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Constitutional Challenges to Washington's Limit on Noneconomic Damages in Cases of Personal Injury and Death

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

In 1986 the Washington legislature passed a tort reform act[1] to ameliorate a perceived crisis in the availability and cost of liability insurance.[2] One of the act's provisions limits the amount of noneconomic damages recoverable in personal injury and wrongful death actions.[3] Cases to which this damages limit applies began coming to trial only in the past few months. In October 1987, one judge applied the limit to reduce a jury verdict by over one million dollars.[4]

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

2. *Id.* § 100.

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

> [(1)] (b) "Noneconomic damages" means subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship.
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> . . . .
>
> (2) In no action seeking damages for personal injury or death may a claimant recover a judgment for noneconomic damages exceeding an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages, as the life expectancy is determined by the life expectancy tables adopted by the insurance commissioner. For purposes of determining the maximum amount allowable for noneconomic damages, a claimant's life expectancy shall not be less than fifteen years. The limitation contained in this subsection applies to all claims for noneconomic damages made by a claimant who incurred bodily injury. Claims for loss of consortium, loss of society and companionship, destruction of the parent-child relationship, and all other derivative claims asserted by persons who did not sustain bodily injury are to be included within the limitation on claims for noneconomic damages arising from the same bodily injury.
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> (3) If a case is tried to a jury, the jury shall not be informed of the limitation contained in subsection (2) of this section.

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

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

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

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

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

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

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

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

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

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

11. *See infra* Table p. 675.

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

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

I. BACKGROUND

A. Insurance Crises and Damages Limits

Many damages limits now in effect are part of state medical malpractice legislation of the mid-1970's.[14] During that period, state legislatures perceived that medical malpractice insurance had become widely unavailable and increasingly expensive.[15] Virtually all legislatures responded to this insurance crisis by enacting laws to control medical malpractice litigation.[16] In at least one-fifth of the states, these laws included provisions to limit recoverable damages.[17] The provisions limit either the liability of each defendant,[18] the recovery of each plaintiff,[19] or both.[20] Nearly all the limits are flat figures[21] that apply either to noneconomic damages only,[22] nonmedical damages only,[23] or all damages.[24]

A different insurance crisis arose in the mid-1980's. During that period, the cost of liability insurance increased not only for health care providers[25] but also for day care centers, architects, commercial fishermen, and other businesses and professions.[26] Many businesses and local governments found liability insurance difficult to obtain.[27] In

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Washington was one of a number of states to respond to the crisis by enacting tort reform legislation[29] that included a limit on the recovery of noneconomic damages.[30] Under the Washington statute, the limit varies with the plaintiff's life expectancy and the average annual state wage.[31] The limit at present ranges from $125,136 for a male aged sixty-four or older to $632,606 for a newborn female.[32]

Washington imposes no other statutory ceiling on damages recoverable in personal injury and wrongful death actions. Other states have limited recovery of damages in common-law causes of action by such legislation as automobile accident victim compensation acts[33] and in statutory causes of action by such legislation as dram-shop acts,[34] governmental tort claims acts,[35] and wrongful death

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

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

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

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

32. *See id.;* 6 WASH. SUP. CT. COMM'N ON JURY INSTRUCTIONS, WASH. PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS, App. B ("Life Expectancy Table [Revised]") (2d ed. Supp. 1984) (based on WASH. STATE INS. COMM'R, COMMISSIONERS STANDARD ORDINARY TABLE OF MORTALITY (1980)); WASH. STATE EMPLOYMENT SEC. DEP'T LABOR MKT. & ECON. ANALYSIS BRANCH, AVERAGE ANNUAL STATE WAGE (1986). The limit for a 64-year-old or older male is calculated by multiplying 0.43 (the statutory factor) by a life expectancy of 15 years (the statutory minimum life expectancy) by $19,401 (the average annual state wage).

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

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

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

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

B. Judicial Response to Damages Limits

Several reported decisions address the constitutionality of medical malpractice and tort reform damages limits. The medical malpractice limits of California,[38] Indiana,[39] and Nebraska[40] have been upheld. The tort reform limit of Florida[41] and the medical malpractice limits of Illinois,[42] New Hampshire,[43] North Dakota,[44] Ohio,[45] and Virginia[46] have been invalidated. Courts had split as to the constitutionality of the Texas medical malpractice damages cap, but the Texas Supreme Court recently held the limit invalid.[47] The constitutionality of the medical malpractice limits of Idaho[48] and Louisiana[49] have been considered but not fully decided in reported decisions; those courts remanded the issue to the trial level. Damages limits in state automo-

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

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

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

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

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

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

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

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

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

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

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

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

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

48. Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied,* 431 U.S. 914 (1977). On remand, the limit was held unconstitutional. Boyd v. Bulala, 647 F. Supp. 781, 785 n.2 (W.D. Va. 1986) (citing Jones v. State Bd. of Medicine, Nos. 55527, 55586 (4th Dist. Idaho Nov. 3, 1980)).

