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Statutory Caps on Damages and the Right to Jury Trial

Paul Day

STATUTORY CAPS ON DAMAGES AND THE RIGHT TO JURY TRIAL

Kansas Malpractice Victims Coalition v. Bell[1]

In the mid 1970s there arose in this country a growing concern that our tort system of compensation was facing a crisis in the area of medical malpractice liability.[2] In the face of growing insurance premiums, due in part to the increasing number of damage awards in malpractice suits, there was a growing fear that quality health care was at risk. Insurers, who had been underwriting malpractice insurance policies, began to refuse coverage because of decreasing profits.[3] There was widespread fear among health care professionals and legislatures that physicians, finding insurance coverage either impossible to obtain or prohibitively expensive, would abandon high risk fields, thereby lowering the overall quality of health care.[4] In response to this perceived crisis forty-three states enacted medical malpractice legislation.[5] Although the various statutes employed a variety of mechanisms[6] designed to curtail this crisis, almost all faced constitutional attacks on various grounds.[7] And, although some survived these attacks, others perished.[8] The purpose of this Note is to explore the death of one such statute

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1. 243 Kan. 333, 757 P.2d 251 (1988).

2. *See* Danzor, *The Effects of Tort Reform on the Frequency and Severity of Medical Malpractice Claims*, 48 OHIO ST. L.J. 413, 413-14 (1987).

3. *Bell*, 243 Kan. at ____, 757 P.2d at 254 (citing Comment, *Caps, "Crisis," and Constitutionality - Evaluating the 1986 Kansas Medical Malpractice Legislation*, 35 U. KAN. L. REV. 763, 765 (1987)).

4. *See generally* Comment, *Caps and Constitutionality - Evaluating the 1986 Kansas Medical Malpractice Legislation*, 35 U. KAN. L. REV. 763, 765 (1987).

5. Bell, *Legislative Intrusions Into The Common Law of Medical Malpractice: Thought About the Deterrent Effect of Tort Liability*, 35 SYRACUSE L. REV. 939 n.1 (1984).

6. The mechanisms used include screening boards, damage limitations, elimination of ad damnum clauses, modification of res ipsa loquitur, and the forced time payments of future benefits.

7. The constitutional attacks include violations of the right to jury trial, due process, equal protection, and the right to remedy by due course of law.

8. *See* Aldana v. Holub, 381 So. 2d 231, 237 (Fla. 1980) (finding statute violated due process clause of Florida Constitution); Carson v. Maurer, 120 N.H. 925, 940, 424 A.2d 825, 836 (1980) (finding that statutory caps on nonpecuniary damages are unconstitutional); Arneson v. Olson, 270 N.W.2d 125, 136 (N.D. 1978) (finding statute unconstitutional on equal protection grounds); Boucher v. Jayerl, 459 A.2d 87, 94 (R.I. 1983) (finding that in the absence of a medical malpractice crisis an equal protection violation existed).

in a recent Kansas Supreme Court decision. Further, this Note will apply the reasoning in that decision to a similar Missouri statute to determine if it too is susceptible to attack on similar constitutional grounds.

In 1986 Kansas enacted three statutes designed to reduce the cost of medical malpractice insurance and thereby stabilize the medical insurance market.[9] The statutes placed a cap on total recovery in medical malpractice actions at $1 million and limited recovery for non-economic damages to $250,000.[10] In the event a jury were to find damages in excess of the statutory limit, the judge would reduce the amount accordingly.[11] The statutes also required that any recovery for future loss be reduced to present value and invested in a state-owned annuity, which would in turn pay out benefits over a number of years.[12] Lastly, the statutes provided a "pinhole provision" whereby a plaintiff could petition the court for a higher statutory limit if the jury award exceeded the initial limitation.[13] If the petition was successful the excess would be paid by a state-run insurance company, as long as it did not exceed $3 million.[14] For example, if a jury verdict resulted in total damages of $6 million, the defendant would only be liable for $1 million, and the state would pay an additional $3 million. The end result was that the plaintiff would only recover $4 million of the jury's original $6 million finding.[15]

In *Kansas Malpractice Victims Coalition v. Bell* a group of malpractice victims sued seeking a declaratory judgment that the statutes violated various provisions of the Kansas Constitution.[16] The coalition claimed that the statute violated the right to trial by jury,[17] the right to remedy by due course of law,[18] as well as the right to equal protection.[19] In ruling the statute unconstitutional, the Kansas Supreme Court found that setting caps

