Malpractice - Liability Limits
Liability Limits' Constitutionality

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Honorable Theodore S. Curtis, Jr.
Senate Chambers
State House
Augusta, Maine 04333

Re: Limitation of Damages - Medical Malpractice

Dear Senator Curtis:

This memorandum treats the constitutional questions implicated by the enactment of a statutory dollar limitation upon the amount of damages recoverable by a victim of medical malpractice. Specifically, the memorandum considers whether the Constitution of Maine would accommodate such a law, and if not, whether a state constitutional amendment effecting such a provision would violate the Constitution of the United States.

For purposes of analysis, we assume that the effect of such a provision would be to deny to some malpractice claimants a portion of compensation for medical expenses, loss of income, and pain and suffering otherwise recoverable under the common law of tort.

In the event that such a limitation upon tort recovery were passed, a suit to test the constitutionality of the statute would probably raise the following constitutional issues:

(1) Whether a person whose damages sustained by reason of medical malpractice exceed the statutory dollar limitation has been denied, pro tanto, his right of remedy for injury done him guaranteed by Article I, § 19 of the Constitution of the State of Maine?

(2) Whether the restriction of the recovery limitation to malpractice torts transform the statute into a special law favoring physicians, medical care facilities, and their insurers, in violation

of Article IV, Pt. Third, § 13 of the Constitution of the State of Maine?

3) Whether the dollar limit on amount of recovery, as applied to a person whose common law damages would exceed that amount, deprives that person, pro tanto, of his right to trial by jury in civil actions guaranteed by Article I, § 20 of the Constitution of the State of Maine?

4) Whether the statutory limitation of recovery is so arbitrary and unrelated to the general welfare such that it amount to a violation of due process clause of the Fourteenth Amendment to the Constitution of the United States?

5) Whether the statutory limitation of recovery violates the Fourteenth Amendment's guarantee of equal protection under the laws because,

a) its discrimination against victims with damages in excess of the statutory limit is not fairly related to a legitimate, identifiable objective of the statute; and/or

b) its discrimination against seriously injured victims of medical malpractice vis-a-vis seriously injured victims of other tortious actions is arbitrary and capricious?

This memorandum will conclude that a dollar limitation on damages recoverable by a victim of medical malpractice, without more, is likely to be found unconstitutional as a violation of the Equal Protection Clause of the Constitution of Maine and of the United States, and hence, no amendment to the Constitution of Maine

will save such a legislative scheme from constitutional infirmity.

I. Deprivation of Right to Redress for Injury

Article I, § 19 of the Constitution of Maine declares:

> "Every person, for an injury done him in his person, reputation, property or immunities, shall have remedy by due course of law, and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay."

Though sweeping in its provisions, this constitutional provision has received scant attention by the courts of Maine during the whole of its history. Even when faced with a controversy that directly implicated this clause - the attribution to a private corporation of governmental immunity against liability for tortious injury - the Supreme Judicial Court refused to decide on the basis of Article I, § 19. Milton v. Bangor Ry. & Elec. Co., 103 Me. 218 (1903). One commentator has suggested, however, that the clause is ripe for resurrection. Note, "Article I, Section 19 of the Maine Constitution: The Forgotten Mandate," 21 Me.L.Rev. 83 (1969).

In passing upon the constitutionality of a limitation of damages recoverable for medical malpractice, the Supreme Judicial Court will have to decide for the first time whether the common law right of action for economic and non-economic loss due to tortious injury has been constitutionalized by Article I, § 19.

