Comments: Blasting the Cap: Constitutional Issues Arising from Maryland's Limitation of Noneconomic Damages in Personal Injury Claims

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BLASTING THE CAP: CONSTITUTIONAL ISSUES ARISING FROM MARYLAND'S LIMITATION OF NONECONOMIC DAMAGES IN PERSONAL INJURY CLAIMS

A topic of fervent debate in recent years has been the growing crisis in personal injury liability insurance, particularly in the area of medical malpractice. Insurers, doctors, and lawyers have presented differing theories as to the cause and solution of the problem. In 1986, the Maryland General Assembly sought to resolve the crisis by limiting the amount recoverable for noneconomic damages in a personal injury action to $350,000. Similar provisions in other states have been struck down as unconstitutional. This comment examines the constitutionality of Maryland's noneconomic damages limitation and argues that the damage limitation violates both the state and federal constitutions. The author concludes with a discussion of the feasibility and potential effectiveness of alternative legislation.

I. INTRODUCTION

On May 27, 1986, the Maryland General Assembly enacted Senate Bill No. 558 into law, codified at sections 10-913, 11-108 and 11-109 of the Courts and Judicial Proceedings Article of the Maryland Code. The key provision of the enactment limits a plaintiff's recovery of noneconomic damages in a personal injury suit to $350,000. Noneconomic damages include pain and suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury. The legislation also requires that juries in personal injury actions itemize the damage award, allows for periodic payment of future economic damages, and provides for unpaid future medical expenses to re-

1. A provision allowing the defendant to introduce evidence of payments made to the plaintiff by collateral sources was stricken from the legislation prior to enactment. See 1986 Md. Laws 639. But see infra note 18 (discussing new Maryland legislation allowing defendant to move for remittitur or new trial on the ground that the award is excessive as a result of payments received by the claimant from collateral sources).

2. Section 11-108 provides:
   (a) Noneconomic damages - In this section:
      (1) "Noneconomic damages" means pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury and
      (2) "Noneconomic damages" does not include punitive damages.
   (b) Limitation of $350,000 established. — In any action for damages for personal injury in which the cause of action arises on or after July 1, 1986, an award for noneconomic damages may not exceed $350,000.
   (c) Award under § 3-2A-06 included. — An award by the health claims arbitration panel in accordance with § 3-2A-06 of this article shall be considered an award for purposes of this section. (1986, ch. 639).

3. Id.
vert to the defendant upon the plaintiff's death.  

The noneconomic damages cap and its concomitant legislation was enacted in response to what the legislature perceives to be a growing liability insurance crisis in Maryland. Although the legislation applies to all personal injury actions, its primary goal is to provide relief to health care providers and their insurers. Specifically, three bases have been articulated for the enactment of the legislation: (1) the desire to attract private insurers back to the Maryland market; (2) the need for qualified physicians providing a full compliment of medical services in Maryland; and (3) the necessity of providing affordable liability insurance to health care providers.

Although there is evidence to the contrary, it does appear that a

4. Section 11-109 provides in part:

(b) Itemized award. — As part of the verdict in any action for damages for personal injury in which the cause of action arises on or after July 1, 1986, the trier of fact shall itemize the award to reflect the monetary amount intended for:

(1) Past medical expenses;
(2) Future medical expenses;
(3) Past loss of earnings;
(4) Future loss of earnings;
(5) Noneconomic damages; and
(6) Other damages.

(c) Form of award for future economic damages, appointment of conservator. — (1) The court or the health claims arbitration panel may order that all or part of the future economic damages portion of the award be paid in the form of annuities or other appropriate financial instruments, or that it be paid in periodic or other payments consistent with the needs of the plaintiff, funded in full by the defendant or the defendant's insurer and equal when paid to the amount of the future economic damages award.

(d) Death of plaintiff before final payment of award. — If the plaintiff under this section dies before the final periodic payment of an award is made, the unpaid balance of the award for future loss of earnings shall revert to the estate of the plaintiff and the unpaid balance of the award for future medical expenses shall revert to the defendant or to the defendant's insurer if the insurer provided the funds for the future damages award.


6. See 1986 Md. Laws 639 (The original draft of the bill would have made the noneconomic damages cap applicable only to actions involving health care providers.).