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9. KAN. STAT. ANN. §§ 60-3407, -3409, -3411 (Supp. 1987)
10. *Id.* § 60-3407.
11. *Id.*
12. *Id.* § 60-3409.
13. *Id.* § 60-3411.
14. *Id.*
15. High damage awards in a medical malpractice actions are relatively rare. Statistics from the legislative hearings on these Kansas statutes indicate that in 1987 there were 21 medical malpractice cases in Kansas and only one verdict exceeded $1 million. Also, over the last ten years only fifteen persons would have been affected by the caps on recovery. *See Bell*, 243 Kan. at ____, 757 P.2d at 256. On a national level, in 1984 the American insurance industry closed approximately 73,500 malpractice claims against 103,300 health care providers. Fewer than one half of settled claims led to compensatory payment. The median payment made was $18,000, and the largest single payment in 1984 was $2.5 million. *See* Gellhorn, *Medical Malpractice Litigation (U.S.) - Medical Compensation* (N.Z.), 73 CORNELL L. REV. 170, 171 (1988).
16. *Bell*, 243 Kan. at ____, 757 P.2d at 253.
17. KAN. CONST. art. I, § 5.
18. *Id.* § 18.
19. *Id.* § 1.

on the amount of recovery and requiring annuity payments for future economic harm did indeed violate a plaintiff's right to remedy by due course of law and the right to trial by jury.[20] The court pointed out that limiting the liability of the state-run insurance company was well within the authority of the state, but limiting the liability of potential tortfeasors in the manner which the statute dictated violated the state's constitution.[21]

The court in *Bell* recognized that because the statute acted as a "compulsory, preestablished remittitur," the determination of damages would be prospective, and therefore an infringement upon the fact finding purpose of a jury.[22] The court noted that while a normal remittitur also infringes upon such findings, it is only applied pursuant to a clear legal standard.[23] Indeed, only when the level of the award "shock[s] the conscience of the court" and the plaintiff is given the option of accepting a reduction or opting for a new trial is a remittitur permitted.[24] The court further noted that there is no exact, mathematical relationship between nonpecuniary damages such as pain and suffering and a jury-determined award.[25] In fact, because of this impossibility of precise determination we allow the jury to decide the question to begin with.[26] The only way to determine an acceptable level of compensation in such circumstances is to allow a cross section of society to judge what fair compensation is. Infringing on the jury's determination of such facts therefore infringes on the right to trial by jury.[27]

At common law, and according to the case law of Kansas, a party is not entitled to a jury trial in actions that were historically equitable.[28] Parties seeking injunctive relief, specific performance, foreclosure, and other equitable remedies are not entitled to a trial by jury.[29] However, a jury trial is a matter of right if a party seeks a legal remedy such as damages.[30] The *Bell* court noted that it would be illogical for a jury, existing for the very reason that damages were claimed, to be denied the ability to determine those damages without the possibility of its finding being statutorily reduced.[31]

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20. *Bell*, 243 Kan. at ____, 757 P.2d at 256-64.
21. *Id.* at ____, 757 P.2d at 256-64.
22. *Id.* at ____, 757 P.2d at 260.
23. *Id.*
24. *Id.*
25. *Id.* (quoting Domann v. Pence, 183 Kan. 135, 141, 325 P.2d 321, 325 (1958)).
26. *Id.*
27. *Id.* at ____, 757 P.2d at 258.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*

The court did recognize that a legislature can modify the right to jury trial in some circumstances.[32] The legislature, through its power to change the common law, can modify the right to jury trial as long as there is no violation of due process, and the modification is "reasonably necessary . . . to promote the general welfare of the people . . . ."[33] One way to prevent such a due process violation is for the legislature to create an adequate substitute remedy.[34] The court distinguished two previous statutes which modified common law rights of recovery, but provided this substitution.[35] In a prior ruling on worker's compensation legislation, which statutorily limited recovery, the court found no due process violation because the workers were allowed, prior to injury, to choose between the common law remedy and the statutory remedy.[36] Although subsequent changes in the statute removed this choice, the court still did not find a violation in that the statute provided an adequate substitute remedy in the form of a reduced standard of proof.[37]

