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The California Statutory Cap on Economic Damages in Medical Malpractice Claims: Implications on the Right to a Trial by Jury

Stephen K. Meyer

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I. INTRODUCTION

Michael Miller, a healthy and active eight year old, was admitted to a California hospital for a routine tonsillectomy. However, during the surgery Michael’s vital signs became erratic and he lapsed into a deep coma. When Michael awoke from the coma twelve days later, it was determined that he had suffered severe, permanent neurological damage.

Michael and his parents subsequently brought a medical malpractice claim against the hospital, surgeon, and anesthesiologist. During the course of the trial the jury heard and witnessed compelling evidence pertaining to Michael’s injuries. The expert testimony indicated that the once bright child suffered a permanent impairment of his motor and learning skills. While Michael’s expected life span of sixty-six years remained unaltered, it was concluded that he would not develop intellectually or socially much beyond that of a typical eight year old, and would require vigilant care for the remainder of his life. The testimony further indicated that Michael’s brain damage also resulted in recurring, debilitating headaches, the pain from which could be only minimally alleviated with available treatment.

Following nine days of testimony and two days of deliberation, the jury found the anesthesiologist negligent and held the hospital vicariously liable. In addition to special damages covering the expected cost of Michael’s medical care, the jury assessed Michael’s pain and suffering over his sixty-six remaining years and awarded 1.2 million dollars in noneconomic compensation. The trial judge subsequently reduced the award for pain and suffering to $250,000 pursuant to state legislation that placed a ceiling on recovery for noneconomic damages in medical malpractice claims.

Michael and his situation are fortunately hypothetical. However, the plight of many California medical malpractice plaintiffs who have had their awards for pain and suffering reduced pursuant
to a state statute is neither fortunate nor hypothetical.¹

The professional liability insurance crisis² of the last two decades prompted all but one state to prescribe reform legislation aimed at remedying the unmanageable insurance rates levied against health care services.³ California's legislative attempt to curtail the crisis was the adoption of the Medical Injury Compensation Reform Act (MICRA).⁴ As part of this Act, the amount recoverable for noneconomic damages in medical malpractice claims was capped at $250,000.⁵ This statutory limit applies equally to all medical malpractice plaintiffs, regardless of life expectancy, the nature of the injury, or the potential absence of substantial pecuniary loss.⁶ The statute mandates that any jury award of noneconomic damages based upon the jury's deliberations and conclusions of fact over the statutory limit be reduced. The reduction is mandated even though the jury's findings may be reasonably supported by the evidence as a matter of law.⁷

In 1985, the California Supreme Court decided Fein v. Permanente Medical Group⁸ and upheld the statutory cap in the face of equal protection and due process challenges.⁹ Although the statute treats unequal plaintiffs equally,¹⁰ the majority deferred to the legislature and applied the lowest level of judicial scrutiny. Hav-

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1. See, e.g., Gilman v. Beverly California Corp., 283 Cal. Rptr. 17 (Ct. App. 1989) (reducing plaintiff's wrongful death award for noneconomic damages to $250,000); Atkins v. Strayhorn, 273 Cal. Rptr. 231 (Ct. App. 1990) (statutorily reducing medical malpractice award to plaintiff whose leg was partially amputated due to medical negligence).

2. The medical malpractice insurance crisis is discussed infra in Part A of Section II.

3. See Ruth Gastel, Medical Malpractice, INS. INFO. INST. DATA BASE REP., Nov. 1991, at 7, (noting that only West Virginia has failed to enact reform legislation).

4. CAL. CIV. CODE § 3333.2 (West 1990 & Supp. 1992). The statute provides that:
   (A) In any action for injury against a health care provider based on personal negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.
   (B) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000).

Id.

5. Id.
6. Id.
7. Id. The statute contains no exceptions and the automatic reduction of an award in excess of $250,000 to $250,000 is not contingent upon a legal finding that the jury's award was excessive as a matter of law. Id.

9. Id. at 684.
10. CAL. CIV. CODE § 3333.2 (West 1990 & Supp. 1992). The statute mandates that awards in excess of $250,000 be lowered to that amount regardless of the severity of the plaintiff's injuries. Id.
ing to satisfy only a rational relationship test, the statute was upheld.\textsuperscript{11}

The majority of states that have considered similar statutes have struck down the damage ceilings on equal protection and due process theories.\textsuperscript{12} Several statutory caps on recovery have also been invalidated as unconstitutional infringements on the right to a jury trial.\textsuperscript{13} Fein, however, remains the definitive statement of California law.\textsuperscript{14} Additionally, two California courts of appeal have applied Fein in specifically holding that the California statutory cap does not abridge the constitutional right to a jury trial.\textsuperscript{15}

This comment argues that section 3333.2 of the California Civil Code is unconstitutional on the theory that the statutory ceiling on recovery denies medical malpractice plaintiffs the constitutional right to a jury trial.

This comment in Section II will first discuss the medical malpractice crisis as the precipitating factor to California’s enactment of the damage cap provision in MICRA. It will then summarize Fein and the holdings of other state and federal courts which have addressed the constitutionality of similar statutory caps on recovery in light of the constitutional right to a jury. Section II will finally discuss the California and federal rights to a jury trial. Section III will set forth the constitutional and practical problems associated with the California statutory cap on economic recovery. Section IV will analyze the statutory cap, relevant constitutional provisions, and the reasoning of courts that have addressed the problem. Finally, a proposed solution will be discussed in Section V.

\section*{II. Background}

\subsection*{A. The Medical Malpractice Crisis and California’s Response}

The early 1970’s witnessed the beginning of what is commonly referred to as the medical malpractice crisis.\textsuperscript{16} Many private insurers

\begin{thebibliography}{99}
\bibitem{11} Fein, 695 P.2d at 686.
\bibitem{12} See Ruth Gastel, Medical Malpractice, INS. INFO. INST. DATA BASE REP., Oct. 1990, at 5.
\bibitem{14} 695 P.2d at 665.
\bibitem{16} Gastel, supra note 3, at 7.
\end{thebibliography}
were compelled to leave the market due to increasing financial losses. The insurance companies able to maintain their businesses did so at the growing expense of health care providers and receivers. While many factors converged to cause the crisis, a central factor was the growing number and dollar amounts of malpractice claims. The resulting escalation in health care liability insurance rates not only affected the care providers, but in turn impacted the availability of affordable medical care.

There is some indication that the crisis is abating, yet concern by the insurance companies, physicians, and the general population persists. Recent statistics indicate that the number of malpractice claims is decreasing. However, the fewer number of claims continue to result in larger awards. As of June 1989, the average insurance cost per malpractice claim was more than $36,000, a four year increase of about $8,000 per claim.

Physicians, generally, are justifiably concerned about this persistent crisis. Their consistent response is that tort reforms are necessary to abate rising costs and the consequential decline in available services. Studies of these reforms, however, indicate that they will only slightly affect the annual costs incurred from tort claims. The American Medical Association (AMA) has estimated that increasing liability costs of about twelve billion dollars constituted roughly fifteen percent of the net amount spent on health services in 1984. Of this growing amount, nine billion was due to changes in physicians' practices. These changes were typified by more expensive procedures designed to minimize risk and potential liability. Charges by medical malpractice insurance companies, however, constituted only three of the twelve billion dollars annually spent on liability costs. These numbers support recent studies which have found liability insurance

17. Gastel, supra note 3, at 7. The term "health care providers" refers to anyone associated with the rendering of medical services. "Receivers" are members of the public who obtain medical care.
22. Hubbard, supra note 18, at 296.
23. Hubbard, supra note 18, at 296.
24. Hubbard, supra note 18, at 296.
premium costs to be less than “excessively high.”

