THE MEDICAL MALPRACTICE ACT: IS THE CAP CONSTITUTIONAL?

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The American Trial Lawyers Association ("ATLA") supports challenges to the constitutionality of medical malpractice damage caps in many states, including Indiana. In Indiana, the statutory limit on damages ("the Cap") contained in the Indiana Medical Malpractice Act ("the Act") is currently $1,250,000 for an act of malpractice that occurs after June 30, 1999. Constitutional claims have been mounted in Indiana that allege that the Cap violates the Indiana Constitution's (1) equal privileges and immunities clause, (2) due course of law clause, (3) access to courts clause, and (4) right to jury trial clause. These claims are without merit under Indiana's constitutional jurisprudence.

In 1975, the Indiana legislature enacted the Act and the Cap in response to a health care crisis in Indiana. At the time of the enactment, physicians in Indiana were faced with rising costs for malpractice insurance, and Indiana residents faced the corresponding problem of reduced access to health care. Physicians in specialty practices and regional hospitals were having difficulty obtaining insurance, and health care providers who could obtain malpractice insurance were paying ever-rising premiums. In response, the legislature decided to limit damage recoveries in medical malpractice cases so that malpractice insurance rates would not continue to rise steeply. This would, in turn, make malpractice insurance less expensive and more available, thereby reducing the cost of the practice of medicine and improving access to health care for Indiana residents. The legislature made a calculated decision that it would be better to provide Indiana residents with the fullest possible access to health care, rather than to allow a relatively small number of patients or their families to receive massive malpractice damage awards.

The Indiana Supreme Court unequivocally upheld the constitutionality of the Act and the Cap in *Johnson v. St. Vincent Hospital, Inc.*[1] The court found that the Cap did not violate the Indiana Constitution's equal privileges clause, due course of law clause, or the right to trial by jury clause. In so finding, the court noted that the scope of an Indiana trial court's consideration of the constitutionality of the Cap is limited. A court cannot question the policy of the legislature. Instead, a court may consider only whether the Act or the Cap violates any specific provision of the Indiana Constitution.

The reasons that the Indiana Supreme Court found the Cap constitutional in *Johnson* are as equally valid today as they were when the Act was passed. Despite ATLA rhetoric to the contrary, renewed constitutional challenges cannot realistically dispute that the Cap has minimized the cost of malpractice insurance in Indiana and that affordable medical malpractice insurance improves access to health care in Indiana. Because it continues to foster its goals, Indiana courts must continue to uphold the constitutionality of the Cap.

I. THE BURDEN TO OVERTURN THE CAP

The Cap, like all other statutes, is presumed to be constitutional.[2] In order to overcome the presumption of constitutionality, a plaintiff must negate "every conceivable basis which might have supported the classification."[3]

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[1] 404 N.E.2d 585 (Ind. 1980).

[2] Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994).

[3] *Id.*

It is not the court's place to "judge the wisdom or the rightness of [the statute's] underlying policies."[4] As the Indiana Supreme Court stated in *Cha*:

> [The statute] need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought the particular legislative measure was a rational way to correct it.[5]

When the Cap was enacted in 1975, the legislature specifically found: (1) seven of the ten insurance companies writing the majority of the medical malpractice insurance policies in Indiana had ceased or limited writing those policies due to the inability to adequately calculate premiums; (2) premiums had increased 1200% over a fifteen-year period due to the frequency and size of claims; (3) physicians in high-risk practices were having difficulty finding insurance coverage; (4) surgeries in some rural areas were being cancelled; (5) emergency services at some hospitals were being discontinued; and (6) many health care providers were fearful of personal financial exposure and were unable to get coverage for medical malpractice claims at an affordable price.[6]

The legislature has revisited the Cap twice since it was instituted. In 1989, the legislature raised the Cap from $500,000 to $750,000 for an act of malpractice that occurred after January 1, 1990.[7] In 1998, the legislature again raised the total possible recovery from $750,000 to $1,250,000 for an act of malpractice that occurs after June 30, 1999.[8] Implicit in the legislature's determination that the Cap should be raised was its determination that the Act and the Cap are still important and effective ways to provide Indiana residents with access to health care.

[4] Cha v. Warnick, 476 N.E.2d 109, 112 (Ind. 1985) (citing *Johnson*, 404 N.E.2d at 596).
[5] *Id*. (citations omitted). *See also* Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L.J. 907 (2001).
[6] *Cha*, 476 N.E.2d at 112.
[7] IND. CODE § 27-12-14-1 (1989).
[8] IND. CODE § 34-18-14-3 (1998).

The Act has been subject to constitutional challenge on numerous occasions, and each time the Indiana Supreme Court has found that the various aspects of the Act are facially constitutional and bear a rational relationship to the intent of the legislature to provide Hoosiers with access to health care.[9]

The Indiana Supreme Court has repeatedly held that the intent of the legislature in enacting the Cap was to protect access to health care by preventing a reduction in services.[10] The legislature made a judgment that there was a causal relationship between the costs associated with malpractice claims and the actual and threatened diminution of health care services.[11] The court found that the price of insurance was integral part of this equation.[12] In light of the reasonable bases of the legislature in enacting the Cap, every Indiana appellate court that has considered the constitutionality of the Cap has upheld its constitutionality.

II. THE CAP CONTROLS INSURANCE COSTS AND PROTECTS ACCESS TO HEALTH CARE

A. DAMAGES CAPS LOWER INSURANCE COSTS

The Act and the Cap apply to any Indiana health care provider who has filed proof of financial responsibility with the Indiana insurance commissioner and has paid the surcharge assessed on all health care providers by the Indiana Patient's Compensation Fund ("the Fund"). Proof of financial responsibility is established by a health care provider's insurer filing proof that the health care provider is insured by a policy of malpractice liability insurance in the amount of at least $250,000 per occurrence and $750,000 in the annual aggregate.[13] Payment of the surcharge to the Fund created under the Act provides the source of money from which all damages in excess of the underlying insurance policy are paid, up to the limit of the Cap; thus an Indiana health care provider's total yearly cost for malpractice insurance is the annual premium plus the annual surcharge.