Likewise, the court distinguished the Kansas Automobile Injury Rehabilitation Act.[38] Under this statute nonpecuniary damages were not recoverable at all in circumstances of nonserious injury.[39] A prior decision dealing with this statute found no violation of the right to jury trial because the plaintiff "received a sufficient *quid pro quo*" in the form of prompt payment under the no-fault insurance provision of the statute.[40] The current malpractice legislation, however, did not provide an adequate substitute remedy because the plaintiff received nothing substantial in return for the limitation on the right to recovery.[41] The defendant in the case had argued that the plaintiff would receive benefits in the form of lower costs, wider availability of health-care, and a guarantee of recovery due to the statute providing malpractice insurance.[42] The court pointed out that these benefits did not make up for the loss to the plaintiff because physicians have always been required, by state law, to carry malpractice insurance.[43] Also, the benefits in the form of lower costs or increased availability of health care would be "minuscule" compared with the loss to a "terribly injured"

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32. *Id.*
33. *Id.* at ____, 757 P.2d at 259 (quoting Manzanares v. Bell, 214 Kan. 589, 599, 522 P.2d 1291, 1300 (1974)).
34. *Id.*
35. *Id.*
36. *Id.* (citing Shade v. Cement Co., 93 Kan. 257, 144 P.2d 249 (1914)).
37. *Id.* (citing Rajala v. Doresky, 233 Kan. 440, 441, 661 P.2d 1251, 1253 (1983)).
38. KAN. STAT. ANN. § 40-3101 (1986).
39. *Id.*
40. Manzanares v. Bell, 214 Kan. 589, 599, 522 P.2d 1291, 1300 (1974).
41. *Bell*, 243 Kan. at ____, 757 P.2d at 259.
42. *Id.*
43. *Id.*

plaintiff who would be denied damages above the statutory limit.[44]

The *Bell* court, however, did not draw another important distinction between the automobile injury statute and the malpractice legislation. The current statute places a statutory limit on recovery for nonpecuniary harm, while the auto statute eliminates it altogether.[45] If recovery for pain and suffering is simply not allowed, then the jury never deliberates on that issue. Arguably, if the jury does not decide an issue, then no violation of the right to jury trial could occur. On the other hand, as to a statutory limitation on damages made prior to trial, which potentially changes a jury's findings, a violation of the right to jury trial can occur. A legislative elimination of nonpecuniary recovery arguably does not violate a constitutional right to jury trial, while a statutory limit on such recovery does.[46]

Section 18 of the Kansas Bill of Rights provides that all persons "shall have remedy by due course of law".[47] The Kansas Supreme Court has defined this to mean the right to "the reparation for injury, ordered by a tribunal having jurisdiction, in due course of procedure and after a fair hearing."[48] Moreover, the right to remedy had been held to include the right to a full remedy for all injuries.[49] The court in *Bell* pointed out that "there can be little doubt" that the malpractice statute impairs the right to a remedy in placing statutory caps on economic or non-economic loss.[50]

It should be noted that providing the necessary resources to pay a judgment is not the same thing as the right to a remedy.[51] There is no constitutional guarantee that a defendant will have the assets to pay a judgment. What is guaranteed is the right to a means of redress of injuries resulting from another's negligence.[52] In this case, the legislature is free to limit the liability of the state-run insurance program; but limiting a plaintiff's

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44. *Id.* at ____, 757 P.2d at 259-60.
45. KAN. STAT. ANN. § 40-3101 (1986).
46. Boyd v. Bulala, 647 F. Supp. 781, 789 (W.D. Va. 1986).
47. KAN. CONST. art. I, § 18.
48. 243 Kan. at ____, 757 P.2d 251, 260 (quoting Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041 (1904)).
49. *Id.* at ____, 757 P.2d at 262 (citing Neely v. St. Francis Hosp., 192 Kan. 716, 391 P.2d 155 (1964)).
50. *Id.* at ____, 757 P.2d at 263. The pinhole provision was also seen to be a violation because it was simply a higher arbitrary limit. Furthermore, the requirement that future damages be reduced to present value and paid out of a state owned annuity also violated the right to a full remedy. Instead of giving the plaintiff the normal lump-sum judgment, the statute forced the plaintiff to relinquish control over his money. Such a limitation on a common law remedy submits the plaintiff to risks he would not otherwise have to incur. An insurance company (a likely seller of annuities) could default on the annuity contract, thereby leaving the plaintiff with nothing, or forcing him to pursue another lawsuit. *Id.*
51. *Id.* at ____, 757 P.2d at 263-64.
52. *Id.*

remedy by capping recovery is potentially unconstitutional because a means of redress for certain injuries is impaired or eliminated.[53]

