see *infra* note 24 and accompanying text.

7. *Davis*, 883 F.2d at 1158-59. For a further discussion of the due process and equal protection challenges, see *infra* notes 21-25 and accompanying text.

8. *Davis*, 883 F.2d at 1159-65. For a further discussion of the court's seventh amendment analysis, see *infra* notes 26-35 and accompanying text.

9. *Davis*, 883 F.2d at 1157. As a result of her injury, Davis walks with a severe limp and her knee constantly "locks up" on her. *Id.* at 1167.

10. *Id.* at 1157. Arthroscopy involves a procedure consisting of a small puncture of the knee. *Id*; *see also* SLOANE-DURLAND ANNOTATED MEDICAL-LEGAL

had informed Dr. Omitowoju that she was vehemently opposed to having her knee cut open.[11]

On the evening prior to the operation, the duty nurse presented Davis with an operation consent form for her signature.[12] Davis, recognizing the word arthroscopy, signed the form believing that she was consenting to the previously discussed arthroscopic surgery.[13] Subsequently, Dr. Omitowoju performed the operation which consisted of both an arthroscopy and an arthrotomy. The arthrotomy procedure required the surgeon to drill into Davis' knee and remove her medial meniscus (knee cartilage).[14] Dissatisfied with the results of the operation, Davis underwent additional treatment and surgery by several different doctors.[15]

After fulfilling the statutory requirement of filing a complaint with the Virgin Islands Malpractice Review Committee, Davis filed a malpractice suit against Dr. Omitowoju in the United States District Court for the Virgin Islands.[16] The jury returned a verdict in favor of Davis in the

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DICTIONARY 63 (1987) (arthroscopy is examination of interior of joint with optical instrument called arthroscope).

11. *Davis*, 883 F.2d at 1167. Davis testified that Dr. Omitowoju informed her that the operation would consist of the placement of two tiny holes in her knee. *Id.* Davis further stated that she told the Doctor that if the operation was to entail any cutting, she would forego the operation and that Dr. Omitowoju guaranteed her there would be no cutting. *Id.* Dr. Omitowoju refuted Davis' account of their conversation stating that he informed her that, if the arthroscopic examination revealed a torn meniscus, he would have to cut open the knee and remove the meniscus. *Id.*

12. *Id.* at 1157. Dr. Omitowoju was not present and the nurse did not explain the handwritten and largely illegible form to Davis. *Id.* The consent form itself stated "type of surgery or treatment to be filled in by the physician in terms understandable to the patient." *Id.*

13. *Id.* In fact, the handwriting on the consent form stated " 'arthroscopy and excision of mass right knee and possible arthrotomy.' " *Id.* An arthrotomy is a surgical incision into a joint. *Id.* at 1157 n.2. Davis, who had a seventh grade education, did not question the technical wording on the consent form. *Id.* at 1157.

14. *Id.* Dr. Omitowoju conceded that the removal of cartilage and scraping and drilling of the bone in Davis' knee were not detailed in the consent form signed by Davis. *Id.* at 1167.

15. *Id.* at 1157. Davis has undergone three subsequent knee operations and has been on crutches for the past four years. *Id.* at 1171. Expert testimony indicated that if Davis ever does regain significant motor function, she will have to undergo another operation consisting of a complete knee replacement. *Id.*

16. *Id.* at 1157. Section 166i(b) of title 27 of the Virgin Islands Code requires that, before a plaintiff files a malpractice complaint, the plaintiff must submit a copy of the complaint to the Virgin Islands Medical Malpractice Action Review Committee. V.I. CODE ANN. tit. 27, § 166i(b) (1975). Although the committee determined that no medical malpractice had occurred, such a determination does not preclude a plaintiff from ultimately filing a lawsuit. *Davis*, 883 F.2d at 1157, 1166.

Davis did not challenge the constitutionality of the malpractice screening panel. For a discussion of the constitutionality of medical malpractice screening panels, however, see Alexander, *State Medical Malpractice Screening Panels in Federal*

amount of $650,000.[17] The district court reduced the jury's verdict to $403,294.92 in order to comply with the Virgin Islands malpractice cap legislation.[18] Davis, on cross appeal[19] to the Court of Appeals for the Third Circuit, challenged the reduction of the jury's verdict claiming it violated her constitutional rights to due process, equal protection and trial by jury under the seventh amendment.[20]

The Third Circuit first addressed Davis' due process and equal protection challenges to the malpractice damage limitation statute.[21] Quoting the Fourth Circuit's opinion in *Boyd v. Bulala*,[22] the court stated that " 'a limitation on a common law measure of recovery does not violate a

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Diversity Actions, 21 ARIZ. L. REV. 959, 970 (1979) (majority of states allows panel decisions to be admissible at subsequent jury trials although not binding on jury); *see also* Turkington, *supra* note 3, at 1305 (federal courts have uniformly rejected seventh amendment challenges to use of screening panels).