The argument to be based on Article I, § 19 is that this constitutional provision froze all common law rights of action as of its adoption, to the extent that no common law right to redress for

injury could be abolished without provision for a substitute remedy. This argument has been referred to as the "quid pro quo" requirement, and is the private rights' analogue to the "taking for just compensation only" provision of the State and Federal Constitutions.[1/]

The courts of the various states have divided on the question of whether state constitutional provisions analogous to Article I, § 19 of the Constitution of Maine preclude the abolishment of a common law right of action without provision for a substitute remedy. In the context of no-fault automobile liability statutes, the first court to pass on the constitutionality of a provision limiting the non-economic recovery of non-seriously injured accident victims held that the substitute remedy established for such victims was sufficient to satisfy the "quid pro quo" criterion set forth in New York Central R.R. v. White, 243 U.S. 188 (1917). Pinnick v. Cleary, 271 N.E.2d 390 (Mass. 1971). However, the Pinnick court explicitly refused to hold that the "quid pro quo" test was constitutionally mandated. Id., n. 16, at 605. The highest court of New York State adopted the same approach in sustaining New York's no-fault statutory program, in an opinion which casts severe doubt on the efficacy and necessity of the "quid pro quo" test. Montgomery v. Daniels, 340 N.E.2d 444 (N.Y. 1975).

1/ The "quid pro quo" requirement is also regarded by some courts as an element of substantive due process. See Caroline Environmental Study Group, Inc. v. Atomic Energy Comm., 45 U.S.L.W. 2465 (W.D.N.C. March 31, 1977) (Price-Anderson Act's limitation of liability for nuclear catastrophe held unconstitutional); Jones v. State Board of Medicine, 555 P.2d 399 (Ida. 1976) rev. den. 45 U.S.L.W. 3749 (U.S. May 17, 1977) (discussed infra).

On the other hand, the Supreme Court of Connecticut has held that the constitutional guarantee of redress for injury precludes the abolishment of a common law right of action without provision for an alternate remedy. Gentile v. Altermatt, 363 A.2d 1 (Conn. 1975), appeal dismissed, __ U.S. __, 96 S.Ct. 763 (1976).

In passing upon the constitutionality of dollar limitations upon damages recoverable by medical malpractice victims, the courts of the various states are also at odds. The Supreme Court of Illinois, for example, in striking down a $500,000 limitation on recoverable damages, distinguished the damage limitations operative in workmen's compensation actions by utilizing the "quid pro quo" argument. In the court's view, the workmen had received a substitute remedy for the relinquishment of the right to sue for unlimited pain and suffering damages, because the workmen's compensation scheme guaranteed full, prompt recovery for medical expenses without having to prove employer negligence. Wright v. Central DuPage Hosp. Ass'n., 347 N.E.2d 736 (Ill. 1975).

The Supreme Court of Illinois also rejected the argument that the common law right of the most seriously injured to sue for full recovery of damages could be constitutionally exchanged for lower medical care costs for all. This "'societal' quid pro quo" argument was held to be likewise distinct from the situation of workmen's compensation.

On the question of whether the "quid pro quo" is a constitutional prerequisite for the alternation of common law rights of action, however, the Illinois court equivocated:

> "Although we do not hold or even imply that under no circumstances may the General Assembly abolish a common law cause of action without a concommitant quid pro quo, we have consistently held that to the extent that recovery is permitted or denied on an arbitrary basis a special privilege is granted in violation of the Illinois constitution."

Id. at 743.[2/]

However, the Idaho Supreme Court expressly rejected a lower court holding that the right-of-redress provision of the state constitution proscribes the modification of the common law right to recover full damages for injuries caused by medical malpractice. Jones v. State Board of Medicine, 555 P.2d 399, 404 (Ida. 1976), review denied, 45 U.S.L.W. 2224 (U.S. May 17, 1977).[3/] In another portion of its

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2/ The Illinois Supreme Court thus rested its decision on less extensive grounds than those of the lower court. The lower court had held that the limitation on recoverable damages violated the state and federal guarantees of due process and equal protection, the state guarantee of redress for every injury, and the provision against special laws. It is therefore arguable that the Illinois Supreme Court did not set up a "quid pro quo" test for the constitutionality of limitations of damages recoverable under the common law, but merely cited the "quid pro quo" aspect of the workmen's compensation statutes in order to distinguish it from the statutory programs sub judice.