Like the right to jury trial, however, legislatures are allowed to modify remedies to further public interests.[54] Judicial review of such a modification requires compliance with due process in that the legislature must again provide an adequate substitute remedy.[55] And, as in the right to jury trial, an adequate "*quid pro quo*" can provide this substitution and thereby abrogate any due process violation.[56] The defendants in *Bell* argued that since the statute lowered the cost of health care and stabilized the insurance market, more doctors would choose to continue practicing instead of abandoning the field due to high insurance costs.[57] This in turn would insure the continued availability of quality health care to malpractice victims, thereby providing the quid pro quo in lieu of any infringement of their right to recover.[58] The court, quite correctly, pointed out that the victims would not need this continued health care had the physicians not been negligent in the first place.[59]

Medical malpractice statutes which limit recovery for damages are also challenged on the basis of equal protection violations.[60] It is arguable that by placing a cap on the damages recoverable in a medical malpractice action, the plaintiff does not enjoy the same rights as a plaintiff who is injured by some other means.[61] Also, a plaintiff with damages below the statutory limit is treated differently than the plaintiff with more serious injuries resulting in damages above the statutory limit. Generally, for a statute to comply with an equal protection clause, it must treat individuals which it affects with equanimity.[62] The *Bell* court, having invalidated the statute on due process grounds, declined to decide the equal protection issue.[63]

When considering the constitutionality of any statute on equal protection or due process grounds, a court must first determine the proper standard

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53. *Id.* at ____, 757 P.2d at 256, 263-64.
54. *Id.* at ____, 757 P.2d at 260 (citing Manzanares v. Bell, 214 Kan. 589, 522 P.2d 1291 (1974)).
55. *Id.* at ____, 757 P.2d at 260.
56. *Id.* at ____, 757 P.2d at 263.
57. *Id.*
58. *Id.*
59. *Id.*
60. *See, e.g.*, Jones v. Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977); Wright v. Central Du Page Hosp., 63 Ill. 2d 313, 347 N.E.2d 736 (1976); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980).
61. Note, *Judicial Review of Medical Malpractice Legislation*, 20 SUFFOLK U.L. REV. 523, 526 (1986).
62. *Id.* at 525-26.
63. *Bell*, 243 Kan. at ____, 757 P.2d at 264.

of review.[64] The normal rule is that if statute creates a suspect classification,[65] or deals with a fundamental right,[66] the court will subject the statute to strict scrutiny.[67] Legislation subjected to this strict standard of review rarely survives.[68] To meet this high standard the statute must further an important state interest and provide the least injurious means of advancing that interest.[69] To date no court has employed the strict scrutiny standard to invalidate statutes involving medical malpractice legislation.[70] Malpractice plaintiffs are not the type of suspect class that would justify the higher standard, and courts have not considered the rights that this legislation endangers to be fundamental.[71]

If there is no suspect classification or threat to a fundamental right, the court will generally employ a rational relationship standard of review.[72] Under this standard the court will defer to legislative judgment and not invalidate a statute as long as it is rationally related to a legitimate state interest and does not clearly violate the constitution.[73] In *Fein v. Permanente Medical Group*, the Supreme Court of California ruled that a cap on non-economic damages was rationally related to a legitimate state interest in regulating the medical industry and preventing meritless claims.[74] By placing a cap on nonpecuniary damages, the *Fein* court reasoned that the state's goals of insuring adequate health care and lowering the cost of malpractice insurance were furthered without unduly infringing upon the plaintiff's rights.[75] Furthermore, the statute provided a sufficient quid pro quo in the form of insuring resources for malpractice victims by reducing the extent

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64. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287-305 (1978) (Supreme Court states that the appropriate standard of review must be determined before ruling on equal protection challenges).

65. Suspect classification will arise 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. Rodriquez, 411 U.S. 1, 28 (1973).

66. A fundamental right is defined as a right which is "explicitly or implicitly guaranteed by the Constitution." *Id.* at 33.