8. One survey indicates that health care providers allocated a lower percentage of net income to liability insurance costs in 1983 than they did seven years earlier. Law, A Consumer Perspective on Medical Malpractice, 49 LAW & CONTEMP. PROBS. 305, 308 (No. 2, 1986)(decrease from 4.40% to 3.69%) [hereinafter A Consumer Perspective]. In 1986, the insurance industry posted $11.5 billion dollars in profits, a record high and a six-hundred percent increase over 1985. McNatt, New Solutions Needed
serious liability insurance problem exists in Maryland. An unbiased and informed observer would conclude that a variety of complex factors have contributed to exacerbate the problem.

This comment will examine the constitutional problems posed by Maryland's damage limitation and will discuss the likely resolution of those constitutional issues. In so doing, the comment will analyze closely the relationship between the causes of the liability insurance crisis and the legislation created to resolve it. The comment will conclude with a discussion of the feasibility and potential effectiveness of alternative legislation.

II. COMPARISON OF MARYLAND'S CAP TO OTHER STATES' CAPS

A review of legislation limiting personal injury awards reveals a variety of approaches. Although Maryland's noneconomic damages cap is similar in many respects to other states' personal injury recovery caps (PIRCs), several vital differences exist which may cause a constitutional analysis of the Maryland cap to result in a different conclusion than an analysis of analogous provisions in other states. Of the states that have enacted caps on personal injury recovery, including those states that have

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1. A recent trend is discernible that insurance premium rates are stabilizing and liability insurance is generally easier to obtain than it was a year or two ago. See Gattuso, How Far Have We Come in Solving the Liability Crisis?, Baltimore Evening Sun, Feb. 3, 1987, at A10, col. 1, 2.

9. Malpractice insurance premiums have risen by 217 percent in the last two years. Sia, Tort Reform Clamor Anticipated, Baltimore Evening Sun, Dec. 28, 1986, at D2, col. 2. The number of physicians providing professional services to pregnant women in Maryland has fallen from 525 physicians to about 300 physicians. Id. Municipalities in the state have experienced increasing difficulty in obtaining liability insurance. Id. See also Walker, Panel Cool on Awards Limit, Baltimore Evening Sun, Feb. 18, 1987, at B1, col. 5.

10. See Sia, Tort Reform Clamor Anticipated, at A8, col. 1. (Dennis McCoy, the trial lawyers' lobbyist, advocates stronger regulation of the insurance industry); McNatt, New Solutions Needed for Maryland's Insurance 'Crisis', Baltimore Evening Sun, Jan. 13, 1987, at A8, col. 1 (Stronger regulation of the insurance industry is needed.). See also Jensen, Legislative Larceny: The Legislature Acts Unconstitutionally When It Arbitrarily Abolishes or Limits Common Law Rights To Redress For Injury, 31 S.D.L. REV. 82, n.3 (1985) (citing a study which concludes that the medical malpractice crisis is a result of a lax disciplinary system which seldom sanctions negligent physicians) [hereinafter Legislative Larceny]. See generally Redlich, Ending the Never-Ending Medical Malpractice Crisis, 38 ME. L. REV. 283 (1986) (discussing the friction generated between the three professions on the issue of the causes of the medical malpractice crisis) [hereinafter Redlich].

11. The comment will not address the separate issues of limitations applicable to governmental tort liability or federal government powers to limit recovery in tort. Section 11-108 is a result of state governmental action which covers all tortfeasors. The 1987 General Assembly has passed a statute which limits governmental tort liability to $250,000.
subsequently found the cap to be unconstitutional or failed to reenact a temporary cap, one places a limit on punitive damages, including Maryland, limit noneconomic damages only, and two limit the plaintiff’s total recovery, excepting medical expenses.

Nearly every state PIRC applies specifically to medical malpractice actions. Maryland’s cap, however, encompasses all personal injury actions with the exception of personal injury actions against state and local governments. Moreover, unlike Maryland, some states enacted their

12. KAN. STAT. ANN. § 60-3402(d) (Supp. 1985) (limiting punitive damages to a certain percentage of the tortfeasor’s gross earnings but in no event greater than $3,000,000).

