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The Constitutional Attack on Virginia's Medical Malpractice Cap: Equal Protection and the Right to Jury Trial

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THE CONSTITUTIONAL ATTACK ON VIRGINIA'S MEDICAL MALPRACTICE CAP: EQUAL PROTECTION AND THE RIGHT TO JURY TRIAL

I. INTRODUCTION

A. *Historical Developments of the Insurance Crisis of the 70's*

Since its enactment, Virginia's statute limiting medical malpractice awards[1] has spawned questions concerning its constitutionality.[2] In response to the alleged insurance crisis of the 1970's,[3] many state legislatures passed statutes designed to slow the rising costs of liability insurance.[4] With such statutes already enacted in many jurisdictions,[5] the

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1. VA. CODE ANN. § 8.01-581.15 (Repl. Vol. 1984). The Virginia General Assembly amended the statute in 1983, increasing the ceiling on recovery to $1,000,000. 1983 Va. Acts ch. 496. The statute reads,

> [I]n any verdict returned against a health care provider in an action for malpractice where the act or acts of malpractice occurred on or after October 1, 1983, which is tried by a jury or in any judgment entered against a health care provider in such an action which is tried without a jury, the total amount recoverable for any injury to, or death of, a patient shall not exceed one million dollars.

Id. An effort to reduce the cap to $500,000 failed in the 1987 legislature. H.B. 130 Va. Gen. Assembly, 1987 Sess., 1987 Va. Acts ___. However, the Virginia General Assembly enacted legislation limiting punitive damages to $350,000. S.B. 402 Va. Gen. Assembly, 1987 Sess., 1987 Va. Acts 344.

2. *See* Harlan, *Virginia's New Medical Malpractice Review Panel and Some Questions it Raises*, 11 U. RICH. L. REV. 51 (1976). While various aspects of the statute have raised constitutional questions, including the review panel and the notice requirement, this note will be confined to an examination of the constitutionality of the limitation on recovery, or "cap."

3. The existence of the medical insurance crisis which prompted the passage of § 8.01-581.15 of the Virginia Code has been questioned. *See generally* Taylor & Shields, *The Limitation on Recovery in Medical Negligence Cases in Virginia*, 16 U. RICH. L. REV. 799, 804-25 (1982). Some insurance industry critics claim investment losses prompted insurance companies to sharply increase medical malpractice liability coverage rates. *See, e.g.*, Oster, *Medical Malpractice Insurance*, 45 INS. COUNS. J. 228, 231 (1978). *See generally* Note, *Limitation on Recovery of Damages in Medical Malpractice Cases: A Violation of Equal Protection?*, 54 U. CIN. L. REV. 1339 (1986).

4. For a discussion of the flurry of legislation passed to end the medical malpractice insurance crisis of the 1970's, see Probert, *Nibbling at the Problems of Medical Malpractice*, 28 FLA. L. REV. 56 (1975); Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759 (1977); Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, 49 LAW & CONTEMP. PROBS. 5 (1986); Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L.J. 1417; Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655 (1976).

5. Nearly every state responded to the crisis with some sort of legislative action, be it tort reform, or ordering studies of the problem. By the end of 1975, 39 states had commissioned studies, while 22 states had revised civil practice laws or rules. *See* Redish, *supra* note 4, at

insurance and health care industries claim that another malpractice insurance crisis exists today.[6] While that may be true in some parts of the country and within some medical specialties, the problem originally was not as severe in the state of Virginia.[7] Today, it is still not as severe in Virginia as it is in other parts of the nation.[8]

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761 n.14. A number of states have limited medical malpractice recoveries in some way. *See, e.g.*, CAL. CIV. CODE § 3333.2 (West Supp. 1987); ILL. ANN. STAT. ch. 73, ¶ 1065.302 (Smith-Hurd Supp. 1985); IND. CODE ANN. § 16-9.5-2-2 (Burns 1983); LA. REV. STAT. ANN. § 40:1299.42 (West 1977 & Supp. 1987); NEB. REV. STAT. § 44-2825 (1984); N.H. REV. STAT. ANN. § 507-C:7 (1983); N.M. STAT. ANN. § 41-5-6(A) (1986); N.D. CENT. CODE § 26.1-14-11 (Supp. 1985); OHIO REV. CODE ANN. § 2307.43 (Baldwin 1981); OR. REV. STAT. § 752.040 (1977); S.D. CODIFIED LAWS ANN. § 21-3-11 (Supp. 1986); TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1987); VA. CODE ANN. § 8.01-581.15 (Repl. Vol. 1984); WIS. STAT. ANN. § 655.27(5)(d) (West Supp. 1986). These statutes were compiled in great part from Qual, *A Survey of Medical Malpractice Tort Reform*, 12 WM. MITCHELL L. REV. 417, 434 n.79 (1986). *See also infra* note 9.

6. While the industries and the press refer to the insurance crunch as a "crisis," one commentator suggests that "dilemma" is a better description, because the nature and severity of the problem are widely misunderstood: "On closer analysis, problems appear severe or intractable mainly in a few geographical areas and medical specialties." Posner, *Trends in Medical Malpractice Insurance, 1970-1985*, 49 LAW & CONTEMP. PROBS. 37, 47 (1986).

7. In November of 1975, Insurance Commissioner John Day told the House and Senate Courts of Justice Committees that there were very few problems regarding the availability of medical malpractice insurance in Virginia. He pointed to the willingness of the state's largest malpractice insurer to continue covering Virginia physicians because problems experienced in other parts of the country did not exist in Virginia at that time and were not expected in the foreseeable future. *See* Day, *Medical Malpractice Insurance: Insurance Commissioner Proposes New Concept*, VA. B. NEWS, Nov.-Dec. 1975, at 19.

Garland L. Hazelwood, Jr., Assistant Commissioner of Insurance for the Virginia State Corporation Commission, which regulates insurance in this state, testified under oath that there was never any insurance availability problem with respect to Virginia physicians. He said that any problem during 1974 and 1975 concerned the availability of insurance for hospitals for basic limits of up to $300,000. *See* Taylor & Shields, *supra* note 3, at 810 nn.58-60 (citing Riggan v. Nassef, No. 42-5769 (Cir. Ct. Halifax County Va., Dec. 17, 1981) (deposition of Garland L. Hazelwood, Jr. at 5, 8-9)).

Despite difficulties in obtaining the primary coverage, there was never a lack of availability of coverage for limits over $750,000, even for hospitals. Case No. 19672 (Va. State Corp. Comm'n Mar. 26, 1976) (testimony of Warren Bessler, Resident General Counsel for St. Paul), *cited in* Taylor & Shields, *supra* note 3, at 810 n.61.

In Williams v. Van Der Woude, 8 Va. Cir. 263, 265 (Fairfax 1986), Judge Fortkort noted that even if the statute was initially unjustified, the General Assembly recognized its effect upon the state when it amended the statute in 1983, increasing the limit on recovery to $1,000,000. Legislators have responded to the general increase in liability insurance rates by recommending tort reform. *See*, THE LIABILITY INSURANCE CRISIS AND THE NEED FOR TORT REFORM, REPORT TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VA., S. DOC. NO. 11 (1987).

The Richmond Obstetrics and Gynecology Society, in an advertisement for tort reform, claimed that most of its membership would not be able to afford to practice obstetrics after this year, and that ten percent had already given up the profession. Richmond Times Dispatch, Jan. 21, 1987, at A4, col.3.

8. A General Accounting Office study, summarized in an insurance industry newsletter, found malpractice insurance premiums were highest for physicians practicing high-risk spe-

Unlike the recovery limitations enacted in most jurisdictions,[9] Virginia's "cap" on medical malpractice recoveries limits economic and noneconomic awards alike.[10] Thus, a severely injured victim of medical malpractice may not be able to recover even his out-of-pocket expenditures and medical costs.[11] While doubt surrounds the effectiveness of the

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cialties in Florida, Illinois, Michigan, New York, and the District of Columbia. *See Second GAO Study Documents Impact of Rising Malpractice Costs on Hospitals, MDs*, MED. LIAB. MONITOR, Oct. 23, 1986, at 3, 4. The publication also reported findings of a Virginia survey of 4,753 physicians practicing in the state. *Virginia Study Shows High Risk MDs Not Only Ones with Coverage Problems*, MED. LIAB. MONITOR, Jan. 30, 1986, at 5. Only 92 physicians said they had difficulty with coverage in 1984 or 1985, but all of them had found another insurance carrier. Claims were not cited as the biggest cause of their difficulty obtaining coverage. Twenty-one said their carrier had left the market; 15 pointed to underwriting standards which excluded them, 3 cited their age, 2 said they were moonlighting, and 30 gave no specific reason. Only 20 doctors mentioned claims as a factor in their difficulty obtaining coverage. Of the 92, 17 were family practitioners, 15 were obstetricians/gynecologists, 11 were internists, 10 were surgeons, and the smaller numbers were in general practice, emergency medicine, orthopedics, anesthesiology, urology, ophthalmology, pediatrics, ENT, and other fields. The study concluded that "a spectrum of causes, not only claims experience, has harrassed [sic] Virginia physicians." *Id.* (quoting survey conducted by the Medical Society of Virginia). Just nine months later, medical malpractice insurance rates increased dramatically for Virginia physicians, in spite of the relatively low number of claims brought against them. St. Paul's Fire and Marine Insurance Company, which insures most of the physicians practicing in Virginia, announced increases of 15.2%; the Virginia Insurance Reciprocal increased its rates by 43%; Pennsylvania Hospital Insurance Company boosted premiums 60%. *Rates are Going Up in Virginia*, MED. LIAB. MONITOR, August 18, 1986, at 1.