Nonetheless, the overwhelming response by state legislatures was to enact statutory tort reforms in the area of medical malpractice claims. In California, the Medical Injury Compensation Reform Act (MICRA) was enacted. The Act provides that noneconomic damages in medical malpractice claims may not exceed $250,000. The statute does not limit damages recoverable for special damages, but merely limits the amount plaintiffs may recover as a result of nonpecuniary loss. The statute applies equally to all medical malpractice plaintiffs with no exceptions. Factors such as the degree and nature of the injury, the life expectancy of the plaintiff, or the reasonableness of the jury’s findings of fact are not considered. The statutory cap of $250,000 on such damages has remained unchanged since its enactment over fifteen years ago.

B. Fein v. Permanente

In Fein v. Permanente Medical Group, the California Supreme Court heard arguments concerning the constitutionality of section 3333.2 of the California Civil Code offered by a malpractice plaintiff whose award was reduced by the trial court in accordance with the statute. The plaintiff’s complaint alleged, and the jury found, that the Permanente Medical Group was negligent in its failure to properly and promptly diagnose plaintiff’s heart condition and eventual heart attack. The jury determined plaintiff’s noneconomic damages, including pain and suffering, to be $500,000. Pursuant to the statute, the award was reduced by the trial judge to $250,000.

27. Hubbard, supra note 18, at 296. The studies concluded that the “‘crisis’” in medical malpractice insurance has abated, and that premiums are not unmanageable. Id.
30. Id.
31. Special damages are those losses actually suffered by a plaintiff. They typically flow directly from an injury, such as medical bills or lost wages. Special damages generally have to be specifically pleaded and proved by the plaintiff. Black’s Law Dictionary 392 (6th ed. 1990).
32. “Nonpecuniary damages” encompass injuries suffered by a plaintiff that are not based in direct monetary loss. Nonpecuniary losses may include pain, suffering, and loss of consortium. For a definition of “pecuniary damages,” see id.
33. However, the statutory ceiling on recovery applies only to actions involving professional negligence, and does not apply to a patient’s battery action against a health care provider. Szkorla v. Vecchione, 283 Cal. Rptr. 219 (Ct. App. 1991).
35. 695 P.2d 665 (Cal. 1985).
36. Id.
37. Fein, 695 P.2d at 671.
The plaintiff attacked the constitutionality of the statute on equal protection and due process grounds. No mention was made of the statute’s impact on the right to trial by jury under the state constitution. In analyzing the constitutional challenges, the court applied a mere rational relationship test. In justifying the use of this test, the court reasoned that since the statute constituted economic legislation and did not involve a suspect class or fundamental right, considerable deference should be given to legislative determinations regarding the need and efficacy of the statutory cap. The court found that “[t]he choice between reasonable alternative methods for achieving a given objective is generally for the Legislature, and there are a number of reasons why the Legislature may have made the choices it did.” For a statute to withstand a rational relationship test, the court must merely find that there is a legitimate state interest and that the means are rationally related to that purpose. The court appeared to have little difficulty in determining that the state’s interest in maintaining reasonable liability insurance rates and ensuring adequate medical care for the public was legitimate. The court also found the statutory cap to be rationally related to achieving that end. The statute was therefore held to be constitutional and the limit on plaintiff’s noneconomic recovery was sustained.

C. Statutory Damage Ceilings and the Right to Trial by Jury

As of October 1990, fifteen state supreme courts have addressed the constitutionality of damage cap provisions similar to section 3333.2 of the California Civil Code. Eleven of these courts have

38. Id. at 679, 682.
39. Id. at 679-81. The “rational relationship test” is simply the term used to describe a court’s level of judicial scrutiny in analyzing a statute. The “rational relationship test” is the least rigorous form of scrutiny. To satisfy the test, statutes must typically merely regard a legitimate state interest and be rationally related to that interest. See, e.g., Railway Express Agency v. New York, 336 U.S. 106 (1949).
40. Fein, 695 P.2d at 679, 683. The court reasoned that since the class of medical malpractice plaintiffs whose jury awards are reduced pursuant to the statute has not been traditionally discriminated against and is not without political power, they do not constitute a suspect class. The court also concluded that the right to have an award in excess of the statutory limit was not fundamental. Given the absence of a suspect class and fundamental right, a mere rational relationship test was applied. Id. (citing American Bank & Trust Co. v. Community Hosp., 683 P.2d 670, 696 (Cal. 1984)).
41. Id. at 683.
42. Id. at 681-82.
43. Id.
44. Id. at 684.
45. Lucas v. United States, 757 S.W.2d 687 (Tex. 1988); Condemarin v. University Hosp., 775 P.2d 348 (Utah 1989); Sofie v. Fibreboard Corp. 771 P.2d 711 (Wash. 1989);
struck down the laws as unconstitutional.\textsuperscript{46} A handful of these statutes were held unconstitutional not because they violated equal protection and due process as urged by the plaintiffs in \textit{Fein},\textsuperscript{47} but as a result of their impact on the state right to a trial by jury.\textsuperscript{48}

1. \textit{State Courts Holding Damage Caps Unconstitutional as an Infringement on the State Right to Trial by Jury}

The supreme courts of Washington, Texas, and Utah invalidated legislative attempts to place ceilings on tort damage recoveries as unreasonable infringements of the right to trial by jury.

The Supreme Court of Washington recently heard \textit{Sofie v. Fibreboard},\textsuperscript{49} a case in which the plaintiffs challenged the constitutionality of a statute that limited recovery for noneconomic damages in all personal injury and wrongful death actions.\textsuperscript{50} The plaintiffs received a judgment against an asbestos manufacturer, only to have the award decreased by over a million dollars by the trial court.\textsuperscript{51} Although the plaintiffs argued that the statute violated equal protection, due process, and the right to trial by jury, the court held the statute unconstitutional as an impermissible interference with the state right to a jury trial, and therefore never reached the merits of the equal protection or due process claims.\textsuperscript{52}

In reaching this conclusion, the court recognized that the Sev-
enth Amendment of the U.S. Constitution does not apply to the states through the Fourteenth Amendment. Using Seventh Amendment analysis as mere analogy, the court struck down the statute "on adequate and independent state grounds." Article 1, section 21 of the Washington State Constitution mandates that the right to a jury trial "shall remain inviolate." The court then proceeded through an analysis of the common law functions and features of the jury. It found clear evidence that the jury's functions at common law included the ascertaining of damages. The United States Supreme Court has approved of such an historical analysis to determine the parameters of the right to a jury trial, and in the same case noted that particular deference should be given to the jury when its task includes the assessment of noneconomic damages.

In recognizing the constitutional and common law right to a jury trial, the court also recognized the power of the legislature to shape particular causes of action. It concluded, however, that contemporary legislative vehicles which operate to alter a jury's verdict do not exceed constitutional limits, as does the statutory ceiling on noneconomic recovery. Referring to the U.S. Supreme Court decision in *Dimick v. Schiedt*, the court embraced the notion that the continuing interest of litigants in their constitutional right to a jury trial cannot be limited by the legislature. While the legislature may have the capacity to do away with particular causes of action, if a particular civil action exists, the litigant must have the right to have a jury decide the factual issues of the case.