3/ The Supreme Court's denial of review should not be interpreted as a tacit approval of the reasoning of the Idaho Supreme Court. The decision of the Idaho court was to remand the case to a lower court for the completion of a factual record to be used by the state Supreme Court in its due process-equal protection review of the law. The United States Supreme Court's denial of review is best viewed as a determination that the case was not ripe for review.

opinion the court rejected the "quid pro quo" criterion as a test of substantive due process. Id., at 406, 408-409 (adopting the reasoning of Montgomery v. Daniels, supra.)

In the absence of a definitive interpretation of Article I, § 19 of the Constitution of Maine, and in view of the doctrinal turmoil surrounding the construction of right-of-redress guarantees by the courts of other states, it would be imprudent to offer a conclusive opinion on whether a limitation of damage recoverable in a malpractice action violates Article I, § 19. Certain observations may be made, however, respecting the tendencies of the Supreme Judicial Court to countenance legislative changes in the common law. The Court has held that Article X, § 3 of the Constitution of Maine incorporated the common law remedies extantat the time of Maine's separation from Massachusetts. Dwyer v. State, 151 Me. 382 (1956) (writ of coram nobis permitted). Article X, § 3 declares:

> "All laws now in force in this State, and not repugnant to this Constitution, shall remain, and be in force, until altered or repealed by the Legislature, or shall expire by their own limitation."

Dwyer's holding that the above clause incorporated the common law, when considered in light of the clause's provision that such law may be "altered or repealed by the legislature," implies that the legislature is constitutionally empowered to abolish common law rights of action without provision of a substitute remedy.

Further support for this suggestion is found in the dictum of Pringle v. Gibson, 135 Me. 297 (1937) (New Brunswick's guest statute applied in suit by non-resident), which quoted with favor the comment

in Silver v. Silver, 280 U.S. 117, 122 (1929) (Connecticut's guest statute upheld) that

> "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to obtain a permissible legislative object,"4/

and by the dictum in Lord v. Chadbourne, 42 Me. 429, 441 (1856) (statute abolishing right of actions concerning alcoholic beverage upheld):

> "The Legislature may pass laws altering or even taking away remedies for the recovery of debts (and for the recovery of compensation in damages for torts) without incurring a violation of the provisions of the constitution, which forbid the passage of ex post facto laws."

The sweeping nature of this language in Lord v. Chadbourne has since been limited. Miller v. Fallon, 134 Me. 145 (1936) and In re Gauthier, 120 Me. 73 (1921) are authority for the proposition that once a right became vested, the legislature may not revoke the right but may only alter the form of remedy. However, since these limitations on legislative action attach only after the events giving rise to the cause of action have occurred, and since a claimant has no vested right in a common law action prior to such an event, it follows that the prospective abolition of a common law right of action or remedy is within the power of the legislature.

4/ The reasoning of Silver has since been thoroughly discredited. Sidle v. Majors, 536 F.2d 1156 (7th Cir. 1976) (Indiana guest statute would violate equal protection if federal question were presented). The Silver conclusion, quoted above, has not been discredited. Montgomery v. Daniels, supra. The Sidle holding suggests, as does this memorandum, that the constitutional test of selective limits on liability must be founded in the Due Process and Equal Protection Clauses, and not in a right-of-redress provision.

Viewed in the spirit of these decisions, Article I, § 19's guarantee of a right of redress is likely to be construed only as a prohibition against restricting access to the courts for redress of a legally-recognized injury. The right to define a "legally-recognized injury" is reserved to the legislature. Thus, a statutory restriction on the amount of damages recoverable in a malpractice action may be viewed as a legislative redefinition of the malpractice tort so as to withdraw that portion of the tortious conduct causing damages in excess of the limit from the realm of "legally recognized," and therefore, constitutionally redressible injury. Although such a holding might sound more in semantics than in jurisprudence, there is judicial authority for it. Shoemaker v. Mountain State Tel. & Tel. Co., 559 P.2d 721 (Colo. 1976); Gentile v. Altermatt, supra.