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

bile accident victim compensation acts,[50] dramshop acts,[51] governmental tort claims acts,[52] and wrongful death acts[53] also have been challenged on constitutional grounds.

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

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

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

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

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

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

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

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

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

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

II. CONSTITUTIONALITY OF THE WASHINGTON LIMIT

A. United States Constitution: Due Process and Equal Protection

The fourteenth amendment to the United States Constitution provides in part that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[58] Under these clauses, Washington's damages cap is subject to attack on the grounds that it denies substantive due process by depriving personal injury plaintiffs of property without providing an adequate benefit in return[59] and denies the equal protection of the laws by discriminating against or among injured plaintiffs. These challenges are considered, first, by determining the appropriate standard of review, and second, by applying the appropriate standard to the statute. Because the federal constitution requires only minimal scrutiny of the statute, the statute probably does not offend either due process or equal protection.

1. Standard of Review

The United States Supreme Court currently subjects legislation challenged on substantive due process and equal protection grounds to three standards of review.[60] The Court applies the same standard whether the legislation is challenged on substantive due process or equal protection grounds.[61] Strict scrutiny is applied where the effect of legislation is either to create a suspect classification[62] or to infringe

58. U.S. CONST. amend. XIV, § 1.

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

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

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

61. *Id.* at 323.

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

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

The federal constitution requires only minimal scrutiny of the Washington damages ceiling. Strict scrutiny is inappropriate because the ceiling neither creates suspect classifications nor affects fundamental rights. The limit creates only economic[68] and age[69] classifications. The Court has not held such classifications suspect.[70] Further, the right to compensation for personal injuries is not fundamental under

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

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

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

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

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

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

69. Washington's limit classifies according to age by permitting plaintiffs with shorter life expectancies less recovery than plaintiffs with longer life expectancies. For example, Plaintiff *A*, a newborn male, has a life expectancy of 70.83 years. WASH. SUP. CT. COMM'N ON JURY INSTRUCTIONS, *supra* note 32. Plaintiff *B*, a 63-year-old male, has a life expectancy of 15.38 years. *Id.* The average annual state wage is $19,401. WASH. STATE EMPLOYMENT SEC. DEP'T LABOR MKT. & ECON. ANALYSIS BRANCH, *supra* note 32. The statute limits Plaintiff *B*'s noneconomic damages to $128,307. However, Plaintiff *A*'s limit is $590,894.

70. *See* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 83 (1978) (economic classification not suspect); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (age classification not suspect); 2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON

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

Intermediate scrutiny also is inappropriate under the federal constitution. The United States Supreme Court has applied the intermediate standard only to classifications based on gender,[74] alienage,[75] and legitimacy.[76] The Court recently gave minimal rather than intermediate scrutiny to classifications based on age[77] and on the type and degree of personal injury where the affected right was the right to collect full damages.[78] The statute's age-based classification does incidentally create a gender-based classification, because women generally have longer life expectancies than men.[79] The gender-based classification, however, is only incidental to the age-based classification and does not reflect invidious gender-based discrimination. It therefore should not trigger intermediate scrutiny.[80] The apparent purpose of the age-based classification is to increase the potential recovery as the potential life span increases.[81] It is consistent with this purpose that if women live longer, they suffer greater noneconomic loss and should be allowed greater recovery.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. *Application of Review*

Under a rational basis standard of review, Washington's noneconomic damages limit probably does not violate the federal constitutional guarantee of substantive due process. The test is whether the challenged law is rationally related[86] to a valid state objective.[87] This suggests two inquiries: First, whether there is a valid state objective, and second, whether the statute has a rational relation to that objective.

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

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

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

84. *Id.* at 84.

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

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

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

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

Moreover, the damages limit appears rationally related to the legislature's purpose. The limit is arbitrary to the extent that it relies on the product of an individual's age, the average annual state wage, and the figure 0.43.[89] However, the Court in *Duke Power Co.* did not find this kind of arbitrariness fatal to the constitutionality of the statute.[90] Limiting recoverable noneconomic damages could rationally be related to a reduction in insurer uncertainties and liabilities. This reduction could rationally be related to an increase in insurance availability and a reduction in insurance rates. Because there appears to be a rational relation between the damages limit and a valid state objective, the limit probably is not unconstitional on federal substantive due process grounds.

Under rational basis review, Washington's limit similarly does not appear to violate the federal equal protection guarantee.[91] The proper test is whether the challenged classification is rationally related to a conceivable legitimate governmental purpose.[92] This test is virtually identical to the substantive due process test and is equally deferential to the legislature. The legislature's desire to make liability insurance available and affordable to governmental, professional, and other entities is a legitimate governmental purpose.[93] The economic[94] and age[95] classifications created by the damages cap seem rationally related to that purpose, because it is rational to believe that these classifications

88. 1986 Wash. Laws ch. 305, § 100.

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

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

91. *Contra* Foster v. Fibreboard Corp., No. 87-2-05629-5, slip op. at 9 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987) (Washington's noneconomic damages cap denies equal protection under rational basis test).