With regard to the statutory limitation on damage recovery, the court found that the statute impermissibly removes from the jury the right to make findings of fact by modifying such findings to a "predetermined formula", even if the findings were reasonable as a matter of law. The *Sofie* majority drew the comparison between the statute at issue in that case, and the several statutes from other states

53. *Id.* at 717.
54. *Sofie*, 771 P.2d at 717.
55. *Id.* at 721.
56. *Id.* at 717.
57. *Id.* (citing *Dimick v. Schiedt*, 293 U.S. 474, 479 (1935)).
58. *Id.* at 719.
59. *Sofie*, 771 P.2d at 720-21. The court concluded that neither remittitur nor mandatory arbitration laws surpassed constitutional requirements. *Id.*
60. *Dimick v. Schiedt*, 293 U.S. 474 (1935). This case is discussed in depth in Part 3 of Section II.
62. *Id.*
which limit noneconomic recovery in medical malpractice cases.\textsuperscript{63} The court noted that none of the states which have upheld such laws considered the implication to the right to a jury trial. Specifically, the court noted that the court in \textit{Fein} did not address the jury issue, even though the Washington and California state constitutional provisions regarding jury trials are very similar.\textsuperscript{64}

The Supreme Court of Texas, in \textit{Lucas v. U.S.},\textsuperscript{65} struck down a statutory provision similar to California Civil Code section 3333.2 on grounds pertaining to the right to trial by jury and due process.\textsuperscript{66} The plaintiffs in \textit{Lucas} were a fourteen month old boy and his parents. They alleged, and the court found, that the child's legs had become paralyzed as a result of a negligently administered injection of penicillin.\textsuperscript{67} The trial court awarded the plaintiffs 1.5 million dollars for pain and suffering. Like the plaintiffs in \textit{Fein}, the \textit{Lucas} plaintiffs' award was subsequently lowered in accordance with the Texas statute.\textsuperscript{68} The Supreme Court of Texas found the damage cap provision to be unconstitutional under both due process and right to jury trial theories.\textsuperscript{69}

The Texas court concluded that the state constitutional right to a jury developed in that state was violated by the damage cap provision.\textsuperscript{70} The majority reasoned that the state constitutional guarantee of access to the courts was intertwined with the right to trial by jury, and neither could be impermissibly hindered by the legislature.\textsuperscript{71} Access to open courts, the court observed, exists for the purpose of remediing injuries. However, "[a] plaintiff who receives a jury verdict for one million dollars, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily caps the recovery."\textsuperscript{72} The plaintiff in such a situation is also being denied the constitutional right of a jury trial.\textsuperscript{73}

\begin{itemize}
  \item 63. \textit{Id.} at 722-25.
  \item 64. \textit{Id.} at 723. Both state constitutions describe the state constitutional right to trial by jury as "inviolate". \textit{Id.} at 721.
  \item 65. \textit{Lucas v. United States}, 757 S.W.2d 687 (Tex. 1988).
  \item 66. \textit{Id.} at 690.
  \item 67. \textit{Id.} at 688.
  \item 68. \textit{Id.} at 688-89. The Texas statutory cap provides "[i]n an action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for damages of the physician or health care provider shall be limited to an amount not to exceed $500,000." \textit{Id.}
  \item 69. \textit{Id.} at 690.
  \item 70. \textit{Lucas}, 757 S.W.2d at 692.
  \item 71. \textit{Id.}
  \item 72. \textit{Id.} (quoting \textit{Smith v. Dep't of Insurance}, 507 So.2d 1080 (Fla. 1987)).
  \item 73. \textit{Id.}
The court ended its analysis by recognizing the legislature's interest in attempting to alleviate health care problems. Such an interest, however, could not justify the denial of individual rights which necessarily accompany even the most benign statutory damage cap provision.\textsuperscript{74}

The Supreme Court of Utah, in \textit{Condemarin v. University Hospital},\textsuperscript{76} likewise invalidated statutory caps on noneconomic recovery following an analysis of the jury issues.\textsuperscript{78} The plaintiffs in \textit{Condemarin} alleged that their physician had negligently performed a cesarean section resulting in neurological damage to their newborn infant. The doctor and his employer hospital were held liable, but the damages were limited to $100,000 by the trial court pursuant to the Utah damage cap statute.\textsuperscript{77}

The Utah Supreme Court began its analysis of the statute by noting that the right to a jury trial as guaranteed by the Utah State Constitution is "deeply rooted in our basic democratic traditions and so important in the administration of justice, not only as a buffer between the state and the sovereign citizens of the state, but also as a means for rendering justice between citizens."\textsuperscript{77} The court went on to find that statutory ceilings on recovery significantly mitigate the historical function of the jury in setting damages. Such a substantial infringement upon a constitutional guarantee compelled the court to find the legislative action and statute invalid.\textsuperscript{78}

2. \textbf{State Courts Sustaining Damage Caps Against Constitutional Right to Jury Challenges}

Contrary to Washington, Texas, and Utah, statutory ceilings on noneconomic recovery have been sustained in the face of challenges pertaining to the right to a jury trial by courts of appeal in California and by the Supreme Courts of Kansas and Virginia.

A California court of appeal, in \textit{Yates v. Pollock}, specifically addressed the California statutory cap’s impact on the medical malpractice plaintiff’s right to a jury trial.\textsuperscript{80} The plaintiffs in \textit{Yates} successfully sued a surgeon for the wrongful death of Charles Yates

\textsuperscript{74} Id. at 690.
\textsuperscript{75} Condemarin v. University Hosp., 775 P.2d 348 (Utah 1989).
\textsuperscript{76} Id. at 366.
\textsuperscript{77} Id. at 348. The statutory cap at issue limited the total amount of recovery to $100,000. \textit{Id.}
\textsuperscript{78} Id. at 365.
\textsuperscript{79} Condemarin, 775 P.2d at 366.
\textsuperscript{80} 239 Cal. Rptr. 383 (Ct. App. 1987).
from the surgeon’s malpractice. The plaintiffs were awarded $1.5 million in economic damages.82

Upon the surgeon’s appeal, the court concluded that the statutory cap on economic damages applied to wrongful death actions.83 The court also rejected the plaintiff’s contention that the damage cap provision unconstitutionally stifled the right to a jury trial.84 While observing the absence of case law immunizing noneconomic damages from legislative limitation,85 the court quoted from Fein in concluding that “the Legislature retains broad control over the measure, as well as the timing, of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and that [it] may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest.”86 The plaintiffs’ award was subsequently reduced pursuant to the statutory ceiling.87

One year after Yates, a court of appeal in the same district similarly upheld the legislative damage cap against the plaintiff’s claim that their right to a jury trial was infringed by the cap.88

In Jordan, the husband and wife plaintiffs sued the husband’s surgeon for medical malpractice and loss of consortium.89 The jury concluded that the surgeon’s removal of Mr. Jordan’s healthy left kidney, instead of his cancerous right kidney, constituted malpractice, and awarded Mr. and Mrs. Jordan $4.5 million, and $625,000 respectively, in noneconomic damages.90 The award was subsequently reduced by the trial court to $250,000 pursuant to MICRA.91

On appeal, the plaintiffs asserted that the $250,000 cap encumbered their constitutional right to a jury trial.92 The court of appeal, however, simply referred to Fein and quoted from Yates, concluding that Yates correctly stated California law on the issue.93 Conse-

81. Id. at 384.
82. Id. at 384 n.1.
83. Id. at 385.
84. Id. at 385-86.
85. Yates, 239 Cal. Rptr. at 386.
87. Id. at 386.
89. Id. at 653.
90. Id.
91. Id.
92. Id. at 654.
sequently, the Jordan court echoed Yates in recognizing the broad authority of the legislature to limit damages, and summarily rejected the plaintiffs constitutional argument.94

In a recent case,95 the Kansas Supreme Court abandoned the rationale of an earlier decision96 that statutory caps on recovery violated a plaintiff's right to trial by jury.97 In Samsel v. Wheeler Transport Services,98 the court recognized that the common law function of a jury includes the determination of damages in a personal injury claim.99 However, the court reasoned that a plaintiff does not have a vested right in any common law cause of action, and the legislature may therefore limit the right to a jury trial on particular claims if it provides an adequate quid pro quo.100

The plaintiff in Samsel was paralyzed as a result of an auto accident which the trial court determined was negligently caused by the defendant driver.101 A Kansas statute capped damages in all personal injury actions for pain and suffering at $250,000.102 In analyzing the plaintiff's claim that the statutory ceiling on recovery was unconstitutional, the Kansas Supreme Court noted the traditional parameters of the right to a jury trial and the legislature's role in setting those boundaries.103 The court reasoned that since a litigant does not have a vested right in any particular common law rule applicable to negligence actions, the legislature may modify those rules as long as due process requirements are satisfied.104 The Kansas court concluded that due process merely required that the legislature act reasonably in the promotion of the general welfare, and that it offer litigants a sufficient quid pro quo for the loss of the right.105

Regarding the general welfare, the court had little difficulty

94. Id.
97. Id.
99. Id. at 556.
100. Id. at 557. "Quid pro quo" is translated as "what for what." BLACK'S LAW DICTIONARY 1248 (6th ed. 1990).
101. Samsel, 789 P.2d at 548.
102. Id. The statutory cap on recovery at issue provides that: "(b) In any personal injury action, the total amount recoverable by each party from all defendants for all claims for ... noneconomic loss shall not exceed a sum total of $250,000." Id.
103. Id. at 556-57.
104. Id. at 557.
105. Id.
concluding that the statutory cap was reasonable and in the public interest as a means of abating insurance costs. The court then rationalized that the provision mandating that a verdict in excess of $250,000 be lowered to that amount assured the plaintiff that her award would not be lowered below $250,000. Since the trial judge would have discretion to lower an award below $250,000 if the statute did not exist, such an assurance served as an adequate quid pro quo. The Kansas Supreme Court subsequently denied plaintiff’s challenge and sustained the statutory cap.

