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A Proposal to Cap Tort Liability: Avoiding the Pitfalls of Heightened Rationality

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A PROPOSAL TO CAP TORT LIABILITY: AVOIDING THE PITFALLS OF HEIGHTENED RATIONALITY

In a nation dependent upon liability protection, dramatic and highly publicized increases in the cost of insurance have created a difficult situation for many members of society.[1] Manufacturers are abandoning entire product lines,[2] workers are struggling to find day-care services for their children,[3] producers of lifesaving vaccines are discontinuing production,[4] and government entities are foregoing liability coverage—all as a result of extraordinary rises in insurance premiums.[5]

Constituents have besieged state and federal lawmakers with demands for immediate action against the spreading crisis. Legislators have reacted by statutorily limiting the noneconomic damages that a plaintiff can recover in a legal action.[6] In view of

1. *See* Gest & Work, *Sky-High Damage Suits*, U.S. NEWS & WORLD REP., Jan. 27, 1986, at 35; Greene, *The Tort Reform Quagmire*, FORBES, Aug. 11, 1986, at 76; King, *A Catastrophic Year Has Airline Insurance Rocketing*, BUS. WK., Jan. 20, 1986, at 30; Lacayo, *The Malpractice Blues*, TIME, Feb. 24, 1986, at 60.

2. *See* Dee, *Bloodbath*, ENTERPRISES, Mar./Apr. 1986, at 3; *Businesses Struggling to Adapt as Insurance Crisis Spreads*, Wall St. J., Jan. 21, 1986, at 33 [hereinafter *Businesses Struggling*].

3. *See generally Child Care: The Emerging Insurance Crisis: Hearings Before the Select Comm. on Children, Youth, and Families*, 99th Cong., 1st Sess. 1 (1985); *Businesses Struggling*, *supra* note 2, at 33.

4. *See Availability and Affordability Problems in Liability Insurance: Hearing Before the Subcomm. on Business, Trade, and Tourism of the Senate Comm. on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. 9 (1985) [hereinafter *Senate Hearing*] (statement of Rep. Porter) (DPT manufacturers stopping production); *Drug Firm's Hands Tied; Users Suffer*, Det. News, Oct. 15, 1986, at A4, col. 1.

5. *See* Blodgett, *Premium Hikes Stun Municipalities*, 72 A.B.A. J., July 1, 1986, at 48; DePalma, *Liability Insurance: Hard to Get and Costly*, N.Y. Times, Feb. 23, 1986, § 11, at 1, col. 5.

6. *See, e.g.*, Act effective June 11, 1986, § 1, 1986 Alaska Sess. Laws ch. 139 (codified at ALASKA STAT. § 09.17.010 (Supp. 1987)); Tort Reform and Insurance Act of 1986, ch. 86-160, § 59, 1986 Fla. Laws 695, 755 (codified at FLA. STAT. § 768.80 (1987)); Act of May 27, 1986, ch. 639, § 1, 1986 Md. Laws 2347, 2350 (codified as MD. CTS. & JUD. PROC. CODE ANN. § 11-108 (Supp. 1987)); Act of June 6, 1986, ch. 227, § 13, 1986 N.H. Laws 475, 485 (codified at N.H. REV. STAT. ANN. § 508:4-d (Supp. 1987)); Act of Apr. 4, 1986, ch. 305, § 301, 1986 Wash. Laws 1354, 1357 (codified at WASH. REV. CODE § 4.56.250 (Supp. 1988)).

expressed opposition to the statutes, litigants will predictably seek legislative or judicial repeal of the limitations.[7]

These limitations represent a second wave of legislation enacted in response to a crisis in affordable insurance coverage. Over the past ten years, a substantial number of states enacted limitations on medical malpractice awards when rising costs and limited insurance availability threatened insurance coverage for doctors and hospitals.[8] Studies indicate that these limitations helped slow the growth of malpractice insurance premiums where they were enacted.[9] Legislators' efforts were frequently foiled, however, as states had their medical malpractice award limitations declared unconstitutional under the equal protection clause of the fourteenth amendment.[10]

This Note sets forth a model statute that limits high damage awards, yet will withstand the rigors of judicial scrutiny. After presenting a brief background of the medical malpractice crisis in Part I, Part II outlines the standards of equal protection review that the courts are presently using. The Note then focuses on the constitutional challenges to caps on medical malpractice liability in Part III. Part IV discusses the values and interests that were found to be dispositive in the courts' decisions. Finally, after analyzing the criteria that must be met to ensure that a legislative limitation will survive judicial scrutiny, Part V proposes a statute to circumscribe noneconomic damage awards.

I. BACKGROUND

The causes of the crisis and the legislative means employed to combat these evils must be delineated to understand properly the equal protection concerns raised by the damage caps. Furthermore, an overview of these causes provides a foundation for ascertaining the rationales for legislative action and the resultant judicial reactions.

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7. *See* Browning, *Doctors and Lawyers Face Off*, A.B.A. J., July 1, 1986, at 38; Schwartz, *Should There Be a Cap on Personal Injury Awards?*, 64 MICH. B.J. 135 (1985).

8. *See* Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 OKLA. L. REV. 195 (1985). Professor Smith's review of the constitutionality of malpractice limits focuses on the differences between state and federal equal protection standards of review. This Note takes the position that although there may be distinctions between the two positions, the state decisions and analyses are consistent with equal protection principles as presently employed by the Supreme Court.

9. *See* P. DANZON, THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE CLAIMS (Inst. For Civil Justice, Rand Corp. R-2870-ICJ, 1982).

10. *See infra* notes 54-86 and accompanying text.

A. *Factors Leading to the Crisis*

Although the impact of rising insurance rates is considerable, the involved parties are still vehemently debating the origins of the insurance problem.[11] In general, several factors are cited as the main contributors to the crisis. First, the insurance companies blame aberrant behavior in the civil justice system, evidenced by unfair and capricious jury awards, for the crisis.[12] Accusing the courts of running a get-rich-quick lottery for the masses,[13] insurance underwriters claim that the unpredictability of excessive liabilities has forced their companies either to raise premiums to protect themselves against potentially prohibitive damage awards, or to withdraw totally from insuring high risk activities.[14]

A second factor contributing to the current insurance crisis is the shrinking reinsurance market. Reinsurers provide insurance for primary coverage carriers by reimbursing the primary's payouts that exceed a specified amount. If insurance companies cannot obtain reinsurance for certain risks, they will not insure those risks. The reinsurance market is drying up for the same reasons that the primary insurance market is contracting: the unpredictability of the judicial system and the diminishing capacity to underwrite risks.[15]

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11. *See* Franck, *Tort Reform Update*, 64 MICH. B.J. 1014 (1986); Perlam, *Should Pain and Suffering Awards Have Statutory Limits: Don't Punish the Injured*, A.B.A. J., May 1, 1986, at 34; Rust, *ABA Rejects AMA Tort Reform Plan*, 3 MED. BENEFITS 22-27 (1986).

12. *See Senate Hearing*, *supra* note 4, at 4 (statement of William C. Wyer, U.S. Chamber of Commerce); Wright, *Why Tort Reform is Needed*, BENCH & B. MINN., Mar. 1986, at 20.

13. Examples of seemingly outlandish jury awards abound. In one jury trial, a plaintiff was recompensed for the loss of a prize bull that died as a result of an accidental spraying of pesticides. The jury awarded the owner $1.5 million in compensatory damages and $7 million in punitive damages.

When a 75-year old welder died of a heart attack while at a restaurant, his widow brought suit against his former employer, Getty Oil. Five months before the heart attack, the deceased had been severely burned while at work. Determining that the heart attack was caused by the stress of the burns, the court awarded the plaintiff $3.7 million in compensatory damages and $24,999,999 in punitive damages.

Sears, Roebuck & Co. lost a case where an obese man claimed his heart attack was caused by a lawn mower starter cord that was too difficult to pull. The jury awarded one million dollars in damages. Greene, *The Hanging Judges of Business*, FORBES, Apr. 7, 1986, at 62; Taylor, *Is It The Best Little Plaintiff's City in Texas?*, Nat'l L.J., Dec. 8, 1986, at 6, col. 1.

14. *See Senate Hearing*, *supra* note 4, at 4 (statement of William C. Wyer, U.S. Chamber of Commerce); Smith, *supra* note 8.

15. *See Senate Hearing*, *supra* note 4, at 93 (statement of Mindy Pollack, Assistant Gen. Counsel, Reinsurance Ass'n of Am.).