17. *Davis*, 883 F.2d at 1157. The judge had never instructed the jury as to the statutory cap on noneconomic damages. *Id.* at 1162. The district court judge subsequently requested that both parties submit briefs in order to conform the verdict to V.I. CODE ANN. tit. 27, § 166b (1975). *Id.* at 1157.

18. *Id.* This reduction capped Davis' noneconomic damages at $250,000 and allowed $153,294.92 for her economic damages. *Id.* It should be noted that the district court applied the statute as it existed at the time of Dr. Omitowoju's act of malpractice in 1984. *Id.* at 1170. In 1986, the legislature amended the statute by capping the total of both economic and noneconomic damages at $250,000. *Id.*

19. Dr. Omitowoju appealed the district court's judgment claiming that the district court committed a number of evidentiary and trial errors. *Id.* at 1165. Specifically, Doctor Omitowoju argued that Davis' expert witness testified to claims at trial which were different from those submitted to the Virgin Islands Malpractice Review Committee. *Id.* Omitowoju also claimed that there was insufficient evidence to support the jury's verdict. *Id.* at 1166. Moreover, he argued that the district court should have instructed the jury to apply a reasonable person test rather than a subjective standard in evaluating whether one informed of the risks of the operation would have still undergone the operation. *Id.* at 1169. Finally, Dr. Omitowoju argued that the amended version of the malpractice cap statute, which limited a plaintiff's total recovery to $250,000 and further limited any noneconomic damages to $75,000, should be applied. *Id.* at 1170. The Third Circuit found no merit in these arguments. *Id.* at 1165-71.

20. *Id.* at 1158.

21. *Id.* Apparently, Davis was aware that her due process and equal protection challenges were weak because she chose to focus primarily on the seventh amendment challenge in her brief. *Id.* at 1159.

22. 877 F.2d 1191 (4th Cir. 1989). In *Bulala*, the plaintiffs challenged the statutory cap limiting their damage recovery in a malpractice action against a doctor whose negligent delivery of their child resulted in birth defects and the ultimate death of their baby. *Id.* at 1194-95. The Fourth Circuit concurred with the district court in concluding that the Virginia state statute, placing an absolute cap on medical malpractice damages of $750,000, did not violate equal protection or due process rights. *Id.* at 1196-97. The Fourth Circuit overturned the ruling of the district court in finding that the statute did not violate the plaintiff's seventh amendment right to a trial by jury. *Id.*

fundamental right or create a suspect classification.' "[23] Therefore, the Third Circuit reviewed Davis' constitutional challenges under the "rational basis test."[24] Concluding that the legislative intent of reducing the high costs of malpractice insurance and promoting quality medical care provided a rational basis for capping the damages awarded to a plaintiff suing for medical malpractice, the Third Circuit found no merit in Davis' due process and equal protection challenges.[25]

The Third Circuit next addressed Davis' central argument — that the seventh amendment precludes the reduction of damages awarded by the jury.[26] Davis claimed that when the district court conformed the jury's verdict to the prescribed statutory limits, it in effect reexamined the jury's factual determination as to the extent of her damages.[27] Davis asserted that such a review was in direct contradiction of the second clause of the seventh amendment.[28]

The Third Circuit acknowledged that there was very little case law addressing seventh amendment challenges similar to the one advanced by Davis.[29] The opinion most closely examined by the Third Circuit was

23. *Davis*, 883 F.2d at 1158 (quoting Boyd v. Bulala, 877 F.2d 1191, 1196 (4th cir. 1989)).

24. *Id.* As stated in *Bulala*, a statutory cap on malpractice damage awards is a "classic example" of an economic regulation. *Bulala*, 877 F.2d at 1196. Therefore, the regulation is subject only to a rational basis review with the burden of proof on the plaintiff to show that the legislature acted in an arbitrary or irrational manner. *Id.* at 1197. The Virgin Island's legislation survived the rational basis review as the statute was found to be rationally related to a legitimate state interest. *Davis*, 883 F.2d at 1158. For a discussion of rational basis review, see City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) and Plyer v. Doe, 457 U.S. 202, 216 (1982).

25. *Davis*, 883 F.2d at 1158. Although the 1975 amendment to V.I. CODE ANN. tit. 27 contained no preamble, it is evident by the preamble to the 1986 amendment to title 27 that the legislative intent was to combat the increased cost of malpractice insurance and prevent the discouragement of health care providers by reason of escalating insurance premiums. *Id.* at 1158 n.5. For a listing of other federal circuit courts of appeals decisions analyzing malpractice damage caps under a rational basis review, see *supra* note 6.