Similarly, the Supreme Court of Virginia in *Etheridge v. Medical Center Hospitals* sustained the validity of Virginia’s statutory cap on noneconomic damages in malpractice claims. The plaintiffs challenged the statute as a violation of the state constitutional right to a jury trial. In rejecting plaintiffs’ challenge, the *Etheridge* court recognized that a traditional function of the jury as factfinder is the determination of damages. The court, however, made the distinction between the legal consequences of a finding of fact and the actual finding itself. The majority reasoned that once the jury has made its findings as to a plaintiff’s damages, its constitutional function is complete. In other words, the jury only determines the quantum of a plaintiff’s injuries. It has not traditionally been, nor should it be, responsible for compelling that the determined amount of compensation be paid. The court subsequently rejected plaintiffs’ challenge and upheld the statutory cap on recovery.

3. Federal Courts and State Statutory Caps in Light of the Seventh Amendment

State statutory ceilings on damage recovery potentially fall within the jurisdiction of the federal, as well as state, constitutions. To date, two federal district courts and one circuit court of appeals have addressed the constitutionality of state statutory cap provisions

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107. *Id.*
108. *Id.*
109. *Id.*
110. 376 S.E.2d 525 (Va. 1989).
111. *Id.*
112. *Id.* at 526-27.
113. *Id.* at 529.
114. *Id.*
116. *Id.*
in light of the Seventh Amendment\textsuperscript{117} and contemporaneous state constitutional provisions. Although the Seventh Amendment is not binding on the states, federal jurisprudence concerning the right to a jury is beneficial in assessing the right to a jury trial under a particular state constitution.

In \textit{Boyd v. Bulala},\textsuperscript{118} the U.S. District Court for the Western District of Virginia was faced with the same Virginia statute which was later interpreted by the Virginia Supreme Court in \textit{Etheridge}.

The plaintiffs in \textit{Boyd} were an infant and her parents who alleged that their physician negligently failed to provide adequate care during labor and delivery resulting in the infant's suffering severe physical and mental handicaps.\textsuperscript{120} The seven member jury returned verdicts for the plaintiffs totaling more than $8 million dollars.\textsuperscript{121} The defendant then moved to have the award reduced to $750,000 as directed by the Virginia statute.\textsuperscript{122}

In assessing defendant's motion, the district court initially found that the Virginia state right to a jury trial was contemporaneous with the Seventh Amendment right.\textsuperscript{123} Applying an historical analysis, the court concluded that under both constitutions the traditional function of the jury includes the determination of damages. Since the statutory cap on damages constricts the jury's capacity to fully assess damages, it is unconstitutional under the Virginia Constitution.\textsuperscript{124} The court concluded that although the legislature may legislate the manner in which a jury makes factual findings, "the legislature may not preempt a jury's findings on a factual issue which has properly been submitted to the jury."\textsuperscript{125} Statutory caps therefore invade not only the province of the jury, but are similarly an unjust encroachment on the judicial branch.\textsuperscript{126}

The district court's opinion in \textit{Boyd} was not binding for long. Shortly after \textit{Boyd} was decided, the Virginia Supreme Court upheld the state statutory cap on damages in \textit{Etheridge}.

\begin{footnotes}
\footnote{117. U.S. CONST. amend. VII.}
\footnote{119. \textit{Etheridge v. Medical Ctr. Hosps.}, 376 S.E.2d 525 (Va. 1989).}
\footnote{120. \textit{Boyd}, 647 F. Supp. at 781.}
\footnote{121. \textit{Id.} at 784.}
\footnote{122. \textit{Id.} at 789.}
\footnote{123. \textit{Id.} at 789.}
\footnote{124. \textit{Id.} at 789-90.}
\footnote{125. \textit{Boyd}, 647 F. Supp. at 789-90.}
\footnote{126. \textit{Id.} at 790.}
\footnote{127. \textit{Etheridge v. Medical Ctr. Hosps.}, 376 S.E.2d 525 (Va. 1989).}
\end{footnotes}
The circuit Court of Appeals heard Boyd's appeal after the Virginia Supreme Court decided *Etheridge*. The circuit court subsequently reversed the district court and deferred to the state supreme court's holding.\(^{128}\) The circuit court held that the *Etheridge* decision, interpreting the state constitutional right to a jury trial, was binding on the federal court.\(^{129}\) It also held that since the Virginia constitutional right to a jury trial and the Seventh Amendment were coextensive, the state statutory cap did not offend the Seventh Amendment.\(^{130}\) The rationale was the same as that given by the *Etheridge* court as to why the state constitutional right was not violated.\(^{131}\)

Finally, a federal district court in Maryland, in *Franklin v. Mazda Corp.*\(^{132}\) denied constitutional challenges to a Maryland statutory cap on noneconomic damages.\(^{133}\) The plaintiff in *Franklin* alleged that she suffered personal injuries and pain and suffering as a result of defendant's strict liability.\(^{134}\) The plaintiff also filed a motion for a declaratory judgment claiming that the Maryland statutory cap on noneconomic recovery was unconstitutional as an infringement on the federal and state constitutional rights to a jury trial.\(^{135}\)

In discerning plaintiff's motion, the district court began its analysis by noting that the jury provisions in the Maryland and U.S. Constitutions were coextensive. It then concluded that the statutory cap did not involve the legislature as a factfinder in a legal controversy, but was instead a proper measure of legislative control over causes of action and the types of damages which may be recovered.\(^{136}\) The court therefore found the statutory cap on noneconomic recovery to be constitutionally sound, and plaintiff's motion for declaratory judgment was denied.\(^{137}\)

**D. The Constitutional Right to a Jury Trial**

The Seventh Amendment and various state constitutional provi-
sions regarding the state right to a jury trial are generally believed to be equal in scope. While the Seventh Amendment is not binding on the states, federal jurisprudence concerning the right to trial by jury nonetheless casts light on state constitutional jury provisions.

1. The California Constitution

Article I, section 16 of the California Constitution states that the right to a jury trial is inviolate, and shall be secured to all. In interpreting this provision, California courts have recognized the historical and contemporary importance of the state right to a trial by jury.

Outside of the medical malpractice context, the California Supreme Court in Seffert v. Los Angeles Transit Lines considered an appeal from a judgment for a plaintiff who was injured while boarding one of defendant's buses. The plaintiff was severely injured as a result of being caught in the bus doors as they suddenly closed, and being dragged for some distance outside the bus. The plaintiff was awarded over $187,000, of which $134,000 was allocated for pain and suffering.

In rejecting the defendant's assertion that the damages were excessive, the court noted that "[t]he amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for a new trial." The court subsequently concluded that a jury's conclusion as factfinder must be afforded great weight, and that the plaintiff's award should not be disturbed.