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

93. *See supra* text accompanying note 88.

94. *See supra* note 68.

95. *See supra* note 69.

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

B. Washington Constitution: Due Process and Equal Protection

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

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

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

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

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

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

100. WASH. CONST. art. I, § 3.

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

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

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

tially identical despite their differing language,[104] Washington courts also consistently have held that the Washington equal protection provision may be interpreted to provide greater individual rights than the federal guarantee.[105]

1. Standard of Review

Washington courts reviewing legislation under the state constitution use the same three standards of review currently applied by the United States Supreme Court under the federal constitution.[106] However, Washington courts do not apply these standards in the same manner as the United States Supreme Court. Instead, Washington courts sometimes subject challenged legislation to higher standards of review than are applicable under the federal constitution.

For example, in *State v. Wood*[107] the Washington Supreme Court noted that the United States Supreme Court had not yet found gender-based classifications suspect and thus subject to strict scrutiny.[108] The Washington court held, however, that under the Washington equal protection guarantee gender was a suspect classification "requiring strict scrutiny to determine whether the State has demonstrated a compelling state interest to uphold such classification."[109] Again, in *Darrin v. Gould*[110] the Washington Supreme Court acknowledged that the United States Supreme Court had found neither that gender-based classifications were suspect, nor that education was a fundamental right.[111] Nevertheless, the Washington court held that an education free from sexual discrimination was a fundamental right under the Washington Constitution.[112] *Wood, Darrin,* and other Washington

104. State v. Perrigoue, 81 Wash. 2d 640, 503 P.2d 1063 (1972). The federal provision requires that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1, cl. 4.

105. *See, e.g.,* Darrin v. Gould, 85 Wash. 2d 859, 868, 540 P.2d 882, 888 (1975); State v. Alfonso, 41 Wash. App. 121, 126, 702 P.2d 1218, 1221 (1985).

106. *See, e.g.,* State v. Rice, 98 Wash. 2d 384, 655 P.2d 1145 (1982) (strict scrutiny); Griffin v. Department of Social & Health Servs., 91 Wash. 2d 616, 590 P.2d 816 (1979) (minimal scrutiny); State v. Wood, 89 Wash. 2d 97, 569 P.2d 1148 (1977) (strict scrutiny); Hunter v. North Mason School Dist., 85 Wash. 2d 810, 539 P.2d 845 (1975) (intermediate scrutiny); Washington Ass'n of Child Care Agencies v. Thompson, 34 Wash. App. 225, 660 P.2d 1124 (1983) (minimal scrutiny).

107. 89 Wash. 2d 97, 569 P.2d 1148 (1977).

108. *Id.* at 100, 569 P.2d at 1150.

109. *Id.* The United States Supreme Court has held that gender-based classifications deserve intermediate, but not strict, scrutiny. *E.g.,* Craig v. Boren, 429 U.S. 190, 197 (1976).

110. 85 Wash. 2d 859, 540 P.2d 882 (1975).

111. *Id.* at 865–66, 540 P.2d at 886–87.

112. *Id.* at 870, 540 P.2d at 888. The right to an education free from sexual discrimination is provided by the Washington Constitution. WASH. CONST. art. IX, § 1.

decisions, as well as case law in other states and considerations of public policy, strongly suggest that Washington courts should apply a higher standard of review to Washington's noneconomic damages cap.

a. Washington Case Law

Under Washington case law the right to be compensated for personal injuries is important enough that statutes burdening the right trigger intermediate scrutiny.[113] In 1975 the Washington Supreme Court held in *Hunter v. North Mason School District*[114] that

> [t]he right to be indemnified[115] for personal injuries is a substantial property right . . . . Statutory classifications which substantially burden such rights as to some individuals but not others are permissible under the equal protection clause of the Fourteenth Amendment only if they are "reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[116]

Application of this intermediate standard should be extended to the right to the full recovery of noneconomic damages. A damages cap significantly affects the right to be indemnified. Indemnification is the restoration of the victim of a loss,[117] and in Washington such restoration includes compensation for noneconomic loss.[118] Washington's

113. *See* Carter v. Fibreboard Corp., No. 87-2-03555-7, slip op. at 20 (Wash. Super. Ct. order on pre-trial motion Feb. 19, 1988). No reported Washington decisions have characterized the right to recover in tort as "fundamental" so as to trigger strict scrutiny in substantive due process or equal protection analysis.

114. 85 Wash. 2d 810, 539 P.2d 845 (1975).

115. The *Hunter* court seems to have meant "indemnified" to include the proper elements of negligence damages, which at the time of *Hunter* included noneconomic damages such as pain and suffering.