9. Forty-two states considered tort reform packages during the 1986 legislative sessions. *1986 Special Legislative Report*, MED. LIAB. MONITOR, September 30, 1986 at 1. Only two states enacted bills limiting the total amount of recovery: S.D. ($1,000,000); Kan. ($1,000,000, but courts may supplement medical losses of another $2,000,000 upon claimant's petition). The following states passed bills that cap recovery for noneconomic damages: Alaska ($500,000); Cal. ($1,000,000); Fla. ($450,000); Haw. ($375,000); Kan. ($250,000); Md. ($350,000); Mass. ($500,000, except where jury finds substantial disfigurement or impairment); Mich. ($225,000, with seven exceptions); Minn. ($400,000); Miss. ($150,000, or three times actual damages, whichever is less); Mo. ($350,000); N.H. ($875,000); Okla. (punitive damages cannot exceed actual damages absent wanton disregard); Utah ($250,000); Vt. ($500,000); Wash. (variable cap with an estimated range of $117,000 to $493,000); W. Va. ($1,000,000); Wis. ($1,000,000). *Id.*

10. The language of the statute plainly says that the total amount of recovery shall not exceed $1,000,000. *See supra* note 1. However, the preamble to chapter 611 just as plainly states that the statute, as amended, places a limitation "on recovery for pain and suffering." 1976 Va. Acts ch. 611 at 784.

There are conflicting rulings on whether a malpractice victim may recover the statutory limit from each tortfeasor. *Compare* Palmer v. Fulcher, 8 Va. Cir. 347, 351 (Fairfax 1987) (statutory limit applies to each defendant individually) *with* Monk v. Alexandria Hosp., 4 Va. Cir. 68, 69-70 (Alexandria 1982) (statutory limit applies to all defendants where they are joint tortfeasors and their negligence results in a single injury to plaintiff).

The General Assembly included a severability clause (the "two clause") in case the statute is found unconstitutional. 1976 Va. Acts ch. 611 at 788.

11. While the American Bar Association's Commission on Medical Professional Liability took no position on whether recovery for noneconomic loss should be limited, the Commission took a strong stand against limiting economic losses: "[I]t is unconscionable to preclude

legislation of the last decade, one study finds that decreases in the frequency and severity of claims do not automatically translate into lower premium costs.[12] A few states have required rollbacks in medical malpractice liability premiums as part of their tort reform packages.[13] The Virginia General Assembly has enacted legislation requiring the insurance industry to submit loss data based on Virginia claims experience to the State Corporation Commission.[14]

B. *Virginia's Limitation on Medical Malpractice Recoveries*

The evolution of tort law in the medical malpractice area includes constitutional challenges to limitations on awards. Several cases have upheld

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a plaintiff, by an arbitrary ceiling on recovery, from recovering all his economic damages, even though some lowering of medical malpractice premiums may result from the enactment of such a ceiling." *Report of the Commission on Medical Professional Liability*, 102 REP. A.B.A. 786, 849 (1977), *quoted in* Comment, *Legislative Limitations on Medical Malpractice Damages: The Chances of Survival*, 37 MERCER L. REV. 1583, 1586-87 n.34 (1986).

Limiting economic damages forces the most seriously injured malpractice victim to shoulder the burden of another's wrongful act upon him. Those who are not adequately compensated by the wrongdoers, as well as their insurers, will request compensation from public assistance programs or treatment from state hospitals. Thus, the cost of malpractice shifts from the private sector of the insurance and health care industries to the public sector.

12. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROBS. 57, 79 (1986).

> First, the net potential impact on premiums also depends on litigation expenses and changes in the timing or disbursement of loss reserves, and hence investment income. Second, reforms that reduce the uncertainty in estimating malpractice claim costs—namely, caps on awards, periodic payment of amounts for future damages, and shorter statutes of repose (running from date of incident, not date of discovery)—may be expected to reduce premiums by a modest amount, over and above the reduction in mean expected losses. One can expect this result because of the reduction in insurers' risk. Perhaps more importantly, by reducing uncertainty, such reforms should reduce the volatility in price and availability of malpractice insurance, which is a major inefficiency of the present malpractice system.

Id.

13. During their 1986 legislative sessions, Hawaii and Florida mandated premium rollbacks; Rhode Island froze physicians' malpractice premiums until June of 1987; North Carolina gave its insurance commissioner authority to cut premium rates when appropriate. *1986 Special Legislative Report*, MED. LIABILITY MONITOR, Sept. 30, 1986, at 2.

A bill which provided the State Corporation Commission with authority to set rates for commercial liability insurance should it become unavailable at adequate levels of coverage was defeated in the 1987 Virginia General Assembly session. The bill would have rolled back rates to pre-1984 levels. *See* H.B. 1260, Va. Gen. Assembly, 1987 Sess., 1987 Va. Acts ___.

14. In her testimony before the Joint Subcommittee Studying the Liability Insurance Crisis and the Need for Tort Reform, Attorney General Mary Sue Terry said that for every premium dollar insurers gained in Virginia during 1985, they lost only 59.7 cents, whereas nationally, insurers lost $1.12 for every premium dollar collected. Richmond News Leader, Jan. 23, 1987, at 4, col. 1.

the constitutionality of Virginia's statute,[15] while others have not.[16] The Virginia Supreme Court will hear two cases challenging the constitutionality of the statute this year.[17]

In the most controversial decision, *Boyd v. Bulala*,[18] the United States District Court for the Western District of Virginia held that while the statute did not violate equal protection guarantees,[19] it did effectively deny the plaintiff her constitutional right to a civil jury trial.[20] Noting that Judge Michael has granted the State of Virginia's motion to intervene and that the case is still on the docket,[21] this comment will primarily examine the constitutional questions addressed in the opinion in light of the possible ruling by the Virginia Supreme Court on the same issue.

C. *The Facts of* Boyd v. Bulala

Plaintiffs Helen and Roger Boyd brought a medical malpractice action against Dr. R. A. Bulala, alleging injuries to themselves and their infant daughter, Veronica Lynn Boyd. According to evidence presented at trial, Dr. Bulala had ordered the delivery room nurses to call him to the hospital only after crowning, just before the child's birth.[22] Consequently, the doctor was absent when the infant suffered fetal distress, and Mrs. Boyd

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15. *See, e.g.*, DiAntonio v. Northampton-Accomack Memorial Hosp., 628 F.2d 287 (4th Cir. 1980) (upholding constitutionality of notice of claim requirement); Clark v. Lewis, No. 85-0156-R (E.D. Va. Jan. 16, 1986) (upholding cap); Smith v. Markham, 6 Va. Cir. 270 (Norfolk 1985) (cap on damages not an unconstitutional violation of due process or equal protection; does not constitute special legislation); Talbot v. Martin, 6 Va. Cir. 165 (Richmond 1984) (damage limit constitutional).

16. *See, e.g.*, Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986) (court granted post-judgment motion to intervene - statute violates state constitution's guarantee of civil jury trial); Williams v. Van Der Woude, 8 Va. Cir. 263 (Fairfax 1986) (statute violates equal protection). Without vacating his opinion in *Boyd*, Judge Michael allowed the Commonwealth of Virginia to intervene, pursuant to its statutory right under 28 U.S.C. § 2403(b), because a statute's constitutionality was questioned. The case remains on the docket. The court will hear arguments on the statute's constitutionality once again, and Judge Michael will issue another opinion. The Attorney General has asked that Judge Michael certify the questions of constitutionality for decision by the Virginia Supreme Court. Brief of the Commonwealth, *Boyd*, 647 F. Supp. 781 (No. 83-0557-A-C). The requested procedure was established on January 16, 1987, when the Virginia Supreme Court entered an order adopting Rule 5:42, effective April 1, 1987, implementing the constitutional amendment approved by the voters on November 4, 1986. *Id.* at 12 n.3. Of interest, Judge Michael voted in favor of Virginia Code section 8.01-581.15 while he served as state senator. *See* 1976 VA. SENATE J. 549.

17. *See* Etheridge v. Medical Center Hosp., No. 860194 (Va. filed Mar. 5, 1986) (challenging the constitutionality of the damage limitation); Mott v. Noer, No. 850223 (Va. filed Mar. 19, 1985) (challenging the notice of claim requirement).

18. 647 F. Supp. 781 (W.D. Va. 1986) (court granted post-judgment motion to intervene).

19. *Id.* at 787-88.

20. *Id.* at 789.

21. *See supra* note 16.