13. CAL. CIV. CODE § 3333.2 (West Supp. 1987) ($250,000 limitation); FLA. STAT. ANN. § 768.80 (West Supp. 1987) ($450,000 limitation); MD. CTS. & JUD. PROC. CODE ANN. § 11-108 (Supp. 1986) ($350,000 limitation); MICH. COMP. LAWS § 600.1483 (West’s Mich. Legis. Service, No. 4 1986) ($225,000 limitation); N.H. REV. STAT. ANN. § 507-C.7 (1983) ($250,000 limitation); OHIO REV. CODE ANN. § 2307.43 (Page 1981) ($200,000 limitation); UTAH CODE ANN. § 78-14-7.1 (Supp. 1986) ($250,000 limitation); W. VA. CODE § 55-7B-8 (1986 Supp.) ($1,000,000 limitation); WIS. STAT. ANN. § 893.55(4)(d) (West Supp. 1985) ($1,000,000 limitation). Massachusetts has enacted a discretionary limitation on noneconomic damages. See MASS. GEN. LAWS ANN. ch. 231, § 60H (West Supp. 1987) ($500,000 limitation). The jury, or the court in a nonjury trial, may ignore the limitation where “a substantial or permanent loss or impairment of a bodily function or substantial disfigurement, or other special circumstances” are present. Id.

14. Former ILL. REV. STAT. ch. 70 § 101 (1975) ($500,000 limitation); IND. CODE ANN. § 16-9.5-2-2 (Burn’s 1983) ($500,000 limitation); KAN. STAT. ANN. § 60-3407 (Supp. 1986) ($1,000,000 limitation and a $250,000 limitation on noneconomic damages; court may award additional damages for medical expenses up to $3,000,000); N.M. STAT. ANN. § 41-5-6 (1986 Repl.) ($500,000 limitation); N.D. CENT. CODE § 26.1-14-11 (Supp. 1985) ($500,000 limitation); NEB. REV. STAT. § 44-2825 (1984) ($1,000,000 limitation); R.I. GEN. LAWS § 9-31-3 (1985) ($100,000 limitation on governmental liability, but the limitation does not apply if the injury occurs while the state is engaged in a proprietary function); S.D. CODIFIED LAWS ANN. § 21-3-11 (Supp. 1986) ($1,000,000 limitation); TENN. CODE ANN. § 9-8-307(e) (1986) (limits governmental liability to $300,000 per person and $1,000,000 per occurrence); VA. CODE § 8.01-581.18 (1983) ($1,000,000 limitation).

15. LA. REV. STAT. ANN. § 40-1299.42 (1984 and West Supp. 1987) ($500,000 limitation); TEX. STAT. ANN. art. 4590i, § 11.02(a) (Vernon Supp. 1987) ($500,000 limitation); but Texas has a fall-back provision which limits noneconomic damage recovery to $150,000 if the current statute is found unconstitutional. See art. 4590i, § 11.03.).

16. But see R.I. GEN. LAW § 9-31-3; TENN. CODE ANN. § 9-8-307(e).

17. See supra note 2. A separate $250,000 recovery limitation on tort actions against “local governments” was enacted in 1987 by the Maryland General Assembly. See 1987 Md. Laws 594. “Local government” is defined as:

(D) “Local government” means:

(1) a chartered county established under article 25A of the code;
(2) a code county established under article 25B of the code;
(3) a board of county commissioners established or operating under article 25 of the code;
(4) Baltimore City;
(5) a municipal corporation established or operating under article 23A of the code;
(6) the Maryland-National Capital Park and Planning Commission;
PIRCs as part of a comprehensive legislative scheme at least partially designed to ensure the availability of funds to compensate a victorious personal injury plaintiff. In these states, health care providers must register with the state and contribute to a state sponsored insurance fund to receive the protection of the cap. These states combine a limitation on a qualified health care provider's liability with a guarantee of an insurance fund pool to cover payment of any award above this limitation, but only to the extent allowable under the PIRC. Application of Maryland's PIRC is not tied to any potential tortfeasor's compliance with or contribution to a comprehensive compensation scheme.

(7) the Washington Suburban Sanitary Commission;
(8) a community college or board of trustees for a community college established or operating under Title 16 of the education article;
(9) a county public library or board of trustees of a county public library established or operating under Title 23, or Title 3 of the education article;
(10) the Enoch Pratt Free Library or Board of Trustees of the Enoch Pratt Free Library;
(11) the Washington County Free Library or the Board of Trustees of the Washington County Free Library;
(12) a special taxing district; and
(13) a nonprofit community service corporation incorporated under Maryland law that is authorized to collect charges or assessments.