A third reason for high insurance costs results, ironically, from insurers charging too little in the past.[16] Underwriters sold their policies at below-cost levels to build fiscal volume, hoping to cover casualty losses through earnings from high yield investments. As investment income declined and liability claims rose, the insurance companies were caught with insufficient funds to cover the mounting demands for indemnification.[17] Consequently, the insurance companies either had to raise their premiums to cover potential losses or completely reassess their involvement in high risk markets.[18]

B. Two Legislative Responses

State legislatures recently have attempted several solutions to the crisis,[19] frequently turning to limitations on compensatory awards.[20] Florida and Washington illustrate two legislative efforts to restrain tort liability awards that may create significantly different results.

In a comprehensive package, Florida lawmakers passed a straight $450,000 limitation upon the total noneconomic damages that any plaintiff can recover in a negligence or breach of

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16. *See* F. BELLOTTI, J. VAN DEKAMP, L. THORBURG, J. MATTOX, C. BROWN & B. LAFOLLETE, AN ANALYSIS OF THE CAUSES OF THE CURRENT CRISIS OF UNAVAILABILITY AND UNAFFORDABILITY OF LIABILITY INSURANCE 10-16 (1986); Molotsky, *Drive to Limit Product Liability Grows as Consumer Groups Object*, N.Y. Times, Mar. 2, 1986, § 1, at 32, col. 1.

17. *See generally Senate Hearing, supra* note 4; R. Fleming, Final Report to Governor James J. Blanchard on the Subject of Health Care Provider Malpractice and Malpractice Insurance (Dec. 17, 1985) (copy on file with U. MICH. J.L. REF.).

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> The capacity constraints of the insurance industry also [contribute] to shortages of liability coverage. The industry generally follows a rule-of-thumb known as the 'Kennedy formula' which theorizes that premiums should not exceed surplus by more than 2 to 3 times. Because underwriting losses are partially paid from surplus, the ratio helps to ensure that carriers do not take on too much business in periods when surplus is low. In 1984, many insurance carriers experienced erosions of surplus due to heavy losses and lower investment earnings. As a result, in 1985, many carriers are turning away new business and more carefully selecting those businesses whom they wish to retain.

Senate Hearing, supra note 4, at 21 (statement of Frank S. Swan, Chief Counsel for Advocacy, Office of Advocacy, Small Business Admin.).

19. Examples of state action are (1) restricting punitive damages, (2) eliminating the collateral source rule, (3) ending joint and several liability, (4) restricting the use of contingent fees, and (5) modifying statutes of repose. Phillips, *To Be or Not To Be: Reflections on Changing Our Tort System*, 46 MD. L. REV. 55, 56-62 (1986).

20. *See supra* note 6 and accompanying text.

warranty action.[21] Noneconomic damages are defined in Florida as awards designed "to compensate for pain and suffering, inconvenience, physical impairment, mental impairment, mental anguish, disfigurement, [and] loss of capacity for enjoyment of life."[22]

The main goal of the Florida law was to eliminate potentially aberrant and excessive jury awards in order to provide insurers with an objective basis for determining their premium rates.[23] The legislature also wanted to ensure that victims were fully reimbursed for all compensable injuries. By establishing a top rate of $450,000, Florida legislators ensured that the vast majority of victims were not precluded from fully recovering for injuries.[24] At the same time, the legislators declared a point at which speculation ceased and society's interests in promoting the continuance of affordable insurance coverage took precedence.

In the State of Washington, legislators took a different path by enacting a liability cap that limited a claimant's recovery for noneconomic damages to an amount "determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages."[25] The Washington legislature's stated goals were to provide an objective standard by which insurance companies could predict potential risks with greater accuracy when establishing their premium rates, to provide full compensation for the economic costs incurred by the plaintiff, and to restrain jury reactions to the highly speculative costs of pain and suffering.[26]

A hypothetical example best demonstrates the differences between the Florida and Washington statutes. Falling debris from a construction site strikes and badly injures a sixty-year old woman. As a result of the injury, the woman is deeply depressed,

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21. Tort Reform and Insurance Act of 1986, ch. 86-160, § 59, 1986 Fla. Laws 695, 755 (codified at FLA. STAT. § 768.80 (1987)).

22. *Id.* § 60, 1986 Fla. Laws at 755 (codified at FLA. STAT. § 768.80 (1987)).

23. *Id.* § 2, 1986 Fla. Laws at 699.

24. The legislatures have fixed the monetary figure for liability limitation at what is essentially an arbitrary number. S. REP. No. 422, 99th Cong., 2d Sess. 1, 99 (1986). Known factors, however, can be used to provide a working framework for legislatures. The available figures for personal injury awards show that in New York the average settlement is $31,740. *Id.* at 6. In a five-year study in Greenville County, South Carolina, 83.6% of all personal injury awards were below $10,000, and only 1.7% exceeded $100,000. *Id.* at 110. Although generalizations from these figures are tenuous, it is fair to say that the legislative caps will allow equitable compensation for the vast majority of cases.

25. Act of Apr. 4, 1986, ch. 305, § 301(2), 1986 Wash. Laws 1354, 1357 (codified at WASH. REV. CODE § 4.56.250 (Supp. 1988)).

26. *Id.*

scarred, and in severe pain for two years. Under the Florida statute, drawing upon its past experiences to evaluate the severity of the women's pain and the depth of her depression, the trier of fact could determine that the woman had suffered noneconomic losses of $250,000 during that period.

In Washington, a jury may reach the same results as the Florida jury, but its award will be cut in half under the statutory formula. Because the average life expectancy of the woman is only seventy-five years, taking 0.43 of the average wage, $8060 in this case, over her fifteen year life expectancy would limit her recovery to $120,900. The results of a number of such scenarios indicate that Washington's statute produces a more favorable climate for defendants than does Florida's. The consequence of such discrepancies among states is not only that victims in comparable circumstances will receive sharply divergent awards, but also that there may be an increase in forum shopping by plaintiffs who wish to avoid such restraints on their interests.

C. Classifications Under the Caps on Liability

By placing a ceiling on the damages that a tort victim can recover, state legislatures implicitly established separate classifications between victims who are fully compensated for their injuries and those who will not be fully compensated.[27] Recoveries by victims who have suffered the gravest injuries, with potentially lifelong aftereffects, may be limited by the damage cap, while those who have relatively slight injuries may receive complete restitution for both the pecuniary and noneconomic damages they have suffered. Whether the ceiling limits recovery of all damages or of only noneconomic reparations, inevitably such classifications will deny some victims full compensation for their injuries.

Faced with incomplete remedies and disparate treatment from the legislature, victims whose recoveries have been restricted are likely to challenge legislative caps in court both on tort liability and on equal protection grounds. These equal protection challenges pose the most potent obstacle to effective tort liability control. Yet, the evolving Supreme Court doctrine of equal protection, and analogously, the states' application of equal protection to legislative caps on medical malpractice liability, reveal the features of a constitutionally permissible tort liability cap.

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27. *See infra* notes 54-55 and accompanying text.

II. STANDARDS OF REVIEW UNDER EQUAL PROTECTION

Under the careful nurturance of the Supreme Court, the equal protection doctrine is formulated upon a relatively simple premise: the "pledge of the protection of equal laws."[28] Concisely stated, the "Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated."[29] Once known as the "last resort" of constitutional arguments,[30] the equal protection doctrine has matured with time into one of the most vibrant doctrines of modern American jurisprudence.[31] Previously formulated by the Court as a two-tiered test,[32] the protections offered by the fourteenth amendment have evolved into a multi-faceted and potent tool of litigants. The broad interpretive powers available under the sliding scale of rationality have enabled many courts to strike down damage limitations under the fourteenth amendment.

A. Strict Scrutiny

The most stringent standard of equal protection review is the strict scrutiny test. Frequently described as "strict in theory and fatal in fact,"[33] the highest standard of review requires that the legislative classification chosen be the least restrictive means

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28. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949); *see also* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.).

29. Tussman & tenBroek, *supra* note 28, at 344.

30. Buck v. Bell, 274 U.S. 200, 208 (1927).

31. *See, e.g.*, Coburn v. Agustin, 627 F. Supp. 983, 986 (D. Kan. 1985) (invalidating Kansas medical malpractice statute).

32. *See* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). The two-tiered standard featured at one level the strict scrutiny test for fundamental rights and suspect groups, and at the other level the rational relation test for the remaining legislative acts in the social and economic field. The test was referred to as outcome-determinative because the use of the strict scrutiny test invariably led to invalidation of the challenged legislation, and the use of the deferential rational relation test was sure to find the legislative action valid. Thus, whichever test the court initially decided to apply to a given situation would be the determining factor in the review. *See also* Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1030 (1979).