22. Boyd v. Bulala, 647 F. Supp. 781, 784 (W.D. Va. 1986).

was attended during labor and delivery only by nurses who were not trained in emergency procedures. The baby suffered a perinatal injury which left her with severe physical and mental handicaps.[23]

The jury returned six verdicts for the plaintiffs totalling $8,300,000.[24] Defendant moved that the amount recovered be reduced[25] to the statutory limit.[26] Six weeks after trial, before the court had ruled on any post trial motions, the child, then three years old, died.[27] Judge Michael upheld the jury award and declared the limitation statute unconstitutional as a violation of the right to jury trial, but maintained the statute could not be challenged successfully on equal protection grounds.[28]

II. Equal Protection: What Standard of Review?

A. *Traditional Two-Tier Analysis*

1. The Limitations of Strict Scrutiny

The equal protection guarantee has emerged as the primary guardian of individual rights.[29] The standards for validity under the due process and equal protection clauses of the fourteenth amendment[30] are identical.[31]

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23. *Id.*

24. The jury awards were as follows:

(1) compensatory damages for Veronica Boyd, $1,850,000
(2) compensatory damages for Helen Boyd, $1,575,000
(3) compensatory damages for Roger Boyd, $1,175,000
(4) compensatory damages for Helen and Roger Boyd, jointly, for past and future medical costs until Veronica reaches 18 years of age, $1,700,000
(5) punitive damages for Veronica Boyd, $1,000,000
(6) punitive damages for Helen Boyd, $1,000,000

Id.

25. *Id.* Defendant's other motions to set aside the verdict were denied; plaintiff's motion to amend the complaint to conform to the evidence at trial was granted. *Id.* at 796.

26. Va. Code Ann. § 8.01-581.15 (Repl. Vol. 1984).

27. *Boyd*, 647 F. Supp. at 784. The court subsequently denied defendant's motion to amend the action to a wrongful death action under Virginia Code sections 8.01-50 and 8.01-56. 647 F. Supp. at 796.

28. *Id.* at 787-89. Judge Michael concluded without analysis that the statute violated the separation of powers. *Id.* at 790.

29. The United States Supreme Court has shied away from substantive due process, and the privileges and immunities clause of the fourteenth amendment has never been a meaningful vehicle for the judicial review of state actions. *See* J. Nowak, R. Rotunda & J. Young, Constitutional Law 524 (3d ed. 1986) [hereinafter Nowak]. Indeed, Justice Holmes descibed equal protection as "the last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927), *quoted in* Nowak, *supra*, at 524.

30. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

31. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Schlesinger v. Ballard,

The equal protection clause is often the vehicle for judicial review of legislative classifications.[32]

Traditionally, the United States Supreme Court has used two tests to analyze equal protection questions. The "strict scrutiny" standard applies where a state discriminates against a "suspect" class or infringes upon a fundamental right.[33] Suspect classifications[34] which have triggered strict scrutiny analysis include race,[35] national origin,[36] and alienage.[37] If a statute does not involve a suspect class, it is still subject to strict scrutiny if it involves a fundamental right.[38]

While the equal protection clause requires a government to treat similar individuals similarly,[39] it does not prevent the government from classifying persons or "drawing lines" in the creation and application of laws.[40] However, the government may not base its classifications upon impermissible criteria nor arbitrarily burden a group of individuals.[41]

A classification which relates to a proper government purpose does not violate equal protection guarantees where it distinguishes persons as dissimilar upon some permissible basis in order to advance the legitimate interests of society.[42] Therefore, "[t]hose who are treated less favorably by the legislation are not denied equal protection of the law because they

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419 U.S. 498, 500 n.3 (1975) (due process clause prohibits federal government from engaging in unjustifiable discrimination). *See generally* Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 540 (1977).

32. *See* Reed v. Reed, 404 U.S. 71, 76 (1971).

33. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (upheld mandatory police officer retirement at age 50); *Reed*, 404 U.S. at 75-76 (gender discrimination); Shapiro v. Thompson, 394 U.S. 618 (1969) (fundamental right to interstate travel); Loving v. Virginia, 388 U.S. 1, 11 (1967) (suspect class; strict scrutiny applied to anti-miscegenation statute which constituted a suspect legislative classification); Korematsu v. United States, 323 U.S. 214, 216 (1944) (suspect class; upholding statute excluding Japanese American citizens from military base following Pearl Harbor attack); Royster Guano Co. v. Virginia, 253 U.S. 412, 415-16 (1920) (discriminatory tax held arbitrary). *See generally* NOWAK, *supra* note 29, at 523-801; Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

34. A classification becomes suspect if the class is "saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

35. Brown v. Board of Educ., 347 U.S. 483 (1954).

36. *Korematsu*, 323 U.S. at 214.

37. Graham v. Richardson, 403 U.S. 365 (1971).

38. The Supreme Court has defined fundamental rights as those which are "explicitly or implicitly guaranteed by the Constitution." *Rodriquez*, 411 U.S. at 33-34.

39. *Royster*, 253 U.S. at 415, *quoted in Reed*, 404 U.S. at 76 (". . .all persons similarly circumstanced shall be treated alike.").

40. NOWAK, *supra* note 29, at 526.

41. *Id.*

42. *Royster*, 253 U.S. at 415.

are not similarly situated to those who receive the benefit of the legislative classification."[43] The concept of equal protection has nothing to do with whether a specific individual rightfully belongs within the classification.[44] Rather, equal protection scrutinizes legislative line drawing.[45]

When a statute falls under the strict scrutiny test, in order to pass constitutional muster, the statute must serve a compelling governmental purpose.[46] Very few statutes survive strict scrutiny; most are declared unconstitutional violations of equal protection guarantees.

Virginia's medical malpractice statute does not single out a traditional suspect class. The right to a full recovery in a tort action does not constitute a fundamental right which would also trigger strict scrutiny of the statute.[47] Therefore, the strict scrutiny test would be an inappropriate standard to apply to Virginia's malpractice statute.[48]

2. The Rational Basis Standard

Traditionally, if the statute did not discriminate against a suspect class or infringe a fundamental right, the Supreme Court applied the rational basis test. Under this standard, the Court engages in little or no scrutiny but instead defers to the legislature's judgment.[49] Equal protection is of-

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43. NOWAK, *supra* note 29 at 525.

44. Whether an individual falls within a specific classification depends upon a review of procedural due process. *See generally Id.*

45. *Id.* at 525-26.

46 *Loving*, 388 U.S. at 11. In applying the strict scrutiny standard, the Court said "the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny'. . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective. . . ." *Id.* (citing *Korematsu*, 323 U.S. at 216).

47. In Boyd v. Bulala, 647 F. Supp. 781, 787 (W.D. Va. 1986), Judge Michael correctly noted that the Supreme Court has included among the list of fundamental rights the following: freedom of expression and association, the right to vote and participate in the electoral process, the right to interstate travel, the right to fairness in the criminal process, the right to fairness in procedures concerning governmental deprivations of life, liberty or property, the right to marry, and the right to privacy.

48. No court to date has invalidated a medical malpractice statute by applying the strict scrutiny test in an equal protection challenge. Williams v. Van Der Woude, 8 Va. Cir. 263, 272 (Fairfax 1986). Those courts which have invalidated malpractice statutes on equal protection grounds have done so by applying an intermediate standard of review. *See, e.g.*, Jones v. State Bd. of Medicine, 97 Idaho 859, ___, 555 P.2d 399, 407 (1976), *cert. denied*, 431 U.S. 914 (1977); Carson v. Maurer, 120 N.H. 925, ___, 424 A.2d 825, 831 (1980) (applied substantial relationship test to invalidate statute under state constitution); Arneson v. Olson, 270 N.W.2d 125, 133 (N.D. 1978).

49. Before the 1930's, the Supreme Court scrutinized more carefully state statutes regulating economics and domestic policy. In the landmark case of Nebbia v. New York, 291 U.S. 502 (1934), the Supreme Court said that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare." *Id.* at 537. Before this decision, the Court used the commerce clause and the contract clause to invalidate economic

fended only if the classification involved is wholly unrelated to the purpose of the legislature.[50]

Moreover, the Supreme Court actually presumes that state legislatures have acted constitutionally.[51] The Court's reluctance to scrutinize economic legislation under substantive due process or equal protection analysis has been described as "total abandonment."[52] Recently, a few justices have indicated a desire to return to a closer scrutiny of the reasonableness of economic or social welfare legislation,[53] but the strong presumption of validity under the rational basis test has not been removed.[54]

The federal circuit courts ruling on equal protection challenges to state medical malpractice statutes have applied the rational basis test in upholding the constitutionality of the statutes.[55] Judge Michael applied the

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legislation, and relied on the fifth and fourteenth amendments and the equal protection clause to protect the economic scheme it favored. The Court decided whether a regulation was reasonably related to a particular goal and whether a classification system was reasonably necessary for a certain economic objective, in evaluating its constitutionality. *See* NOWAK, *supra* note 29, at 352, *citing* R. MCCLOSKEY, THE AMERICAN SUPREME COURT 182-84 (1960).

Following *Nebbia*, the Court upheld economic regulations, confirming its deference to legislative actions. *See, e.g.*, Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) (state's right to work law upheld); United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (upholding federal statute prohibiting interstate shipment of filled milk; congressional finding that filled milk constituted a health hazard sufficient to pass rational basis test); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (Washington's minimum wage law for women does not violate due process by depriving employers of freedom of contract).

50. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911), *quoted in* Dandridge v. Williams, 397 U.S. 471, 485 (1970). Thus, where a court applies the rational basis test, the state legislature has a virtual blank check where equal protection is concerned. "It is always possible to define the legislative purpose of a statute in such a way that the statutory classification is rationally related to it." Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 128 (1972).

51. "[S]tatutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961). When the purpose or objective of the statute has not been expressed, the Court looks for conceivable objectives which *might* have motivated the legislature in establishing the statutory classifications. *See id.*

52. *See* NOWAK, *supra* note 29, at 357.