If the Supreme Judicial Court were to adhere to the tenor of its prior opinions, and hold that the legislature might abolish a common law right of action for tortious damage in excess of a certain limit without providing a substitute remedy, the constitutional inquiry would still not be at an end. The legislature can exercise its prerogative only in conformity with the requirements of due process and equal protection; its actions must still rationally relate to a permissible legislative object. Jones v. State Board of Medicine, supra. Restated in question form, the right to full recovery of common law damages in tort is not immune from legislative abolishment, but can a selective abolishment be justified as advancing a legitimate state interest? Many of the same considerations that bear upon the

right-of-redress question reappear in the due process-equal protection analysis, and will be treated in another portion of this memorandum.

II. Special Law

Article IV, Pt. 3, § 13 declares that:

> "The Legislature shall, from time to time, provide, as far as practicable, by general laws, for all matters usually appertaining to special or private legislation."

From the wording of this clause, it is unclear whether the Maine Constitution proscribes the withholding of privileges granted to others in the same sense as the Illinois Constitution interpreted in Wright v. Central DuPage Hosp. Ass'n., supra. This uncertainty is obviated, however, by the statement in Milton Bangor Ry. and Elec. Co., supra, at 223, that

> "The people have not conferred upon the legislature the power to exempt any particular person or corporation from the operation of the general law [of negligence], statutory or common."

While this principle may proscribe the granting or withholding of legal privileges to "particular person(s) or corporation(s)," it does not appear to restrict the apportioning of such privileges among different classes of persons or corporations where there is a rational basis for such apportionment. See Dirksen v. Great Northern Paper Co., 110 Me. 374 (1913). Indeed, the court in Wright v. Central DuPage Hosp. Ass'n., supra, at 743, employed such equal protection terms as

"classification," "unreasonable," and "arbitrary," is finding the limitation of damages to be a special law."[5/]

Once again, the question of constitutionality of the proposed limitation of recovery on damages as a "special law" is subsumed in the due process-equal protection issues, and will be considered below.

III. Denial of Right of Trial by Jury

Article I, § 20 of the Constitution of the State of Maine provides that

> "In all civil suits, and in all controversies concerning property, the parties shall have a right to trial by jury, except in cases where it has been heretofore otherwise practiced. . ."

The argument has been made that a limitation on the amount of damages recoverable in an action for malpractice would infringe upon the right to trial by jury for so much of the injury that exceeds the damage limit. Note, "Indiana's Medical Malpractice Act: Legislative Surgery on Patient's Rights." 10 Valparaiso U.L.Rev. 304 (1976). As the New York Court of Appeals noted in Montgomery v. Daniels, supra, at 460-461, however, this argument is merely a rephrasing of the right-to-redress argument:

> "If . . . the Legislature otherwise properly abrogate the claim in part, to that extent there remains nothing to which the right to trial by jury may attach."

5/ Wright v. Central DuPage Hosp. Assn., supra, is properly viewed as an equal protection decision disguised as a state constitutional "special law" decision. By deciding the case on state grounds, the Illinois Supreme Court avoided review of its decision on certiorari by the United States Supreme Court.

Id., at 460 (citation omitted). The Supreme Judicial Court has also recognized the principle that the right to trial by jury attaches only where the common law right of action for damages exists. Portland Pipe Line Corp. v. Environmental Imp. Comm'n., supra, at 29. The challenge to limitation of damages based on the right of trial by jury is therefore subsumed within the question of whether the legislature has the right to abolish in part a common law cause of action. This question has been answered in the affirmative in part I of this memorandum; hence no right to trial by jury is infringed by a limitation on recoverable damages.