Id.


Maryland does have a state created voluntary insurance fund, but application of section 11-108 bears no relationship to whether the tortfeasor is covered by the insurance fund. See MD. ANN. CODE art. 48A, §§ 548-56 (1986). In Maryland, additional legislation has been enacted during the past legislative session, but this legislation further inhibits a personal injury plaintiff's ability to sue for and recover damages from a tortfeasor. See Sia, Tort Reform Clamor Anticipated, Baltimore Evening Sun, Dec. 28, 1986, at D1, col. 5. In an action predicated on medical malpractice, the defendant may move for remittitur or new trial on the ground that the award is excessive due to payments received by the claimant from collateral sources. See 1987 Md. Laws 596. Unless actual malice is proven, the liability of local governments and their employees is limited to $200,000 per individual claim and $500,000 per occurrence. See 1987 Md. Laws 594. The age that an underage claimant's cause of action against a health claim provider begins to accrue for limitations purposes is reduced from 16 years of age to 11 years of age. See 1987 Md. Laws 592.


20. IND. CODE ANN. § 16-9.5-1-5; LA. REV. STAT. ANN. § 40:1299.41D. A substantive due process attack on a state PIRC may be weakened by the establishment of a patient's compensation fund because a quid pro quo is established. See infra notes 141-42 and accompanying text.
III. CONSTITUTIONAL ATTACKS ON PERSONAL INJURY RECOVERY CAPS

This section reviews the various constitutional attacks that have been presented in challenging statutory limitations on recovery for personal injury. It is important to recognize at the outset that state constitutions often provide more stringent protection of individual rights than does the federal constitution. Accordingly, no constitutional analysis of a state PIRC is complete without reference to the relevant state constitution and the interpretation of that document by the state's highest court.21

A. Right to a Jury Trial

Perhaps the most compelling argument proffered in striking down state PIRC's as unconstitutional is one based on constitutional right to jury trial provisions.22 Recently, the United States District Court for the Western District of Virginia, exercising its diversity jurisdiction, found that Virginia's $1,000,000 total damages recovery limitation violated both the federal and state constitutional right to jury trial provisions.23 The court held that the legislature may not preempt a jury's finding of fact once a matter has properly been submitted to and decided by that jury.24 In so holding, the court differentiated between procedural regulations and substantive limitations on the jury function:

The legislature may pass measures which affect the way a jury determines factual issues. The legislature may prescribe rules of procedure and evidence, create legal presumptions, allocate burdens of proof, and the like. Just as certainly, the legislature may abolish a common law right of action and if it desires, replace it with a compensation scheme. The legislature may even make rules concerning the type of damages recoverable and the way in which damages are paid. But the legislature may not preempt a jury's findings on a factual issue which has properly

21. See infra, notes 67-68 and accompanying text.
22. By striking down state PIRC's as violative of state constitutional right to jury trial provisions, state courts can avoid engaging in a stringent constitutional equal protection analysis, an analysis that may be subject to criticism as judicial legislation. Cf. Fein v. Permanente Medical Group, 38 Cal. 3d 137, 158, 695 P.2d 665, 679, 211 Cal. Rptr. 368, 382 (1985) ("[P]olicy determinations as to the need for, and the desirability of, the enactment are for the legislature."); Johnson v. St. Vincent Hosp., 273 Ind. 374, 387, 404 N.E.2d 585, 594 (1980) ("In dealing with the constitutionality of a statute of our State, we do not sit to judge the wisdom or rightness of its underlying policies.").
23. Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986). Prior to determining the constitutionality of the Virginia PIRC under state and federal constitutional right to jury trial provisions, the court found that the PIRC did not violate state or federal equal protection provisions. Id. at 787-88. Cf. Smith v. Department of Ins., 507 So. 2d 1080, 1088-89 (Fla. 1987) (providing, in dicta, that Florida's PIRC unconstitutionally infringes on the constitutional right to a jury trial).
been submitted to the jury. In particular, the legislature may not mandate the amount of judgment to be entered in a trial.\textsuperscript{25}