Numerous analyses have shown that limitations on damages reduce medical malpractice insurance premiums. A June 2003 General Accounting Office ("GAO") report found that, although there are a number of reasons why medical malpractice premiums have increased, increased losses on medical malpractice claims are the primary cause of higher malpractice premium rates.[14] As recently as January 2004, a study conducted by Professor Kenneth E. Thorpe from Emory University revealed that empirical data showed that caps on damages awards in several states were associated with lower loss ratios and lower premiums, and that premiums in states with a cap on damages awards were 17.1 percent lower than in states without such caps.[15] A study conducted by the U.S. Department of Health and Human Services found that the unpredictable, costly, and slow litigation system causes insurance costs to rise.[16] The HHS report further found that "a major contributing factor to the most enormous increases in liability premiums has been rapidly growing awards for non-economic damages in states that have not

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[9] *See, e.g.,* Martin v. Richey, 711 N.E.2d 1273 (Ind. 1999) (the two-year statute of limitations in the Act was facially constitutional); Bova v. Roig, 604 N.E.2d 1 (Ind. Ct. App. 1992), *trans. denied* (*Johnson* applied and the Cap is constitutional); St. Anthony Med. Ctr. v. Smith, 592 N.E.2d 732 (Ind. Ct. App. 1992), *trans. denied* (same); Cha v. Warnick, 476 N.E.2d 109 (Ind. 1985) (evidence showing extent of delays in obtaining panel opinion under the Act was insufficient to make the Act unconstitutional and the Act was a reasonable means of achieving continuation of medical services in the state); Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585 (Ind. 1980).

[10] *Johnson*, 404 N.E.2d at 597.

[11] *Id.* at 590.

[12] *Id.*

[13] A different minimum annual aggregate insurance amount is required for health maintenance organizations and health facilities. Hospitals can file verified financial statements that, in the insurance commissioner's discretion, indicate an ability to pay up to the specific annual aggregates, thereby self-insuring. IND. CODE § 34-18-4-1(3) (West 2004).

[14] U.S. GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES, June 2003.

[15] Kenneth E. Thorpe, *The Medical Malpractice "Crisis": Recent Trends and the Impact of State Tort Reforms*, HEALTH AFFAIRS, Jan. 21, 2004, *available at* http://content.healthaffairs.org/cgi/reprint/hlthaff.w4.20v1.pdf.

[16] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM, July 24, 2002.

reformed their litigation system to put reasonable standards on these awards."[17] The HHS report concluded that states with effective tort reform in place, that is, caps on damages, are faring better than states without tort reform.[18]

A GAO study prepared in 1986 considered the impact of tort reform in six states.[19] To reach its conclusions, the GAO studied rates, sent questionnaires, and conducted interviews with state insurance departments, medical societies, hospital associations, bar associations, chapters of the American Trial Lawyers of America, chapters of the Medical Specialty Societies, and leading medical malpractice insurers. While the study found that insurance costs rose in Indiana, it also found that many in Indiana believe that tort reform lessened the increase in insurance costs. "Indiana officials generally believed that Indiana's 1975 medical malpractice legislation and subsequent amendments have greatly stabilized Indiana's medical malpractice insurance situation over the past decade."[20] That is, insurance costs in Indiana would have increased much more than they did had the Cap not been enacted.

The GAO also conducted a study in 1999 of medical malpractice rates in Washington, D.C., Maryland, and Virginia.[21] In that study, the GAO noted that the two primary influences on insurance premiums are the number of claims and the amount of claim payments, or in other words claims frequency and claims severity.[22] The 1999 GAO Study further acknowledged that there is evidence that damages caps affect insurance rates.[23]

B. MEDICAL MALPRACTICE COSTS AFFECT ACCESS TO HEALTH CARE

If malpractice insurance costs in Indiana continue to increase, there are physicians who eventually will stop practicing in Indiana. Experts acknowledge that some physicians will cease practicing or relocate based upon the cost of malpractice insurance.[24] This alone requires Indiana courts to uphold the constitutionality of the Act because plaintiffs cannot negate one justification for the Cap, that it is one method to ensure the availability of health care to Indiana residents.

If the cost of medical malpractice insurance rises, some physicians will be unable to pass the increased cost to patients because of managed care, Medicare, and Medicaid limitations; therefore the increased expense would result in decreased income for those physicians. As a result of decreased income, some physicians would retire early, some would leave the practice, some would leave Indiana, and others would simply not come to Indiana. Furthermore, rising medical malpractice costs would affect decisions of community health centers and nonprofit hospitals, and would cause certain of those organizations to reduce services provided to indigent Indiana residents. A study by Phillip Powell, Associate Clinical Professor of Business Economics and Public Policy at the Kelley School of Business, has shown that physicians are reasonable economic actors and that a even small decreases in physician income will cause some physicians to retire early.[25] .

Abolishing the Cap would also adversely affect access to health care through clinics. It is very probable that community hospitals, which staff clinics and provide services to underinsured or uninsured residents of Indiana, would be deeply affected by increases attributable to malpractice insurance costs. If the expenses for insuring such programs went up significantly, they would have to consider ceasing obstetrical care as this is a notoriously high-cost area. Since many such community hospital organizations also train family practice residents, not only would health care delivery be curtailed, so would health care training.

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[17] *Id.* at 12.

[18] *Id.* at 14. S*ee also* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, UPDATE ON THE MEDICAL LITIGATION CRISIS: NOT THE RESULT OF THE "INSURANCE CYCLE", Sept. 25, 2002, and U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SPECIAL UPDATE ON MEDICAL LIABILITY CRISIS, Sept. 25, 2002.

[19] U.S. GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: SIX STATE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS (1986)

[20] *Id.*

[21] U.S. GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: EFFECTS OF VARYING LAWS IN THE DISTRICT OF COLUMBIA, MARYLAND AND VIRGINIA, Oct. 15, 1999.

[22] *Id.*, Letter 2.

[23] *Id.,* Letter 1.