33. Gunther, *supra* note 32, at 8; *see also* Bernal v. Fainter, 467 U.S. 216, 219 n.6 (1984) ("[o]nly rarely are statutes sustained in the face of strict scrutiny").

possible in the promotion of a compelling state interest.[34] The exacting demands of strict scrutiny are reserved for two situations: first, when a legislative classification impinges upon a fundamental right;[35] and second, when distinctions are based upon a "suspect" trait[36] such as race,[37] national origin,[38] or alienage.[39] Although the Court declares that legislation may survive strict scrutiny,[40] it appears that such a statement is simply a ritualistic cleansing of the soul, because the Court invariably finds that the impinging classifications fall short of the requisite degree of merit.[41]

B. Intermediate Standard of Review

Dissatisfaction with the outcome-determinative results of the traditional two-tiered test[42] led the Supreme Court to define a middle standard, the "intermediate" test.[43] Under this standard, the court offers limited protection to groups that do not qualify as a suspect class, yet are still deemed to be worthy of protection

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34. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1000-02 (1978).

35. Fundamental rights are "explicitly or implicitly guaranteed by the Constitution." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973); *see, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Dunn v. Blumstein, 405 U.S. 330 (1972) (voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); NAACP v. Alabama, 357 U.S. 449 (1958) (association). Discovery of new fundamental rights appears to be on the wane with the recent Supreme Court announcement that it was not "inclined to take a more expansive view of our authority to discover new fundamental rights," and therefore, "[t]here should be . . . great resistance to expand the substantive reach of [the equal protection] clause." Bowers v. Hardwick, 106 S. Ct. 2841, 2846 (1986) (holding that sexual preference is not a fundamental right).

36. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

37. Strauder v. West Virginia, 100 U.S. 303 (1880).

38. Hernandez v. Texas, 347 U.S. 475 (1954).

39. Graham v. Richardson, 403 U.S. 365 (1971). *But see* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 630-44 (2d ed. 1983) (hereinafter J. NOWAK).

40. *See* L. TRIBE, *supra* note 34, § 16-6, at 1000.

41. *See* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911). There have been only a handful of cases that have survived strict scrutiny. *See* Buckley v. Valeo, 424 U.S. 1 (1976) (upholding federal ceiling on individual contributions to political campaigns); Burns v. Fortson, 410 U.S. 686, 687 (1973) (50 day durational voter residency requirement "necessary" to promote the state's important interest in accurate voter lists"); Marston v. Lewis, 410 U.S. 679, 681 (1973) (same); Korematsu v. United States, 323 U.S. 214 (1944) (upholding order excluding American citizens of Japanese origin from designated West Coast military areas).

42. *See* Gunther, *supra* note 32, at 12.

43. *See* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1024, 1055 (1979); Note, *Refining the Methods of Middle-Tier Scrutiny: A New Proposal for Equal Protection*, 61 TEX. L. REV. 1501 (1983).

from the prejudicial excesses of society.[44] To withstand constitutional challenge, classifications involving "quasi-suspect" traits "must serve important governmental objectives and must be substantially related to achievement of those objectives."[45] The Court has rigidly limited its application of middle-tier scrutiny to statutes that classify according to ad hominem traits such as illegitimacy, alienage, or gender.[46]

C. *A Sliding Scale of Rational Relation Scrutiny*

In areas of social and economic regulation that do not involve fundamental rights and suspect or quasi-suspect groups, the Court has been uncertain about the extent of review it should exercise under the fourteenth amendment.[47] The standard for lowest-level review is generally refered to as "minimal rationality," under which a court will refuse to set aside social legislation unless the complainant can show that the classification "is without any reasonable basis and therefore is purely arbitrary."[48] Im-

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44. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (refusing to recognize the mentally retarded as a quasi-suspect group).

45. *Compare* Craig v. Boren, 429 U.S. 190, 197 (1976) (invalidating an Oklahoma statute that prohibits sale of nonintoxicating beer to males under age 21 and to females under age 18) *with* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (striking down a state policy excluding men from the university); Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding Selective Service Act requirement that only men register); Michael M. v. Superior Court, 450 U.S. 464 (1981) (rejecting claim that California "statutory rape" law fails equal protection if it only punishes male participants).

46. *See Cleburne Living Center*, 473 U.S. at 440-41. These classifications reflect "outmoded notions" of citizens with a "history of purposeful unequal treatment" or citizens who have been "subjected to unique disabilities . . . not truly indicative of their abilities." *Id.* at 441 (citing Massachusetts Bd. of Retirement v. Murgin, 427 U.S. 307, 313 (1976)). Because potential tort victims have not yet been identified, they cannot represent themselves to the public and legislature, and therefore, some argue, they are a suppressed group deserving quasi-suspect protection. *See* Note, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829, 863 (1979). As *Cleburne* indicated, however, third parties can adequately protect powerless groups. In the case of potential tort victims, however, state legislatures and Congress are composed largely of lawyers, who constitute one of the groups economically affected by the liability limitations; thus, the interests of tort victims should be more than adequately voiced in the governing process. *See also* Sandalow, *The Distrust of Politics*, 56 N.Y.U. L. REV. 446, 464-65 (1981) (examining the inherent problems of determining which groups deserve "quasi-suspect" status, and which groups the political process adequately protects).

47. J. NOWAK, *supra* note 39, at 591-98.

48. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911) (upholding a state law regulating the uses of subterranean mineral water); *see also* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (upholding a state law that permitted only certain merchants to sell merchandise, while forbidding vendors from selling the same goods); Gunther, *supra* note 32, at 12.

patient with the outcome-determinative results of the minimalist test,[49] however, the Court has concluded that not all cases involving social legislation can fit within the confines of the traditional rational relation test and still meet the standard of fundamental fairness demanded by the equal protection clause.[50] As a result, the "heightened rationality" standard has emerged. Under this test, courts no longer hypothesize any conceivable legislative purpose, but demand that a "substantial relationship" exist between the ends and means of the challenged statute.[51]

The Supreme Court's application of the rationality tests indicates its adoption of a sliding scale of review that wavers between the minimal and heightened tests. Case law indicates that depending upon the egregiousness of the factual circumstances before it, the Court will employ a standard that "comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending . . . on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[52] Courts can employ, there-

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49. *See supra* note 32 and accompanying text.

50. *See* Coburn v. Agustin, 627 F. Supp. 983, 990 (D. Kan. 1985) (concluding from Cleburne Living Center, 473 U.S. 432 (1985) and Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) that the Supreme Court has adopted a new—but undeclared—test that is distinct from the traditional rational basis test); L. TRIBE, *supra* note 34, § 16-5, at 999-1000.

51. *See, e.g.*, F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 416 (1920) (striking down a state statute exempting local businesses that only do business outside of the state from income taxes). The heightened rationality test envisions the court playing a more active role in the formulation of social regulation. As Professor Gunther stated:

> Putting consistent new bite into the old equal protection would mean that the Court would be less willing to supply justifying rationales by exercising its imagination. It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture.

Gunther, *supra* note 32, at 21.

The courts will use their "teeth" in the heightened rational relation to exceed "the conceivable basis standard by scrutinizing the state's asserted interest, the means selected to advance those interests, and the factual connection between the state's classification and the end." Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 GEO. L.J. 1071, 1101 (1974). Therefore, by examining the conflicting interests and the means employed, the court utilizes a balancing test in order to protect those interests that are not fundamental or suspect, but are still of enough importance to be found worthy of the court's protection in certain circumstances. Linde, *Due Process of Law Making*, 55 NEB. L. REV. 197, 208-09 (1976).

52. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting); *see also* Schlesinger v. Ballard, 419 U.S. 498, 520 (1975) (Brennan, J., dissenting) ("While we have in the past exercised our imaginations to conceive of possible rational justifications for statutory classifications, we have recently declined to manufacture justifications in order to save an apparently invalid statutory classification." (citations omitted)); Vlandis v. Kline, 412 U.S. 441, 458 (1973) (White, J., concurring) ("It is

fore, either heightened rationality to ensure legislative precision and responsibility, or minimal rationality to verify legislative enactments promulgated diligently and with accountability.[53]

III. COURT DECISIONS DECIDING THE CONSTITUTIONALITY OF MEDICAL MALPRACTICE RECOVERY LIMITATIONS

Because legislatures have only recently adopted ceilings on tort recovery, plaintiffs have not yet challenged the validity of the statutes. State court perceptions of the equal protection doctrine involved in challenges to medical malpractice limitations provide a guide to the present analysis of tort liability caps.