Reaching a contrary holding, the Supreme Court of Indiana previously had upheld that state’s PIRC in the face of a constitutional right to jury trial attack.\textsuperscript{26} The court held that Indiana’s $500,000 cap on the total recovery of damages did not interfere with the jury’s assessment of damages, but only apportioned the damages on permissible grounds of public policy.\textsuperscript{27} This reasoning, however, fails to recognize that the constitutional right to a jury trial applies not only to factual determinations by the jury, but also to the implementation of the jury’s determination.\textsuperscript{28} The problem with the court’s upholding of the statute on those grounds is that any determination of damages by the jury above the $500,000 PIRC set by the Indiana legislature is rendered nugatory by the fact that the trial court is powerless to enforce the judgment to the extent in which it exceeds the cap.

Similarly, when the Maryland noneconomic damages cap is applied, a jury’s determination of noneconomic damages in excess of $350,000 will be wholly avoided.\textsuperscript{29} Significant legislative interference with a person’s constitutional right to a jury trial warrants a court’s application of strict scrutiny.\textsuperscript{30} Application of section 11-108 ventures far beyond the bounds of procedural regulation of the universally recognized function of the jury.\textsuperscript{31} The mandatory cap on noneconomic damages simply cannot

\textsuperscript{25} Id. The Court of Appeals of Maryland also has considered the distinction between rules of procedure and infringement upon the substantive right to have a jury determine damages in personal injury cases. In Attorney General v. Johnson, 282 Md. 274, 385 A.2d 57 (1978), the court held that mandatory submission of a medical malpractice claim to an arbitration board and the subsequent use of the arbitration board’s award as presumptive evidence of actual damages in a jury trial on appeal are procedures that do not violate Article 23. Id. at 274, 385 A.2d at 57. These procedures were held to be reasonable restrictions that do not unconstitutionally infringe on a person’s right to a jury trial. Id. at 295-96, 385 A.2d at 69-70. The court found it significant that, on appeal, a person would receive a trial of all factual issues, including a determination of damages, by an unburdened jury within a reasonable time and without undue expense. Id. at 301, 385 A.2d at 72-73. The court made a determination that the due process required by Art. 19 of Maryland’s Declaration of Rights was not violated: “[W]e simply cannot conclude that the additional expense and delay mandated by this malpractice claims statute is so unreasonable in relation to its legitimate goal that it contravenes due process.” Id. at 299, 385 A.2d at 71. The court applied minimal scrutiny to the statute because it did not “significantly interfere” with the fundamental right to a jury trial. Id. at 310, 385 A.2d at 38.


\textsuperscript{27} Id.

\textsuperscript{28} “It is the policy of this Act that recoveries be limited to $500,000, and to this extent, the right to have the jury assess the damages is available. No more is required . . . .” Id. (emphasis added).

\textsuperscript{29} See supra text accompanying notes 24-25.


\textsuperscript{31} Cf. Knickerbocker Life Ins. v. Hoeske, 32 Md. 317, 326 (1869) (A statute which
survive any real analysis within the parameters of Article 23 of the Maryland Declaration of Rights.32

B. Equal Protection

The most vociferous constitutional attack on state PIRCs has been made within the ambit of federal and state equal protection provisions. In states with PIRCs that only apply to medical malpractice actions, PIRC legislation may violate state and federal constitutional equal protection clauses in two respects. First, the PIRC discriminates between health care providers and all other tortfeasors, granting the benefit of the cap only to health care providers.33 Secondly, the PIRC discriminates between catastrophically injured plaintiffs and less severely injured plaintiffs, allowing full recovery only to the less severely injured.34 This second classification applies with equal force in states which apply their PIRCs to all personal injury actions, not just to medical malpractice claims.

Once a discriminatory classification has been established, a court must decide which standard of equal protection analysis to utilize in examining the constitutionality of the PIRC. Traditional equal protection analysis required that a two-tiered test be used.35 Where the discriminatory classification infringes on a "suspect class"36 or a "fundamental right"37, the governmental action is subject to strict scrutiny.38 The gov-