67. *See Rodriquez*, 411 U.S. at 40 (strict standard of review applied only to laws creating suspect classifications or impinging on constitutional rights).

68. *See* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (stating that the strict scrutiny test is strict in theory and fatal in fact).

69. *See* Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

70. Comment, *The Constitutional Attack on Virginia's Medical Malpractice Cap: Equal Protection and the Right to Jury Trial*, 22 U. RICH. L. REV. 95, 102 n.48 (1987).

71. *Id.* at 102.

72. *See, e.g.*, Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985) (en banc).

73. *Id.* at 157-67, 695 P.2d at 679-86, 211 Cal. Rptr. at 382-89.

74. *Id.*

75. *Id.*

to which non-meritorious claims would consume these resources.[76]

Other courts have employed an intermediate standard when reviewing the constitutionality of various statutes.[77] This so-called "means focus test" dictates that the court actually inquire into the legislative purposes for enacting the statute and make a judicial determination of whether the legislation is suited for the accomplishment of the proposed goals.[78] A court applying this standard in the context of medical malpractice legislation would inquire as to whether there actually was a crisis which needed such a legislative solution, and whether this particular statute succeeded in dealing with the crisis. State courts applying this intermediate level of review to malpractice legislation generally find the statutes unconstitutional.[79] Other commentators claim that this intermediate standard should be applied in the context of malpractice legislation because the perceived malpractice crisis either no longer exists or never existed in the first place.[80] Furthermore, the effectiveness of such statutes should be opened up to judicial inquiry because, arguably, they have not achieved the goals which their proponents envisioned.[81]

Like most other states, Missouri has enacted legislation designed to abrogate the perceived crisis in medical malpractice litigation.[82] Before considering the current statute, it is necessary to examine past Missouri statutes and their treatment by Missouri courts. In 1976 legislation was introduced providing a number of mechanisms designed to deal with expanding liability in the medical industry.[83] The statute first provided for pretrial screening panels which, in theory, were to encourage settlement and weed out non-meritorious claims.[84] Before filing any suit seeking damages from a health care provider, a plaintiff had to first submit the case to the screening panel for review.[85] Parties were free to reject the recommendations of the panel with no adverse effects on their subsequent right

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76. *Id.*

77. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971).

78. *Reed*, 404 U.S. at 75-76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

79. *See, e.g.*, Carson v. Maurer, 120 N.H. 935, 424 A.2d 825 (1980).

80. Comment, *Medical Malpractice Statutes: Special Protection for a Privileged Few?*, 12 N. KY. L. REV. 295, 338 (1985).

81. *Id.*

82. MO. REV. STAT. §§ 538.010-.080 (1978) (repealed 1984), MO. REV. STAT. §§ 538.205-.300 (1986).

83. *Id.* §§ 538.010-.080. The 1976 legislation provided for a new medical malpractice statute of limitations, pretrial screening boards, and the prohibition of dollar amounts in medical malpractice ad damnum clauses. Terry, *Missouri's Malpractice Concord*, 51 MO. L. REV. 457, 459 (1986).

84. Terry, *supra* note 83, at 459.

85. MO. REV. STAT. §§ 538.010-.080 (1977) (repealed 1984).

to proceed to trial.[86] Once at trial the panels findings were not binding on the jury and the parties were prohibited from introducing into evidence what those findings actually were.[87]

The Missouri Supreme Court, however, found that requiring pretrial screening trials was unconstitutional. In *State ex rel. Cardinal Glennon Memorial Hospital v. Gaertner*, the court found that the statute violated a plaintiff's right of access to the courts.[88] In Judge Simeone's concurring opinion, he stated that "any substantial impediment barring access to the judicial system is detrimental and contrary to the provisions of the Missouri Constitution."[89] Since the statute required this procedure before access to the courts was allowed, the review boards were deemed unconstitutional.[90] In distinguishing a New York case which upheld such panels, the majority opinion noted that the review boards in that particular case were convened after the actual court proceedings had begun; therefore, the panels did not impede access to the courts.[91]