53. *See infra* notes 98-103 and accompanying text.

54. NOWAK, *supra* note 29, at 358 & nn.56-59. The Supreme Court has invalidated only one economic regulation on equal protection grounds since 1937, and that decision was later overruled. *See* Morey v. Doud, 354 U.S. 457 (1957) (statute exempting American Express money orders from certain licensing regulations unconstitutional), *overruled*, City of New Orleans v. Dukes, 427 U.S. 297, 306 (1976).

55. *See* Gronne v. Abrams, 793 F.2d 74 (2d Cir. 1986) (upholding New York statute requiring pre-trial screening of medical malpractice claims); Montagino v. Canale, 792 F.2d 554 (5th Cir. 1986) (upholding Louisiana's shorter statute of limitations in medical malpractice cases); Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985) (upholding California's

rational basis test when he held that Virginia's medical malpractice statute meets equal protection standards.[56] The majority of state courts have upheld the constitutionality of medical malpractice statutes by applying the rational basis test.[57]

The United States Supreme Court denied an appeal of a California Supreme Court decision upholding the state's limitation on noneconomic damages in medical malpractice cases.[58] While a summary dismissal constitutes a decision on the merits which creates controlling precedent,[59] the dismissal does not represent an endorsement of the rationale used by the California Supreme Court in its application of the rational basis test.[60]

In *United States Railroad Retirement Board v. Fritz*,[61] after considering whether the Court *should* inquire into the facts before the legislature and the actual purpose of the legislature, the Court followed the traditional view that *any* plausible reason for the statute is sufficient to withstand an equal protection challenge,[62] although three different views on

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limit on noneconomic recoveries); Brubaker v. Cavanaugh, 741 F.2d 318 (10th Cir. 1984) (upholding Kansas' shorter statute of limitations in medical malpractice cases); Fitz v. Dolyak, 712 F.2d 330 (8th Cir. 1983) (upholding Iowa's six-year statute of limitations on most medical malpractice actions); DiAntonio v. Northampton-Accomack Memorial Hosp., 628 F.2d 287 (4th Cir. 1980) (upholding Virginia's notice of claim requirement); Woods v. Holy Cross Hosp., 591 F.2d 1164 (5th Cir. 1979) (upholding Florida's mandatory mediation procedures). The Supreme Court also denied an appeal of the California Supreme Court decision upholding the state's limit on noneconomic recoveries in Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal denied*, 106 S. Ct. 214 (1985) (appeal dismissed for lack of substantial federal question).

56. *Boyd*, 647 F. Supp. at 787 (court granted post-judgment motion to intervene). *Contra* Waggoner v. Gibson, 647 F. Supp. 1102 (N.D. Tex. 1986). The court in *Waggoner* applied the rational basis test to a Texas statute limiting recovery to $500,000, saying, "application of the rational relationship test is not 'an all but certain indication of validity' for malpractice statutes." *Id.* at 1106 (citation omitted).

57. *See, e.g.*, *Fein*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368; American Bank & Trust Co. v. Community Hosp., 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984);Florida Patient's Compensation Fund v. Von Stetina, 474 So. 2d 783 (Fla. 1985); Johnson v. St. Vincent Hosp., Inc., 273 Ind. 374, 404 N.E.2d 585 (1980); Rudolph v. Methodist Medical Center, 293 N.W.2d 550 (Iowa Ct. App. 1980); Everett v. Goldman, 359 So. 2d 1256 (La. 1978); Attorney Gen. v. Johnson, 282 Md. 274, 385 A.2d 57 (1978), *appeal dismissed*, 439 U.S. 805 (1978); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977); State *ex rel.* Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

58. *See Fein*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985); *see generally* Note, Fein v. Permanente Medical Group: *Future Trends in Damage Limitation Adjudication*, 80 Nw. U.L. Rev. 1643 (1986).

59. *See* Hicks v. Miranda, 422 U.S. 332, 344 (1975).

60. Thus the Court felt the plaintiff's equal protection argument did not pose a substantial federal question. In *Hicks*, the Court said, "inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal development indicates otherwise." *Id.* at 344 (citations omitted).

61. 449 U.S. 166 (1980).

62. *Id.* at 179.

the question were reported.[63] The Court recently has applied the rational basis test to other economic regulations.[64] Virginia's medical malpractice statute is an economic regulation. Therefore, unless the Court specifically adopts a higher standard of review in an equal protection challenge to medical malpractice legislation,[65] the Supreme Court would likely apply the rational basis test to Virginia's medical malpractice statute.

In a challenge under the Virginia Constitution, the result would likely be the same. Virginia's Constitution does not have an equal protection clause, but equal protection rights are guaranteed by the anti-discrimination clause[66] and the prohibitions against special legislation.[67] The Virginia Supreme Court has held that the anti-discrimination clause is strictly limited by its own terms,[68] and that it is no broader than the equal protection clause.[69] Where the court has applied the special legislation clause, it has used the reasonable basis test.[70]

In *Smith v. Markham*,[71] Judge Winston noted that the special legislation provision is not violated unless the class created by the statute is arbitrary or unreasonable, and applies to less than all persons belonging to the class without distinction.[72] He articulated the rational basis test[73]

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63. *See id.*

64. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1980) (upholding state statute banning retail sale of milk in plastic non-returnable, non-refillable containers); City of New Orleans v. Dukes, 427 U.S. 297 (1976) (upholding ordinance restricting vendors' right to sell food from pushcarts in French Quarter); United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (upholding regulation of filled milk). "[W]here the legislative judgment is drawn in question, [the inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed, affords support for . . . [the legislation]." *Id.* at 154. In writing for the majority, Justice Stone said even absent the legislative findings, the Court would have sustained the legislation because it *presumes* the existence of facts supporting the legislative judgment. *Id.* at 152.

65. Two standards of equal protection review which fall between the two extremes have recently emerged. *See infra* notes 98-109 and accompanying text.

66. VA. CONST. art. I, § 11 states in pertinent part "the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged."

67. VA. CONST. art. IV, § 14 states in pertinent part:

> The General Assembly. . .shall not, by special legislation, grant relief in these or other cases of which the courts or other tribunals may have jurisdiction. . . . The General Assembly shall not enact any local, special, or private law . . . [g]ranting to any private corporation, association, or individual any special or exclusive right, privilege, or immunity.

68. *See supra* note 66 and accompanying text.

69. *See* Archer v. Mayes, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973).

70. *See* Bray v. County Bd. of Arlington, 195 Va. 31, 37, 77 S.E.2d 479, 483 (1953).

71. 6 Va. Cir. 270 (Norfolk 1985).

72. *Id.* at 272.

73. [E]very presumption is to be made in favor of an act of the legislature. And it is not to be declared unconstitutional except where it is clearly and plainly so. Courts will uphold acts of a legislature when their constitutionality is debatable, and the burden is upon the assailing party to prove the claimed invalidity.

Id.

and stated that the legislature supported its statute with findings of fact and an expressed concern for the health of the public.[74] He held that the medical malpractice statute does not constitute special legislation in violation of the Virginia Constitution.[75]

Because Virginia's medical malpractice statute does not discriminate against one of the classes listed in article I, section 11, it does not violate the anti-discrimination clause. Faced with a special legislation challenge, the court will likely apply the standard it has applied in the past, the reasonable basis test, which is equivalent to a weak equal protection review. In Chapter 611 of the 1976 Acts of Assembly, the legislature stated a plausible reason for adopting the medical malpractice statute.[76] Therefore, the statute does not constitute special legislation in violation of the Virginia Constitution.

B. *Emerging Equal Protection Review*

1. The Substantial Relationship Test

The Supreme Court has applied the "substantial relationship" (sometimes called "means scrutiny" or "means focused") test to analyze discriminatory state actions based on gender[77] or illegitimacy.[78] To survive this intermediate level of scrutiny, a government classification must be reasonable, and must rest upon "some ground of difference having a fair and substantial relation to the object of the legislation."[79] The Court has

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74. *Id.*

75. *Id.* at 273.

76. 1976 Va. Acts ch. 611 at 784. The preamble reads, in pertinent part, as follows:

> Whereas, the General Assembly has determined that it is becoming increasingly difficult for health care providers of the Commonwealth to obtain medical malpractice insurance with limits at affordable rates in excess of $750,000; and [w]hereas, the difficulty, cost and potential unavailability of such insurance has caused health care providers to cease providing services or to retire prematurely and has become a substantial impairment of health care providers entering into practice in the Commonwealth and reduces or will tend to reduce the number of young people interested in or willing to enter health care careers; [w]hereas, these factors constitute a *significant* problem adversely affecting the public health, safety and welfare which *necessitates* the imposition of a limitation on the liability of health care providers in tort actions commonly referred to as medical malpractice cases. . . .

Id. (emphasis added).

77. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1977) (applying substantial factor test to invalidate Idaho probate code which discriminated against women); Craig v. Boren, 429 U.S. 190 (1976) (test applied to gender-based discrimination in Oklahoma statute regulating sale of alcoholic beverages).

78. *See* Lalli v. Lalli, 439 U.S. 259 (1979) (upholding classification based upon illegitimacy); *see also* Levy v. Louisiana, 391 U.S. 68 (1967).

79. *Reed*, 404 U.S. at 75-76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415

applied this test where the class is "quasi-suspect" or the right involved is a "quasi fundamental" right.