34. Id.
36. For Supreme Court cases elucidating suspect classifications, see Smith, Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws, 38 OKLA. L. REV. 195, 202 n. 29 (1985) [hereinafter Smith].
37. Id. n.30. The Supreme Court has determined that the right of privacy is a fundamental right within the penumbra of several fundamental constitutional guarantees. Griswold v. Connecticut, 381 U.S. 479 (1965). Although it appears that no commentator has endorsed or even discussed the creation of a fundamental right to full recovery in tort for one's personal injuries using a Griswold approach, the idea possesses some merit. A synthesis of a right to a jury trial, a right of access to courts including a right to "full remedy," a right to be secure in one's person, and, finally, an equal protection right to be free of unreasonably discriminatory classifications could lead a court to conclude that a fundamental right to full recovery in tort for personal injuries is implicit in the federal and/or state constitutions. Cf. Griswold at 484-85 (A synthesis of first amendment protection from governmental intrusions, third amendment prohibition against the quartering of soldiers "in any house" in time of peace, fourth amendment rights to be secure in one's person, fifth amendment rights against self-incrimination, and the ninth amendment preservation of rights not enumerated creates a fundamental right to privacy.).
ernment must show that a compelling governmental interest is being furthered and that the least restrictive alternative available is employed in implementing this interest.39 Statutes rarely survive a strict scrutiny analysis.40

If a statute does not discriminate against a suspect class or infringe upon a fundamental right, the statute is subject to minimal scrutiny.41 At this level of analysis, an attack on the constitutionality of the statute will be successful only if the plaintiff proves that the statute "rests on grounds wholly irrelevant to the achievement of the State's objective."42 This level of scrutiny is applied against statutes which amount to mere economic regulation.43 Because of the minimal standard of review, these statutes are rarely struck down.44

Growing dissatisfaction with this traditional two-tiered approach in equal protection analysis has led to the development of an intermediate analysis in cases that do not fit so neatly within the two-tier dichotomy.45 This approach, referred to as "intermediate scrutiny" or "heightened review,"46 is applied where either quasi-suspect classes or important, but not fundamental, substantive rights are involved.47 The test requires that a legislative classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation, so that persons similarly circumstanced shall be treated alike."48 The Supreme Court has applied this level of analysis in cases involving classifications based on gender,49 marital status,50 illegitimacy,51 and alienage.52

Many state courts have examined the equal protection implications

39. Id.; Medical Malpractice Damages, supra note 33, at 1591-92.
42. Id. (upholding Maryland's Sunday Blue Laws).
44. Medical Malpractice Damages, supra note 33, at 1592 ("[C]onstitutionality is all but a foregone conclusion."); Gunther, supra note 40, at 8 ("minimal scrutiny in theory and virtually none in fact").
45. See generally Gunther, supra note 40.
46. The "heightened review" standard was developed by the Court of Appeals of Maryland. See, e.g., Broadwater v. State, 306 Md. 597, 510 A.2d 583 (1986); Hornbeck v. Somerset Co. Bd. of Educ., 295 Md. 597, 458 A.2d 758 (1983); Attorney General v. Waldron, 289 Md. 683, 426 A.2d 929 (1981). The "heightened review" standard arises from the "rational basis" tier of analysis set forth by the Supreme Court. See Waldron, 289 Md. at 709-10, 426 A.2d at 943-44.
47. See Waldron, 289 Md. at 711, 458 A.2d at 781-82.
of their state PIRCs. No clear consensus has emerged. It is clear, however, that the level of scrutiny that a court applies will, in all likelihood, determine whether the statute survives a constitutional attack based on equal protection grounds. Courts that apply minimal scrutiny invariably uphold the constitutionality of the PIRC. Those courts that apply an intermediate or heightened level of scrutiny invalidate the constitutionality of the statute. Most courts have dismissed the argument that strict scrutiny applies to PIRCs, reasoning that full recovery of damages in tort is not a fundamental right.


54. Medical Malpractice Damages, supra note 33 at 1594. A recent commentary was sharply critical of the Fein decision and the apparent abandonment of the development of an intermediate tier by the Supreme Court of California; the comment lambasted the court's application of minimal scrutiny to the California PIRC. See Comment, Medical Malpractice — $250,000 Cap On Pain & Suffering: Does the Statute Meet Its Constitutional Burden and Legislative Goals? — Cal. Civ. Code § 3333.2 (1986), 8 WHITTIER L. REV. 601 (1986).