[24] F. HELLINGER & W. ENCINOSA, THE IMPACT OF STATE LAWS LIMITING MALPRACTICE AWARDS ON THE GEOGRAPHIC DISTRIBUTION OF PHYSICIANS, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, CENTER FOR ORGANIZATION AND DELIVERY STUDIES, July 3, 2003.

[25] P. Powell & D. Nakata, *Can Earnings Decline Cause a Retirement Flight of Physicians? Financial Compensation and the Decision to Stay in Practice*, 58 MED. CARE RES. & REV. (Sept. 2001).

Abolishing the Cap would also affect access to health care through not-for-profit hospitals. Many not-for-profit hospitals provide care to underinsured and uninsured residents in Indiana. If expenses related to medical malpractice insurance rise, such hospitals necessarily will have to cut services provided to underinsured and uninsured residents. Serving those in need is usually contained in the mission of not-for-profit health organizations. Unfortunately, not-for-profits are not allowed to accumulate income to pay for anticipated malpractice insurance costs in future years. Such hospitals and health care facilities would have to decrease services if expenses rose.

III. THE CAP ON ITS FACE DOES NOT VIOLATE THE DUE COURSE OF LAW CLAUSE OF THE INDIANA CONSTITUTION

The Cap is not facially unconstitutional under the due course of law clause of the Indiana Constitution.[26] Article I, Section 12 of the Indiana Constitution states:

> All courts shall be open; and every person, for injury done to him and his person, property, or reputation, shall remedy by due course of law. Justice shall be administered freely and without prejudice; completely, and without denial; speedily, and without delay.[27]

A statute is constitutional under the due course of law clause where it provides a rational means to achieve a legitimate legislative goal.[28] In considering a challenge to the constitutionality of a statute, courts accord a statute every reasonable presumption supporting its validity and place the burden upon the party challenging it to show unconstitutionality.[29] A statute is not unconstitutional simply because the court might consider it born of unwise, undesirable, or even ineffectual policies.[30]

The Indiana Supreme Court considered and rejected a challenge to the Indiana Medical Malpractice Act on due course of law grounds in *Johnson.* There the court noted that the Cap was a valid legislative response to the lack of an effective risk-spreading device for the medical industry, given that the public required the industry to provide essential services. The court stressed the legislature's legitimate concern that the medical community had shown reluctance to provide its services because of the shortage of effective insurance for the attendant risks. The court found that establishing a form of government-sponsored insurance, limiting liability, and placing the burden of the limitation on persons injured by the industry were rational responses to the potential risk that health care could be severely restricted absent these measures.

The *Johnson* court reasoned that the limitation upon recovery was "the natural consequence of the establishment of an insurance type program."[31] The limitation also provided a factor for calculating premiums and charges to those covered. The court observed, "An insurance operation cannot be sound if the funds collected are insufficient to meet the obligations incurred."[32] Although the court recognized that a badly injured plaintiff who may require constant care might not recover full compensation, the court was "impressed with the large amount which is recoverable and its probable ability to fully compensate a large proportion of injured patients."[33] Tellingly, the court observed:

> [B]adly injured patients would have little or no chance of recovering large sums of money if the evil the act was intended to prevent were to come about, *i.e.*, that an environment would develop in the State in which private or public malpractice insurance were unavailable or unused. Of some relevance here is also the fact that after suit and recovery against a health care provider is completed, there continues a total life-time dependency upon other health care providers for vital

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[26] The Indiana Supreme Court has held that the analysis under Article I, Section 12 of the Indiana Constitution is independent of that under the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution. McIntosh v. Melroe Co., 729 N.E.2d 972, 975 (Ind. 2000).
[27] IND. CONST. art. I, § 12.
[28] *McIntosh*, 729 N.E.2d at 979. S*ee also* N.B. v. Sybinski, 724 N.E.2d 1103, 1112 (Ind. Ct. App. 2000) (upholding cap on welfare benefits to some of state's most needy citizens).
[29] *Johnson*, 404 N.E.2d 585; Sidle v. Majors, 341 N.E.2d 763 (Ind. 1976).
[30] *Johnson*, 404 N.E.2d at 591.
[31] *Id.* at 599.
[32] *Id.*
[33] *Id.*

> treatment of the residuum of illness from the prior negligence and of new and unrelated illnesses. Thus to the extent that the limitation upon recovery is successful in preserving the availability of health care services, it does so to the benefit of the entire community including the badly injured plaintiff. Finally, there is evidence in the record before us that the Act with its limitation upon recovery is achieving its intended goal.[34]

The Indiana Supreme Court therefore concluded that the limitation upon patient recoveries was neither arbitrary nor irrational, but rather furthered the public purposes of the Act. The statute's rational relationship to the legislature's legitimate purposes continues to justify the Cap today.

A plaintiff would not be able to produce evidence that the Cap is wholly ineffective in maintaining access to health care in Indiana, so there would be no evidence to provide a basis to strike down the Act. Such "evidence" submitted to overturn the constitutionality of a piece of legislation on due course of law grounds would have to negate "every conceivable basis which might have supported the classification."[35] Professor Eleanor Kinney, of the Health and Law Center at Indiana University School of Law in Indianapolis, noted that shortly after enactment of tort reform, medical malpractice premiums in Indiana dropped, malpractice insurance became readily obtainable again, and Indiana enjoyed stability in the affordability and availability of malpractice insurance during the mid-1980s while other states experienced a "crisis" in this area.[36]

Moreover, evidence on the frequency of claims has no bearing on the legitimacy of the Cap. Indiana's cap on damages is designed to control the *size* of claims and, in particular, the occurrence of unpredictable catastrophic claims.[37] That the Act does not result in adverse effects on the ability of patients to present and adjudicate claims upholds the Act's rationality. Moreover, Professor Kinney has pointed out in a more recent analysis that "empirical research repeatedly demonstrates that damage caps are one of the few tort reforms that effectively reduce the severity of malpractice claims."[38] She also pointed out that Indiana's reforms have helped Indiana health care providers enjoy low malpractice premiums compared to other states.[39]

As an offset to the Act's $1,250,000 limitation, the legislative scheme offers those most severely injured by medical malpractice at least two concrete benefits: a greater likelihood that the offending physician or other health care provider has malpractice insurance and an assurance of collection from a solvent fund.[40] Compensation and medical care for those grossly injured by medical malpractice are legitimate social interests, which are furthered by the Act. The Cap adversely affects those patients with severe injuries, but it is accompanied by a *quid pro quo:* a reasonable alternative remedy has been provided and a reasonable assurance that the majority of patients injured by medical malpractice will have some recovery. Indeed, as Professor Kinney has noted, an evaluation of Indiana's Medical Malpractice Act indicates that Indiana's reforms have been "unexpectedly quite generous" to claimants.[41] The legislature's statutory solution to the medical malpractice problem is constitutionally sound because it furthers the stated purpose of compensating victims.