The dissent in *Gaertner*, however, explicitly argued for the adoption of a rational relationship standard of review and found that such a requirement should not be ruled unconstitutional.[92] It stated that "an act of the legislature is presumed to be valid and will not be declared unconstitutional unless it clearly and undoubtedly contravenes some constitutional provision".[93] In recognizing that a medical malpractice crisis does exist, the dissent would have deferred to the legislature on how to deal with such a crisis, as long as the method used was not a blatant violation of the constitution.[94] Since these review boards were simply analogous to a pre-trial conference, in that their recommendations were not binding on the jury or admissible as evidence, the impediment on access to the courts was in fact minimal.[95] The state's interest in abrogating the crisis "certainly justified" this minimal intrusion.[96]

Likewise, the *Gaertner* dissent pointed out that the right to jury trial would remain inviolate if a review panel was required.[97] Since the recommendations of the review board were not binding on the jury the statute

86. *Id.* §§ 538.045-.050.
87. *Id.* § 538.050.
88. State *ex rel.* Cardinal Glennon Memorial Hosp. v. Gaertner, 583 S.W.2d 107, 110 (1979) (en banc).
89. *Id.* at 111.
90. *Id.* at 110.
91. *Id.*
92. *Id.* at 118 (Morgan, J. dissenting).
93. *Id.* at 117 (quoting Americans United v. Rogers, 538 S.W.2d 711 (Mo. 1976), *cert. denied*, 429 U.S. 1029 (1976)).
94. *Id.* at 117-18.
95. *Id.* at 113.
96. *Id.* at 118.
97. *Id.* at 113.

only created a "pre-condition" to a plaintiff's exercise of his right to jury trial.[98] Furthermore, the dissent stated that "[t]he right of access to the courts and trial by jury is not an unfettered right that exists over and above all other rights and remedies. The legislature must be free to provide new remedies . . . to meet new crises in these changing times."[99]

A second mechanism which the 1976 legislation employed was a new statute of limitations in medical malpractice cases.[100] Normally, in a negligence action a plaintiff has five years from the time of the negligent act to file his suit.[101] Under the new statute of limitation, however, the plaintiff had to file her action for medical malpractice within two years of the negligent act, except when the negligence involved leaving foreign objects in the body.[102] When objects are left in the body, the action had to be brought within two years of discovery of the object.[103] The purpose of such a reduction in the statute of limitations was to reduce the number of claims actually filed, thereby easing the pressure on insurance companies to increase their rates or abandon the medical insurance market.[104] Insurance companies contend that the greater the period of time there is for a plaintiff to bring a claim, the more difficult it is to actuarially predict the amount of liquidity needed to meet future obligations.[105] Errors in such predictions were leading to large losses as older instances of negligence gave rise to current claims.[106]

In *Ross v. Kansas City General Hospital and Medical Center*, the plaintiff claimed that this new statute of limitations violated the equal protection clause of the Missouri Constitution.[107] Since the statute does treat differently those who have foreign objects left in their bodies and those who do not, the plaintiff in the case argued that it deprived him of equal protection.[108] Employing a rational relationship standard of review, the Missouri Supreme Court concluded that the legislature was within its authority to create such differential treatment.[109] Since the discovery of negligence is substantially less likely when foreign objects are left in the body, a "rational legislature" could find that a longer statute of limitation was needed for that particular class of victims.[110] Moreover, the court noted

98. *Id.*
99. *Id.* at 114.
100. Mo. REV. STAT. § 516.105 (1978).
101. Mo. REV. STAT. § 516.120 (1952).
102. Mo. REV. STAT. § 516.105 (1978).
103. *Id.*
104. Comment, *supra* note 80, at 298-99.
105. *Id.*
106. *Id.*
107. Ross v. Kansas City Gen. Hosp., 608 S.W.2d 397, 398 (1980).
108. *Id.*
109. *Id.* at 399.
110. *Id.*

that problems of proof, one justification for limiting the time period in which a suit can be brought, are not as serious when the best evidence of the negligence is still in the body.[111]

It is interesting to note that *Ross* only rejected the equal protection argument on the basis that the legislature had a rational basis for treating malpractice victims differently.[112] The court did not address the issue of whether the legislature had a rational basis for treating malpractice differently from other victims of negligence. Since the normal statute of limitations in a negligence case is five years, a viable equal protection argument still exists. To determine if there is a rational basis for such a distinction, a court would have to determine whether a medical malpractice crisis actually exists. The court, quite notably, did not address this issue.