In Byram v. Superior Court, a California court of appeal maintained that "[t]he right to trial by jury is a basic and fundamental part of our system of jurisprudence." As a result, it should be vigorously safeguarded, and any doubt as to its applicability should

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139. Id.
142. Id.
143. Id. at 339.
144. Id. at 342.
145. Id.
146. Seffert, 364 P.2d at 342.
147. 141 Cal. Rptr. 604 (Ct. App. 1977).
148. Id. at 607.
be resolved in favor of maintaining a party's right to trial by jury.\textsuperscript{149}

In light of this strong presumption in favor of a litigant's right to a jury, the court ordered the trial court to grant plaintiff's motion for relief from his earlier waiver of a jury trial in his personal injury action.\textsuperscript{150}

The California Supreme Court embraced the analysis of the Byram court. In \textit{People v. Collins},\textsuperscript{151} the court addressed the historical role of the jury and its relation to legislative powers. The plaintiff in \textit{Collins} appealed his conviction of first degree robbery, claiming that the substitution of an alternate juror after jury deliberations began compromised his right to a jury trial.\textsuperscript{152} In addressing the appeal, the state supreme court emphasized that the state right to a jury trial was inviolate. In discerning the parameters of this right, one must look at how it existed at common law. The court concluded that the right to a jury trial, which has been held to include the capacity of the jury to determine damages, may not be abridged by any legislative enactment.\textsuperscript{153} While the court recognized that the legislature may enact reasonable regulations of the enjoyment of this right, the fundamental elements of the jury trial as they existed at common law must be preserved and secured to all. Although the court sustained the petitioner's conviction, it held that it was an error for the trial court not to instruct the jury to begin deliberations again with the new juror.\textsuperscript{154}

2. \textit{The Seventh Amendment Right to a Jury Trial}

The analysis of the right to a trial by jury as guaranteed by the Seventh Amendment is very similar to state constitutional provisions. The Seventh Amendment\textsuperscript{155} states that the "right of trial by jury shall be preserved."\textsuperscript{156} The use of the term "preserved," and the Amendment's inclusion in the Bill of Rights, certainly provide evidence of the framers' conception of this right. It was established as an individual guarantee against encroachment upon individual liberties by the state, as were all the Bill of Rights.\textsuperscript{157}

\begin{footnotesize}
\begin{enumerate}
\item[149.] Id.
\item[150.] Id. at 608.
\item[151.] 552 P.2d 742 (Cal. 1976).
\item[152.] Id. at 744.
\item[153.] Id. at 745.
\item[154.] Id.
\item[155.] U.S. CONST. amend. VII.
\item[156.] Id.
\end{enumerate}
\end{footnotesize}
However, unlike most of the individual liberties contained in the Bill of Rights, the Supreme Court has not directly indicated what functions of the jury are to be preserved. As was done in the state constitutional analysis, one must look to what essential jury functions existed at common law to determine which functions must be preserved.

In Dimick v. Schiedt, the U.S. Supreme Court used an historical analysis to determine whether additur violated the Seventh Amendment. The Court found that determining damages, as an issue of fact, was within the jury's province and protected by the Seventh Amendment. The Court also maintained that "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." The Court consequently found that additur was not allowed in federal courts since it infringed on the federal right to a jury trial.

Some, however, maintain that the above analysis in Dimick has since been overruled by the Supreme Court in Tull v. United States. Using the same historical analysis as in Dimick, the Tull Court found that in a proceeding under the Federal Clean Water Act, a defendant has the right to a jury trial but not the right to have the jury assess the civil penalty.

III. IDENTIFICATION OF THE PROBLEM

The California statutory ceiling on noneconomic recovery in medical malpractice claims raises several constitutional and equitable questions. States that have considered the validity of similar statutes have both upheld and struck down the statutes on equal protection, due process and right to trial by jury constitutional theories.

While California Civil Code section 3333.2 appears to unfairly place the burden of maintaining reasonable medical liability insurance rates on the very persons most severely injured as a result of professional negligence, the statute has nonetheless been upheld against equal protection and due process challenges.

158. Id.
159. 293 U.S. 474 (1935).
160. Id. at 485-86.
161. Id. at 486.
162. Id.
164. Id. at 427.
165. See supra part II.C.
167. Id. The statutory cap on recovery, while applicable to all medical malpractice
The California statutory cap has not, however, been scrutinized by the California Supreme Court as a possible impairment on the constitutional right to trial by jury. State and federal courts which have analyzed statutory caps on damages have reached conflicting conclusions. The remainder of this comment synthesizes the arguments and holdings of courts which have invalidated statutory caps as an infringement on the right to a trial by jury. The justifications offered by courts which have upheld such statutes in the face of jury related challenges are rebutted and distinguished. The subsequent conclusion is that California Civil Code section 3333.2 should be invalidated as an impermissible infringement on the constitutional right to a jury trial. Finally, the status of the California Supreme Court’s decision in Fein will be assessed in light of the statutory cap’s impact on the right to a jury trial.

The future status of the California statutory ceiling on recovery for noneconomic damages in medical malpractice claims is certainly significant to anyone with an interest in the state of health care. This includes liability insurance companies and health care providers, as well as the recipients of medical care. If the statutory cap is invalidated as unconstitutional, the potential impact on liability insurance rates and the resulting availability of medical services are certainly concerns that must be addressed. Opponents of tort reform will be given the opportunity to study the effect of such reforms on insurance rates, and perhaps illustrate that insurance rates remain the same, irrespective of the presence of statutory caps. Proponents of such reforms will be burdened with the necessity of advocating reforms which are not offensive to the constitution.

Perhaps no one will be impacted more by the invalidation of the statutory cap than the class of severely injured medical malpractice plaintiffs. The absence of statutory caps will enable them to be

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168. See supra notes 44-46 and accompanying text.


170. "A January 1991 report by Jury Verdict Research, Inc. showed that of the 423 medical malpractice awards reported to the service in 1989, 107 or 25 percent totaled $1 million or more. See Gastel, supra note 3, at 1."
compensated for their pain and suffering to the extent determined to be just and fair by a jury of their peers.

Finally, and perhaps most importantly, the citizens of California will benefit from the invalidation of the legislature's attempt to remedy a perceived problem by the rolling back of individual liberties. While it is not disputed that the state has a strong interest in the maintenance of effective and affordable health care, the zealous pursuit of such an interest cannot be tolerated if achieved at the expense of cherished individual rights. The preservation of liberties such as the right to trial by jury is significant not only to medical malpractice plaintiffs, but to unknown future litigants who might have otherwise been subject to similar governmental infringements.

IV. Analysis

A. The California Statutory Cap on Noneconomic Recovery in Medical Malpractice Claims

Section 3333.2 of the California Civil Code limits the amount a medical malpractice plaintiff may recover for noneconomic injuries to $250,000. An award of noneconomic damages has traditionally served as a means of compensating the plaintiff for pain, suffering, disfigurement, loss of consortium, inconvenience and other nonpecuniary losses. While these injuries may be difficult to quantify or value, they are nonetheless real injuries suffered by plaintiffs as the result of a defendant's lack of care. The difficulty in assessing the proper amount of recovery for a plaintiff's pain and suffering does not minimize the damage suffered by the plaintiff or the liability incurred by the defendant.

In medical malpractice claims, noneconomic damages are often the primary type of injury suffered by a plaintiff. For example, a plaintiff whose face was severely disfigured as the result of a physician's negligence will undoubtedly experience tremendous pain and suffering as a consequence of the disfigurement. Since the disfigurement is not likely to cause excessive monetary losses, as would be the case if the plaintiff were disabled, recovery will most likely be limited to medical expenses and pain and suffering. The statutory cap on noneconomic recovery would severely hinder such a plaintiff's hope of being properly compensated for a lifetime of pain and suffering caused by the physician's negligence.

172. Id.
The California statutory cap\textsuperscript{178} functionally usurps the jury's role in assessing noneconomic damages. Once a defendant's liability is established, the jury as factfinder is traditionally responsible for determining the type and extent of damages a plaintiff is entitled to receive.\textsuperscript{174} The statutory cap does not stop the jury from hearing and evaluating evidence. It also allows the jury to go through the motions of deliberating and assessing the amount of damages which would best serve to compensate the plaintiff for any injuries. The jury's determination of fact is only binding, however, if its judgment does not exceed the predetermined amount set by the legislature. The statutory cap necessitates the reduction of noneconomic damages in excess of $250,000 even though the jury's findings may be just and reasonable as a matter of law.\textsuperscript{176} The statute, therefore, curiously usurps the jury's findings only in claims brought by those plaintiffs who are most seriously injured.