A majority of the courts considering the validity of the caps on malpractice liability have found that the ceilings violate equal protection principles.[54] A comparison of the decisions finding the limits unconstitutional with decisions finding the ceilings

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clear that we employ not just one, or two, but . . . a 'spectrum of standards.' "). Proof of a heightened rationality test is built upon a growing base of precedent, while the Supreme Court continues to "lead[] court and counsel into a labyrinth of fictions" by refusing to acknowledge its existence. Linde, *supra* note 51, at 208; *see, e.g., Cleburne*, 473 U.S. 432 (1985) (invalidating a zoning ordinance limiting homes for the mentally retarded); *Ward*, 470 U.S. 869 (striking down a state tax that imposed a higher rate upon out of state companies); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (holding invalid a statute that denied claimant a hearing); Jimenez v. Weinberger, 417 U.S. 628 (1974) (invalidating provision of Social Security Act); USDA v. Moreno, 413 U.S. 528 (1973) (disqualifying a provision of the federal food stamp program for assistance limited to households composed of related persons); James v. Strange, 407 U.S. 128 (1972) (invalidating statute that required recoupment of legal expenses incurred in the defense of indigent); Eisenstadt v. Baird, 405 U.S. 438 (1972) (striking down criminal sanctions for the sale of contraceptives to unmarried persons).

53. *Rodriguez*, 411 U.S. at 99, 127 (1973) (Marshall, J., dissenting) (objecting to lower court's finding that education is not a fundamental right). For authors who have discerned the use of a sliding scale of rationality, see Bice, *Standards of Judicial Review*, 50 S. CAL. L. REV. 689, 700-01 (1977); Cohen, *Is Equal Protection Like Oakland? Equality as a Surrogate for Other Rights*, 59 TUL. L. REV. 884 (1985); Linde, *supra* note 51, at 208; Nowak, *supra* note 51, at 1101; O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection*, 54 N.Y.U. L. REV. 19, 52 (1979); Wilkinson, *The Supreme Court, The Equal Protection Clause, and The Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 954 (1975).

54. Several state courts have struck down caps on medical malpractice suits. *See* Florida Medical Center v. Von Stetina, 436 So. 2d 1022 (Fla. Dist. Ct. App. 1983), *rev'd on other grounds sub nom.* Florida Patient's Compensation Fund v. Von Stetina, 474 So. 2d 783 (Fla. 1985) (reversing lower court due to passage of remedial amendment during appeal); Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977); Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Simon v. St. Elizabeth Medical Center, 3 Ohio App. 3d 164, 355 N.E.2d 903 (1976); Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983); Baptist Hosp. v. Baber, 672 S.W.2d 296 (Tex. Ct. App. 1984).

valid[55] reveals a set of common factors that were weighed in the judicial balance. Analysis of these common factors discloses the criteria that a legislature should meet when it drafts caps on tort liability.

A. *Jurisdictions Holding Medical Malpractice Statutes Unconstitutional on Equal Protection Grounds*

The first challenge of a malpractice damage limitation statute before a state high court was *Wright v. Central Du Page Hospital Association.*[56] In *Wright,* the plaintiff sought a declaratory judgment against the constitutionality of the Illinois medical malpractice statute.[57] The plaintiff sought judgment against a section of the Act which provided that the maximum recovery "on account of injuries" by reason of medical, hospital or other healing art malpractice" was $500,000. The statute thus provided malpractice security for doctors and insurers by placing a ceiling on the total economic and noneconomic damages recoverable by a victim.

The plaintiff asserted that the liability cap violated the equal protection and due process guarantees of the Illinois and federal constitutions.[58] Conversely, the defendant argued that the actions were within the province of proper legislative conduct, and that the classifications were a necessary step in dealing with the medical malpractice insurance crisis.[59]

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55. California, Indiana, and Nebraska courts have upheld caps on medical malpractice suits. *See* Fein v. Permanente Medical Group, 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 665 (en banc), *appeal dismissed,* 474 U.S. 892 (1985); Johnson v. St. Vincent Hosp., 273 Ind. 374, 404 N.E.2d 585 (1980); Sibley v. Board of Supervisors, 462 So. 2d 149 (La. 1985); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977).

56. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

57. Section 401a of the Illinois Insurance Code, ILL. REV. STAT. ch. 73, para. 1023a (1975). This statute was subsequently repealed by Act approved Aug. 28, 1979, P.A. 81-288, § 2, 1979 Ill. Laws 1442.

58. *Wright,* 63 Ill. 2d at 325-26, 347 N.E.2d at 741. The plaintiff argued that the legislative limitation was an arbitrary and unreasonably discriminatory classification because the state's efforts to minimize the growth of medical malpractice insurance premiums placed a harsh burden on severely injured victims who were most in need of financial protection, yet fully compensated malpractice victims who sustained relatively slight injuries.

59. *Id.* The one step at a time formula was enunciated by the Supreme Court in Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) ("[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others."). *See also* Note, *Equal Protection,* 82 HARV. L. REV. 1065 (1969).

The standard of equal protection review used by the *Wright* court in declaring the statute unconstitutional is not clearly discernable from the record. Although the court purportedly found no rational basis for the legislative classification,[60] the court's actions indicate that it employed a standard of scrutiny more exacting than mere deferential rationality.[61] The court weighed the concerns of the legislature against the injustice of depriving a victim of full economic compensation mandated under the common law without a quid pro quo.[62]

As a result of this weighing, the court found the statutory damage limitations unconstitutional.[63] Specifically, the court indicated its distaste for substantive limitations on economic damages: "[T]he very seriously injured malpractice victim, because of the recovery limitation, might be unable to recover even all the medical expenses he might incur."[64] The legislature's statute created arbitrary distinctions and was not rational.[65] The court declared, furthermore, that although the plaintiff did not have a vested right in a common law cause of action,[66] her claim could not be arbitrarily limited without a resultant quid pro quo.[67] The court rejected the defendant's assertion of a "societal" quid pro quo, that "the loss of recovery potential to some malpractice victims is offset by 'lower insurance premiums and lower medical care costs for all recipients of medical care.' "[68] It stated that these benefits did not extend to the seriously injured medical malpractice victim.[69] By interweaving the equal protection analysis with the loss of a common law remedy, the court found the

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60. *Wright*, 63 Ill. 2d at 330, 347 N.E.2d at 743.

61. *See supra* note 32 and accompanying text. The deferential rationality standard should always lead to a finding of constitutionality.

62. *See* Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 789 (1977). The quid pro quo argument is based upon the fourteenth amendment in that by eliminating a remedy, without providing a concomitant remedy, the legislature is acting in an irrational manner.

63. Wright v. Central Du Page Hosp. Ass'n, 63 Ill.2d 313, 329-30, 347 N.E.2d 736, 743 (1976). Justice Underwood, in dissent, conceded that a stronger case for upholding the statute would have been made if the $500,000 limitation had permitted full compensation for economic damages, and only limited noneconomic damages. *Id.* at 334, 347 N.E.2d at 746.

64. *Id.* at 327-28, 347 N.E.2d at 742.

65. *Id.* at 329, 347 N.E.2d at 743.

66. *Id.* at 327, 347 N.E.2d at 743.

67. *Id.* at 329, 347 N.E.2d at 743 ("[T]o the extent that recovery is permitted or denied on an arbitrary basis a special privilege is granted in violation of the Illinois Constitution.").

68. *Id.* at 328, 347 N.E.2d at 742.

69. *Id.*; *see also* Note, *supra* note 46, at 871 n.256 (1979) ("As a matter of logic, the benefits of the legislation (reduced or maintained medical costs) would, of course, inure to even the most severely injured patient. However, as evident in the *Wright* court's

balance weighed in favor of the plaintiff.[70] The $500,000 limitation, consequently, denied recovery on an arbitrary basis and constituted special legislation; on this basis, the court declared the statute to be unconstitutional.[71]

Because Illinois' *Wright* decision was the first state high court pronouncement on the validity of malpractice liability caps, commentators and courts widely analyzed and applied it.[72] Although the court's reasoning has been criticized,[73] many approve of its results,[74] and its persuasive effect influenced later court decisions.

The Idaho Supreme Court in *Jones v. State Board of Medicine*[75] was the first court to openly use the heightened rationality standard. In deciding whether a provision of the Idaho Hospital-Medical Liability Act[76] violated state and federal equal protection standards,[77] the court announced its support for the heightened rationality standard and specifically refuted the notion of judicial restraint.[78]

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discussion of the Workmen's Compensation Act, the court focused on whether the statute's benefits were outweighed by the burdens it imposed.").