The legislature has a legitimate legislative objective in capping medical malpractice awards: to avoid limitations on the availability of health care services, which would be detrimental to the interests of all Indiana citizens. The Cap is a reasonable means to achieve the legislative goal to provide access to health care. In *Martin v. Richey,* the Indiana Supreme Court noted that "the legislature cannot deprive a person of a complete tort remedy arbitrarily and unreasonably, consistent with the protections Section 12 affords, that legislation which restricts such

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[34] *Id.*
[35] *Id.* at 597.
[36] E. Kinney, *Indiana's Medical Malpractice Reform Revisited: A Limited Constitutional Challenge,* 31 IND. L. REV. 1043, 1047 (1998).
[37] *Id*. at 1046.
[38] E. Kinney & W. Gronfein, *Indiana's Malpractice System: No-Fault by Accident?,* 54 LAW & CONTEMP. PROBLEMS 169, 181 (Winter 1991).
[39] *Id*. at 169.
[40] That is not to say that the due course of law provision requires a legislative quid pro quo. *See, e.g.*, McIntosh, 729 N.E.2d at 976; Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88 n.32 (1978).
[41] Kinney, *supra* note 36, at 1047.

right must have a rational means to achieve a legitimate legislative goal."[42] Similar due process challenges to caps on medical malpractice damages in other states have failed, and courts have upheld those caps as constitutional.[43]

The legislature, governing a society of fallible human beings, must have wide discretion to make difficult policy decisions. A person runs the risk each day of being killed or maimed without any realistic ability to seek compensation from anyone. The legislature made a difficult but reasonable decision when it chose to place a limitation on the liability of health care providers in order to ensure continued access to health care for Indiana's residents.

IV. THE MEDICAL MALPRACTICE CAP DOES NOT VIOLATE THE EQUAL PRIVILEGES CLAUSE OF THE INDIANA CONSTITUTION ON ITS FACE

The Cap is constitutional under the equal privileges and immunity clause ("equal privileges clause") on its face.[44] Article I, Section 23 of the Indiana Constitution provides for equal protection of the rights of Indiana citizens.[45] Specifically, that section provides:

> The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, should not equally belong to all citizens.[46]

A statute comports with the equal privileges clause if the disparate treatment accorded by the legislation is reasonably related to inherent characteristics that distinguish unequally treated classes.[47] The focus in determining classifications must be on whether the statute classifies persons and if not, whether the statutory classification of claims treats every person who has that claim the same.[48]

Assuming the statute to be constitutional, courts place the burden upon the challenger to negate "every conceivable basis which might have supported the classification."[49]

> Legislative classification becomes a judicial question only where the lines drawn appear arbitrary or manifestly unreasonable. So long as the classification is based upon substantial distinctions with reference to the subject matter, we will not substitute our judgment for that of the legislature; nor will we inquire into the legislative motives prompting such classification.[50]

The Medical Malpractice Act does not classify persons and the Act treats the same, every person who has the same claim. As a result, the Act passes constitutional muster under the equal privileges clause.

A. THE CLASSIFICATION TO BE EVALUATED IS A CLAIMS CLASSIFICATION

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[42] 711 N.E.2d at 1283.

[43] *See* Evans v. Kutch, 56 P.3d 1046 (Alaska 2002) (upholding Alaska's tort reform including a cap on damages pursuant to a due process analysis); Pulliam v. Coastal Emergency Servs., 509 S.E.2d 307 (Va. 1999) (upholding Virginia's statutory cap on damages in medical malpractice cases pursuant to a due process analysis); Gourley v. Nebraska Methodist Health Sys., Inc., 663 N.W.2d 43 (Neb. 2003) (statutory cap did not constitute special legislation in violation of state constitution).

[44] The Indiana Supreme Court has held that the tests under Section 23 and Section 12 are "very similar." *McIntosh*, 729 N.E.2d at 980.

[45] The Indiana Supreme Court has held that the analysis under Article I, Section 23 of the Indiana Constitution is independent of that under the Equal Protection Clause of the Fourteenth Amendment. Collins v. Day, 644 N.E.2d 72, 75 (Ind. 1994). Indiana's equal privileges clause provides distinct protections from those provided under the Equal Protection Clause and bans all improper grants of unequal privileges. *Id*. at 80.

[46] IND. CONST. art. I, § 23.

[47] *McIntosh*, 729 N.E.2d at 981; *Collins*, 644 N.E.2d at 78-79.

[48] *McIntosh*, 729 N.E.2d at 981.

[49] *Id*. (quoting *Johnson*, 404 N.E.2d at 597). S*ee also* Indiana Gaming Comm'n v. Moseley, 643 N.E.2d 296 (Ind. 1994); Pazzaglia v. Review Bd., 608 N.E.2d 1375, 1377 (Ind. Ct. App. 1993).

[50] *Collins*, 644 N.E.2d at 80.

An analysis of the constitutionality of the Act under the equal privileges clause requires a determination of whether the Act creates classes based not upon characteristics of the claim but upon events that may occur to persons having a claim.

The Act does not statutorily classify persons. All people who have a claim are affected equally by the Cap, as they are by a variety of similar legislative classifications. For example, should a person happen to be injured by a governmental entity, the law limits damages to $300,000.[51] If an injury occurs on the job, no matter how severe, the worker's compensation law limits available compensation.[52] Similarly, if a patient is injured through the negligence of a health care provider, severely or not, the law limits the available compensation.