B. \textit{Fein v. Permanente}  

The California Supreme Court in \textit{Fein v. Permanente Medical Group}\textsuperscript{176} upheld the statutory cap against constitutional challenges. In rejecting the plaintiff's equal protection and due process challenges, the majority did not consider the statute's impact on the plaintiff's right to trial by jury. As will be discussed, the statute's effect of infringing on the plaintiff's right to a jury trial makes the statutory cap constitutionally infirm on grounds independent of equal protection and due process. A California court would not, therefore, be restricted by \textit{Fein} in striking down the statute as an unconstitutional denial of the right to trial by jury.

C. \textit{The State and Federal Right to a Jury Trial}  

Both the California Constitution\textsuperscript{177} and the Federal Constitution\textsuperscript{178} protect a litigant's right to a jury trial. While the two constitutions are independent, the constitutional provisions regarding the preservation of jury trials in each constitution are similar in scope and effect. The functions of the jury at common law in the federal and state systems are critical in the determination of which jury

\begin{itemize}
  \item \textsuperscript{173} CAL. CIV. CODE § 3333.2 (West Supp. 1992).
  \item \textsuperscript{174} See, e.g., Dimick v. Schiedt, 293 U.S. 474 (1935).
  \item \textsuperscript{175} CAL. CIV. CODE § 3333.2 (West Supp. 1992).
  \item \textsuperscript{176} 695 P.2d 665 (Cal. 1985).
  \item \textsuperscript{177} CAL. CONST. art. I, § 16.
  \item \textsuperscript{178} U.S. CONST. amend. VII.
\end{itemize}
functions must be protected.  

1. The California Constitution

Article I, section 16 of the California Constitution states that "trial by jury is an inviolate right" which must be secured to all.\textsuperscript{180} Black's Law Dictionary defines inviolate as "intact; not violated; free from substantial impairment."\textsuperscript{181}

In interpreting the California right to a jury trial, California courts have maintained that the state constitutional right to a jury trial is a basic and fundamental guarantee which must be zealously guarded.\textsuperscript{182}

A California court of appeal in Byram v. Superior Court espoused that there should be a presumption in favor of a litigant's right to a jury.\textsuperscript{183} Any doubt as to whether a litigant should be entitled to a jury trial should be resolved in favor of allowing the party to have the claim heard and judged by a jury of the plaintiff's peers.\textsuperscript{184} Consequently, a California court hearing constitutional jury challenges to the statutory cap on noneconomic recovery should begin its analysis with the overview that the right to a jury must be "zealously" guarded, and end its analysis by resolving any doubt in favor of a litigant's right to a jury.

The California Supreme Court has also embraced the protectionist language of the Byram court.\textsuperscript{185} In People v. Collins, the majority explained that the right to a jury trial as it existed at common law must be preserved and may not be impinged by the legislature.\textsuperscript{186} The legislature may, the court reasoned, enact reasonable regulations on the enjoyment of this right "as long as the essential elements of trial by jury are preserved."\textsuperscript{187} The legislature may, therefore, place reasonable conditions on the right to a jury trial. It may not, however, abridge the core functions of the jury as they existed at the time the California Constitution was adopted.

In addition, the California Supreme Court in Seffert v. Los An-

\begin{itemize}
  \item \textsuperscript{179} See, e.g., Dimick v. Schiedt 293 U.S. 474 (1935); Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989).
  \item \textsuperscript{180} CAL. CONST. art. I, § 16.
  \item \textsuperscript{181} BLACK'S LAW DICTIONARY 742 (6th ed. 1990).
  \item \textsuperscript{182} See, e.g., People v. Collins, 552 P.2d 742, 745 (Cal. 1976), cert. denied, 429 U.S. 1077 (1977); Byram v. Superior Court, 141 Cal. Rptr. 604, 607 (Ct. App. 1977).
  \item \textsuperscript{183} 141 Cal. Rptr. 604, 607 (Ct. App. 1977).
  \item \textsuperscript{184} Id.
  \item \textsuperscript{185} Collins, 552 P.2d at 745.
  \item \textsuperscript{186} Id.
  \item \textsuperscript{187} Id.
\end{itemize}
geles Transit Lines specifically concluded that the assessment of damages was a question of fact, to be determined by the jury as factfinder. Likewise, courts of other states which have addressed the common law function of juries have generally held that the traditional common law function included the determination of damages. These same courts are divided, however, on the capacity of the legislature to place conditions on the essential functions of the jury. Fortunately, the California Supreme Court has spoken on the matter. Under the Collins analysis, if the determination of damages is an essential common law function of the jury, then that function must be preserved against legislative abridgment. Scholars and lawyers will undoubtedly argue over the meaning of the term "preserved." However, read in conjunction with the state constitution's declaration that the right to a jury trial is inviolate, legislation that fails to maintain the jury's role in determining damages should certainly be rigorously scrutinized.

Medical malpractice plaintiffs whose noneconomic damages are determined to be in excess of $250,000 are statutorily compelled to have the legislature, and not the jury, assess their noneconomic damages. Such a compulsion makes the jury's role for these plaintiffs merely academic, a far cry from inviolate.

2. The Seventh Amendment

The Seventh Amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The Seventh Amendment is not binding on the states in civil trials, but is coextensive with most state constitutional provisions guaranteeing the right to a jury trial. Therefore, Seventh Amendment jurisprudence may provide a sound analogy to a state statute's impact on the state constitution.

189. See, e.g., Sofie v. Fibreboard Corp., 771 P.2d 711, 716-17 (Wash. 1989). Additionally, the court specifically noted that "the jury's role in determining noneconomic damages is perhaps even more essential." Id. at 717.
190. Collins, 552 P.2d at 745.
191. CAL. CONST. art. I, § 16.
192. U.S. CONST. amend. VII.
194. However, the Seventh Amendment could potentially be binding on federal courts sitting in diversity. These federal courts must apply state substantive law, but are free to apply federal procedural law. Therefore, if a federal court concluded that the Seventh Amendment was procedural, it may be binding. See generally Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
The U.S. Supreme Court has accepted the use of an historical analysis in determining which common law jury functions must be preserved. In *Dimick*, the Court reasoned that the determination of damages was clearly a common law function of the jury.\(^{195}\) It subsequently struck down the validity of additur, which allowed the trial court judge to supplement jury verdicts that were found inadequate as a matter of law. The Court maintained that the determination of damages is an issue of fact. Any modification of a jury's factual findings would unequivocally usurp the constitutional role of the jury. The court also reasoned that particular deference should be given to a jury's verdict when the damages at issue are noneconomic.\(^{196}\) This deference stands to reason since noneconomic losses are incapable of the precise quantification and potential miscalculation associated with assessing pecuniary losses. The determination of noneconomic damages is particularly suited to the jury since it alone may form a collective opinion concerning such an imprecise measurement.

The U.S. Supreme Court recently used the *Dimick* analysis to determine the role of the jury in proceedings under the Federal Clean Water Act.\(^{197}\) The Court in *Tull v. United States* concluded that a defendant in an enforcement proceeding under the Act has the right to a jury trial, but not to have the jury assess the civil penalty.\(^{198}\) The Court's ruling did not, however, invalidate the *Dimick* Court's rationale. The holding in *Tull* was specifically limited to regulatory enforcement proceedings, and therefore does not limit the right to a jury trial in civil actions as defined in *Dimick*. The constitutional right to a jury trial must be preserved only to the extent that it existed at common law. A litigant therefore has no more of a right to have a jury assess regulatory penalties, than the litigant would have in claims of equity. In neither instance has a jury traditionally been guaranteed.

The United States Supreme Court's analysis is not binding on California courts, but it provides useful guidance in determining the traditional roles of juries. Also, legislative enactments which violate the Seventh Amendment will undoubtedly contain characteristics which, if found in state legislation, may signal state constitutional infirmities.