116. *Hunter,* 85 Wash. 2d at 814, 539 P.2d at 848 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)) (additional citations omitted). The standard applied in *Hunter* is more intense than the rational basis test. *See* Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399, 407 (1976), *cert. denied,* 431 U.S. 914 (1977); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825, 830–31 (1980); Rose v. Doctors Hosp. Facilities, 735 S.W.2d 244, 249 (Tex. Ct. App. 1987). *But see* Johnson v. St. Vincent Hosp., 273 Ind. 374, 404 N.E.2d 585, 600 (1980). The *Johnson* court applied "the fair and substantial relationship test" to Indiana's damages cap in the apparent belief that it was invoking only minimal scrutiny. *See* 404 N.E.2d at 600–01.

The United States Supreme Court's decision in *Duke Power Co. v. Carolina Envtl. Study Group* three years after *Hunter* suggests that the *Hunter* court was incorrect to apply intermediate scrutiny under the federal constitution. *See* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978). The *Hunter* court instead might safely have relied solely on the state equal protection clause. *See* Sibley v. Board of Supervisors, 477 So. 2d 1094, 1104–07 (La. 1985); *Carson,* 424 A.2d at 831.

117. *See* BLACK'S LAW DICTIONARY 692 (5th ed. 1979).

118. *See* Shaw v. United States, 741 F.2d 1202 (9th Cir. 1984). The court in *Shaw* noted that Washington law permitted recovery of damages for pain and suffering and other noneconomic damages, and that under Washington law such damages were compensatory. *Id.* at 1208.

limit in one case reduced the aggregate damages award by eighty-six percent.[119] This is as significant an infringement on the right to indemnification as was the statute challenged in *Hunter,* which statute effectively eliminated the plaintiff's cause of action.[120]

b. Case Law in Other States

In some cases, courts in other states have applied intermediate scrutiny to state due process and equal protection challenges of damages caps. While the rational basis test has been applied more often, the decisions to invoke intermediate scrutiny show greater sensitivity to the discriminatory effect of damages ceilings and the nature of the interests at stake. In one case, a court invoked intermediate scrutiny partly in reliance on the Washington Supreme Court's decision in *Hunter v. North Mason School District.*[121]

In *Carson v. Maurer*[122] the New Hampshire court cited the Washington court's holding in *Hunter* that the right to recover for personal injuries is a substantial property right.[123] The *Carson* court found that characterization compelling, concluding that "the rights involved herein are sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test."[124] The court acknowledged that the United States Supreme Court had restricted application of intermediate scrutiny to cases involving classifications based on gender and illegitimacy, but announced that it was free to grant individuals greater protections under the state constitution.[125]

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119. *See* Sofie v. Fibreboard Corp., No. 87-2-00407-6, slip op. at 2 (Wash. Super. Ct. Oct. 30, 1987).

120. The *Hunter* court invalidated a Washington statute that required persons with claims against certain governmental bodies to either file their claims with those bodies within 120 days of the date the claim arose or forfeit those claims. 85 Wash. 2d at 811 n.1, 539 P.2d at 846 n.1.

121. Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) (citing Hunter v. North Mason School Dist., 85 Wash. 2d 810, 539 P.2d 845 (1975)).

122. 120 N.H. 925, 424 A.2d 825 (1980).

123. 424 A.2d at 830.

124. *Id.* Some courts have relied on other grounds to review medical malpractice damages ceilings under intermediate scrutiny. In Arneson v. Olson, 270 N.W.2d 125, 133 (N.D. 1978), the North Dakota court relied on its earlier use of intermediate scrutiny of a statute that limited tort recoveries in Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974). The *Hassett* court had found that the United States Supreme Court's then-recent introduction of a new intermediate analysis closely approximated the test historically used by the North Dakota court. 217 N.W.2d at 775. In Sibley v. Board of Supervisors, 477 So. 2d 1094, 1107–08 (La. 1985), the Louisiana court found that a damages limit classified people based on their physical condition, a classification prohibited under the Louisiana Constitution.

125. 424 A.2d at 831.

In *Jones v. State Board of Medicine*[126] the Idaho Supreme Court held that intermediate scrutiny was applicable where "the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute."[127] The discriminatory character of the Washington limit is apparent on its face. The limit facially discriminates against aged and noneconomically injured plaintiffs. While there may be a rational relationship between the classification and the declared purpose of the statute, the lack of a substantial relationship is indicated by the fact that a reduction in awards of noneconomic damages cannot force insurers to offer coverage at reasonable rates.

c. Public Policy Considerations

Public policy considerations also compel the use of an intermediate standard of review. First, courts should carefully scrutinize legislation that supports a special interest at the expense of a disadvantaged class. Second, severely injured victims whose noneconomic damages are limited might as a result receive less than full compensation even for their economic damages. Noneconomic damages often are that part of the plaintiff's award that pays the attorney's fee. A reduction in noneconomic damages may mean that the attorney's share of the total judgment must be paid from monies that were allocated by the court to economic damages, such as past and future medical expenses.

2. Application of Review

The discriminatory classifications that Washington's damages limit creates, rather than the statute's aggregate effect on those it regulates, render the statute unconstitutional under intermediate scrutiny. In other words, a court should hold that the statute violates the Washington Constitution's equal protection guarantee but not the substantive due process guarantee.