26. *Davis*, 883 F.2d at 1159. The text of the seventh amendment reads as follows:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

27. *Davis*, 883 F.2d at 1159.

28. *Id.* In claiming that the district judge violated the explicit terms of the seventh amendment, Davis focused on the clause "no fact tried by a jury shall be otherwise reexamined in any court." *Id.*

29. *Id.* The Third Circuit pointed out that in *Tull v. United States*, the Supreme Court upheld the validity of a provision in the Clean Water Act which required a federal judge, rather than the jury, to set civil penalties. *Id.* (citing 481 U.S. 412 (1987)). The Third Circuit concluded that *Tull* was of little precedential value, however, since the jury in this case had already awarded damages. *Id.* at 1160. The Third Circuit also reviewed the Supreme Court's decision in

the Fourth Circuit case of *Boyd v. Bulala*.[30] In *Bulala*, the court upheld the validity of a Virginia statute placing a cap on malpractice damage recovery which was challenged on seventh amendment grounds.[31]

While ultimately reaching the same result as the Fourth Circuit, the Third Circuit implemented a unique analysis. The court focused on the "exact and literal meaning" of the text of the second clause of the seventh amendment to uphold the Virgin Islands malpractice damage cap statute.[32] The Third Circuit emphasized that the restriction of the second clause referred exclusively to the role of the judiciary and, therefore, should not be applied to any other branch of government.[33] Under this interpretation, the Third Circuit concluded that the district court judge's reduction of the jury's damage award was not a reexamination of a finding of fact of the jury, but rather was the implementation of a policy decision by the Virgin Islands' legislature.[34] Moreover, since the second clause of the seventh amendment was found to only restrict the court and not the legislature, the judge's application of the statutorily mandated reduction of the damage award was held to be constitutional.[35]

Dimick v. Schiedt. *Id.* at 1159-60 (citing 293 U.S. 474 (1935)). *Dimick* provided that additur (power of trial court to increase amount of inadequate award made by jury) was an improper action for a court as the plaintiff is entitled to have a jury determine damages at a new trial. *Dimick*, 293 U.S. at 486-87. The Third Circuit found that this authority was not controlling on the facts of *Davis*. *Davis*, 883 F.2d at 1159. The Third Circuit did note that the dicta in *Dimick* stated that remittitur (power of trial court to deny motion for new trial based on excessive damage award if defendant agrees to specified reduction in jury damage award) was a proper court action and as a traditional longstanding practice, it should not be disturbed. *Id.* at 1160.

30. *Id.* at 1160-61 (analyzing *Bulala*, 877 F.2d 1191 (4th Cir. 1989)).

31. *Bulala*, 877 F.2d at 1196. The Fourth Circuit determined that it was the jury's role to determine the facts, but that it was not within the jury's domain to determine the legal consequences of its factual findings. *Id.* The Fourth Circuit also made the "common sense" conclusion that if the state legislature can abolish a cause of action, they can surely take the more restrained step of limiting the damages recovered. *Id.*; *see also* Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1330-32 (D. Md. 1989).

32. *Davis*, 883 F.2d at 1161-65. The court noted that unlike the first clause of the seventh amendment, which utilized broad terms in preserving the right to a trial by jury, the second clause speaks specifically and exclusively on the role of the court. *Id.* at 1162. For the text of the seventh amendment, see *supra* note 26.

33. *Davis*, 883 F.2d at 1162. The Third Circuit thereby concluded that the second clause of the seventh amendment was to serve "as a guarantee of the integrity of the judicial process generally and as a check on the powers of the trial judge specifically." *Id.*

34. *Id.*

35. *Id.* The court qualified its holding by stating that it did not intend to imply that the legislature was completely free of seventh amendment restrictions. *Id.* at 1162 n.11. The court reiterated that its holding meant only that the seventh amendment's second clause was primarily concerned with action of the court and did not restrict the legislature's power to enact a malpractice damage cap statute. *Id.*

To further support its conclusion that the district court judge did not reexamine a factual finding of the jury, the Third Circuit analogized the damage cap to the theory of collateral estoppel.[36] The Third Circuit implied that the legislative resolution concerning the damage cap was similar to a resolution of the issue in a prior proceeding.[37] In viewing the damage cap legislation as an issue already decided, the court deemed it improper for the issue to be reexamined by a jury in subsequent litigation.[38]

In addition to its literal examination of the seventh amendment, the court made reference to the historical underpinnings surrounding its enactment in concluding that the amendment was adopted as a guard against corrupt judges.[39] The Third Circuit emphasized that it is difficult to draw conclusions from historical data and reiterated that its finding that the seventh amendment did not bar the legislative damage cap rested primarily on the literal interpretation of the amendment's unambiguous text.[40]