The additur provision which was invalidated in *Dimick* is very similar to California Civil Code section 3333.2, except that it works

\(^{195}\) Dimick v. Schiedt, 293 U.S. 474, 486-87 (1935).
\(^{196}\) Id. at 479 (quoting Beardmore v. Carrington, 2 Wils. 244, 248 (1764)).
\(^{198}\) Id. at 427.
in reverse. For the same reasons that an increase in a jury's award impinges on the traditional role of the jury, so does a mandatory decrease. In both cases the jury's determination of fact is usurped. In the case of additur it is usurped by the judge, and with statutory caps it is preempted by the legislature. Such infringements are constitutionally unacceptable. Therefore, California courts should find the statutory cap on noneconomic recovery in medical malpractice claims unconstitutional under the same analysis used by the U.S. Supreme Court in *Dimick*.

D. Courts Which Have Invalidated Statutory Caps as Unconstitutional Infringements on the Right to Trial by Jury

Three state supreme courts and one federal district court have struck down state statutory ceilings on damage recovery as unconstitutional infringements on the right to trial by jury.

The courts began their analysis of the constitutional impact of the statutory caps on the right to a jury trial by performing an historical analysis of the common law functions of juries. As the Washington Supreme Court in *Sofie v. Fibreboard* explained, "the scope of the right to trial by jury may be defined by the common law through a historical analysis, but the right itself is protected by the state constitution." The Washington court then reasoned that the functions of the jury as they existed at common law must be preserved. One of these functions, the determination of damages, was clearly implicated by the Washington statute which limited recovery in all personal injury and wrongful death actions.

The analysis by the *Sofie* court should be very similar to that of a California court addressing the statutory cap's impact on the California right to a jury trial. The Washington and California constitutional provisions regarding the right to a jury trial both describe the right as "inviolate." Also, an historical analysis of the California jury should conclude that a traditional jury function was the determination of damages, as was the case in Washington.

The *Sofie* court conceded that the legislature has the "power to

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199. The provisions work in reverse to the extent that additur provides for the supplementation of an inadequately low jury award, while the California cap on noneconomic recovery serves to lower any jury award over $250,000 in medical malpractice claims. *See Cal. Civ. Code* § 3333.2 (West Supp. 1992).


201. *Id.*

shape litigation."203 Such power, however, must give way to individual constitutional guarantees. The legislature may do away with a particular cause of action completely as long as it provides adequate means for an individual to redress any injuries. For example, workers' compensation statutes provide for no fault worker compensation in the place of civil suits between employers and employees. Since the right to trial by jury exists only in the context of a trial, the right is not violated if no trial exists. The Sofie court reasoned that since the right to a jury is a constitutional right, it cannot be removed by legislative action.204 "As long as the cause of action continues to exist and the litigants have access to a jury," the court explained, "that right of access remains as long as the cause of action does."205

The Sofie court also distinguished the judicial practice of remittitur from the legislative damage cap.206 The doctrine of remittitur, as employed in Washington, empowers the trial court to lower a jury's award of damages. The majority went on to explain that remittitur is distinct in that it is a judicial finding in light of the particular facts of the case, as opposed to a predetermined legislative limit which happens automatically.207 Also, a trial judge may implement remittitur only in accord with established constitutional guidelines. The judge must honor the strong presumption in favor of a jury's determination of damages, and may upset that finding only upon the conclusion that the verdict is "wholly unsupported by the evidence, obviously motivated by passion or prejudice, or shocking to the court's conscience."208 Finally, the court explained that the party against whom remittitur is levied has the choice of accepting the reduction or opting for a new trial.209

Legislative and judicial measures designed to shape causes of action, such as workers' compensation and remittitur, do not necessarily violate the right to a jury trial. The right is preserved and held inviolate only to the extent that it existed at common law. Clearly, the right to trial by jury at common law could not have been successfully asserted where no trial existed or where the jury had ignored rules of law. The California statutory cap on noneconomic recovery, however, far exceeds the legitimate power of the legislature to shape

203. Sofie, 771 P.2d at 719.
204. Id. at 720.
205. Id.
206. Id.
207. Id. at 720-22.
208. Sofie, 771 P.2d at 721.
209. Id.
causes of action. The cap substitutes findings of fact made by juries with predetermined legislative findings.

As the Utah Supreme Court in Condemarin v. University Hospital explained, arbitrary legislative ceilings on damages awarded by juries "seriously infringes" upon the right to trial by jury. The Texas Supreme Court in Lucas v. United States embraced the analysis of the Utah and Washington courts, and invalidated the Texas limitation on noneconomic recovery in malpractice claims. It reasoned that for the right of access to a trial by jury to have any meaning, the jury must be allowed to determine damages without the subsequent imposition of an arbitrary cap.

The federal district court's analysis in Boyd v. Bulala is also helpful in assessing the constitutionality of California's statutory cap. The Boyd court struck down a Virginia statutory cap for medical malpractice claims on the theory that it violated the Virginia constitutional right to a trial by jury. While exercising deference to legislative actions generally, the court held that the legislature "may not preempt a jury's findings on a factual issue which has properly been submitted to the jury." The legislature is not constitutionally empowered to mandate a particular quantum of damages to be ordered in a trial. The district judge explained that such legislative attempts are not afforded deference since the constitutional provisions must prevail.

The above analysis of the Supreme Courts of Washington, Utah, Texas, and that of the federal district court in Boyd is pertinent to the constitutionality of the California statutory cap on noneconomic recovery. In striking down the cap, a California court should conduct the same type of historical analysis as was performed by the previously mentioned courts. It should inevitably find that the California common law function of a jury included the determination of damages. The statutory cap should then be distinguished from legitimate exercises of legislative power in shaping causes of action. Finally, the court should conclude that the statutory cap unreasonably impinges upon the protected factfinding duties of the jury and is therefore unconstitutional.

212. Id. at 690.
214. Id. at 789-90.
215. Id.
E. Courts Which Have Upheld Statutory Caps in the Face of Jury Related Constitutional Arguments

Two California Courts of Appeal, the Supreme Courts of Virginia and Kansas, as well as three federal courts, have ruled that statutory damage caps do not violate state or federal constitutional rights to a trial by jury. All of these courts recognized that the determination of damages was a traditional function of the jury, yet they maintained that the statutory caps were legitimate exercises of power over causes of action.

The California Courts of Appeal in *Yates v. Pollock* and *Jordan v. Long Beach Community Hospital*, held that the statutory cap on noneconomic damages in medical malpractice claims provided for by section 3333.2 of the California Civil Code did not abridge the plaintiff's right to a jury trial. In reaching this conclusion, the *Yates* court did nothing more than quote from *Fein*. The court's constitutional analysis of the jury issue was circumscribed by the language in *Fein* concluding that a legislature may limit or restrict the amount or timing of damages provided that such a limit or restraint is rationally related to a legitimate state interest.

Additionally, the *Jordan* court simply reiterated the *Yates* quote from *Fein*, and concluded without explanation that "*Yates* correctly states the California law in this respect." The *Yates* and *Jordan* courts' rulings on the jury issue are misconceived for several reasons. Initially, their sole reliance on *Fein* is misplaced. The court in *Fein* no where addressed the statutory cap's impact on the right to a jury trial. The court's constitutional analysis was limited to due process and equal protection theories. Indeed, the language from *Fein* regarding the broad legislative control over damages and the simple requirement of a rational relationship quoted by *Yates* and *Jordan* to resolve the jury issue, was written by the *Fein* court in the context of a due process challenge.