70. *See* Redish, *supra* note 62, at 789.

71. Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 330, 347 N.E.2d 736, 743 (1976). The constitutional protections afforded by the special law prohibition of the Illinois Constitution and the equal protection clause of the fourteenth amendment are virtually identical. *See, e.g.*, Chicago Nat'l League Ball Club v. Thompson, 108 Ill. 2d 357, 368, 483 N.E.2d 1245, 1255 (1985); McRoberts v. Adams, 60 Ill. 2d 458, 463, 328 N.E.2d 321, 324 (1975).

72. *See, e.g.*, Note, Wright v. Central Du Page Hospital Association: *A Grim Prognosis For Medical Malpractice Review Panels?*, 22 S.D.L. REV. 461, 465-66 (1977); *Illinois Supreme Court Review-Constitutional Law—Medical Malpractice Statute Unconstitutional*, 1977 U. ILL. L.F. 298 [hereinafter *Illinois Supreme Court Review*]; Note, *Medical Malpractice Statute—Medical Malpractice Statute Declared Unconstitutional*, 1977 WIS. L. REV. 203 [hereinafter Note, *Statute Declared Unconstitutional*].

73. *See* Redish, *supra* note 62; *Illinois Supreme Court Review*, *supra* note 72, at 316-20; Note, *Statute Declared Unconstitutional*, *supra* note 72, at 221, 225-26.

74. *See Illinois Supreme Court Review*, *supra* note 72, at 320; Comment, *Testing the Constitutionality of Medical Malpractice Legislation: The Wisconsin Medical Malpractice Act of 1975*, 1977 WIS. L. REV. 838, 869.

75. 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977).

76. *Id.* at 862, 555 P.2d at 402. IDAHO CODE § 39-4204 (1977) limited liability to $150,000 per malpractice claim and $300,000 per malpractice occurrence.

77. *Jones*, 97 Idaho at 870, 555 P.2d at 410.

78. *Id.* at 871, 555 P.2d at 411 ("[B]lind adherence and over-indulgence results in abdication of judicial responsibility."). Deferential equal protection was enunciated in McGowan v. Maryland, 366 U.S. 420 (1961):

> The constitutional safeguard [of equal protection] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Id. at 425-26.

Noting the injustice of preventing full recovery to those most seriously injured while conferring a benefit upon the doctors and hospitals of the state,[79] the court adopted a means-oriented focus.[80] The tribunal declared that when the challenged statutory classification discriminates on its face, and no relationship exists between the classification and the declared legislative purpose, the court must bypass the minimum scrutiny test and apply a heightened standard of review.[81] Consequently, the court ordered that the lower court factually determine whether the "statute reflects any reasonably conceived public purpose, and [whether] the establishment of the classification [has] a fair and substantial relation to the achievement of the objective and purpose."[82]

Subsequent court decisions holding malpractice recovery limitations unconstitutional combine the analyses of *Jones* and *Wright*.[83] The state courts that have found the limitations unconstitutional have used a standard of review more exacting than deferential rationality without explicitly announcing their standard.[84] Although these courts have concentrated on the factual nexus between legislative purpose and statutory means, an implicit evaluation of the conflicting interests played a prominent role in the decisionmaking process.[85] The courts have balanced the governmental goals of assuring adequate health care and lowering malpractice insurance costs against the interests of

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79. "The classification which is thereby created distinguishes between those who are damaged as a result of medical malpractice in amounts exceeding $150,000 as contrasted with others likewise damaged by medical malpractice but whose damages are less than $150,000." Jones v. State Bd. of Medicine, 97 Idaho 859, 870, 555 P.2d 399, 410, *cert. denied*, 431 U.S. 914 (1977).

80. *Id.* at 871, 555 P.2d at 411 ("That test scrutinizes the *means* by which the challenged legislation is said to affect its articulated and otherwise legitimate purpose.").

81. *Id.*

82. *Id.* The court relied on the standard set forth by the United States Supreme Court in F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

83. *See* Florida Medical Center v. Von Stetina, 436 So. 2d 1022 (Fla. Dist. Ct. App. 1983) (finding legislation violative of equal protection), *rev'd on other grounds sub nom.* Florida Patient's Compensation Fund v. Von Stetina, 474 So. 2d 783 (Fla. 1985); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) (striking down the statute as a violation of equal protection and failure to provide a quid pro quo); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (holding the imposition of limitations unjustified by lack of evidence supporting the existence of a crisis); Boucher v. Sayed, 459 A.2d 87 (R.I. 1983) (finding of no crisis did not support classification burden under equal protection); Baptist Hosp. v. Baber, 672 S.W.2d 296 (Tex. Ct. App. 1984) (utilizing the equal protection and quid pro quo analysis to strike down the damage cap).

84. *See, e.g., supra* note 32 and accompanying text (traditional rationality defers to legislative decisions); Redish, *supra* note 62, at 766; Smith, *supra* note 8, at 207 (1985).

85. *See* Smith, *supra* note 8, at 207; Note, *supra* note 46, at 880.

the victims of medical malpractice. In each instance, the constitutional balance favored the victims who were denied economic restitution; as a result, each statute was declared arbitrary and not based upon a rational decision-making basis.[86]

B. Jurisdictions Holding Liability Limitations Constitutional

Courts that have upheld malpractice liability limitations against equal protection attacks have done so under the minimal rational relation standard of review.[87] The first court to approve malpractice damage restrictions was the Nebraska Supreme Court in *Prendergast v. Nelson*.[88] The plaintiff sought a declaratory judgment against the Nebraska Hospital-Medical Liability Act, which places a $500,000 ceiling on damages.[89]

The Nebraska court, using the minimal standard of review resorted to by other courts when examining social and economic legislation, rejected the judicial activism of *Wright*.[90] Noting that the legislature was "free to experiment and to innovate and to do so at will, or even 'at [its] whim,' "[91] the court held that the legislature's classifications properly ensured the preservation of insurance coverage. Consequently, the court specifically sanctioned the state's right to address the malpractice insurance crisis in this fashion.

The Nebraska court also rejected the plaintiff's argument that the legislature does not have the right to change common law doctrines. The court declared that the legislature was not lim-

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86. Florida Medical Center v. Von Stetina, 436 So. 2d 1022 (Fla. Dist. Ct. App. 1983), *rev'd on other grounds sub nom.* Florida Patient's Compensation Fund v. Von Stetina, 474 So. 2d 783 (Fla. 1985) (reversing lower court due to passage of remedial amendment during appeal); Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977); Wright v. Central Du Page Hosp. Ass'n, 63 Ill.2d 313, 347 N.E.2d 736 (1976); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Simon v. St. Elizabeth Medical Center, 3 Ohio App. 3d 164, 355 N.E.2d 903 (1976); Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983); Baptist Hosp. v. Baber, 672 S.W.2d 296 (Tex. Ct. App. 1984).

87. *See* Smith, *supra* note 8, at 209.

88. 199 Neb. 97, 256 N.W.2d 657 (1977).

89. NEB. REV. STAT. § 44-2821(2) (Supp. 1987). Under the statute, a claimant is able to elect whether or not to be included within the statutory limitations prior to receiving medical treatment. The majority relied substantially upon this factor. *Nelson*, 199 Neb. at 101, 256 N.W.2d at 669. Justice White, in dissent, however, indicates that a patient who is brought unconscious to the hospital does not have the power to elect under the statute, and the power of the hospitals to deny medical treatment to those who do not elect is a powerful coercive tool. *Id.* at 132, 256 N.W.2d at 676.

90. *Nelson*, 199 Neb. at 107, 256 N.W.2d at 676-77.