The primary question raised by *Davis* is whether the Third Circuit, through its literal interpretation of the text of the seventh amendment, misconstrued either the language or intent of the framers of the Constitution and Bill of Rights. Focusing on the scope and rationale of the *Davis* opinion, the Third Circuit's holding is consistent with the literal meaning as well as constitutional intent of the seventh amendment. The Third Circuit's opinion, however, has laid the groundwork for the development of harsh ramifications for the victims of medical malpractice.[41]

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36. *Id.* at 1162. The Third Circuit examined the Supreme Court's holding in *Parklane Hosiery Co. v. Shore*. *Id.* (citing 439 U.S. 322 (1979)). In *Parklane*, the Supreme Court held that the defendant's seventh amendment rights were not violated when he was not permitted to relitigate issues resolved in a prior proceeding to which the plaintiff was not a party. *Parklane*, 439 U.S. at 337.

37. *Davis*, 883 F.2d at 1162 (citing *Parklane*, 439 U.S. at 336 n.23). "*Collateral estoppel does not involve the reexamination of any fact decided by a jury*. [T]he whole premise of collateral estoppel is that once an issue has been resolved in a prior proceeding, there is no further factfinding to be performed." *Davis*, 883 F.2d at 1162 (quoting *Parklane*, 439 U.S. at 336 n.23) (emphasis in original).

38. *Id.*

39. *Id.* at 1163-64. The Third Circuit cited the following references to emphasize the notion that the seventh amendment was enacted in response to a fear of judicial power and not legislative power: J. P. REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, THE AUTHORITY OF RIGHTS 51 (1986) (fear that English lawyers appointed to reside over colonial courts had greater attachment to imperial rule than impartial justice); Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966); Thomas Jefferson to the Abbe Arnoux, July 19, 1789, *reprinted in* 5 P. KURLAND & R. LERNER, THE FOUNDERS' CONSTITUTION 364 (1987) (juries needed because judges can be tempted by bribery and easily biased to one side). *Id.* at 1164.

40. *Davis*, 883 F.2d at 1165 (citing Davis v. Michigan Dep't of Treasury, 109 S. Ct. 1500, 1504 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute.").

41. For a discussion of the negative policy effects of the decision, see *infra* notes 81-83 and accompanying text.

The Third Circuit was correct in its statement that "it is often difficult to draw conclusive determinations from historical evidence in addressing a contemporary question of constitutional interpretation."[42] Courts and commentators offer differing opinions on the historical evidence surrounding the adoption of the seventh amendment.[43] It is doubtful that historical analysis can provide a clear interpretation of the seventh amendment, therefore, the Third Circuit was correct in enunciating that historical analysis should not be the determinative factor.[44]

The Third Circuit intensely scrutinized what it viewed as the literal unambiguous text of the seventh amendment.[45] This analysis was the cornerstone of the *Davis* decision.[46] The Third Circuit found the difference between the text of the first and second clauses of the seventh amendment to be significant.[47] The court explained that while the first clause "in broad terms preserves the right to a trial by jury, the second clause speaks exclusively of the role of the court."[48] The court used this differentiation to explain that the second clause was enacted only to serve as a check on the judicial branch and not on the legislative branch.[49]

The Third Circuit also relied on practical considerations in determining the scope of the second clause of the amendment. The court stated that no constitutional dispute would have arisen if the district judge had properly instructed the jury concerning the limitations of the legislative damage cap prior to their deliberation on the damage

42. *Davis*, 883 F.2d at 1165 (citing Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1282 (1986) ("[H]istory cannot point with sufficient clarity to unambiguous principles capable of determining the outcome of cases.")).

43. *See Davis*, 883 F.2d at 1163-65. The Third Circuit examined the historical context of the seventh amendment and concluded that the right to a jury trial existed as a guard against judicial bias. *Id.* at 1164. *But see* Boyd v. Bulala, 672 F. Supp. 915, 919 (W.D. Va. 1987) (history of seventh amendment reveals it serves as check upon legislature and judiciary), *reconsideration granted*, 678 F. Supp. 612 (W.D. Va. 1988) (judgment modified to reflect monies received in settlement with co-tortfeasor), *rev'd*, 877 F.2d 1191 (4th Cir. 1989).

44. *Davis*, 883 F.2d at 1165. Although not relying on the historical analysis, per se, the Third Circuit still found such analysis instructive in declaring that the seventh amendment only precluded the court from reexamining the factual findings of the jury. *Id.*

45. *Id.* at 1159-63.

46. *See id.* at 1165. The Third Circuit stated that it attempted to give meaning to the precise language of the amendment and that it was satisfied that the holding did "no violence to the framers' principle that judges, and judges only, are precluded from reexamining facts tried by a jury." *Id.*

47. *Id.* at 1162.

48. *Id.* For the text of the seventh amendment, see *supra* note 26.