In medical malpractice cases, the distinction is the mode of injury. Compensation for damages that arise out of injuries caused by the malpractice of health care providers is limited. There is no statutory classification of claimants. Anyone can present a claim and anyone can have his compensation capped by the statute.[53] "It is the claim, not any innate characteristic of the person, that defines the class."[54]

B. THE CLASSIFICATION IS REASONABLY RELATED TO THE CHARACTERISTICS THAT DEFINE THE CLASS

The Cap reflects a legislative determination to control the size of claims and to control the occurrence of unpredictable catastrophic claims that threaten to make malpractice insurance unavailable or unaffordable, thus adversely affecting the availability of health care in Indiana. The burden is on one who seeks to declare the Cap unconstitutional to show that there is "no correlation between the limitation upon recovery and the promotion of health care."[55]

> In considering whether the limitation upon recovery furthers this end in a suitable manner, the reality must be confronted that one deals here with probabilities. In the absence of all insurance, that is a mechanism for spreading risk of loss due to malpractice, claims would have to be paid from the personal assets of health care providers.[56]

In *Johnson*, the court found that the probability of collecting a large damage award from the personal assets of a health care provider would be very small. The court found the classifications of health care providers and injured patients were an integral part of the statutory framework that provided for a government-sponsored risk spreading mechanism as an alternative to solely private insurance.[57]

The Cap promotes certainty and finality by limiting the exposure of health care providers. It assures a greater likelihood that the negligent physician or other health care provider has malpractice insurance and thus a greater likelihood of collection of compensation by the injured party. Indiana courts have repeatedly recognized the special burden that the Medical Malpractice Act places on plaintiffs in medical malpractice cases. However, those courts have also found that the distinction is rationally related to serving legislative goals and is a permissible balancing of the competing interests involved.[58]

Even if the Cap could be considered to distinguish between classes of persons according to their injuries, it still passes constitutional muster. The question is whether the Act's discrimination is arbitrary, capricious, and unreasonable. Section 23 requires that the preferential treatment provided by the statute be uniformly applicable to all similarly situated persons. On its face, the statute applies to everyone. All persons, despite the severity of their injuries, are treated equally.[59]

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[51] IND. CODE § 34-13-3-4. *See* In re Train Collision at Gary, Ind., 654 N.E.2d 1137 (Ind. Ct. App. 1995), *rehearing denied, trans. denied* (upholding constitutionality of damages cap of Indiana's Tort Claims Act).

[52] IND. CODE § 22-3-7-1 *et seq.* *See also Collins*, 644 N.E.2d at 81-82 (holding that the statutory exemption from coverage for agricultural employees did not violate Article I, Section 23).

[53] 729 N.E.2d at 980.

[54] *Id.*

[55] *Johnson,* 404 N.E.2d at 600.

[56] *Id.* at 601.

[57] *Id.*

[58] *McIntosh*, 729 N.E.2d at 980; *Johnson*, 404 N.E.2d at 604.

[59] *See McIntosh*, 729 N.E.2d at 982. *See also Martin*, 711 N.E.2d at 1280-81 (upholding against Section 23 challenge the legislative scheme distinguishing between medical malpractice claimants and nonmedical malpractice

C. THE CAP REMAINS CONSTITUTIONALLY VIABLE

An allegation that the Cap violates Section 23 because the preferential treatment for a classification that may have been constitutional when it was enacted has now ceased to satisfy the requirements of Section 23 because of intervening social and economic change is not viable. In *Collins,* the Indiana Supreme Court considered the constitutionality of the exclusion of agricultural workers from the coverage of the Indiana Worker's Compensation Statute.[60] The plaintiff argued that the worker's compensation agricultural exemption violated Section 23 because it extended an immunity to a special class of employers that was denied to a general class of employers. The court considered the various features distinguishing Indiana agricultural employers from other employers that may have been the basis for the legislative classification and found that the agricultural exemption was uniformly and equally applicable to all persons who are agricultural employers.[61] The court considered whether there had been changes in social or economic conditions since the statute's enactment in 1915 such that the classification was no longer appropriate under Section 23. The court found that although social and economic changes were well documented, "the plaintiff has failed to carry the burden placed upon the challenger to negative every reasonable basis for a classification."[62] Therefore the court was not persuaded that the agricultural exemption had become inconsistent with the requirements of Section 23.

Plaintiffs might seek to challenge the constitutionality of the Cap using the *Collins* framework to argue that there have been significant social and economic changes since the enactment of the Act in 1975, such that the justification for the equal privileges distinctions is no longer valid. There is no evidence to support this argument or the argument that abolishing the Cap would have little impact on the cost of insurance or access to health care. Today, just as in 1975, caps on damages positively affect malpractice insurance rates and positively affect access to health care.

It is often proffered that caps have effects on per capita health care spending, that caps have no effect on claim frequency, and that the profitability of insurance companies is higher in states with caps. Such arguments have no impact on the accessibility to health care justification offered by the legislature. Whether caps affect per capita health care spending is not relevant to the inquiry of whether caps affect medical malpractice costs and correspondingly affect access to health care. Regardless of per capita health care spending overall, the evidence is that caps have moderated the increase in health care costs in Indiana. Similarly, whether caps affect claim frequency has nothing to do with whether caps affect medical malpractice costs and correspondingly affect access to health care. The purpose of the Cap was not to reduce the frequency of claims; rather, it was to reduce the size of damages awarded in medical malpractice claims. Profitability of the insurance companies has no bearing on whether the Cap affects medical malpractice costs and access to health care. Regardless of the profitability of an insurance company, if the Cap is removed, medical malpractice costs for Indiana health care providers will rise. Further, the Indiana Supreme Court has rejected arguments that there are other reasons, such as insurance company profitability, for the rise in rates and unavailability of coverage. In *Johnson*, the court stated that the legislature chose to address the unavailability of insurance, regardless of the motivation behind the curtailment of the availability of medical malpractice insurance.[63] As the court stated, "for constitutional purposes, the motivation behind the curtailment of the availability of malpractice insurance is of little moment. The fact of that curtailment is very important and is the reality with which the legislature chose to deal."[64]

Therefore, the Act will withstand future constitutional challenges. Just as the court in *Collins* considered all the possible reasons that the legislature might have found that agricultural employers were different from other employers, a court evaluating the constitutionality of the Act must consider all of the possible reasons the legislature might have considered that rising medical malpractice costs would adversely affect access to health care. Every single possible justification for the Act cannot be refuted, so the Cap must stand under Section 23 of the Indiana Constitution.