91. *Id.* at 114, 256 N.W.2d at 668 (quoting Munn v. Illinois, 94 U.S. 113 (1876)).

ited by a judicial requirement that it ensure a quid pro quo when redefining common law rights.[92]

The California Supreme Court's ruling in *Fein v. Permanente Medical Group* is indicative of the general tenor of recent decisions that have upheld legislative caps on liability.[93] The court rejected the plaintiff's claim that the malpractice limitations on noneconomic damages violated the equal protection doctrine,[94] and refused to endorse the requirement of a quid pro quo remedy or to adopt the heightened rationality standard of review for social legislation. The court applied the minimal rationality standard and justified the legislative classifications as an attempt to lower liability costs and to limit medical malpractice insurance premiums.[95] Central to the California court's decision was the fact that the legislature had "placed no limits whatsoever on a plaintiff's right to recover for all of the economic, pecuniary damages—such as medical expenses or lost earnings—resulting from the injury."[96] It distinguished contrary decisions because "[w]ith only one exception, all of the invalidated statutes contained a ceiling which applied to both pecuniary and nonpecuniary damages, and several courts—in reaching their decisions—were apparently considerably influenced by the potential harshness of a limit that might prevent an injured person from recovering his medical expenses."[97]

The court dismissed the plaintiff's argument in favor of a constitutionally mandated quid pro quo, and reaffirmed the legislature's right "to modify the scope and nature of such damages."[98] In addition, the court noted that the legislative steps to preserve a viable medical malpractice insurance program had provided a safety net by ensuring that patients who were injured would be

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92. *Id.* at 106, 256 N.W.2d at 664-65 (quoting Munn v. Illinois, 94 U.S. 113 (1876)):

> A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.

93. 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 665 (en banc), *appeal dismissed*, 474 U.S. 892 (1985).

94. *Id.* at 157-58, 211 Cal. Rptr. at 382-83, 695 P.2d at 679.

95. *Id.* at 157-59, 211 Cal. Rptr. at 382-83, 695 P.2d at 679-80.

96. *Id.* at 159, 211 Cal. Rptr. at 383, 695 P.2d at 680.

97. *Id.* at 161, 211 Cal. Rptr. at 385, 695 P.2d at 682.

98. *Id.* (citing American Bank & Trust Co. v. Community Hosp., 36 Cal. 3d 359, 204 Cal. Rptr. 671, 683 P.2d 670 (1984) holding that the statute providing for periodic payments of "future damages" does not violate due process or equal protection principles).

able to receive some form of compensation. If the state had not taken that step to limit liability awards, many doctors might be forced to practice without insurance, thereby effectively denying a victim complete economic or noneconomic compensation.[99]

IV. ANALYSIS OF STATE COURT DECISIONS

Although the state courts are split on the constitutionality of medical malpractice liability ceilings,[100] a pattern emerges from the decisions that helps to explain the final outcome rendered by the respective courts. The standard of equal protection review, the existence of a concomitant remedy, and the legal difference between economic and noneconomic damages are the prominent factors weighed by the courts.

A. Standard of Review

All of the courts that have examined the validity of the malpractice liability limitations under equal protection have used some form of the rational relation test.[101] The results indicate that tribunals evaluate the competing interests of groups affected by the legislation.[102] Courts have attempted to strike a

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99. Fein v. Permanente Medical Group, 38 Cal. 3d 137, 160, 211 Cal. Rptr. 368, 384, 695 P.2d 665, 681 (en banc), *appeal dismissed*, 474 U.S. 892 (1985).

100. *See supra* notes 54-55 and accompanying text.

101. *See* Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 HARV. J. ON LEGIS. 143 (1981) (citing cases); *see, e.g.*, Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980). Although the *Carson* court purported to use the intermediate standard, it appears that the court employed the heightened rational relation test. The court's named standard is probably the result of widespread confusion over the difference between the intermediate test, which applies to quasi-suspect groups, and the heightened rational relation test. *See* G. GUNTHER, CONSTITUTIONAL LAW 605 n.5 (11th Ed. 1985) ("the 'newer equal protection' theory is not the same as the 'intermediate' scrutiny developed in the modern cases for some quasi-suspect classifications such as gender.").

102. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting); *see also* Linde, *supra* note 51, at 208:

> [It is] stressed that the reviewing court should concentrate on the rationality of the means without disturbing the legislative choice of ends. Still, although it purports to leave policy choices to the political process, the test depends on holding the law to some objective other than the immediate effect of the law itself. Thus it forces litigants to debate the ostensible or assumed goal of a policy as much as the likelihood that the goal will be reached by means of the challenged law. And the effort to phrase this debate as a scrutiny of reasons rather than of values—of rationality rather than legitimacy—leads court and counsel into a labyrinth of fictions.

balance between the state goals of providing adequate health care and lowering malpractice insurance costs and ensuring the interests of the malpractice victim.[103] Depending upon how a majority of a court views the succeeding balance, the court has employed either heightened rationality to strike down the legislation,[104] or minimal rationality to sustain the liability limitations.[105]

B. Recovery Limitations

The determining factor in each validity of malpractice liability limitations decision has been whether the cap limits economic or noneconomic damages. Without expressly stating why economic damages are considered to be fundamentally more important than noneconomic damages, courts have given the respective damage types different weights.

1. Judicial recognition of economic damages as a quasi-fundamental right— Courts that have declared that statutory caps violative of the equal protection clause have emphasized the presence of a limitation on economic damages.[106] These courts clearly exhibit the hostility of the judiciary to a statute that could prevent an innocent victim from recovering even the pecuniary losses suffered as a result of another party's negligent actions.[107] Although the goal is to place victims back in their original positions, denial of economic losses has the inequitable result of preventing the victim from recovering even the most basic building block in the remedial process. Consequently, the courts have found that the legislative goal of limiting economic damages does not justify the seemingly arbitrary results.[108]

Compensatory recovery for economic injuries incurred through the fault of another is not considered a fundamental right.[109]

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103. See Note, *supra* note 46, at 880 for a detailed discussion of the various decisions.

104. *See supra* text accompanying note 90.

105. *See supra* text accompanying note 91.

106. *See supra* note 86. Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) is aberrant as the only decision striking down a statute that limited solely noneconomic damages.

107. *See supra* text accompanying notes 68 and 83.

108. *See supra* note 86.

109. *See* Bazley v. Tortorich, 397 So. 2d 475 (La. 1981); Estate of Cargill v. City of Rochester, 119 N.H. 661, 406 A.2d 704 (1979), *appeal dismissed,* 445 U.S. 921 (1980); Johnson v. Saint Vincent Hosp., 273 Ind. 374, 404 N.E.2d 585 (1980); Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied,* 431 U.S. 914 (1976); State *ex rel.* Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

Yet, it is nonetheless viewed as "an important substantive right."[110] When a salient value exists within a substantial nexus to interests implicitly or explicitly guaranteed by the Constitution, a majority of the Supreme Court has been willing to designate these values as quasi-fundamental rights.[111] To provide adequate protection for these preferred values, the Court employs a standard beyond the traditional confines of the rationality test, which is attested to by the rise of the heightened rationality test within the context of equal protection.[112]

Under the auspices of equal protection the individual is secure from deprivation of those liberties "long recognized at common law as essential to the orderly pursuit of happiness by men."[113] As the Supreme Court stated in *Ingraham v. Wright:*

> Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.
>
> While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment.[114]

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110. Coburn v. Agustin, 627 F. Supp. 983, 994 (D. Kan. 1985); Learner, *supra* note 101; *see* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978).

111. L. TRIBE, *supra* note 34, § 15-9, at 919-20, § 16-31, at 1089-92; Linde, *supra* note 51, at 208. For general examples of the use of heightened rationality, see City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (invalidating a zoning ordinance that limited homes for the mentally retarded); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (striking down a state tax that imposed a higher rate upon out of state companies); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (holding invalid a statute that denied claimant a hearing); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (invalidating local school board requirement that pregnant teachers take unpaid maternity leaves of several months); Jimenez v. Weinberger, 417 U.S. 628 (1974) (invalidating provision of Social Security Act); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting) (arguing that education is a fundamental right); USDA v. Moreno, 413 U.S. 528 (1973) (striking down a provision of the federal food stamp program limiting assistance to households composed of related persons); Vlandis v. Kline, 412 U.S. 441, 458 (1973) (striking down irrebuttable presumption of out-of-state residence for those whose legal address is outside the state) (White, J., concurring); Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating criminal sanctions for the sale of contraceptives to unmarried persons); James v. Strange, 407 U.S. 128 (1972) (invalidating statute that enabled state to recoup expenses incurred in legal defense of indigents).

112. This trend is undeniable, as exhibited in the Supreme Court decisions cited *supra* note 111 and in the state court decisions discussed in the text accompanying *supra* notes 83-86 that have emulated the trend. *See* L. TRIBE, *supra* note 34, § 16-32, at 1082; Gunther, *supra* note 32, at 12; Linde, *supra* note 51, at 208.

113. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

114. 430 U.S. 651, 673-74 (1977).