49. *Davis*, 883 F.2d at 1162. The Third Circuit surmised that the language "no fact tried by a jury shall be otherwise reexamined in any *Court* of the United States" created no restriction on the legislative branch. *Id.* at 1161-62 (emphasis added).

award.[50] The Third Circuit noted that " 'issues of fact are to be determined by the jury under appropriate instructions by the court.' "[51] If the jury ignores the instruction, the trial judge has the authority to offer the malpractice victim remittitur to the amount prescribed by statute or a new trial.[52] Applying this rationale to the facts in *Davis*, the Third Circuit deduced that if the district court can "require a jury to restrict its verdict to conform to a legislative cap . . . [it] can correct or modify an unfettered verdict so as to comply with the same legislative mandate."[53]

Despite using a different analysis, the ultimate result reached by the Third Circuit is consistent with the holdings of other federal courts which have addressed seventh amendment challenges to statutory malpractice damage caps.[54] Although the Supreme Court has never spoken directly on the issue, it clearly appears the Supreme Court would uphold the constitutional validity of such a statute.[55]

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50. *Id.* at 1162-63. *But see* Boyd v. Bulala, 647 F. Supp. 781, 788 (W.D. Va. 1986) (even instructing jury on damage cap prior to deliberation improperly infringes on jury's role in assessing damages), *reconsideration granted*, 678 F. Supp. 612 (W.D. Va. 1988), *rev'd*, 877 F.2d 1191 (4th Cir. 1989).

51. *Davis*, 883 F.2d at 1163 (quoting Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935) and Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593, 596 (1897)).

52. *Davis*, 883 F.2d at 1163 n.12. The district court judge realized he could have charged the jury to limit its award to the statutory maximum but thought that, if the jury exceeded the statutory limit, he could rectify the situation. *Id.*

Remittitur is permissible only when a verdict cannot be justified upon the evidence, and only if the court affords the plaintiff the option of a new trial. Kennon v. Gilmer, 131 U.S. 22, 29 (1889); Scott v. Plante, 641 F.2d 117, 136 (3d. Cir. 1981), *vacated*, 458 U.S. 1101 (1982).

53. *Davis*, 883 F.2d at 1163

54. In *Bulala*, the Fourth Circuit relied heavily on the premise that since the legislature can abolish a cause of action completely, it can also properly limit the recoverable damages. *Bulala*, 877 F.2d 1191, 1196 (1989). Furthermore, the Fourth Circuit stated that, once the jury has made its findings of fact with respect to damages, it has fulfilled its constitutional function and that it was not the jury's role to determine the legal consequences of its factual findings. *Id.* Thus, regardless of the jury's damage award, the court was bound by the Virginia legislature's prior determination that, as a matter of law, damages awarded in excess of $750,000 were not appropriate. *Id.*

In the only other federal case addressing a similar malpractice cap challenge, the United States District Court for the District of Maryland held that the legislature constantly shapes the issues that are given to the jury by shaping the law. Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1330-34 (D. Md. 1989). Consequently, a legislative malpractice damage limitation was just another legislative shaping of the law, well within the legislature's power. *Id.* at 1331.

In view of *Bulala* and *Franklin*, it is readily apparent that the Third Circuit has broken new ground in its reliance on a literal interpretation of the text of the seventh amendment.

55. *See* Tull v. United States, 481 U.S. 412 (1987) (Court allowed judge to assess civil penalties for violation of Clean Water Act); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) (Supreme Court held absolute damage cap limiting recovery in case of nuclear accident to $560 million did not violate due process clause of fifth amendment); *see also* Turkington, *supra* note 3,

The Third Circuit, in its interpretation of the text of the seventh amendment, failed to address the first clause of the amendment. The first clause states that "[i]n suits at common law . . . the right to a trial by jury shall be preserved."[56] This clause has been interpreted by the Supreme Court as preserving the right to a jury trial in those actions analogous to "suits at common law" existing in the English courts in 1791.[57] As the recovery of medical malpractice damages is an action at law, it is undisputed that a jury is required to determine liability.[58] The issue of whether the jury must also determine the amount of damages in such actions, however, is an area of conflicting views and heated debate.[59]

The Third Circuit chose not to adopt the analysis of the Fourth Circuit in *Bulala*.[60] In reversing the decision of the United States District Court of the Western District of Virginia,[61] the Fourth Circuit stated

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at 1304 (no significant federal constitutional restrictions on medical malpractice tort reform).