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claimants as reasonably related to the goal of maintaining adequate medical treatment and containing medical malpractice insurance costs.)

[60] 644 N.E.2d at 80.

[61] *Id.* at 84.

[62] *Id.*

[63] *Johnson*, 404 N.E.2d at 601.

[64] *Id.*

Courts from other jurisdictions have upheld the constitutionality of medical malpractice damages caps under similar provisions of their state constitutions. For example, the Colorado Supreme Court found that caps on damages in medical malpractice cases did not violate Colorado's equal protection clause because it is reasonable to assume that unpredictable and large damage awards contribute to the rising cost of malpractice insurance and operate to limit the availability of health care services.[65] That court found that Colorado's statute satisfied the rational basis test because the concerns that prompted the legislature to establish Colorado's cap reasonably supported the passage of that state's act.[66] The court noted that "the wisdom and effectiveness with which the HCAA might remedy the concerns sought to be addressed are, of course, not questions which this court will entertain, for 'we do not sit as a "super legislature" to weigh the propriety of … legislation.'"[67]

Also notable is *Fein v. Permanente Medical Group,* in which the California Supreme Court upheld the California statute limiting recovery of noneconomic damages to $250,000. In *Fein*, the majority of the California Supreme Court, in supporting the legislative malpractice damages cap, stated:

> Faced with the prospect that, in the absence of some cost reduction, medical malpractice plaintiffs might as a realistic matter have difficulty collecting judgments for any of their damages--pecuniary as well as nonpecuniary--the legislature concluded that it was in the public interest to attempt to obtain some cost savings by limiting noneconomic damages. Although reasonable persons can certainly disagree as to the wisdom of this provision, we cannot say that it is not rationally related to a legitimate state interest.[68]

Overall, the Act represents a reasonable balance between the rights of plaintiffs and those of health care providers. It does not violate the equal privileges and immunities clause of the Indiana Constitution.

V. THE CAP DOES NOT VIOLATE THE EQUAL PRIVILEGES OR THE DUE COURSE OF LAW PROVISIONS AS APPLIED

The Cap does not violate the equal privileges and immunities clause or the due course of law clause as applied. Courts have found that a statute that may be facially constitutional can be found to be unconstitutional if the treatment is not uniformly applicable to and equally available to all persons similarly situated.[69] The Act is not subject to defeat on such grounds. The Cap applies to all medical malpractice plaintiffs equally.

The Indiana Supreme Court rejected a facial challenge to the statute of limitations in the Act, but found that the statute of limitations was unconstitutional as applied to the plaintiff in *Martin*, who, because of the long latency period of her disease, had no reason or way to know of her injury prior to the expiration of the two-year statute of limitations.[70] The court specifically noted that prior decisions, including *Johnson*, had upheld the facial

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[65] Scholz v. Metropolitan Pathologist, 851 P.2d 901 (Colo. 1993).
[66] *Id.* at 907.
[67] *Id.* (quoting Colorado Soc'y of Cmty. & Inst. Psychologists v. Lamm, 741 P. 2d 707, 712 (Colo. 1987)). *See also* Guzman v. St. Francis Hosp. 623 N.W.2d 776, 784-785, 787 (Wis. App. 2000) (upholding the constitutionality of Wisconsin statutory cap on noneconomic damages medical malpractice actions under the state equal protection clause and finding a rational basis to believe the cap on damages furthered the legislature's goal of preserving health care services in Wisconsin); Murphy v. Edmonds, 601 A.2d 102, 113 (Md. 1992) (holding that Maryland's cap on damages in medical malpractice cases does not violate Maryland's equal protection clause pursuant to a rational basis analysis); Adams v. Children's Mercy Hosp., 832 S.W.2d 898 at 907 (Mo. 1992) (holding that cap on noneconomic damages in medical malpractice cases is related to the goals of the legislature and therefore does not violate the Missouri equal protection clause. The court found that the legislature could rationally believe that the cap on noneconomic damages would reduce damage awards and thereby reduce insurance premiums paid by health care providers, which would in turn encourage those providers to continue providing quality medical services in Missouri); Etheridge v. Medical Ctr. Hosp., 376 S.E.2d 525 (Va. 1989); Williams v. Kushner, 549 So. 2d 294 (La. 1989); Fein v. Permanente Med. Group, 695 P.2d 665 (Cal. 1985), *appeal dismissed,* 474 U.S. 892 (1985) (White, J., dissenting).
[68] 695 P.2d at 681 (footnotes omitted).
[69] *Collins*, 644 N.E.2d at 80.
[70] *Martin*, 711 N.E.2d at 1279.

constitutionality of the Act, including its occurrence-based statute of limitations provision.[71] The Indiana Supreme Court stated its holding as follows:

> We find that the statute of limitations *as applied* to the plaintiff in this case is unconstitutional under Section 23 because it is not "uniformly applicable" to all medical malpractice victims within the meaning of *Collins v. Day*. Simply put, the statute precludes Melody Martin from pursuing a claim against her doctor because she has a disease which has a long latency period and which may not manifest significant pain or symptoms until several years after the asserted malpractice. The statute of limitations is also unconstitutional under Section 12 because it requires plaintiff to file a claim before she is able to discover the alleged malpractice and her resulting injury, and, therefore, it imposes an impossible condition on her access to the courts and pursuit of her tort remedy.[72]

Unlike the application of a statute of limitations to a claim unknown to the plaintiff, the Cap applies equally to all medical malpractice plaintiffs.[73] As a result, the Cap is not unconstitutional as applied.