The Supreme Court has refused to expand the "quasi-suspect" exception to strict scrutiny. In *City of Cleburne v. Cleburne Living Center*,[80] the Supreme Court reversed the Fifth Circuit Court of Apeals, holding that the mentally retarded constituted a quasi-suspect class entitled to intermediate level review. While the Court unanimously held the ordinance involved was unconstitutional,[81] the Justices disagreed on what standard of review was being applied.[82]

In *Dandridge v. Williams*,[83] the Court held that the state's most needy children did not constitute a quasi-suspect class entitled to the intermediate level scrutiny. In this case, the Court upheld a Maryland statute which placed a cap on the total amount of benefits a family could receive under the Aid to Families with Dependent Children program.[84] Aside from its summary dismissal of the *Fein v. Permanente Medical Group*[85] case, this case provides the closest analogy to severely injured medical malpractice victims the Court has considered to date, since both impoverished children and malpractice victims are helpless to change their condition. It is therefore unlikely that the quasi-suspect category will be further expanded, and even less likely it will be expanded to include medical malpractice victims.

While the Supreme Court has not extended the means scrutiny test, several state courts have applied it to medical malpractice statutes.[86]

(1920)). The viability of the means scrutiny test has been questioned:

> An examination of the Court's use of the means scrutiny test reveals that it has been limited to 'twilight zone' cases—those in which a quasi-fundamental right or an 'almost' suspect classification is present. If this is the unarticulated basis for use of the doctrine, it appears unlikely that the means scrutiny test is the proper standard of review in cases challenging medical malpractice legislation. No 'almost' suspect classification is present. A stronger argument for imposing means scrutiny, however, might be that discrimination against persons with medical malpractice claims resembles discrimination affecting the enjoyment of a fundamental right, since the right of compensation for bodily injury is arguably of great significance.

Redish, *supra* note 4, at 773-74.

80. 473 U.S. 432 (1985).

81. The ordinance required a group home for the mentally retarded to obtain a special use permit before operating. 473 U.S. at 436.

82. Writing for the Court, Justice White argued that the traditional rational basis test was being used. *Id.* at 446. Others argued a new "heightened scrutiny" standard was being introduced. *Id.* at 473.

83. 397 U.S. 471 (1970).

84. *Id.* at 486, 487.

85. *See supra* notes 58-59 and accompanying text.

86. *See, e.g.*, Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977); Wentling v. Medical Anesthesia Servs., 237 Kan. 503, 701 P.2d 939 (1985) (statute which discriminated between medical malpractice victims who received benefits from insurance and those who received benefits from gratuitous sources held not to

Each time this standard has been applied, courts have declared the statute in question unconstitutional.[87] While acknowledging the general rule that the protected classes have not been expanded in federal equal protection cases, the New Hampshire Supreme Court did not limit itself to the federal standard: "In interpreting our State constitution. . .we are not confined to federal constitutional standards and are free to grant individuals more rights that [sic] the Federal Constitution requires."[88] The court then applied the means scrutiny test and found the state's medical malpractice statute unconstitutional.[89]

In *Wright v. Central DuPage Hospital Association*,[90] the Illinois Supreme Court used the means scrutiny test to invalidate a statute limiting malpractice damages. The court based its decision on the 100-year old common law right to full recovery of damages in medical malpractice actions. The court examined whether the statute provided an adequate quid pro quo, a benefit to the malpractice victim, in exchange for the limitation on his right to recovery.[91]

While a state may find a basis in its own law for requiring an adequate quid pro quo, the United States Supreme Court has never clearly established this requirement.[92] In *Boyd v. Bulala*,[93] Judge Michael correctly declined to adopt this requirement, refusing to apply a higher standard of scrutiny to Virginia's medical malpractice act.

> [T]he purpose of [the statute], to maintain an adequate level of health care services in the Commonwealth by ensuring that health care providers can obtain affordable insurance, is sufficient justification under the Constitution for treating those injured through medical malpractice differently from those injured in other torts.[94]

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substantially further legislature's objective to reduce medical malpractice verdicts); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978). In holding the statutes unconstitutional, these courts found there was an insufficient relationship between the legislative objectives and the means selected to accomplish the goals.

87. *See* Williams v. Van Der Woude, 8 Va. Cir. 263, 272 (Fairfax 1986).

88. *Carson*, 120 N.H. at ___, 424 A.2d at 831.

89. The New Hampshire medical malpractice statute limited recoveries for noneconomic losses. *See* N.H. REV. STAT. ANN. § 507-C:7 (1983).

90. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

91. *Id.* at 327, 347 N.E.2d at 742 (emphasis added).

92. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88 (1978) (emphasis added). The Court did not resolve this question because it held the statute made available a reasonably just substitute for the common law remedies it replaced. *Id.* The Court also noted that a statutory limit on recovery is a classic economic regulation which is entitled to judicial deference. *Id.*

93. 647 F. Supp. 781, 786 (W.D. Va. 1986) (court granted post-judgment motion to intervene). *But see* Waggoner v. Gibson, 647 F. Supp. 1102 (N.D. Tex. 1986) (no quid pro quo in exchange for displacement of common law right of recovery).

94. *Boyd*, 647 F. Supp. at 786.

Two recent state cases invalidating medical malpractice statutes have not expressly adopted the intermediate scrutiny approach. This may suggest some acquiescence in the restriction of the standard to gender and illegitimacy classifications.[95] In decisions following Reed v. Reed,[96] the Virginia Supreme Court has applied a heightened standard of review, ruling that the General Assembly may not pass laws treating one class differently from another unless the classification is reasonably related to the legislative objective.[97] In these decisions, the Virginia Supreme Court held that the statutes survived the higher standard of review.

The classifications involved in the cases were broad ones which fell into the quasi-suspect category. It is likely that the Virginia Supreme Court will limit its application of means scrutiny to those classifications. The court will probably apply the rational basis test when evaluating Virginia's medical malpractice statute and find it constitutional.

2. Heightened Scrutiny Under the Rational Basis Test

A fourth test, the "heightened scrutiny" standard, has emerged in the most recent line of cases, which nominally fall under the rational basis test.[98] In *City of Cleburne v. Cleburne Living Center*,[99] the Court declared unconstitutional an ordinance restricting the operation of group homes for the mentally retarded, but its decision splintered into several rationales.[100] Justice White, writing for the majority, articulated no "new" standard of review, thus purporting to apply the traditional rational basis test.[101] Justice Marshall, joined by Justices Brennan and Blackmun, concurred in the opinion but argued that the Court was applying a higher standard of review *within* the rational basis test ("heightened scrutiny").[102] In another concurring opinion, Justice Stevens, joined by Chief Justice Burger, asserted that the three levels of review were mythical in nature. They argued that all the Court's decisions represented a generally

95. *See Williams*, 8 Va. Cir. at 274 (citing Duren v. Suburban Community Hosp., 482 N.E.2d 1358 (Ohio Ct. Com. Pl. 1985) and Detar Hosp. Inc. v. Estrada, 694 S.W.2d 359 (Tex. Ct. App. 1985)).

96. 404 U.S. 71 (1971).

97. *See* Duke v. County of Pulaski, 219 Va. 428, 247 S.E.2d 824 (1978) (classification for automobile tax purposes); Archer v. Mayes, 213 Va. 633, 194 S.E.2d 707 (1973) (different treatment of men and women eligible for jury service).

98. *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (ordinance requiring group home for the retarded to obtain special use permit before operating violates equal protection); Coburn v. Agustin, 627 F. Supp. 983 (D. Kan. 1985) (discussing in great detail the standards in *Cleburne*).

99. 473 U.S. 432 (1985).

100. *Id.*

101. 473 U.S. at 446.

102. *Id.* at 456 (emphasis added).

consistent search for a rational basis.[103] The Court held that the rational basis test should apply because no fundamental rights were at stake and no suspect or quasi-suspect classification was involved.[104]

The Court noted that *the record* did not reveal a rational basis for believing the group home posed a threat to the city's legitimate interests.[105] Thus, the Court departed from the traditional rational basis analysis, which does not look to the facts in the record, but presumes, that a plausible basis underlies the legislation.[106] Here the Court did not defer to the governing body's judgment.

In *Coburn v. Agustin*,[107] the United States District Court in Kansas attempted to apply the *Cleburne* decision's rationale in an equal protection challenge to a Kansas medical malpractice statute. The *Coburn* court interpreted *Cleburne* as setting up two standards for the rational basis test: the traditional deferential approach and a heightened scrutiny standard. The court said heightened scrutiny should be applied where the statute affects a "sensitive" class or an "important" right.[108] The court then looked at the facts which were before the legislature at the time of its enactment, and held that the statute bore no rational relationship to the factual problem presented. The court concluded that the statute was an unconstitutional denial of equal protection.[109]

In *Williams v. Van Der Woude*,[110] the most recent decision declaring unconstitutional Virginia's medical malpractice statute, the court also rejected the traditional rational basis test. The *Williams* court noted that while all the federal court decisions reviewed statutes which treated malpractice victims differently from other tort victims,[111] Virginia's statute singles out a tiny class comprised entirely of the most severely injured.[112]

Such a tiny "subclass" is distinct from the large class of mentally retarded citizens affected by the statute invalidated in *Cleburne*.[113] The group of medical malpractice victims is also distinct from all of the groups clearly accorded protection under the strict scrutiny test and the means scrutiny test.[114]

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103. *Id.* at 451-52.
104. *Id.* at 446.
105. *Id.* at 448 (emphasis added).
106. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Reed v. Reed, 404 U.S. 71 (1971); McGowan v. Maryland, 366 U.S. 420 (1961).
107. 627 F. Supp. 983 (invalidated collateral source rule in state's medical malpractice cases).
108. *Id.* at 995; *see also infra* note 114.
109. *Coburn*, 627 F. Supp. at 995-97.
110. 8 Va. Cir. 263 (1986).
111. *See supra* note 55 and accompanying text.
112. *Williams*, 8 Va. Cir. at 274.
113. 473 U.S. 432.
114. *See supra* notes 33-38 & 72-73 and accompanying text.