The current Missouri statute dealing with medical malpractice litigation has a number of provisions designed to deal with this malpractice crisis.[113] Included is a $350,000 cap on nonpecuniary damages.[114] One rationale for such a limitation is that nonpecuniary damages are seen as the main cause of inflated awards in malpractice litigation.[115] Likewise, nonpecuniary damages are seen as encouraging non-meritorious claims in that the possibility of a substantial award for nonpecuniary damages can be the incentive to pursue such a claim.[116] Furthermore, the lack of any mathematical certainty on arriving at a level of compensation indicates that the figures are arbitrary and therefore should be limited to prevent overcompensation.[117]

Other commentators feel that nonpecuniary damages are actually a source of compensation for a plaintiff's attorney.[118] Since normally attorney's fees are not recoverable as damages, a high contingent fee could cut into a plaintiff's economic recovery.[119] Nonpecuniary damages are simply viewed as a way of offsetting these large contingent fees.[120] Also, a juror, aware of a substantial contingent fee, might be more likely to award a larger amount for non-economic damages so as to insure that the plaintiff is adequately compensated.

Although the $350,000 limit in Missouri's statute appears to be a substantial sum, in many cases such a figure could be inadequate in compensating for certain types of injuries.[121] For instance, large recoveries

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111. *Id.*
112. 608 S.W.2d 397, 399 (1980).
113. Mo. REV. STAT. §§ 538.205-.306 (1986).
114. *Id.* § 538.210.
115. Terry, *supra* note 83, at 469.
116. Fein v. Permanente Medical Group, 38 Cal. 3d 137, 163, 695 P.2d 665, 683, 211 Cal. Rptr. 368, 386 (1985).
117. *Id.*
118. DOBBS, REMEDIES § 8.1, at 550-51 (1973).
119. *Id.*
120. *Id.*
121. *See Fein*, 38 Cal. 3d at 167, 695 P.2d at 689, 211 Cal. Rptr. at 392 (Bird, C.J., dissenting).

often occur when newborn infants are injured through the negligence of the delivering physician. In such a situation, $350,000 for the pain and suffering of a lifetime is, arguably, less than adequate compensation.[122] Likewise, in the case of horrible disfigurement, compensation for humiliation and embarrassment only comes through the award of nonpecuniary damages.[123] Once again, $350,000, spread over an entire lifetime is perhaps inadequate.

Irrespective of the adequacy of such a limit, there remains the question of whether Missouri's limitations on such recovery can survive constitutional scrutiny. A recent New Hampshire decision found similar damage caps to be unconstitutional.[124] In *Carson v. Maurer* the Supreme Court of New Hampshire applied an intermediate standard of review to a statute limiting nonpecuniary damages.[125] In rejecting the strict standard, the court found that the right to recover for personal injury was not fundamental.[126] Also, the lack of any suspect classification counselled against the stricter standard of review.[127] The court did not, however, adopt the rational relationship standard. It viewed the right to recover for personal injuries as a "substantive right", thereby justifying an intermediate standard.[128] This standard requires that the statute "be reasonable . . . and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation in order to satisfy state equal protection guarantees."[129] Although insuring the availability of adequate health care was a legitimate objective of the legislature, the court found that the statute did not bear a close enough relation to those objectives to survive constitutional scrutiny.[130] A severely injured plaintiff, the court reasoned, would be denied equal protection if the statute were enforced.[131]

In contrast to the New Hampshire decision, the U.S. District Court for the Western District of Virginia, in ruling on the constitutionality of a Virginia statute which also limited non-economic damages, found the statute unconstitutional on slightly different grounds. In *Boyd v Bulala*, the court, finding that the statute did not create a suspect classification

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122. *Id.*
123. *Id.*
124. Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980).
125. *Id.* at 932-33, 424 A.2d at 831.
126. *Id.* at 931-32, 424 A.2d at 830.
127. *Id.*
128. *Id.*
129. *Id.* at 932, 424 A.2d at 831 (citing State v. Scoville, 113 N.H. 161, 163, 304 A.2d 366, 369 (1973)).
130. *Id.* at 940-41, 424 A.2d at 836.
131. *Id.* at 941-42, 424 A.2d at 837. The *Carson* court stated that "it is simply unfair and unreasonable 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." *Id.*

or infringe upon a fundamental right, used the rational relationship standard of review.[132] In interpreting the Virginia Constitution, the federal court found that past decisions had not considered the right to a full recovery in tort a fundamental right.[133] Furthermore, the court found that the legislative means of maintaining adequate health care through damage caps was a rational means of achieving such a goal; therefore it did not consider the equal protection and due process clauses violated.[134] The *Boyd* court also noted that the lack of a "quid pro quo" did not provide the reason for applying a heightened standard of review.[135] The court noted that since the United States Supreme Court had never created a quid pro quo requirement, such analysis should not be used.[136] Furthermore, the court stated that damage caps were "classic" economic regulation which should be upheld absent a suspect classification or a fundamental right.[137]