55. See Fein, 38 Cal. 3d at 164, 695 P.2d at 683-84, 211 Cal. Rptr. at 387; Prendergast, 199 Neb. at 113-14, 256 N.W.2d at 668; Johnson, 273 Ind. at 399-400, 404 N.E.2d at 601. At times, the Indiana court appears to unintentionally blend an intermediate level of scrutiny with an "any rational basis" level of scrutiny. Id. at 395-96, 404 N.E.2d at 600. First, the court appears to require a "fair and substantial" relationship between the classification and its purpose, then it requires the appellant to show "no correlation" between the PIRC and its purpose. Id.

56. Jones, 99 Idaho 859, 555 P.2d 399 (remanding the case to the trial court which subsequently ruled that the statute was unconstitutional); Arneson, 270 N.W.2d at 135 ("whether there is a sufficiently close correspondence between statutory classification and legislative goals . . ."); Carson, 120 N.H. at 943, 424 A.2d at 838.

57. See Carson, 120 N.H. at 931, 424 A.2d at 830; Sibley, 462 So. 2d at 155-56. Two states have constitutional provisions which bar the legislature from enacting any legislation which impairs a person's right to recover in full for personal injuries. Ariz. Const. art. II, § 31, Ky. Const. § 54. Presumably, a state PIRC enacted in either of these states would be examined under a strict scrutiny analysis. Accord Barrio v. San Manuel Div. Hosp., 143 Ariz. 101, 692 P.2d 280 (1984) (cause of action to recover damages for negligence is a fundamental right guaranteed by the Arizona Constitution.).
1. Federal Equal Protection Analysis

Because of the precedent arguably established in *Duke Power Co. v. Carolina Environmental Study Group*, and the general hesitation by the Supreme Court to expand the classifications it will subject to intermediate scrutiny, it appears that a court interpreting only the federal constitution would apply no more than minimal scrutiny when examining a PIRC. In *Duke Power*, the Supreme Court applied the "any rational basis" test in upholding a federal statute limiting the recovery of damages from a nuclear power plant operator in the event of a nuclear accident. State courts that have upheld PIRCs under an "any rational basis" analysis have placed great reliance on *Duke Power* in declining to adopt a more rigorous analysis.

*Duke Power* is distinguishable from the PIRC cases in several respects, however. First, while it is true that in *Duke Power* the Supreme Court, in dicta, upheld the constitutionality of the Price-Anderson Act as nonviolative of the equal protection implicit in the fifth amendment, the general statutory scheme implemented by Congress to regulate the nuclear power industry provided the statute's "general rationality." No such general statutory scheme provides comparable rationality for most state PIRCs, including the Maryland PIRC. Second, the protections, purposes, and governmental interests involved in *Duke Power* are strikingly different from those present where a state PIRC is involved. The statute examined in *Duke Power* limits the recovery of damages in what the Court perceived to be the extremely remote event of a major nuclear accident, the ramifications of which would be so devastating that a private nuclear power plant operator would almost assuredly be driven

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59. See, e.g., *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986) (upholding Texas' PIRC under federal equal protection analysis); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985) (upholding California's PIRC after the *Fein* decision); *Boyd*, 647 F. Supp. 781 (appling minimal scrutiny in analyzing the equal protection implications of Virginia's PIRC). See also *Smith*, supra note 36, at 219 (citing *Duke Power* as "strong precedent for the constitutionality of federal liability limitations").
61. *See Johnson*, 273 Ind. at 395-96, 404 N.E.2d at 600 ("We conclude that the same test [as that used by the Supreme Court in *Duke*] is applicable here, and that it is likewise applicable to testing the Act on the state constitutional grounds used."); *Sibley v. Board of Supervisors*, 462 So. 2d at 156-57 ("On the basis of the above authority [*Duke Power*, *Fein*, and *Johnson*], we conclude that the Act need only be subjected to a rational basis analysis."), modified on rehearing, 477 So. 2d 1094 (1985).
63. Id.
to insolvency well before liability payments reached the cap set forth in the Price-Anderson Act. 65 Thus, unlike state PIRCs, Price-Anderson affords a personal injury claimant a greater likelihood of recovery than he would have had without it. 66 Further, blind reliance on federal constitutional interpretation such as that in Duke Power leads state courts to ignore the independent vitality of their state constitutions, which may be more protective of individual rights, 67 as well as the legitimate role state courts play in shaping state law. 68