The Supreme Court reviewed the facts in the record in *Cleburne* while maintaining that it was applying the traditional rational basis test.[115] The *Williams* court observed that the result in *Cleburne* may have been based on the fact that the record lacked *any* facts to support the ordinance and therefore, the ordinance was arbitrary. Thus, no new sensitive class was being defined and no new standard was being applied by the Court.[116] In light of the Supreme Court's insistence that it was applying the rational basis test, which normally validates a statute, the *Williams* court's interpretation makes sense.

Judge Fortkort noted, while conceding that "*Cleburne* does not pronounce any clear criteria for determining when the purported 'heightened scrutiny' under the rational basis umbrella should be used,"[117] he nevertheless determined that the Virginia malpractice statute did not survive heightened scrutiny because there was no real malpractice insurance crisis in Virginia in the 1970's.[118] Therefore, he reasoned, Virginia's medical malpractice statute is an unconstitutional violation of equal protection.

Since the United States Supreme Court has limited its application of means scrutiny to classes considered quasi-suspect,[119] it is doubtful the Virginia Supreme Court will adopt the heightened scrutiny standard in medical malpractice cases. The Virginia Supreme Court has said that "[e]very action of the legislature is presumed to be constitutional."[120] The Virginia Supreme Court has also ruled that the malpractice statute,[121] challenged in *Fletcher v. Tarasidis*,[122] "enjoys a presumption of constitutionality."[123] The court did not reach the issue of constitutionality in

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115. *Cleburne*, 473 U.S. 432. The Court's insistence that it was not blurring the distinction between the various standards of equal protection review was recently noted by a federal district court in Kansas. In Ferguson v. Garmon, 643 F. Supp. 335 (D. Kan. 1986), the court applied the rational basis test to a statute permitting the introduction into evidence of collateral source payments in medical malpractice cases. The court considered it "significant that the courts of appeals have refused to discuss, much less recognize, the heightened form of rational basis test enunciated in *Coburn*." *Id.* at 340.

116. *Williams*, 8 Va. Cir. at 276-77.

117. *Id.* at 276.

118. *Id.* at 278 (citing Taylor & Shields, *supra* note 3). Judge Fortkort noted that legislation must "define broader classes, and avoid creating and injuring 'discrete and insular minorities' that benefit only special interests and the law must define goals that 'rationally' serve the public interest." *Williams*, 8 Va. Cir. at 284 (*quoting* United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938)); *see also supra* notes 49-51 and accompanying text.

119. *See supra* notes 77-82 and accompanying text.

120. *See, e.g.*, Working Waterman's Ass'n of Va. v. Seafood Harvesters, Inc., 227 Va. 101, 110, 314 S.E.2d 159, 164 (1984) (statute regulating method of removing hard-shell clams from subaqueous beds constitutional). "Every act of the legislature is presumed to be constitutional, and the Constitution is to be given a liberal construction so as to sustain the enactment in question, if practicable." *Id.* at 110, 314 S.E.2d at 164.

121. *See* VA. CODE ANN. §§ 8.01-581.1 to .12:2 (Repl. Vol. 1984).

122. 219 Va. 658, 250 S.E.2d 739 (1979).

123. *Id.* at 660, 250 S.E.2d at 739. This assessment came after the Virginia Supreme

Fletcher,[124] but based on this statement, the court, when it does decide the issue, will probably hold that the malpractice statute is constitutional under the rational basis test.[125]

III. The Right to Jury Trial: How Sacred is Sacred?

A. *No Constitutional Right to Civil Jury Trial*

The sixth amendment guarantees a defendant in a federal criminal trial the right to trial by jury, if he has been charged with a "serious offense."[126] A defendant charged with a "petty" offense is not constitutionally entitled to a jury trial.[127] The seventh amendment guarantees the right to a jury trial in a federal civil case. The right attaches to any action at common law in which the right to jury trial existed at the time the Constitution was adopted.[128]

The United States Supreme Court has selectively incorporated into the fourteenth amendment, five of the first eight amendments in the federal Bill of Rights, thus insuring that those rights would not be abridged by the states.[129] Significantly absent from the list of incorporated rights is the right to a civil jury trial guaranteed by the seventh amendment.[130]

Court defined the standard for the rational basis test: "When [a legislative] classification is not suspect it is permissible if the governmental objective is 'legitimate' and the classification bears a 'reasonable' or 'substantial' relation thereto." Duke v. County of Pulaski, 219 Va. 428, 432, 247 S.E.2d 824, 826 (1978).

124. 219 Va. at 660, 250 S.E.2d at 739.

125. Even if the Virginia Supreme Court applied the heightened scrutiny test to the statute, it would probably uphold it on the basis that the statute creates a classification which reasonably relates to a legitimate governmental purpose. A higher standard of review does not necessarily mean a statute will be invalidated. *See supra* note 92 and accompanying text; *see also* Redish, *supra* note 4, at 780.

126. *See* United States v. Fletcher, 505 F. Supp. 1053 (W.D. Va. 1981).

127. *Id.*; *see also* Ragsdale v. City of Danville, 116 Va. 484, 82 S.E. 77 (1914). Even though the states must not deprive a criminal defendant of his right to trial by jury, the Virginia Supreme Court has held that the federal jury trial *standards* apply only to the federal courts. *See* Manns v. Commonwealth, 213 Va. 322, 191 S.E.2d 810 (1972) (emphasis added).

128. The provision in any constitution, whether state or federal, which guarantees the right of trial by jury, must be read in the light of the circumstances under which it is adopted. Unless the right of trial by jury existed at the time of its adoption in the particular case, it could hardly be contended that such a right was to be given by the constitution, unless it expressly so provided or it was necessarily implied.

Pillow v. Southwest Va. Improvement Co., 92 Va. 144, 149, 23 S.E. 32, 33 (1895) (upholding statute which authorized court of equity to decide all questions of law arising in partition action); *see also* Alexander v. Commonwealth, 212 Va. 554, 186 S.E.2d 43 (1972), *vacated on other grounds*, 413 U.S. 836 (1973); Bowman v. Virginia State Entomologist, 128 Va. 351, 372, 105 S.E. 141, 148 (1920).

129. *See generally* Nowak, *supra* note 29. Included among the incorporated rights is the sixth amendment guarantee of a jury trial in criminal prosecutions. *Id.* at 315-18.

130. Total incorporation of the federal Bill of Rights, advocated by Justice Black in

The Court has explicitly held that the seventh amendment right to a jury trial in a civil case does *not* apply to the states through the fourteenth amendment.[131] In common law suits pending in the state courts, a trial by jury does not constitute a privilege or immunity protected by the fourteenth amendment.[132] Indeed, "the Federal Constitution has never been held to require jury trial in civil cases in state courts. An attempt to write such a requirement into the Federal Constitution was defeated by the drafters."[133]

In *Boyd v. Bulala*,[134] Judge Michael relied upon *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[135] in finding that Virginia's medical malpractice statute violates the right to a jury trial in a federal diversity case.[136] Judge Michael's reliance on the *Byrd* case is misplaced. In *Byrd*, a state "procedural" rule requiring a hearing by a judge rather than a jury to determine whether an injured worker's only remedy was through the South Carolina Workmen's Compensation Act, was superceded by the right to a federal court jury determination of that issue *in a federal diversity case*. Justice Brennan, writing for the majority, noted that the state's requirement that a judge, not a jury, rule on the defense, was *not* "an integral part of the special relationship created by the statute. Thus the requirement appears to be merely a form and mode of enforcing the im-

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Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting), would make all provisions of the Bill of Rights binding on the states through the due process clause of the fourteenth amendment. Total incorporation has never been adopted by a majority of the Supreme Court justices. *See* Pointer v. Texas, 380 U.S. 400, 411-12 (1965) (Goldberg, J., concurring). *See generally* NOWAK, *supra* note 29, at 315 & n.7.

131. *See, e.g.*, New York Cent. R.R. Co. v. White, 243 U.S. 188 (1917) (denial of jury trial not inconsistent with due process); Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916); Melancon v. McKeithen, 345 F. Supp. 1025 (E.D. La.), *aff'd sub nom.* Hill v. McKeithen, 409 U.S. 943 (1972); Chesapeake & Ohio Ry. Co. v. Carnahan, 118 Va. 46, 86 S.E. 863 (1915), *aff'd*, 241 U.S. 241 (1916).

132. *See Chesapeake & Ohio Ry. Co.*, 118 Va. at 54-55, 86 S.E. at 866. In Palko v. Connecticut, 302 U.S. 319 (1937), the Court said that only the guarantees found to be "implicit in the concept of ordered liberty" apply to the states through the due process clause of the fourteenth amendment. The Court said a trial by jury is not "of the very essence of a scheme of ordered liberty." *Id.* at 325. The Court noted that its prior rulings allowed states to modify or even abolish trial by jury without violating the United States Constitution. *Id.* at 324.