IV. Due Process - Equal Protection

A. Due Process

In Maine, as in all of the states, the requirements of substantive due process are that:

> "1. The object of the exercise (of legislative power) must be to provide for the public welfare."
>
> "2. The legislative means employed must be appropriate to the achievement of the ends sought."
>
> "3. The manner of exercising the power must not be unduly arbitrary or capricious."

State v. Rush, 324 A.2d 748 (Me. 1974).

1. Permissible Object. The objective of a limit on medical malpractice damages is to effect a reduction in the price of medical care for all citizens of Maine, and to remove the inclination toward "defensive medicine" fostered by the tort recovery system. Both

objectives lie well within the core of permissible state objectives, namely, the promotion of the public health and welfare.

2. Rational Means. In due process scrutiny of social welfare legislation, the test is not whether the means adopted in fact advance the legislative ends, but whether the means could conceivably advance the legislative objective. State v. Rush, supra. A legislature might reasonably determine that a limitation on recoverable damage in malpractice actions would reduce malpractice insurance premiums and consequently health care costs.[6/]

3. Arbitrary Exercise. This question bears closely upon the collateral inquiry under the Equal Protection Clause.

B. Equal Protection

In Maine, the standard of equal protection applicable to social and economic welfare legislation has been alternatively stated as follows:

1) the classification must not rest on grounds wholly irrelevant to the objectives of the statute, State v. S. S. Kresge, 364 A.2d 868 (Me. 1976).

2) the difference in treatment must be reasonably related to the object of the regulation, Union Mutual Life Ins. Co. v. Emerson, 345 A.2d 504 (Me. 1973).

6/ The Supreme Court of Idaho has remanded Jones v. State Board of Medicine to a lower court for the production of a factual record linking the limitation of damages to a reduction of medical care costs.

3) the classification must be based on actual differences, Portland Pipeline Corp. v. Environmental Improvement Comm'n., 307 A.2d 1 (Me. 1973).

The common thread in each of the three decision cited above is that the court was willing to hypothesize any conceivable state of facts to justify the legislative classification. Such an adjudicatory posture is inconsistent with the requirement that differences in treatment be based upon actual differences between the classes. This inconsistency only underscores the fact that the Supreme Judicial Court, like mostother courts, in resolving disputes based on equal protection, probably reaches its conclusion on the merits before determining whichshade of the equal protection standard justifies its conclusion.

Were the Supreme Judicial Court to adhere to the standard of scrutiny announced in its decisions cited above, the Court would probably rule that a limitation on damages recoverable by a victim of malpractice satisfies the Equal Protection Clause:

1) with respect to the challenge that the particular dollar limit chosen was arbitrary, the Court would hold that it is permissible for the Legislature to engage in numerical line-drawing, Shapiro Bros. Shoe Co., Inc. v. Lewiston-Auburn S.P.A., 320 A.2d 247 (1974);

2) with respect to the argument that the statute invidiously discriminates against the more seriously injured victim, the Court would hold under the "conceivable facts" tests that a) such discrimination is rationally related to the goal of holding down

malpractice insurance rates and thereby increasing the scope and availability of health care; and/or b) damages exceeding the statutory limit could conceivably be found by the legislature to be so speculative that no invidious discrimination is wrought upon such victims; and

3) with respect to the challenge that the statute invidiously discriminates against medical malpractice victims as opposed to other tort victims, the Court would hold that a) the "crisis" in medical malpractice may warrant special treatment of such victims; and/or b) the Constitution does not prohibit the legislature from addressing itself to the problem of the tort system "one step at a time," Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955).

There is good reason to believe, however, that the Supreme Court will not adopt the deferential posture incorporated into the traditional standards of equal protection. The three courts which have passed upon the constitutionality of such limitations upon recovery in malpractice actions have employed a stricter standard of equal protection. This was accomplished explicitly in one case, Jones v. State Board of Medicine, supra; and implicitly in the others, Wright v. Central DuPage Hospital Assn., supra; Simon v. St. Elizabeth Medical Center, supra.[7/]

7/ There is growing support for the position that these are in fact interim levels of equal protection analysis between the extremes of "minimum scrutiny" of economic legislation and "strict scrutiny" of legislation incorporating "suspect" classifications (such as race) or impinging upon fundamental rights. See San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting); Gunter, "Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harvard L. Rev. 1 (1972).