A statute satisfies the substantive due process requirement when it is substantially related[128] to the promotion of a legitimate governmental

126. 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied,* 431 U.S. 914 (1977).

127. 555 P.2d at 411. The court invoked an intermediate standard of review in weighing an equal protection challenge to Idaho's damages limit, but seemed to invoke only a rational basis standard to consider a substantive due process challenge to the limit. *See id.* at 409–10. This comports with the United States Supreme Court's omission to apply intermediate scrutiny in the context of substantive due process.

128. "Substantially" means materially, importantly, or essentially. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1981).

interest.[129] The stated object of the Tort Reform Act was to create a more equitable tort compensation system and increase the availability and affordability of liability insurance.[130] This appears to be a legitimate governmental interest.[131]

The statute probably is not substantially related to that interest. Although there is evidence that damages ceilings reduce damages awards,[132] and while it may be rational to believe that a reduction in damages will lead to an eventual reduction in rates,[133] there is no apparent substantial relationship between a reduction in damages judgments and an increase in insurance availability and affordability. The mid-1980's insurance crisis was caused in part by bad insurance company management practices.[134] Further, insurance companies are not obliged to increase availability and decrease rates as their uncertainties and liabilities decrease. In view of these other influences on insurance availability and rates, the relationship between the statute's means and end seems rational but not substantial.

Yet even if there is not a substantial relationship between the statute and the legislature's purpose, courts are likely to discredit a substantive due process challenge for three reasons. First, courts may refuse to apply intermediate scrutiny to the challenge, even while applying such scrutiny to an equal protection challenge.[135] Second, courts may avoid substantive due process challenges if they can dispose of a case on equal protection grounds. Washington courts rarely in recent years have invalidated legislation on substantive due process grounds.[136] Third, Washington courts may defer to the decisions of courts in other

129. Recent Washington decisions appear not to have applied the substantial relationship test to a substantive due process challenge. The stated test is based on the test applied in Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

130. 1986 Wash. Laws ch. 305, § 100.

131. *See supra* text accompanying note 88.

132. Danzon, *The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims*, 48 OHIO ST. L.J. 413, 416 (1987). Professor Danzon found that "[t]he average impact of statutes to limit all or part of the plaintiff's recovery has been to reduce average severity by twenty-three percent." *Id.*

133. *See supra* text accompanying notes 89–90.

134. *See supra* note 28 and accompanying text.

135. *E.g.*, Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977). *But see supra* notes 60–61 and accompanying text. There appear to be no recent Washington decisions in which a court applied intermediate scrutiny to a statute challenged on substantive due process grounds.

136. *See* Aetna Life Ins. v. Washington Life & Disability Guar., 83 Wash. 2d 523, 533–34, 520 P.2d 162, 169 (1974); Seattle Times v. Tielsch, 80 Wash. 2d 502, 512, 495 P.2d 1366, 1371 (1972) (Finley, J., dissenting).

states, which courts have consistently rejected substantive due process challenges to medical malpractice damages limits.[137]

These considerations probably will influence a court not to find a substantive due process violation but will not interfere with the determination of the equal protection challenge. Under the equal protection guarantee of the state constitution, the statute should be stricken. The state equal protection test is whether the statute's classifications have a fair and substantial relation to the object of the legislation.[138] This test differs slightly from due process intermediate scrutiny. It examines whether the statute's discriminatory effect, rather than the statute's aggregate effect, bears a substantial relationship to the statute's purpose.

Courts that have used intermediate scrutiny to review medical malpractice damages limits either have found that the limits failed the substantial relationship test[139] or have remanded the cases to the trial courts for further factual determinations.[140] The North Dakota court in *Arneson v. Olson*[141] applied intermediate scrutiny to that state's medical malpractice damages ceiling and found the ceiling violative of the state equal protection guarantee. The court found that the limit benefited physicians but denied adequate compensation to plaintiffs with proven meritorious claims and did nothing toward the elimination of nonmeritorious claims.[142]

The New Hampshire Supreme Court in *Carson v. Maurer,*[143] in applying intermediate scrutiny to a medical malpractice damages cap challenged under the New Hampshire equal protection guarantee, also found no substantial relationship between the cap and the legislative purpose. The court rather found that "[i]t is simply unfair and unrea-

137. *See, e.g.,* Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal dismissed,* 474 U.S. 892 (1985); Rose v. Doctors Hosp. Facilities, 735 S.W.2d 244 (Tex. Ct. App. 1987). The courts in *Fein* and *Rose* applied minimal, rather than intermediate, scrutiny.

138. *See* Hunter v. North Mason School Dist., 85 Wash. 2d 810, 814, 539 P.2d 845, 848 (1975).

139. *See* Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980). *Contra* Johnson v. St. Vincent Hosp., 273 Ind. 374, 404 N.E.2d 585 (1980) (purported to invoke substantial relationship test but in fact decided equal protection challenge under rational basis test).

140. Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied,* 431 U.S. 914 (1977); Sibley v. Board of Supervisors, 477 So. 2d 1094 (La. 1985). On at least one of these remands, the limit was held unconstitutional. Boyd v. Bulala, 647 F. Supp. 781, 785 n.2 (W.D. Va. 1986) (citing Jones v. State Bd. of Medicine, Nos. 55527, 55586 (4th Dist. Idaho Nov. 3, 1980)).

141. 270 N.W.2d 125, 135 (N.D. 1978).

142. *Id.* at 135–36.

143. 120 N.H. 925, 424 A.2d 825, 837 (1980).

sonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation."[144]

Washington's cap denies equal protection for similar reasons. The cap denies adequate compensation to the most seriously injured plaintiffs, plaintiffs with proven meritorious claims, and imposes on them the burden of supporting the insurance industry. The legislative object of preserving insurance availability and affordability is not substantially related to the classifications of plaintiffs according to whether their damages are economic or noneconomic, whether their noneconomic damages are above or below an arbitrary limit, or whether they are young or old.[145] The difference between economic loss and noneconomic loss is that economic loss is quantified by doctors, hospitals, and employers, who establish the monetary value of past and future medical care and lost wages, whereas noneconomic loss is quantified by laypersons who sit on juries. There is no substantial relationship between the distinction and the legislative purpose. The distinction merely enforces a suspicion of claims for noneconomic loss.

The statute's classifications may not even have a substantial relationship to a reduction in insurer uncertainty and liability. Although the statute forbids the instruction of juries as to the existence of a limit, it seems likely that citizens eventually will learn that the limit exists.[146] Such knowledge might encourage juries that wish to avoid the statute to categorize their awards as economic damages, which are unlimited under the statute.

Additionally, the legislature cannot guarantee that a reduction in insurer uncertainty and liability will be passed along to the entities

144. 424 A.2d at 837. There are many analogies between automobile guest statutes—and the reasons for abolishing such statutes—and contemporary tort reform legislation. Consider the discussion of guest statutes in W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 215–17 (5th ed. 1984). Washington repealed its guest statute in 1974. *Id.* at 216 n.84.

145. A 55-year-old male who has suffered severe and permanent injuries is limited to $177,610 in noneconomic damages, whereas a 25-year-old male who has suffered severe injuries from which he will completely recover within a year can recover as much as $399,102 in noneconomic damages. *See* WASH. REV. CODE § 4.56.250 (1987); WASH. SUP. CT. COMM'N ON JURY INSTRUCTIONS, *supra* note 32; WASH. STATE EMPLOYMENT SEC. DEP'T LABOR MKT. & ECON. ANALYSIS BRANCH, *supra* note 32. "There is no substantial relationship or rational basis asserted which the court could accept for that difference in classification." Foster v. Fibreboard Corp., No. 87-2-05629-5, slip op. at 9 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987).

146. For example, a front-page newspaper story in the Seattle Times recently announced that a trial court judge had ruled the Washington limit unconstitutional. *Judge Rules Lid on Injury Awards Unconstitutional,* Seattle Times, Feb. 20, 1988, at 1, col. 4.

that must buy liability insurance. Aggregate awards may have dropped after medical malpractice damages caps were imposed in the mid-1970's, but there might be no relationship between the drop in awards and the promise of available and affordable liability insurance.

The classifications are not substantially related to the legislative end. While a rational relationship might exist between the classifications and the end, this relationship does not rise to the level of substantiality. The damages limit therefore denies the equal protection of the laws guaranteed by the Washington Constitution.[147]

C. *Washington Constitution: Right of Trial by Jury*

Washington's limit on damages requires the trial court to reduce the jury's determination of noneconomic damages when the jury's award exceeds the statute's ceiling. This interference with the jury function raises another constitutional challenge. The Washington Constitution provides that "[t]he right of trial by jury shall remain inviolate."[148] The word "inviolate" in the provision means "freedom from substantial impairment" but does not prohibit modification of administrative details that do not affect the enjoyment of the right to a jury trial.[149]

Washington's noneconomic damages limit abridges the jury trial guarantee.[150] The guarantee limits the authority of the legislature to take away the right to a jury trial.[151] The damages limit does more than modify administrative details; it substantially impairs the jury trial right.

More than one court already has invalidated a damages limit on right to jury trial grounds. In *Boyd v. Bulala* [152] a federal district court judge held that both the federal and Virginia constitutional guarantees of the right to a jury trial were violated by Virginia's $750,000 limit on

147. Because Washington's equal protection guarantee does not prohibit the grant of special privileges or immunities to municipal corporations, the damages limit probably is not unconstitutional on state equal protection grounds when applied to a municipality. *See* WASH. CONST. art I, § 12.

148. *Id.* art. I, § 21.