VI. THE CAP DOES NOT VIOLATE THE OPEN COURTS PROVISION OF THE INDIANA CONSTITUTION

The Cap also withstands constitutional scrutiny under the open courts clause of the Indiana Constitution. Article I, Section 12 of the Indiana Constitution provides:

> All courts shall be open; and every person, for injury done to him and his person, property, or reputation, shall remedy by due course of law. Justice shall be administered freely and without prejudice; completely, and without denial; speedily, and without delay.[74]

In discussing the open courts provision in *Martin*, the Indiana Supreme Court stated that "there is not a 'fundamental' right of access to the courts or to bring a particular cause of action to remedy an asserted wrong."[75] Instead, the court acknowledged that the legislature has the right to modify or abrogate common law rights as long as that change does not interfere with constitutional rights.[76]

Indiana courts have continually recognized the power of the legislature to modify or abrogate common law remedies. As the Indiana Supreme Court noted in *Johnson*:

> This … basic state legislative authority was addressed in the context of notice statutes and statutes of limitation limiting common law remedies by Justice Shake in *Sherfey v. City of Brazil,* (1937) 213 Ind. 493, 13 N.E.2d 568, thusly:
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> > If appellant is entitled, under the Constitution, to the enforcement of his common-law action, free of any legislative restraint, then the General Assembly possesses no power to prescribe any limit within which such actions shall be brought. Such a conclusion is wholly untenable.

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[71] *Id*.
[72] *Id.* (emphasis in original, citation omitted)
[73] For example, in *McIntosh*, 729 N.E.2d at 983, the court noted that on its face, the statute of repose applied to everyone and that the plaintiff did not fall within any subset of the class of individuals whose claims were time-barred. In this case, the Cap applies to everyone, and there is no subset of the class that can be identified that would be affected by the Cap. The effect of declaring the Cap unconstitutional as applied would be to nullify the Cap. Obviously the sole intent of the Cap is to preclude awards in excess of a specified amount. If the Cap is unconstitutional as applied to plaintiffs with awards in excess of the limitation, it would be unconstitutional for everyone.
[74] IND. CONST. art. I, §12. The Indiana Supreme Court has noted that there is a distinction between the open courts provision of Section 23 and the due course of law provision of Section 12. McIntosh v. Melroe Co., 729 N.E.2d 972, 976 (Ind. 2000). As such, the provisions are addressed separately in this article.
[75] *Martin*, 711 N.E.2d at 1283.
[76] *Id*.

> The Medical Malpractice Act deals with the responsibility as between health care provider and patient. The relationship of health care provider and patient imposes on the health care provider a common law legal duty. The nature and extent of that duty may be modified by legislation. Hence, the Legislature may also validly act to restrict the remedy available for a breach of that duty. This challenged provision of the Act may not be regarded as repugnant to due process simply because it alters the standing manner of achieving a remedy in court, or because it restricts a longstanding remedy.[77]

In *McIntosh*, the Indiana Supreme Court found that the ten-year statute of repose in products liability actions did not violate the open courts provision because the legislature retains the right to modify and or abolish common law remedies.[78] The court stated:

> This Court has long recognized the ability of the General Assembly to modify or abrogate the common law. … In sum, the courts of this State, like those of most others, "generally agree that the constitutional assurance of a remedy for injury does not create any new substantive rights to recover for particular harms. Rather, the clause promises that, for injuries recognized elsewhere in the law, the courts will be open for meaningful redress."[79]

Similarly, the Cap does not violate the open courts provision of the Indiana Constitution because the legislature has the right to modify or abrogate common law claims of medical negligence.[80] As such, the legislature's cap on damages in medical malpractice claims does not violate the open courts provision.

Courts in other jurisdictions have found that caps on damages do not violate the open courts provision of their state constitutions. In *Murphy v. Edmonds*, a Maryland appeals court found that the Maryland legislature had the power to abrogate or modify the common law so long as it did not violate other provisions of the constitution.[81] The court held that pursuant to the Maryland statute the Maryland legislature effectively abrogated any cause of action for noneconomic tort damages in excess of $350,000, but that this did not violate Maryland's access to courts clause of its constitution.[82]

Similarly, in *Adams v. Children's Mercy Hospital*, the Missouri Supreme Court found that Missouri's cap on noneconomic damages in medical malpractice cases did not violate the open courts provision of the Missouri Constitution because the legislature has the right to modify the common law, and the statute simply redefines the substantive law by limiting the amount of noneconomic damages plaintiffs can recover; and further, the *Adams* court held that there is no need to conduct a quid pro quo analysis when considering the open courts provision of the Missouri Constitution.[83]

VII. THE CAP DOES NOT VIOLATE THE RIGHT TO JURY TRIAL IN INDIANA

The Cap does not violate plaintiffs' right to jury trial under the Indiana Constitution. Article I, Section 20 of the Indiana Constitution provides: "In all civil cases, the right of trial by jury shall remain inviolate."[84]

In *Johnson*, the Indiana Supreme Court found that the Cap does not violate the right to trial by jury.[85] The court noted that the plaintiffs argued that the right to trial by jury included the right to have the jury determine all of the facts.[86] The court found that the right to trial by jury was not violated for two reasons. First, the court found that the jury does have the right to factually determine the amount of damages available to the plaintiff. The jury does so

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[77] *Johnson*, 404 N.E.2d at 594.
[78] *McIntosh*, 729 N.E.2d at 976-77.
[79] *Id.* at 977 (citations omitted). S*ee also* Martin v. Richey, 711 N.E.2d at 1282-83; State v. Rendleman, 603 N.E.2d 1333 (Ind. 1992); Sidle v. Majors, 341 N.E.2d 763 (Ind. 1976) (finding the legislature can modify common law rights).
[80] S*ee Johnson,* 404 N.E.2d 585.
[81] 601 A.2d 102 at 116-17.
[82] *Id.*
[83] 832 S.W.2d at 907.
[84] IND. CONST. art. I, § 20.
[85] *Johnson,* 404 N.E.2d at 601.
[86] *Id.*

by rendering a verdict and resolving all of the factual issues pending before them. The court then applies the law to that determination by allocating the total damages among health care provider, its insurer, and the Patient's Compensation Fund. As such the court found "the statute does not withdraw the fixing of damages in excess of the [then existing] $100,000 limit from the jury at all."[87]