56. U.S. CONST. amend. VII, cl. 1.

57. *Tull*, 481 U.S. at 417-21 (1987). In *Tull*, the Court stated that the characterization of the relief as legal or equitable was "more important than finding a precisely analogous common law cause of action in determining whether the seventh amendment guarantees a jury trial." *Id.* at 421 (citing Curtis v. Loether, 415 U.S. 189, 196 (1974)); *see also* Boyd v. Bulala, 672 F. Supp. 915 (W.D. Va. 1987), *rev'd*, 877 F.2d 1191 (4th Cir. 1989); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

58. The issue of whether the jury must determine liability was not contested in *Davis*. *Davis*, 883 F.2d at 1155.

59. Federal cases addressing this issue include Boyd v. Bulala, 877 F.2d 1191, 1196 (4th Cir. 1989) (reversing District Court for Western District of Virginia's holding that statutory cap on damages violated seventh amendment); Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1338 (D. Md. 1989) (upholding statutory damage cap); Reuwer v. Hunter, 684 F. Supp. 1340, 1344 (W.D. Va. 1988) (declaring Virginia malpractice cap unconstitutional). Some of the various state court decisions deciding the constitutionality of malpractice damage caps under state and federal constitutional right to jury trial challenges include Smith v. Department of Insurance, 507 So. 2d 1080, 1089 (Fla. 1987) (legislation cannot restrict right to have jury determine damages unless reasonable alternative remedy or overpowering public necessity); Johnson v. Saint Vincent Hospital, Inc., 273 Ind. 374, 400-01, 404 N.E.2d 585, 602 (1980) (right to jury trial not abridged where legislature puts monetary limit on damages).

60. *Davis*, 883 F.2d at 1161. The Third Circuit explained that its approach to analyzing the seventh amendment was different from the Fourth Circuit's approach. *Id.*

61. Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986), *reconsideration granted*, 678 F. Supp. 612 (W.D. Va. 1988), *rev'd*, 877 F.2d 1191 (4th Cir. 1989). The district court stated that it was unconstitutional for the court to ignore a verdict for an amount above the cap, which was supported by the evidence, and instead enter judgment for the cap amount. *Id.* at 789. The district court gave great deference to the Supreme Court's statement that " '[m]aintenance of the jury as a factfinding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' " *Id.* at 788 (quoting Dimick v. Scheidt, 293 U.S. 474, 486 (1935)).

that, although it is the role of the jury to determine the extent of a plaintiff's injuries, it is not the responsibility of the jury to determine the legal consequences of this finding of fact.[62] Rather than focusing on the proper role of the jury, the Third Circuit chose to examine the absence of limitations imposed on the Virgin Islands legislature by the second clause of the seventh amendment.[63]

Although, in *Tull v. United States*,[64] the Supreme Court held that a jury determination of remedy is not a fundamental element of the right to a jury trial in a civil case,[65] its opinion has been criticized for a failure to substantiate this reasoning.[66] Based on these criticisms, it appears that in future challenges of the Virgin Islands malpractice damage cap statute, malpractice victims will, unlike the *Davis* court, emphasize the first clause of the seventh amendment.[67]

Although the practical analysis applied by the Third Circuit seems viable, there are many policy considerations which the Third Circuit failed to address.[68] The court never considered that under the recent 1986 amendment to the Virgin Islands damage cap statute, which caps both economic and noneconomic damages, worthy malpractice victims will be prevented from recovering even their most basic medical expenses.[69]

The Third Circuit's opinion gains strong support from an examina-

62. Boyd v. Bulala, 877 F.2d at 1191, 1196 (4th Cir. 1989) (citing Etheridge v. Medical Center Hosps., 237 Va. 87, 376 S.E.2d 525 (1989)). Although not required to follow the *Etheridge* court's reasoning on a question of federal constitutional interpretation, the Fourth Circuit nonetheless found its analysis persuasive. *Id.*

63. *Davis*, 883 F.2d at 1161-63.

64. 481 U.S. 412 (1987). In *Tull*, the Supreme Court specifically held that the seventh amendment guarantees a jury trial to determine liability in actions by the government seeking civil penalties under the Clean Water Act, but that the seventh amendment did not guarantee the right to have the jury assess civil penalties under the Act. *Id.* at 424-27.

65. *Id.* (citing Colgrove v. Battin, 413 U.S. 149, 156 n.11 (1973) (only incidents regarded as fundamental, inherent in and of essence of system of trial by jury beyond reach of legislature)); Galloway v. United States, 319 U.S. 372, 392 (1943) (seventh amendment preserves jury trial only in its most fundamental elements).

66. *Tull*, 481 U.S. at 427-28 (Scalia, J., dissenting) (no precedent for judgment of civil liability by jury but assessment of amount by court); Reuwer v. Hunter, 684 F. Supp. 1340, 1344 (W.D. Va. 1988) (*Tull* majority admitted no historical evidence before it concerning right to jury in determination of civil remedies); Note, *Right to Trial by Jury in an Action for Civil Penalties and Injunctive Relief Under the Clean Water Act*, 28 NAT. RESOURCES J. 607, 621 (1988) (stating that *Tull* Court too easily dismissed jury trial right as mere procedural detail).