149. State v. Furth, 5 Wash. 2d 1, 18–19, 104 P.2d 925, 933 (1940).

150. Foster v. Fibreboard Corp., No. 87-2-05629-5, slip op. at 12 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987); *accord* Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986) (Virginia damages ceiling violates federal and Virginia guarantees of right to jury trial). *Contra* Johnson v. St. Vincent Hosp., 273 Ind. 374, 404 N.E.2d 585 (1980) (Indiana damages cap does not violate jury trial provision of Indiana constitution).

151. State v. Ellis, 22 Wash. 129, 131, 60 P. 136, 137 (1900), *overruled on other grounds,* State v. Lane, 40 Wash. 2d 734, 246 P.2d 474 (1952).

152. 647 F. Supp. 781 (W.D. Va. 1986).

damages recoverable in medical malpractice actions.[153] The court found that the federal jury trial guarantee provided the right to have the jury determine not only liability but damages.[154] According to the court, the statutory limit, which required "entering a judgment predetermined by the legislature in place of a judgment on a verdict properly reached by a jury," had no permissible basis.[155] At least two Washington trial courts, on pre-trial motions, have rejected the defense of the damages limit partly on right of trial by jury grounds.[156]

The determination of the plaintiff's damages, including noneconomic damages,[157] is a question of fact for the jury.[158] The statutory cap, in effect, permits the legislature to reexamine and modify the findings of the jury. This interference is especially inappropriate in view of the authority of a judge to set aside an excessive verdict and order a new trial, enter judgment notwithstanding the verdict, or order remittitur where the evidence does not support the verdict. This authority is well-established both at common law and in modern court rules.[159] Unlike a statutory damages cap, these judicial interventions are exercised neither arbitrarily nor in disregard of the facts proved at trial.

Washington's damages cap ignores facts proved at trial. It takes into account only the plaintiff's age and the average annual state wage and not the seriousness of either the injury or the loss. The statute

153. *Id.* at 789; *see also* Smith v. Department of Ins., 507 So. 2d 1080, 1088–89 (Fla. 1987) (Florida tort reform damages cap invalidated partly because it denies plaintiff constitutional benefit of jury trial). The *Boyd* court later refused to reconsider its holding. Boyd v. Bulala, 672 F. Supp. 915 (W.D. Va. 1987).

154. 647 F. Supp. at 788 ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." (quoting Dimick v. Schiedt, 293 U.S. 474, 486 (1935))).

155. *Id.* at 789.

156. Foster v. Fibreboard Corp., No. 87-2-05629-5, slip op. at 12 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987); Carter v. Fibreboard Corp., No. 87-2-03555-7, slip op. at 30 (Wash. Super. Ct. order on pre-trial motion Feb. 19, 1988). In *Foster,* King County Superior Court Judge Ellington declared that the limit "renders the right to a jury trial not substantive, not fully extended." Foster v. Fibreboard Corp., No. 87-2-05629-5, slip op. at 12 (Wash. Super. Ct. order on pre-trial motion Sept. 18, 1987).

157. Power v. Union Pac. R.R., 655 F.2d 1380, 1388 (9th Cir. 1981) (under Washington law, amount of damages for loss of companionship is left to trier of fact); Farman v. Farman, 25 Wash. App. 896, 611 P.2d 1314 (1980) (amount of damages for intentional infliction of emotional distress is question for trier of fact).

158. Shea v. City of Spokane, 17 Wash. App. 236, 562 P.2d 264 (1977) (proof of damages is question of fact for jury); Baker v. Prewitt, 3 Wash. Terr. 595, 19 P. 149 (1888) (where amount of damages is not fixed, agreed upon, or liquidated, jury must be called unless waived).

159. Some such common-law rules have become court rules. *E.g.,* WASH. SUPER. CT. CIV. R. 59(a)(5) (judge may set aside excessive verdict and order new trial).

"invades the province of the jury and restricts the jury's ability to assess damages."[160] It is therefore unconstitutional under the Washington Constitution.[161]

III. CONCLUSION

Washington's damages limit violates the state equal protection and right of trial by jury guarantees. Under the state equal protection provision, courts should give the statute intermediate scrutiny. This standard of review is supported by Washington case law, case law in other states, and public policy considerations. Because the statute's classifications are not substantially related to a legitimate legislative interest, the statute denies tort plaintiffs the equal protection of the laws. The statute denies the right of trial by jury because it materially invades the province of the jury to find facts.

State constitutional guarantees of due process and equal protection should not be understood by courts merely to restate the fourteenth amendment. Washington courts can and do grant greater protections of individual rights under the state constitution. Such protection is warranted in the review of legislation that classifies and affects the rights of tort victims.

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160. Boyd v. Bulala, 647 F. Supp. 781, 789 (W.D. Va. 1986).