Even though the *Boyd* court found no equal protection or due process violations, it nevertheless found the statute unconstitutional.[138] The plaintiff in the case had argued that the medical malpractice cap infringed upon the right to trial by jury.[139] The court did indeed find that the statute violated the right to jury trial in that the caps on nonpecuniary and pecuniary damages created a legislative presumption that damages would never exceed the statutory limit.[140] Because the caps were a "judgment predetermined by the legislature", the statute was invalid.[141] The federal court, like the Kansas Supreme Court in *Bell*, noted that—unlike an application of a remittitur or a judgment notwithstanding the verdict—the enforcement of the statutory limit on damages followed no proper legal standard.[142] In upsetting a jury finding with a JNOV, the verdict is only reversed if "is plainly contrary to or unsupported by evidence".[143] The court noted that legislatures were free to limit the type of damages allowed, but they could

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

133. *Id.* at 787. The court noted that such fundamental rights include freedom of speech, the right to vote, the right to a fair trial, and the right to privacy.

134. *Id.* at 787-88.

135. *Id.* at 786.

136. *Id.* (citing Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978)).

137. *Id.*

138. *Id.* at 790.

139. *Id.* at 785. In the federal courts the right to jury trial is guaranteed by the seventh amendment. Although the due process clause of the United States Constitution has not been applied to the seventh amendment, federal courts sitting in diversity must enforce the right to jury trial. *See* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958). The Eighth Circuit in *Boyd*, however, never actually had to apply this rule because the Virginia Constitution, article I, section 11, provided the right to civil jury trial. *Boyd*, 647 F. Supp. at 789.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

not prospectively disturb a jury's findings of fact.[144] According to the *Boyd* court, a legislature should be free to eliminate a recovery for certain types of damages, such as pain and suffering; but once the right to collect for these damages exists, a jury finding as to those findings must not be violated.[145]

The question now becomes whether Missouri's cap on non-economic damages can survive these various attacks on the constitutionality of such statutes. Since Missouri does not follow the "quid pro quo" analysis used by Kansas courts, it appears that any attack will turn upon the standard of review Missouri courts use. It is likely that they will use a rational relationship standard since the right to recovery in negligence suits is not viewed as fundamental.[146] Likewise, the statute's unequal treatment of plaintiffs is unlikely to create a suspect classification because a rational legislature could find a crisis in the area of medical malpractice. A disparity in treatment between those recovering in normal negligence suits and those recovering for malpractice would therefore not give rise to an equal protection violation. Furthermore, in *Strahler v. St. Luke's Hospital*,[147] both Justice Welliver and Justice Blackmar indicated that it is not for the courts to determine whether a crisis in the medical malpractice industry actually exists.[148] Therefore, an attack on the statute on equal protection or due process grounds is unlikely to prevail.

However, the statute might well be vulnerable to attack on other constitutional grounds. The Missouri Constitution provides that the right to jury trial shall remain inviolate.[149] If Missouri courts follow the same reasoning as the Kansas Supreme Court and the 8th Circuit, the statute would violate the right to trial by jury. A pre-established remittitur on non-economic damages is indeed a disruption of a jury's findings. Once recovery for such things as pain and suffering is allowed, an arbitrary limit on the amount recoverable is potentially a prospective disruption of a jury's findings. As such, it is a violation of a plaintiff's right to trial by jury.

PAUL DAY

144. *Id.* at 789-90.
145. *Id.*
146. *See* Terry, *supra* note 83, at 485 (1986). *See also* Ross v. Kansas City Gen. Hosp., 608 S.W.2d 107, 116-17 (1979).
147. 706 S.W.2d 7 (Mo. 1986) (en banc).
148. *Id.* at 14, 20 (Blackmar, J., and Welliver, J., dissenting).
149. MO. CONST. art. 1, § 22(a).