A fundamental precept of societal law, stretching back to the earliest forms of societal justice, is the right to be free from unwarranted bodily invasion.[115] When viewed in conjunction with judicial protection of rights central to personal privacy, "the rights to personal security and bodily integrity, and corresponding rights to relief from invasions thereof, are logically encompassed by this constitutional interpolation."[116] Consequently, the courts view preservation of full compensatory damages as an interest unable to attain the stringent protections provided a fundamental right, yet it is still deserving of more protection than is traditionally accorded to values examined under the minimal rational relation test. Because economic damages form the cornerstone of the attempt to return victims to the position they held prior to their accidents, the judiciary considers the preservation of economic damages to carry the weight of a quasi-fundamental right. Thus, the courts will examine closely legislative means and goals to ensure that majoritarian liability limitations do not unduly impinge upon the valued rights of an inadequately represented minority.[117]

2. *Judicial scrutiny of noneconomic damages under the minimal rationality test*— Courts have held that legislation limiting only noneconomic damages does not affront the constitutional principles of equal protection.[118] Because awards for pain and suffering and other nonpecuniary damages are not fundamental rights under the Constitution,[119] and are not considered to be as integral to physical recovery as economic damages, the courts have recognized that "the Legislature possesses broad au-

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> And if men strive together, and one smite another with a stone, or with his fist, and he die not, but keepeth his bed;
>
> If he rise again, and walk abroad upon his staff, then shall he that smote him be quit: only he shall pay for the loss of his time, and shall cause him to be thoroughly healed.

Exodus, 21:18-19; *see also* Woodbine, *The Origins of the Action of Trespass* (pts. 1 & 2), 33 YALE L.J. 799 (1924), 34 YALE L.J. 343 (1925); Deiser, *The Development of Principle in Trespass*, 27 YALE L.J. 220 (1917).

116. Learner, *supra* note 101, at 191; *see* Ingraham v. Wright, 430 U.S. 651 (1977); Roe v. Wade, 410 U.S. 113 (1973).

117. *See generally* J. ELY, DEMOCRACY AND DISTRUST (1980) (advocating the use of "representation-reinforcing" model in constitutional adjudication for the protection of minority interests within a majoritarian government).

118. *See* Coburn v. Agustin, 627 F. Supp. 983 (D. Kan. 1985); Fein v. Permanente Medical Group, 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 665 (en banc), *appeal dismissed*, 474 U.S. 892 (1985); *see also* Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 332, 347 N.E.2d 736, 745 (1976) (Underwood, J., dissenting).

119. *See supra* note 109 and accompanying text.

thority to modify the scope and nature of such damages."[120] The wisdom of noneconomic damage awards, as for pain and suffering, has frequently faced critical review by jurists and legal scholars.[121] The noneconomic damage award has become a well-established remedy, but courts have not accorded it the same deference as pecuniary damages. Although economic costs are viewed as integral to physical recovery, noneconomic damages are not essential to recovery or are so speculative that their relative value is diminished. Critics of nonpecuniary damages note that "the law relating to damages for pain and suffering in personal injury cases is extremely uncertain and the outcome of its application by juries and courts is highly unpredictable."[122] In the absence of definitive principles to guide courts and juries, detractors believe that "money damages are at best only imperfect compensation for such intangible injuries and . . . such damages are generally passed on to, and borne by, innocent consumers."[123]

Because noneconomic damages are highly speculative, the courts will not accord limitations on noneconomic damages the same weight or value accorded to limitations on the more defined and objective economic damages.[124] State courts base their actions upon the sliding scale of rationality and are more willing to find a rational basis for the noneconomic limitations, as opposed to the economic restraints, by deferring to legislative initiatives to curb the lesser-valued pain and suffering costs in order to solve a perceived crisis "one step at a time."[125]

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120. *Permanente*, 38 Cal. 3d at 157, 211 Cal. Rptr. at 382, 695 P.2d at 680 (citing American Bank & Trust Co. v. Community Hosp., 36 Cal. 3d 359, 204 Cal. Rptr. 671, 683 P.2d 670 (1984)).

121. *See generally* Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219 (1958); Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476 (1959); Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200 (1958); Zelermyer, *Damages for Pain and Suffering*, 6 SYRACUSE L. REV. 27 (1954). Originally courts employed "pain and suffering" in legal actions as a form of punitive damages to prevent retaliation by the victim's family. O'Connell & Bailey, *The History of Payment For Pain & Suffering*, 1972 U. ILL. L.F. 1, 83. Courts have recognized pain and suffering since the mid-1800's as a common damage remedy in negligence suits. *Id.* at 94; *see also* Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 511, 15 Cal. Rptr. 161, 169, 364 P.2d 337, 345 (1961) (Traynor, J., dissenting).

122. Plant, *supra* note 121, at 210.

123. Fein v. Permanente Medical Group, 38 Cal. 3d 137, 159, 211 Cal. Rptr. 368, 384, 695 P.2d 665, 680-81 (en banc), *appeal dismissed*, 474 U.S. 892 (1985).

124. *Id.; see also* Coburn v. Agustin, 627 F. Supp. 983, 992-93 (D. Kan. 1985).

125. Fein v. Permanente Medical Group, 38 Cal.3d 137, 211 Cal. Rptr. 368, 695 P.2d 665 (en banc), *appeal dismissed*, 474 U.S. 892 (1985); Johnson v. St. Vincent Hosp., 273 Ind. 374, 404 N.E.2d 585 (1980); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977).

C. *Quid Pro Quo*

The second consideration in the judicial balancing act has been whether a quid pro quo is constitutionally mandated in order to protect malpractice victims from the arbitrary limitations of the legislature.[126] Although the courts have denied that an alternative remedy is a prerequisite to proper legislative abrogation of common law actions,[127] they have relied on the "presence or absence of a quid pro quo to the disadvantaged class as a factor in their determination."[128] Thus, when legislatures couple the loss of a malpractice remedy with the potentially harsh results of a limitation on economic damages, courts find the scales tip in favor of the victimized plaintiff.

In contrast, a number of courts have either rejected the necessity of a quid pro quo or found that the legislative actions preserve a remedy for malpractice victims. The California court in *Fein v. Permanente Medical Group*[129] found a legislative intent to provide a quid pro quo by ensuring that doctors were able to afford malpractice insurance. The court found that victims might be unable to recover funds sufficient to cover their medical expenses from negligent doctors who lacked insurance.[130] The *Wright* court's contrary holding was flawed, in that the court refused to recognize that the societal benefit of reduced medical costs may enure to a victim who has previously paid lower insurance premiums, and she may receive medical treatment for her injuries at a reduced cost.[131]

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126. *See supra* notes 58-89 and accompanying text.

127. *See* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978); Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 328-31, 347 N.E.2d 736, 742-743 (1976); Carson v. Maurer, 120 N.H. 925, 942-43, 424 A.2d 825, 837-38 (1980); Arneson v. Olson, 270 N.W.2d 125, 134-35 (N.D. 1978); Simon v. St. Elizabeth Medical Center, 3 Ohio Misc. 2d 164, 355 N.E.2d 903, 909-10 (C.P. Montgomery County 1976); *see also* Redish, *supra* note 62, at 785; Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH. L. REV. 419, 463 (1976).

128. Baptist Hosp. v. Baber, 672 S.W.2d 296, 298 (Tex. Ct. App. 1984).

129. 38 Cal. 3d at 160 n.18, 211 Cal. Rptr. at 385 n.18, 695 P.2d at 682 n.18 (en banc), *appeal dismissed*, 474 U.S. 892 (1985).

130. *Id.* at 158, 211 Cal. Rptr. at 383, 695 P.2d at 680. The logic of the court is readily apparent. With the average medical malpractice jury award being $950,000, *see Senate Hearing*, *supra* note 4, at 33 (statement of William Wyer, U.S. Chamber of Commerce), very few doctors will be able to pay the enormous damages that are awarded to malpractice victims. The rationale behind the existence of insurance is to prevent the burden from falling solely upon one person. Instead, it is economically efficient to spread the cost across the boundaries of society. Therefore, if affordable insurance coverage is not preserved, the end result will be that in many cases the negligent party will not be able to pay the costs meant to reimburse the plaintiff, or will be financially destroyed.

131. *See* Note, *supra* note 46, at 871 n.256.