67. For the text of the seventh amendment, see *supra* note 26.

68. For a discussion of these policy considerations, see *infra* notes 81-83 and accompanying text.

69. The 1986 amendment limits total damage recovery to $250,000 and it limits noneconomic damage recovery to $75,000. V.I. CODE ANN. tit. 27, § 166b (Supp. 1989) (added 1975, amended 1986).

tion of the possible ramifications and effects that could result from a finding that the seventh amendment barred statutory malpractice damage caps.[70] Even in the controversial *Bulala* district court opinion, the court qualified its holding by noting that many methods were available to the legislature to circumvent the jury trial limitation.[71] Specifically, the *Bulala* court stated that a legislature has authority to establish rules governing the types of damages recoverable;[72] to create procedural mechanisms limiting jury discretion;[73] and to replace common law causes of action with compensation schemes.[74] It follows that the legislature of the Virgin Islands could produce the same practical limitations on malpractice victim recovery by creating legislation eliminating entire classes of damages[75] without having to address the seventh amendment jury trial restrictions.[76]

Some commentators suggest that the constitutionality of medical malpractice damage caps hinges on the nature of the cap in question.[77] The statutory cap addressed in *Davis* only limited the recovery for noneconomic damages.[78] In capping noneconomic damages, the legislature limited the amount the plaintiff could recover for pain and suffering, inconvenience, physical impairment, and other non-pecuniary damages. Thus the plaintiff could still recover for his out-of-pocket pecuniary damages.

There is less hostility to noneconomic damage caps because the

70. *See* Boyd v. Bulala, 647 F. Supp. 781, 789 (W.D. Va. 1986) (recognition of legislature's power to effect malpractice damage awards notwithstanding seventh amendment), *reconsideration granted*, 678 F. Supp. 612 (W.D. Va. 1988), *rev'd*, 877 F.2d 1191 (4th Cir. 1989).

71. *Id.* Although the court did not state outright that the legislature could circumvent the seventh amendment limitation, one commentator has suggested that this is the practical result and interprets the *Bulala* holding as narrowly drawn in only banning absolute medical malpractice caps. *See* Note, *supra* note 3, at 580.

72. *Bulala*, 647 F. Supp. at 789.

73. *Id.* "The legislature may prescribe rules of procedure and evidence, create legal presumptions, allocate burdens of proof, and the like." *Id.*

74. *Id.*; *see also* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88 (1977) (Price Anderson Act, which placed $560 million limitation on liability for nuclear accidents at licensed federal plants was reasonable substitute for common-law or state tort remedies it replaced).

75. *See* Note, *supra* note 3, at 579-80. The damages the legislature could eliminate include: wrongful death damages, future earnings, pain and suffering and lost earnings. *Id.* at 580 n.127.

76. *See Bulala*, 647 F. Supp. at 789; Note *supra* note 3, at 580 (legislature can use mechanisms to limit jury's discretion).

77. One aspect of the nature of a statutory cap is whether it limits economic damages, noneconomic damages or both. Two commentators suggest that a damage cap statute is much more likely to be declared constitutional if it only limits noneconomic damages. *See* Note, *Challenging the Constitutionality*, *supra* note 2, at 831; Note, *supra* note 3, at 580-82.

78. *Davis*, 883 F.2d at 1158. For the text of V.I. CODE ANN. tit. 27, § 166b (1975), which limits noneconomic damages to $250,000, see *supra* note 2.

plaintiff, at least from a strictly monetary viewpoint, is no worse off than he was before the tortious act of malpractice. Furthermore, the subjective nature of determining compensation for noneconomic damages mitigates in favor of limiting such damages and serves the public policy of discouraging frivolous litigation seeking unwarranted astronomical awards for pain and suffering.[79]

The 1986 amendment to the Virgin Islands damage cap statute places a recovery limit on both economic and noneconomic damages.[80] This creates different policy considerations for the Third Circuit, as upholding the validity of the amended statute will create harsh results for medical malpractice victims.[81] The premise that a malpractice victim will always be able to recover at least his basic medical expenses no longer exists. Furthermore, the recovery for noneconomic damages is severely limited in light of previous recoveries prior to the amendment.[82]

Many courts and commentators abhor the prospect that legislation will prevent "bare bones" compensation to cover the medical expenses of malpractice victims with meritorious claims, and yet do nothing to deter nonmeritorious claims of a lesser, but still significant, monetary degree.[83]

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79. *See* Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1332 (D. Md. 1989) (juries react emotionally in awarding noneconomic damages creating anomaly in court system that strives for rationalism and predictability); Fein v. Permanente Medical Group, 38 Cal. 3d 137, 163, 695 P.2d 665, 683, 211 Cal. Rptr. 368, 386 ("possibility of phenomenal awards for pain and suffering that can make litigation worth the gamble"), *appeal dismissed*, 474 U.S. 892 (1985); Note, *supra* note 3, at 583 (arbitrary nature of pain and suffering awards mitigates in favor of noneconomic damage caps).