In Jones, the Supreme Court of Idaho, in relying upon the more recent decisions of the United States Supreme Court, applied a "means-focus" test in passing upon the equal protection aspects of the limitation of damages. The Idaho court justified the application of this "intermediate scrutiny" because the limit of liability patently discriminated against the more seriously injured victim and because the relationship between the damage limitation and the goal of increased availability of health care was considered on first appraisal to be tenuous. The court remanded the case for production of a factual record which would establish: 1) that there exists a medical malpractice crisis in the state; 2) that any difficulty in obtaining malpractice insurance is directly related to the absence of a limitation on damages; 3) that there exists a problem of unavailability of health care in the state which would be beneficially affected by a limitation on damage recoveries.

The Supreme Court of Illinois, in vesting its invalidation of damage limits on the state constitutional proscription against special laws, in effect employed an "intermediate" scrutiny test of equal protection. Wright v. Central DuPage Hospital Ass'n., supra. The court honored the plaintiffs argument that the $500,000 limit on damages,

> "arbitrary classified, and unreasonably discriminated against, the most seriously injured victims of medical malpractice . . . (and) that the burden of this legislative effort to reduce or maintain the level of malpractice insurance premiums falls exclusively on those extremely unfortunate victims who most need financial protection."

Id., at 741. The court did not bother to consider what permissible legislative objectives could have been advanced by the limitation of recovery, as is done in "minimum scrutiny" equal protection cases; it held instead that the discrimination against the most seriously injured was invidious.

In Ohio, a court of common pleas likewise did not pause to consider what legitimate state objectives would be fostered by a $200,000 limit on damages. Simon v. St. Elizabeth Medical Center, supra. The court found the statutes restriction on the common law remedy of the malpractice victim to be invidiously discriminatory, unjustified by any crisis state of affairs, "short of civil insurrection." Id., at 912.

The practical import of these three decisions is that the courts are suspicious of any statutory scheme that confers a definite benefit upon a group popularly regarded as influential and wealthy, at the expense of a class generally regarded as defenseless and victimized. Judicial suspicions are especially intensified when the benefit or privilege withdrawn from the disadvantaged class is the opportunity to invoke the protection of the courts. In such instances, the courts will at least demand a convincing showing that the facially discriminatory legislation will accrue overriding benefits to the citizenry at large, and in some cases, will require that some alternative benefit - a 'quid pro quo"- be restored to the disadvantaged class.

Conclusion

If the Supreme Judicial Court adheres to its previously-announced standards of equal protection, and more importantly, if its decision is controlled by such standards, it will uphold the limitation on damages recoverable in a malpractice action. However, in view of the judicial consensus on the specific issue, the Court is more likely, either explicitly or implicitly, to undertake a stricter review of the statute on equal protection grounds, and ultimately strike down the statute.

Certain collateral considerations may bear upon the ultimate determination of the Supreme Judicial Court. If the statutory scheme affords a guarantee of a substitute remedy for the seriously injured malpractice victims, or if the limitation upon damages is restricted to the less tangible, more speculative elements of damage such as awards for pain and suffering or impairment of bodily functions,[8/] the Court is likely to be less exacting in its review.

Sincerely,

Bob Frank

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BF:jg

8/ See Cyr v. B. Offen & Co., 501 F.2d 1145, 1148-49, n. 2 (1st Cir. 1974), where New Hampshire's limitation of damages for wrongful death was upheld against an equal protection challenge, the court observing that damages recoverable by an estate were inherently more speculative than damages to an injured party sustained prior to death.