Consequently, the judicial decisions reflect a burgeoning uncertainty over whether an alternative remedy is a prerequisite to legislative restriction of common law remedies. Those courts that did not reject the issue out of hand have still hesitated to rely solely on the absence of a quid pro quo to justify their action against legislative restriction.[132] Apparently, the courts' indecision reflects their concern that adoption of the quid pro quo doctrine could significantly hamper the legislative power to effect social change. A judicial requirement that the legislature formulate a "reasonable substitute" every time that it abrogates or modifies obsolete common law rights would effectively restrict legislative initiatives in the legal field. "Moreover, by immunizing common-law rights from total abrogation, the doctrine effectively raises common-law causes of action to the level of constitutional rights, a status they were never intended to have."[133] A basic element of common law development is its amoebic ability to penetrate or recede according to the evolving values of society. Limiting the evolution of the common law by a judicially mandated quid pro quo would stymie both the state's ability to act as a social laboratory, and the creative potential of the common law.[134]

The presence or absence of a quid pro quo may therefore carry some weight in the final judicial decision. Yet, in the face of judicial illegitimacy and the countervailing system's interest, the courts have not found the absence of a quid pro quo to be in itself a determinative factor.[135] A statute which solely limits noneconomic damages, therefore, will not be invalidated under the quid pro quo argument.

D. Summary

In order to establish a valid statute, a legislature must work within the confines of modern equal protection jurisprudence.[136] The judicial positions reveal a series of common factors that are determinative in the final outcome. The paramount factor in the equation is the judicial decision to adopt a sliding scale of rationality. Sensitive to the erratic path set forth by the Supreme

132. *See supra* note 127 and accompanying text.

133. Redish, *supra* note 62, at 787.

134. *See id.* at 787.

135. *See* Baptist Hosp. v. Baber, 672 S.W.2d 296 (Tex. Ct. App. 1984); *see also* J. ELY, *supra* note 117.

136. *See generally* Tussman and tenBroeck, *supra* note 28.

Court, state courts have emulated the varying levels of scrutiny employed by the Court in its equal protection analysis. The new attitude indicates that independent of the legislative will, in certain contexts, the judiciary will scrutinize and weigh the conflicting interests at issue. This freedom provides the court with a tool to ensure that judicially prized values will be dealt with by the legislatures in the rational manner contemplated by the principles underlying the Constitution.

Legislation limiting tort damages will inevitably discriminate between severely injured tort victims, who will not be fully compensated, and those with relatively slight injuries, who will be fully recompensed. The judiciary has weighed the legislative goals and means utilized to assure affordable insurance coverage against the interests of the injured parties. Courts have refused to validate restraints that limit the victims's quasi-fundamental right to full recovery of economic damages, without the existence of a concomitant quid pro quo. In contrast, the subjective value of noneconomic damages has not weighed as heavily on the judicial scales. In such cases, the courts are willing to defer to legislative attempts to solve the liability crisis by limiting the amount of noneconomic damages that a victim may recover.

Consequently, to remain viable under the strictures of the equal protection doctrine, a restraint on damages must only limit noneconomic damages. Any attempt to limit a victim's recovery of economic damages is simply an invitation for judicial intervention, and a declaration that the statute is an arbitrary act without rational basis.

V. MODEL STATUTE TO LIMIT TORT LIABILITY

This Note proposes a statute with a constitutionally valid limitation upon noneconomic damages. It employs a straight limitation in order to avoid possible confusion and collateral considerations. Because the ceiling figure is basically arbitrary,[137] the proposed statute leaves the figure to the determination of the legislators. Studies indicate, however, that any figure exceeding $100,000 will compensate the vast majority of people for their noneconomic injuries, and concurrently function to provide an objective basis for insurance companies to determine their future costs and corresponding insurance rates.[138]

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137. *See supra* note 24.
138. *Id.*

In addition to the general verdict on negligence, a special interrogatory is required by the statute.[139] Special interrogatories are used to emphasize important points and prevent the jury from acting on the basis of bias.[140] The interrogatories ensure strict separation of objective economic damages and subjective noneconomic damages. A court is responsible for explaining the differences between economic and noneconomic damages and preparing detailed questions to ensure strict control of the jury.[141] It thereby prevents potentially sympathetic jurors from inflating economic awards in order to compensate for lost noneconomic damages.

Judicial review of the jury award is mandated to ensure that the jury faithfully fulfills its duties. Remittitur is provided for in the statute to allow judicial action on excessive verdicts.[142] "It is a universal rule . . . that a remittitur may not be granted by a court in lieu of a new trial unless consented to by the party 'unfavorably affected thereby.' "[143] Yet the judicial discretion to grant a new trial conditioned upon the acceptance of the remittitur is a powerful tool.[144]

In the federal system additur is unconstitutional,[145] however, state law may allow it in restricted circumstances.[146] To ensure that judges retain the power to order just compensation when the jury award is clearly at odds with the findings of the special interrogatories, the proposed statute will permit additur under strictly controlled circumstances for economic damages, yet deny increases in noneconomic damages that would exceed the statutory limitation.

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139. The other elements of the statute are utilized to ensure strict compliance with the damage limitations. The authorities cited *supra* note 6 may be consulted for additional information on each element presented in the Model Statute.

140. *See* Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253 (1920):

> The special verdict compels detailed consideration. But above all it enables the public, the parties and the court to see what the jury really has done. . . . [T]he special verdict enables errors to be localized so that the sound portions of the verdict may be saved and only the unsound portions be subject to redetermination through a new trial.

Id. at 259.

141. *See* C. WRIGHT, LAW OF FEDERAL COURTS 630-33 (4th ed. 1983).

142. *See generally* Comment, *Remittitur Practice in the Federal Courts*, 76 COLUM. L. REV. 299 (1976).

143. United States v. 93.970 Acres of Land, 258 F.2d 17, 30 (7th Cir. 1958), *cert. denied*, 358 U.S. 947 (1959); *see, e.g.*, 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2816 (1973).

144. *See* Dimick v. Schiedt, 293 U.S. 474 (1935).

145. *Id.* at 487 (holding additur to be a violation of the right to jury trial).

146. *See* Yep Hong v. Williams, 6 Ill. App. 2d 456, 128 N.E.2d 655 (1955); 11 C. WRIGHT & A. MILLER, *supra* note 143, § 2816.

MODEL STATUTE

SECTION 1: SHORT TITLE

This Act shall be known and may be cited as Model Tort Liability Limitation Act.

SECTION 2: SCOPE

This Act shall apply to all personal injury actions involving either physical or mental harm, disease, sickness, and death.

SECTION 3: DEFINITIONS

For purposes of this Act, the subsequent terms are defined as follows:
(1) "Economic damages" are objectively verifiable pecuniary losses, including, but not limited to, medical expenses, loss of earnings, cost of replacement or repair of property, cost of obtaining limited substitute services, burial costs, and loss of business or employment opportunities that are grounded in substantial actuality. The term "economic damages" shall be narrowly construed by the courts.
(2) "Noneconomic damages" are subjective, nonpecuniary losses, including, but not limited to, pain, suffering, inconvenience, mental anguish, loss of dignity, physical disability or disfigurement, emotional distress, loss of society and companionship, loss of consortium, and damage to the parent-child relationship.

SECTION 4: SPECIAL INTERROGATORIES

(1) Any judgment or verdict rendered by a trier of fact which determines that liability exists on the part of the defendant(s) shall include specific findings of the following damage awards:
(a) Prior economic damages of claimant;

(b) Future economic damages of claimant, including, but not limited to:

(i) Medical and other costs of health care of claimant; and

(ii) Lost wages or lost earning capacity of claimant; and

(iii) Cost of replacement or repair of property;

(c) All noneconomic damages of the claimant.

(2) When indicating the monetary sums intended to compensate the claimant for future losses under subsections (1)(b)(i) and (ii), the trier of fact shall state the time period for which such sums are intended to provide compensation.

(3) The future damages itemized under subsections (1)(b) shall be computed to reflect present value.

SECTION 5: JUDICIAL REVIEW OF DAMAGE AWARDS

In any action to which this Act applies, wherein the trier of fact finds the defendant(s) liable, and a verdict is rendered that awards pecuniary restitution to the plaintiff(s), the court shall be responsible, upon proper motion of either party, for reviewing the sum of the award to determine if the award is excessive or inadequate in light of the facts presented to the jury, and if the award could be adduced in a logical manner by reasonable persons. Without exception, in all circumstances the provisions of section 6 shall not be overruled by the provisions of section 5. All judicial actions pursuant to this section must be entered on a written record by the court.

SECTION 6: LIMITATION OF NONECONOMIC DAMAGES

In any action to which this Act applies, a plaintiff who has been awarded damages for noneconomic losses, as defined in Section 3(b), shall not recover monetary sums in excess of $ [*insert amount*].

SECTION 7: EFFECTIVE DATE

Actions subject to this Act shall apply to all claims that accrue after the effective enactment date of this Act.

—Richard S. Kuhl