161. The limit by its terms applies to all "action[s] seeking damages for personal injury or death." WASH. REV. CODE § 4.56.250(2) (1987). Nevertheless, the limit is not unconstitutional on jury trial grounds as to all such actions, but rather only to actions for personal injury. Whether a person is entitled to a jury trial under the Washington Constitution depends on whether the right existed in 1889, when the Washington Constitution was adopted. Firchau v. Gaskill, 88 Wash. 2d 109, 558 P.2d 194 (1977). The right to a jury trial in a civil action existed in Washington in 1889. *See* Baker v. Prewitt, 3 Wash. Terr. 595, 19 P. 149 (1888) (breach of warranty action); Northern Pac. R.R. v. Holmes, 3 Wash. Terr. 543, 18 P. 76 (1888) (negligence action). The state constitution therefore preserves the right. On the other hand, the cause of action for wrongful death did not exist until created by the legislature in 1917. 1917 Wash. Laws ch. 123, § 1. Although parties to a claim for wrongful death have a right to a jury trial, that right is statutory and not constitutional.

The distinction may cause a court to sever the application of the damages limit as to personal injury actions but leave intact the limit as to wrongful death. *Contra* Carter v. Fibreboard Corp., No. 87-2-03555-7, slip op. at 31 (Wash. Super. Ct. order on pre-trial motion Feb. 19, 1988) (jury trial right exists regardless of "whether the right was created by statute or existed at common law"). Severance would, in effect, amend Washington's wrongful death act to provide for a limit on noneconomic damages. Such a limit is probably constitutional under the Washington jury trial guarantee. *See* Hall v. Gillins, 13 Ill. 2d 26, 147 N.E.2d 352 (1958). *But see* White v. State, 203 Mont. 363, 661 P.2d 1272 (1983).

TABLE: REPORTED DECISIONS ON THE CONSTITUTIONALITY OF MEDICAL MALPRACTICE AND TORT REFORM DAMAGES LIMITS. This Table gathers in chronological order recent decisions on the constitutionality of medical malpractice and tort reform damages limits. The Table does not include cases that have been overruled or that merely follow binding precedent. Where both a state and federal court have decided the constitutionality of the same statute, the Table reports both decisions. For citations to the following cases, see footnotes 38-49.

CASE	LIMIT	STANDARD OF REVIEW	HELD	GROUNDS
Wright v. Central DuPage Hosp. (Ill. 1976)	$500,000[A]	Q	UC	SL[S]
Jones v. State Bd. of Medicine (Idaho 1976)	Variable[A]	NA RB/I	C R	AC[S] DP,[B] EP[B]
Simon v. St. Eliz'th Med. Cntr. (Ohio C.P. 1976)	$200,000[G]	Q	UC[D]	EP[B]
Prendergast v. Nelson (Neb. 1977)	$500,000[A]	RB	C	SP[S]
Arneson v. Olson (N.D. 1978)	$300,000[A]	I	UC	EP[B]
Johnson v. St. Vincent Hosp. (Ind. 1980)	$500,000[A]	Q	C	DP,[B] EP,[B] JT[S]
Carson v. Maurer (N.H. 1980)	$250,000[NE]	I	UC	EP[S]
Baptist Hosp. v. Baber (Tex. App. 1984)	$500,000[NM]	RB	UC	EP[Q]
Malone & Hyde, Inc. v. Hobrecht (Tex. App. 1985)	$500,000[NM]	NA	UC	*Baptist Hosp.*
Fein v. Permanente Medical Group (Calif. 1985)	$250,000[NE]	RB	C	DP,[B] EP[Q]
Detar Hosp. v. Estrada (Tex. App. 1985)	$500,000[NM]	RB	UC	EP,[B] AC[S]
Hoffman v. United States (9th Cir. 1985)	$250,000[NE]	RB	C	EP[F]
Duren v. Suburban Comm'y Hosp. (Ohio C.P. 1985)	$200,000[G]	Q	UC	Q[B]
Sibley v. Board of Supervisors (La. 1985)	$500,000[NM]	Q	R	EP[S]
Waggoner v. Gibson (N.D. Tex. 1986)	$500,000[NM]	RB	UC	DP,[B] EP,[B] AC[S]
Boyd v. Bulala (W.D. Va. 1986)	$750,000[A]	RB NA	C UC	DP,[Q] EP[B] JT[B]
Lucas v. United States (5th Cir. 1986)	$500,000[NM]	RB	C	DP,[F] EP[F]
Smith v. Dep't of Ins. (Fla. 1987)	$450,000[NE]	NA	UC	AC,[S] JT[S]
Lucas v. United States (Tex. 1988)	$500,000[NM] $150,000[NE]	RB	UC	AC[S]

Explanation of symbols:

Type of damages limited: A = All damages; G = General damages; NE = Noneconomic damages; NM = Nonmedical damages

Standard of review: I = Intermediate; RB = Rational basis; NA = Not applicable; Q = Unclear

Holding: C = Constitutional or not unconstitutional; UC = Unconstitutional; D = Dictum; R = Not decided in reported case, remanded to trial court for decision as to constitutionality

Grounds for court's decision: AC = Right of access to courts; DP = Due process; EP = Equal protection; JT = Right of trial by jury; SL = Special legislation; SP = Special privilege; Q = Unclear

Constitution relied on by court: B = Both federal and state constitutions; F = Federal constitution only; S = State constitution only; Q = Unclear