Secondly, neither the *Yates* nor the *Jordan* court discussed the applicability of the rational relationship test to a constitutional right to a jury trial challenge, as opposed to equal protection or due process attacks. Unlike the due process and equal protection challenges
to the California statutory cap, the jury trial challenge does not involve the restriction of an economic right. The *Fein* court itself indicated that the rational relationship test of a due process issue was applicable when economic rights were involved.\(^{221}\) The *Fein* plaintiff’s due process and equal protection attacks admittedly involved economic rights to the extent that the challenges were based on the statutory cap’s impact on the amount of damages received. Such is not the case with the constitutional right to a jury trial challenge. The infringement of the right to a jury trial is not dependent on the size of the plaintiff’s award, but rather on the legislature’s usurpation of a traditional jury function, the assessment of damages. Consequently, a violation of the express constitutional right to a jury trial should not be subject to a rational relationship test. Consistent application of such a test unduly denigrates the constitutional right to a jury trial to the level of no greater importance than mere economic rights.

Finally, the *Yates* and *Jordan* courts improperly focused on the rights and power of the legislature, rather than those of the jury. Once it is established that the determination of damages is a traditional function of the jury, the rights and powers of the legislature are limited. The California Supreme Court in *People v. Collins* unequivocally stated that common law functions of the jury must be preserved against legislative abridgment.\(^ {222}\) Consequently, the broad powers referred to in *Fein* must yield to the specific right to a jury trial.

The Supreme Court of Kansas in *Samsel v. Wheeler Transport Services* maintained that a litigant does not have a vested right in any particular cause of action.\(^ {223}\) The legislature may therefore modify the cause of action as long as it complies with due process requirements. The court proceeded to reason that due process merely required that the legislature not act arbitrarily in pursuit of the general welfare, and that it provide litigants an adequate quid pro quo. The court sustained the $250,000 cap claiming that the due process requirements were met.\(^ {224}\)

The first error in the Kansas court’s reasoning was its conclusion that the statutory cap on damages modified a cause of action. It is true that litigants do not have vested rights in causes of action, and

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221. *Id.* at 679.
222. 552 P.2d 742, 745 (Cal. 1976).
224. *Id.* at 558.
that the legislature may modify them. The statutory cap on recovery, however, does not modify the tort cause of action. It does not alter the procedural or substantive requirements of a claim. Instead, it merely usurps the jury's determination of damages with that of the legislature if the jury awards more than $250,000. This is a direct infringement on a jury's role in an existing cause of action, and is outside the bounds of the legislature's powers.

The second error made by the Kansas court was its conclusion that the statutory cap provided an adequate quid pro quo. The court reasoned that the cap insured that an award of over $250,000 would not be reduced below $250,000. Since this assurance did not exist prior to the statute, it serves as an adequate quid pro quo. This reasoning is faulty for many reasons. Initially, the removal of the possibility of a lower award in exchange for the certainty of a lower award hardly seems like a bargain. Also, the trial judge was not free to lower the jury's verdict as desired. A trial judge may only lower a jury's verdict in very limited circumstances. Finally, the statutory cap limits the recovery of every plaintiff whose jury award was in excess of $250,000, while it is unlikely that remittitur would have been exercised in every such case. The court assumes that plaintiffs with awards of more than $250,000 would have been in certain danger of having their awards reduced below $250,000. However, such an assumption simply has no basis in fact.

The Virginia Supreme Court in Etheridge v. Medical Center Hospitals[225] and the Fourth Circuit Court of Appeals in Boyd v. Bulala[226] upheld the Virginia statutory cap under the theory that juries are not responsible for the legal consequences of their factual determination of damages.[227] This is true to the extent that the jury is not involved in how damages are actually recovered. However, to argue that a statutory cap involves only the legal consequences, and not the factual determination of damages, makes a mockery of the important role of the jury. For the fact finding duty of the jury to benefit the litigants, the findings must be accorded weight and followed. To separate the final judgment of damages from the process of reaching it makes the traditional function of the jury nothing more than a hollow academic enterprise with no real significance. A statutory cap, therefore, must be held unconstitutional as an impermissible impairment of the jury's traditional function of determining damages.

226. 877 F.2d 1191 (4th Cir. 1989).
227. Id. at 1195-96.
Finally, the federal district court in *Franklin v. Mazda Corp.*, reasoned that intrinsic in the legislative power to abolish complete causes of action is the power to define by statute what damages may be recovered.\(^2\) It is true that the legislature has the power to abolish complete causes of action. However, individuals have certain constitutional guarantees intertwined with existing causes of action which cannot be abrogated by the legislature. The traditional jury function of determining damages is not subject to legislative modification. Although litigants may not have vested rights in particular causes of action, they do have a vested right in having a jury hear whatever causes of action continue to exist.\(^2\) The *Franklin* court committed a logical fallacy when it assumed that the power to determine damages was subsumed by the power to abolish causes of action. The former is reserved for the jury, and the latter for the legislature.

V. PROPOSAL

California Civil Code section 3333.2 should be invalidated as an unconstitutional infringement on the state right to a jury trial. The statute should be either legislatively repealed, or in the absence of a legislative response, medical malpractice plaintiffs should challenge the statutory cap as an unconstitutional infringement on their right to a trial by jury. In addressing these claims, California courts should follow the analysis of *Sofie, Lucas, Condemarin*, and *Dimick*, and hold the statute unconstitutional in light of its impact on a litigant's right to a jury.\(^2\)

The absence of the statutory cap will provide the legislature and the health care sector with an opportunity to compare professional liability costs relative to when the statutory cap was applicable. Recent studies have indicated that tort reforms do not significantly


\(^{230}\) The *Fein* majority was silent as to the statutory cap’s impact on the state right to a jury trial. However, while *Fein* would not preclude a court from finding the statutory cap unconstitutional, such a finding would make the *Fein* majority’s equal protection and due process analysis inapplicable. The majority applied a mere rational relationship test to the cap. However, once a court determines that the cap infringes upon the fundamental right to a jury trial, the rational relationship test would necessarily give way to a higher level of judicial scrutiny. Applying a strict scrutiny test, it is likely that the statutory cap would also be unconstitutional on equal protection and due process theories. *See, e.g.*, *Dimick v. Schiedt*, 293 U.S. 474, 486 (1934).
lower liability costs. However, if costs do rise as a result of the cap's absence, alternate remedial steps should be considered. Among them might be a no fault system similar to workers' compensation. Additionally, the nature of physicians' practices could be critically studied and evaluated with an eye toward decreasing the exorbitant costs incurred as a result of the changes in physician practices aimed at decreasing risk and a physician's potential liability.

However, until the legislature or another appropriate body provides an effective and constitutionally sound alternative to statutory caps, increased professional liability costs may simply be the necessary price to guarantee the free and full exercise of the right to trial by jury.

VI. Conclusion

This comment addressed the California statutory cap on damage awards' impact on the constitutional right to a jury trial. It discussed the medical malpractice crisis as the impetus for the damage cap statute, and explained how the statutory cap applies equally to all medical malpractice plaintiffs, regardless of the severity of their injuries or the reasonableness of the jury's award. The California and federal rights to a jury were examined using an historical analysis, and it was concluded that one of the jury's functions traditionally has been the determination of damages. The analysis and reasoning of courts which have considered the impact of statutory caps on the right to a jury were discussed and scrutinized. It was determined that the courts which have invalidated the statutory caps because of their infringement on the right to a jury trial offered sound reasoning supported by history. It was also concluded that the courts which have found no impingement on the right to a jury trial as the result of statutory caps failed to present cogent, rational justifications for their findings. Finally, it was argued that California Civil Code section 3333.2 should be invalidated as an unconstitutional infringement on the right to trial by jury.

Medical malpractice plaintiffs, like Michael Miller, are not being afforded the opportunity to have their claims assessed by a jury of their peers. The legislature, which has never heard of Michael

231. Gastel, supra note 3, at 1, 8. Despite massive, widespread tort reforms designed to lower liability costs, both the number and size of malpractice claims are increasing. Specifically, a study by the AMA indicated that defensive medicine practiced by physicians contributed nearly three times as much to spiraling health care costs than did the threat of lawsuits. Id.
Miller, his claim, or the nature of his injuries, has substituted its uninformed determination of what his pain and suffering are worth, for that of a jury which had the benefit of hearing all relevant evidence. Such a usurpation of the traditional role of the jury is constitutionally offensive, and must be invalidated.

Stephen K. Meyer