Second, the court found that the jury trial right is not a limitation upon the authority of the legislature to set limits upon damages for common law claims. As such, the cap on damages as established by the legislature does not violate the jury trial clause of the Indiana Constitution.[88] The court noted:

> The legislature may terminate an entire valid and provable claim through a statute of limitations. It may validly cause the loss of the right to trial by jury through failure to comply with the requirement to assert the right by procedural rule. It is the policy of this Act that recoveries be limited to $500,000 and to this extent the right to have the jury assess the damages as available. No more is required by Article I, Section 20 of the Indiana Constitution in this context.[89]

As discussed in the open courts section above, the Indiana Supreme Court has acknowledged that the legislature has the right to modify common law rights.[90] Implicit in this is the ability to limit the compensation available to a plaintiff.

Several courts in other jurisdictions have upheld caps on malpractice damages pursuant to challenges that the caps violate the right to jury trial. Courts have noted the distinction between the jury's right to find facts and the court's role in applying the law to the facts. In *Kirkland v. Blaine County Medical Center*,[91] the Idaho Supreme Court found that the Idaho cap on noneconomic damages in medical malpractice cases did not violate the right to jury trial under the Idaho Constitution because the statute did not infringe on the jury's right to find facts. Rather, the statute simply limits the legal consequences of the jury's findings. The court found that the cap on damages did not infringe on the right to a jury trial because plaintiffs are still entitled to present all their claims and evidence to the jury and have the jury render a verdict based on the evidence. The court found that is all that the right to jury trial entitles them. "The legal consequences of the jury's verdict are as matter for the legislature (by passing laws) and the court (by applying those laws to the facts as found by the jury)."[92] Therefore the court found the cap on noneconomic damages did not violate Idaho's right to jury trial.

Similarly in *Etheridge v. Medical Center Hospital,* the Supreme Court of Virginia rejected the argument that a cap on damages violated Virginia's constitutional guaranty of a jury trial saying:

> [T]he Virginia Constitution guarantees only that a jury will resolve disputed facts. … Without question the jury's fact-finding function extends to the assessment of damages. … Once the jury has ascertained the facts and assessed the damages, however, the constitutionally mandate is satisfied. … Thereafter, it is the duty of the court to apply the law to the facts. … Limitations on medical malpractice recoveries contained in [Virginia statute] does nothing more than establish the outer limits of a remedy provided by the General Assembly. A remedy is a matter of law, not a matter of fact. … A trial court applies the remedy's limitations only after *the jury has fulfilled its fact-finding function*. Thus the [Virginia statute] does not infringe upon the right to a jury trial because the section does not apply until after a jury has completed its assigned function and judicial process.[93]

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[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *See supra* Section VI
[91] 4 P.3d 1115, 1120 (Idaho 2000).
[92] *Id.*
[93] 376 S.E.2d at 529 (emphasis added). *See also* Murphy v. Edmonds, 601 A.2d 102, 116-17 (Md. App. 1992) (Maryland's cap on noneconomic damages in personal injury actions does not violate the right to jury trial because the statute preserves the right to have a jury resolve the factual issues with regard to the amount of noneconomic damages and the court then determines the legal effect of that fact-finding); Guzman v. St. Francis Hosp., 623 N.W. 2d 776, 784-85 (Wis. App. 2000) (the statutory cap on recovery of non-economic damages in medical malpractice actions did not violate the right to trial by jury because the jury conducts its fact-finding for the trial and then the judge must apply the law as enacted by the legislature to award damages. The court noted that the constitutionality

Courts from other jurisdictions have also found that where the legislature has the ability to limit a common law remedy, the constitutional right to jury trial is not violated by a damages cap. In *Guzman v. St. Francis Hospital,* the court found that because the legislature can deprive a medical malpractice plaintiff of a cause of action pursuant to a statute of limitations the legislature can also impose a cap on noneconomic damages without violating the right to jury trial. The court stated that the legislature has effectively suspended a cause of action in medical malpractice actions for noneconomic damages exceeding the statutory cap, which it has every right to do.[94]

VIII. CONCLUSION

Constitutional challenges to the Cap and the Act may be at an end in Indiana for a variety of reasons. The Cap and Act together assure up to a $1.25 million fully insured recovery to a medical malpractice plaintiff. In jurisdictions without caps, physicians may carry limited insurance or no insurance, making recovery difficult. The Act also provides for low-cost experts and a lower cost of litigation through the medical review panel process. Many, if not most, medical malpractice actions are resolved at the panel level. Most important, however, the Cap continues to serve the legislative ideal of making malpractice insurance reasonably affordable to Indiana physicians and of fostering the goal of available health care for all Indiana residents.

Resumed efforts to declare the Cap and Act unconstitutional should be unsuccessful. The very premise that led to the legislature's passage of the Cap and Act was access to health care by Hoosiers. That premise is just as applicable today as it was in 1975.

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of this type of limitation on the jury determination of facts was similar to that which exists with comparative negligence statutes where the ultimate recovery of a plaintiff who was contributorily negligent is determined by the judge, regardless of the jury determination of damages due to the defendant's negligence); Adams v. Children's Mercy Hosp., 832 S.W.2d. 898 at 907 (Mo. 1992) (the court found that a statutory cap on noneconomic damages did not violate the right to jury trial because the jury is able to define facts and then the court determines the effect as a matter of law).

[94] 623 N.W.2d 776, 784-85 (Wis. App. 2000). *See also* Kirkland v. Blaine County Med. Ctr., 4 P.3d 1115 (Idaho 2000) (finding that Idaho's cap on noneconomic damages in medical malpractice cases did not violate the right to jury trial because the legislature has the power to abolish common law rights and therefore has the power to limit the remedies available for cause of action).