133. 1 A.E.D. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 246 (1974) (citing THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 39, 88th Cong., 1st Sess. 1013 (1964)). *But see* Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237 (1982) (arguing that the fourteenth amendment *does* incorporate the entire Bill of Rights).

134. 647 F. Supp. 781 (W.D. Va. 1986) (court granted post-judgment motion to intervene).

135. 356 U.S. 525 (1958).

136. *Boyd*, 647 F. Supp. at 788-89.

munity . . . and not a rule intended to be bound up with the definition of the rights and obligations of the parties."[137]

The Supreme Court refused to determine whether the right to trial by jury involved in the controversy was constitutionally protected.[138] The Court held that the balancing test and the outcome determinative test of the *Erie* Doctrine apply only where the statute in question is procedural and there is no federal procedural law on point.[139] Thus, a state statute would only be superceded by the right to jury trial in a diversity case if the statute were procedural rather than substantive in nature.

The Virginia medical malpractice statute *clearly* defines the rights of the medical malpractice plaintiff. The statute modifies the common law right of recovery for injuries suffered through medical malpractice. It is therefore substantive, rather than procedural, and the *Byrd* analysis does not apply.[140]

Although he agreed with Judge Michael's concern that the statute interfered with the right to a jury trial, Judge Fortkort in *Williams v. Van Der Woude*, disagreed with his conclusion: "While there is no doubt that the placement of a limitation on damages is an interference with the jury process, the Supreme Court may not conclude that the limitation on the jury as a fact finder is a violation of the Seventh Amendment."[141] Judge Fortkort noted further that "[o]ne cannot say that in our legal system the jury is a necessary component of accurate factfinding."[142]

There is no "procedural" rule incorporated into the medical malpractice statute that conflicts with the right to jury trial in a federal diversity case. The medical malpractice statute constitutes substantive, not procedural, state law. A federal court judge, in a diversity case, applies the substantive law of the state where the federal court is located.[143] There-

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137. *Byrd*, 356 U.S. at 536.

138. *Id.* at 537 n.10.

139. *Id.*

140. The Supreme Court, in Erie R.R. Co. v. Tompkins, 304 U.S. 64, (1938), said that

> [s]upervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

304 U.S. at 79.

141 8 Va. Cir. 263, 269 n.1 (Fairfax 1986).

142. *Id.* (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971) (sixth amendment right to jury trial in criminal cases does not extend to juveniles charged with criminal acts in juvenile court delinquency proceedings)). Judge Fortkort also noted that the *Boyd* holding would invalidate many of the statutes upheld under equal protection analysis. He continued, "[n]evertheless, the right to jury trial in a civil case is one of the rights in the Bill of Rights and courts may have given the seventh amendment less deference than our historical roots demand." *Id.* at 270 n.1.

143. The right to trial by jury in federal court is governed by federal law. State law may be disregarded in three circumstances: where state law denies a jury trial in a case where the

fore, Virginia's medical malpractice statute does not infringe the right to a jury trial in a federal diversity case.

B. *Right to Jury Trial under Virginia's Constitution*

If there is a constitutional right to a trial by jury that would supercede a legislative limitation of damages in a medical malpractice action, it must be found in the state constitution. In *Boyd v. Bulala*,[144] Judge Michael held Virginia's medical malpractice statute violates the state constitution's guarantee of a civil jury trial, by limiting recovery and interfering with the jury's determination of damages.

The Virginia Supreme Court has interpreted the right to trial in civil cases as a right which existed when the constitution was passed in 1776.[145] "It has been long well settled that neither the State nor Federal Constitution guarantees or preserves the right of trial by jury except in those cases where it existed when these Constitutions were adopted."[146] Therefore, if no right to a jury trial existed at that time, the privilege does not exist under section 11 of the Virginia Constitution. Thus, the right extends to actions at common law which existed at that time, and does not extend to actions in equity. Tort actions, including medical malpractice actions, existed at common law at that time,[147] and thus the right to a jury trial applies to those actions.

It does not follow, however, that a legislative limitation on damages violates the right to jury trial. In 1969, legislators attempted to add a phrase reemphasizing the commitment to jury trial in civil cases.[148] The

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seventh amendment requires a jury trial; where state law denies a jury trial but federal courts customarily permit such trial though not required to do so by the seventh amendment; and where state law provides trial by jury on an issue that in the federal system would normally be decided by the judge. *See* C. WRIGHT, LAW OF FEDERAL COURTS 606-07 (4th ed. 1983). For a more general discussion of the right to jury trial and the Erie Doctrine, see also *id.* at 352-97, 605-18.

The seventh amendment limits the exercise of power in federal courts only and has no relation to enforcement of rights in other forums. *See, e.g.*, Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 220 (1916); Fontenot v. Marquette Casualty Co., 161 So. 2d 467, 470 (La. Ct. App. 1963).

144. 647 F. Supp. 781 (W.D. Va. 1986).

145. *See* Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S.E. 141 (1920); Pillow v. Southwest Va. Improvement Co., 92 Va. 144, 23 S.E. 32 (1895). The actual wording of the Virginia Constitution suggests a right that is not absolute: "That in controversies respecting property, and in suits between man and man, trial by jury is *preferable* to any other, and ought to be held sacred." VA. CONST. art. I, § 11 (emphasis added). For a general discussion of the history of the right to a jury trial in civil cases in Virginia, see HOWARD, *supra* note 133, at 244-48.

146. *Bowman*, 128 Va. at 372, 105 S.E. at 148.

147. *Boyd*, 647 F. Supp. at 788 n.5 (citing Stetler, *The History of Reported Medical Professional Liability Cases*, 3 MED. PROF. LIABILITY CASES 366 (1957)).

148. The attempt represented concern over potential elimination of juries accompanying

proposed amendment died in conference committee,[149] but that same year, section 11 of the constitution was revised, eliminating the distinction between cases tried before a justice of the peace and other cases.[150]

Even though a criminal defendant has a right to a jury trial under the Virginia Constitution, the presence of a jury is not mandated.[151] If the *presence* of a jury is not mandated in a criminal trial, it follows that the *presence* of a jury is not mandated in a civil trial. Indeed, this is so because the privilege is so easily waived.[152]

A more accurate description, then, of the constitutionally guaranteed right to jury trial, is the *opportunity* to have a jury determine the facts in a civil trial:

> The section does not require that a jury must pass on disputed issues of fact. Consequently, the Legislature can pass and has passed legislation providing that the failure of the parties to demand a trial by jury constitutes a waiver of that right. Such statutes are not interpreted as an abrogation of the right.[153]

If a jury determination of damages is an absolute and unqualified constitutional right, any attempt to interfere with the fact-finder's conclusion is unconstitutional. The Virginia Supreme Court has upheld various procedures, such as demurrers, against attacks alleging they violate the right to a jury trial.[154] The right is not jurisdictional—it can be waived. Moreover,

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the adoption of no-fault automobile insurance plans. *See* HOWARD, *supra* note 133, at 245.

149. For a summary of the amendment's brief legislative history, see *id.* at 245-46.

150. The revision also permits the General Assembly to reduce the number of jurors to five in all civil suits. *See id.* at 245.

151. The presence of a jury is not a jurisdictional requirement. *See* Brown v. Epps, 91 Va. 726, 736, 21 S.E. 119, 122 (1895) (right to jury trial can be waived); *cf.* McKinsey v. Squires, 32 W. Va. 41, ___, 9 S.E. 55, 56 (1889) (statute provided for trial by jury in chancery cases, but both parties failed to request jury; therefore statute held not to deprive right to jury trial).

152. *See* VA. CODE ANN. § 8.01-336 (Repl. Vol. 1984) (civil) and § 19.2-262 (Repl. Vol. 1983) (criminal). "A statute providing that certain issues 'shall' be tried by a jury has been found not to eliminate the possibility of waiver of that right, the word 'shall' being interpreted as 'may' for this purpose." HOWARD, *supra* note 133, at 247 (citing Meade v. Meade, 111 Va. 451, 69 S.E. 330 (1910)).

153. HOWARD, *supra* note 133, at 247 (citing Jayne v. Kane, 140 Va. 27, 124 S.E. 247 (1924)).

154. *See, e.g.*, W.S. Forbes & Co. v. Southern Cotton Oil Co., 130 Va. 245, 108 S.E. 15 (1921). Applied consistently, the holding in *Boyd* would affect other areas where the General Assembly has limited recoveries, such as wrongful death, workmen's compensation, no-fault systems, and actions against the government. It would also be difficult to reconcile the strict right to jury trial with the complex litigation exception. Because the right the jury trial attaches only to common law actions as they existed when the state constitution was passed, statutes creating a new cause of action, such as workmen's compensation, need not provide for trial by jury. These are usually regarded as exclusive remedies which eliminate common law actions. *See* HOWARD, *supra* note 132, at 247-48.

a simple failure to timely request it can extinguish it forever.[155] The constitutionality of the statute providing for the expiration of the right to jury trial must also be questioned if *Boyd* is followed.