80. V.I. CODE ANN. tit. 27, § 166b (Supp. 1989) (added 1975, amended 1986). The amended version states:

> (a) The total amount recoverable for any injury of a patient may not exceed two hundred and fifty thousand dollars ($250,000) . . . .
> (b) The only damages which may be awarded . . . are the following:
> (1) economic damages; and
> (2) noneconomic damages
> (c) The total amount awarded for noneconomic damages . . . as a result of a single occurrence . . . may not exceed seventy-five thousand dollars ($75,000).

Id.

The *Davis* court rejected Dr. Omitowoju's argument that the 1986 amended statute should be applied retroactively by relying on a canon of construction that statutes operate prospectively. *Davis*, 883 F.2d at 1170.

81. If the 1986 amendment is upheld by the Third Circuit, medical malpractice victims will be subjected to one of the harshest statutory damage cap schemes to date.

82. *E.g.*, *Davis*, 883 F.2d at 1157. If the amended statute had been utilized, Davis would have recovered her economic damages of $153,294.92, but her noneconomic damages, which a jury valued at $486,704.08, would have been capped at $75,000.

83. *See* Condemarin v. University Hosp., 775 P.2d 348, 366 (Utah 1989) (statute creates absurdly low amount which will not even cover basic medical

Although the *Davis* decision appears to aid in the promotion of a legitimate legislative concern in the short run,[84] it is likely that the Third Circuit has backed itself into an inescapable corner and will be unable to avoid the harsh, almost unconscionable results which may be generated by the amended statute.[85]

The *Davis* court's literal interpretation of the seventh amendment leaves little opportunity for Third Circuit attorneys to circumvent the Virgin Islands' statutory cap on damages using a trial by jury hypothesis. *Davis* provides a textual interpretation of the seventh amendment which seems unlikely to be overturned.[86] In the majority of cases where malpractice damage caps have been overturned, it has been based on state rather than federal constitutional provisions.[87] The Virgin Islands, existing as an unincorporated territory of the United States, has yet to adopt a constitution of their own.[88] Although the seventh amendment does not apply per se to the Virgin Islands, the Virgin Islands legislature has adopted by statute the same jury trial rights as those existing under the federal Constitution.[89]

The fate of limited damage recovery for medical malpractice victims in the Virgin Islands appears firmly implanted in the Third Circuit's textual interpretation of the seventh amendment. Because of the dis-

expenses); Arneson v. Olson, 270 N.W.2d 125, 135 (N.D. 1978); Note, *supra* note 2, at 831.

84. For a discussion of the advantages of capping noneconomic damages, see *supra* note 79 and accompanying text.

85. For a discussion of the harsh ramifications of the amended statute, see *supra* notes 81-83 and accompanying text. Based on the Third Circuit's reliance on a literal reading of the text of the seventh amendment, it is difficult to conceive how the court could possibly declare the 1986 amendment to the statute unconstitutional because it caps economic and severely limits noneconomic damages.

86. It is difficult to conceive of a textual interpretation of the seventh amendment which would prove the Third Circuit's analysis erroneous.

87. Turkington, *supra* note 3, at 1317. It is appropriate for state courts to interpret state constitutions in a more expansive way than the United States Supreme Court interprets the United States Constitution even when the state constitutional provision is identical to a clause in the federal Constitution. *Id.* at 1321. State court decisions invalidating malpractice damage caps based on state constitutional provisions include: Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Wright v. Central Du Page Hospital Association, 63 Ill.2d 313, 347 N.E.2d 736 (1976).

88. A proposed constitution was adopted and submitted to the Congress of the United States and received congressional approval. Virgin Islands-Constitution, Pub. L. No. 97-21, 95 Stat. 105 (1981). The voters of the Virgin Islands, however, failed to adopt this constitution when put to a vote in November of 1981. V.I. Revised Organic Act of 1954, V.I. CODE ANN. tit. 1, § 1 (Supp. 1989).

89. Section 3 of the Virgin Islands Revised Organic Act of 1954 states that the first to ninth amendments of the United States Constitution (among other parts) shall have the same effect in the Virgin Islands as they have in the United States or in any state of the United States. V.I. Revised Organic Act of 1954 § 3; *see also* V.I. CODE ANN. tit. 5 App. I Rule 38 (Supp. 1989) (preserves parties right to jury trial).

turbing reality and harsh ramifications created by the 1986 amendment to the damage cap statute, however, in all probability the Third Circuit will be forced to address future constitutional challenges to the statutory cap.

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