Long ago the principle was accepted that the legislatures have the power to amend or even abolish a common law cause of action "to attain a permissible legislative object."[156] Moreover, no person has a property, or a "vested interest, in any rule of the common law."[157] Since medical malpractice actions are common law actions, and since the state legislature has the power to amend or abolish the common law which is not constitutionally protected, the General Assembly has the power to amend the common law right to limit or even abolish recovery for malpractice injuries.

As pointed out by the Commonwealth of Virginia in its brief in the *Boyd* case, "[t]he right to trial by jury does not exist in a vacuum: it accrues to an individual only when a cause of action accrues as to which the right is protected."[158] If the cause of action never arises, as where there is no legal remedy, there is no right to jury trial. In *Hammond v. United States*,[159] the Court of Appeals for the First Circuit noted, "[i]f the United States can abolish the right to a cause of action altogether it can also abolish the right to a jury trial that is part of it."[160] Therefore, the General Assembly's power to modify the substantive law of the state supercedes the procedural right to trial by jury, and the legislature's exercise of that power does not abridge the right to jury trial under the Virginia Constitution.

IV. CONCLUSION

While it is true that Virginia's medical malpractice statute benefits those who insure medical malpractice tortfeasors, and presumably benefits the wrongdoers through lower insurance premiums, to the detriment of the most severely injured victims and perhaps ultimately to the detriment of the state, the statute should withstand constitutional scrutiny. In Virginia, the courts accord the legislature great deference in equal protection cases. The right to trial by jury does not preempt the power of the General Assembly to modify the common law. Any change in the medical malpractice statute should come from that body:

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155. *See* VA. CODE ANN. § 8.01-336 (Repl. Vol. 1984) and § 19.2-262 (Repl. Vol. 1983); *see also* Standardsville Volunteer Fire Co. v. Berry, 229 Va. 578, 331 S.E.2d 466 (1985) (jury trial as a matter of right on the motion of either party).

156. *See, e.g.*, Silver v. Silver, 280 U.S. 117, 122 (1929).

157. Munn v. Illinois, 94 U.S. 113, 134 (1876).

158. Brief of the Commonwealth of Virginia at 10, Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986) (No. 83-0557-A-C).

159. 786 F.2d 8 (1st Cir. 1986).

160. *Id.* at 15.

> Whether these measures are advisable as a policy matter is not the issue properly before the courts, for in a democracy it is vitally important that the judiciary separate questions of social wisdom from questions about constitutionality. Questions of wisdom are more appropriately retained for decision by the more representative legislative organs of government.[161]

Perhaps the General Assembly will consider joining the majority of jurisdictions which have adopted limitations on recoveries in medical malpractice actions and restrict the cap to noneconomic losses. This compromise would be consistent with the traditional goal of tort law, compensation of the victim, while attempting to alleviate the burden of high liability insurance premiums. Recently enacted reporting requirements[162] may prevent insurance companies from reaping a windfall from tort reform.

V. ADDENDUM

Nearly one year after this case was decided, Judge Michael issued an order denying the Commonwealth of Virginia's motion to reconsider and defendant's post-judgment motions.[163] The motion to reconsider was limited to the question of whether the statute's limitation on damages violated the right to trial by jury guaranteed by the seventh amendment of the United States Constitution and article I, section 11 of the Virginia Constitution.[164] Judge Michael found that the seventh amendment was determinative of the case and declined to certify the case to the Virginia Supreme Court pursuant to Rule 5:42 to consider the Virginia constitutional provision.[165]

After submitting an expanded version of the facts of the case,[166] the

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161. Redish, *supra* note 4, at 763. In upholding the statutory limit in Clark v. Lewis, No. 85-0156-R, slip op. (E.D. Va. 1986), the late Judge D. Dortch Warriner said,

> [C]ourts are for trying cases. Legislatures are for setting policy. I would be appalled to learn that the plaintiffs' bar had not lobbied the General Assembly for all it was worth when the medical malpractice bill was up for consideration—and ever since then. The insurance and medical services lobby prevailed. Now counsel wants to have me veto the legislation. Were I governor I might have done so but I am a mere judge and as such have no legislative or executive responsibilities.

Id., slip op. at 5.

162. The new law empowers the State Corporation Commission to ensure that liability rates reasonably reflect expense and loss experience in Virginia. *See* H.B. 1235, Va. Gen. Assembly, 1987 Sess., 1987 Va. Acts 1225. Its effectiveness in controlling liability premiums will not be evident in the near future.

163. *Boyd v. Bulala*, No. 83-0557-A-C, slip op. at 5-6 (W.D. Va. Nov. 12, 1987).

164. *Id.* at 6.

165. *Id.* at 7 n.1.

166. *Id.* at 1-6. The sad circumstances surrounding the birth of Veronica Lynn Boyd are thoroughly detailed in this section. Because of Dr. Bulala's standing order that the delivery room nurses wait until the baby had crowned before they called him, he was absent from

court maintained its earlier position that the statute was an unconstitutional violation of the seventh amendment right to jury trial.[167] The court said that the statute "substantially diminishes the role of the jury in determining damages, at least in cases such as this, where the proven damages far exceed the amount of the cap."[168] The court then focused on the central issue: whether the seventh amendment guarantees a jury determination of damages.[169]

The court cited *Tull v. United States*[170] as providing some guidance in its decision to declare the malpractice cap unconstitutional.[171] While the United States Supreme Court stated that the seventh amendment protects the most fundamental elements of a jury trial,[172] the holding of the case does not support Judge Michael's conclusion.

In *Tull*, the government sued a developer under the Clean Water Act[173] for dumping fill on wetlands on the island of Chincoteague, Virginia. The government sought the maximum penalty, a total of $22,890,000, along with injunctive relief.[174] The district court denied petitioner's timely demand for a jury trial, then imposed civil penalties and granted injunctive relief.[175]

The court noted the well-established rule that the constitution protects the right to jury trial to determine liability on the legal claims which were

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the hospital when the child suffered acute distress. The infant's fetal heart rate had dropped from the normal range of 120-140 beats per minute down to 84. The nurses on duty were not trained to handle such an emergency, and they immediately notified Dr. Bulala. The baby was born, blue and limp, before the doctor arrived. When he finally entered the room, he callously demanded of the mother, "Couldn't you wait?" According to the record, this remark caused the mother a great deal of pain not only at that time, but also as the extent of the child's injuries became apparent. *Id.* at 3. When asked why he did not come to the hospital in a timely fashion, he replied that doctors also need their sleep. *Id.* at 4. Expert testimony clearly established that Dr. Bulala's conduct fell below the standard of care in Virginia, that his standing order was an egregious practice, and that had he been present, he probably could have prevented the child's injuries. *Id.* Because of deprivation of oxygen before birth, the baby suffered severe brain injury resulting in cerebral palsy, profound mental retardation, and a seizure disorder. These conditions led to feeding difficulties, recurrent pneumonia, and a danger of bone deformation. Had Veronica lived, she might have developed mentally to the level of a one-year-old child, and she would have required institutional care for the rest of her life. *Id.* at 5.

167. *Id.* at 17.

168. *Id.* at 10.

169. *Id.*

170. 55 U.S.L.W. 4571 (U.S. April 28, 1987).

171. *Boyd*, slip. op. at 11.

172. *Tull*, 55 U.S.L.W. at 4575.

173. 33 U.S.C. § 1319(b). This section authorizes injunctive relief and subjects an offender to a civil penalty not to exceed $10,000 per day.

174. *Tull*, 55 U.S.L.W. at 4572.

175. *Id.* at 4571.

joined with the equitable claim.[176] But this constitutional right did not conflict with the Court's holding that the assessment of the civil penalty is not a fundamental element of that right:

> The Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability. The answer must depend on whether the jury must shoulder this responsibility as necessary to preserve the "substance of the common-law right of trial by jury." Is a jury role necessary for that purpose? We do not think so. Only those incidents which are regarded as fundamental, as inherent in and of the essence of *the system* of trial by jury, are placed beyond the reach of the legislature. . . . [T]he assessment of a civil penalty is not one of the "most fundamental elements."[177]

The Court reasoned that since the assessment of civil penalties usually seeks the amount fixed by Congress, "[t]he assessment of civil penalties thus cannot be said to involve the 'substance of a common-law right to a trial by jury,' nor a 'fundamental element of a jury trial.' "[178]

Justice Scalia disagreed with the majority's holding because "the right to trial by jury on whether a civil penalty of unspecified amount is assessable also involves a right to trial by jury on what the amount should be."[179] However, he went on to state, "The fact that *the legislature could elect to fix the amount of penalty* has nothing to do with whether, if it chooses not to do so, that element comes within the jury trial guarantee."[180]

While a statutory civil penalty determined by a judge is not the same as a determination of damages by a jury, at least in this context a judicial determination of penalties following a jury determination of liability does not conflict with the seventh amendment right to jury trial. Justice Scalia did not question the authority of Congress to fix the amount of penalty but was concerned with the status of the element had Congress not done so.[181] Based upon *Tull*, the Court would probably hold that just as an assessment of a penalty by a judge based on a congressional mandate does not conflict with the right to jury trial, so an assessment of a remedy based on a state legislative mandate does not conflict with the right to jury trial.

M. Margaret Branham Kimmel

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176. *Id.* at 4575 (quoting Curtis v. Loether, 415 U.S. 189, 196 n.11 (1974)).
177. *Id.* (citations omitted)(emphasis added).
178. *Id.*
179. *Id.* at 4576.
180. *Id.* (emphasis added).
181. *Id.*