2. State Equal Protection Analysis

a. Strict Scrutiny

The right to recover in full for personal injuries is probably not a

65. Duke Power, 438 U.S. at 91, n.36. The legislation in Duke Power was enacted primarily because private insurers could not adequately insure nuclear power plant operators' potential liability. Id. at 64-65. Although certain subgroups of health care providers have had difficulty obtaining liability insurance for short periods of time in some states, this difficulty does not reach the seriousness of the situation the nuclear power industry faced in the mid-1950's. See Law, A Consumer Perspective on Medical Malpractice, 49 LAW & CONTEMP. PROBS. 305, 305 & n.1 (1986) (The main complaint from the medical profession is that insurance premiums are too high, not that insurance coverage is nonexistent.) [hereinafter A Consumer Perspective].


67. Because of a growing resurgence of federalism and the increasing willingness of state courts to stray from federal constitutional analysis, it cannot be assumed that interpretation of the federal constitution is conclusive when examining similar state constitutional provisions. See Attorney General v. Waldron, 289 Md. 683, 705 n.9, 714 n.20, 426 A.2d 929, 941 n.9, 946 n.20 (1981). See also Marcotte, Federalism and the Rise of State Courts, ABA Journal p. 60, 62 (Apr. 1, 1987) (54 cases decided by state high courts in 25 states have gone beyond the federal constitution's minimum protection). State constitutions are increasingly recognized as a source of independent scrutiny by the courts, particularly where individual rights are concerned. This trend to more closely scrutinize state constitutional provisions has led to greater protection of individual rights. See Smith, supra note 36, at 219 ("[S]tate courts are exercising their judicial and political prerogative of finding state constitutional violations of state statutes in order to vindicate individual rights."). See generally Rees, State Constitutional Law for Maryland Lawyers: Individual Civil Rights, 7 U. BALT. L. REV. 299 (1978).

68. See Smith, supra note 36. The author lists five reasons why state courts may be less restrained in exercising their judicial powers than federal courts:

(1) state courts occupy a different institutional position in the state court system than does the Supreme Court in the federal system;
(2) state courts routinely engage in fashioning general common law —a power denied to the federal courts since Erie Railroad v. Tompkins;
(3) state constitutional rights may differ qualitatively from the federal constitutional rights;
(4) federal courts are obliged to pay due deference to state laws out of concerns for federalism; and
(5) unlike federal courts, state courts are not courts of limited jurisdiction and are often invested with broad general jurisdictional powers to adjudicate cases.

Id. at 208.
fundamental right under the federal or Maryland constitutions. The right is not guaranteed explicitly or impliedly in either document. Strict scrutiny arguments have failed when classifications based on gender and education have been attacked as constitutionally infirm. Arguably, the right infringed here does not reach the constitutional importance of fairness in gender or education classifications. In the same vein, it cannot be argued that seriously injured tort victims are a suspect class, the protection of which mandates strict scrutiny of legislation which discriminates against it.

b. Rational Basis v. Heightened Review

Once strict scrutiny is eliminated as an appropriate standard of review for an equal protection analysis of statutory damages caps, it then must be determined whether the standard of review should be mere rational basis, under which the statute would inevitably be upheld, or the intermediate “heightened review”, under which the statute could arguably be struck down. On this point state courts have diverged. Some courts have differentiated between PIRCs that cap total recovery for personal injury and those that cap only noneconomic damage recovery, such

69. But cf. supra note 57.
70. The argument can be made, however, that the “full remedy” provision of Article 19 of Maryland’s Declaration of Rights conveys the right to recover in full for personal injuries. See infra nn. 148-57 and accompanying text. See generally Legislative Larceny, supra note 10, at 91-92 (analyzing South Dakota’s “remedy for injury” constitutional provision and concluding that the provision prohibits the state legislature from limiting such common law rights in existence when the South Dakota constitution was adopted). The “full remedy” provision of Maryland’s Declaration of Rights probably mandates procedural fairness only, however, and therefore cannot be the source of a substantive right in itself. See Attorney General v. Johnson, 282 Md. at 298-301, 385 A.2d at 71-73. In Johnson, the court held that the “Law of the Land” mentioned in Article 19 is the same due process required by the due process clause of the 14th amendment. Id. at 298-99, 385 A.2d at 71. The court was analyzing Article 19, in conjunction with the right to a jury trial provision, to determine if the restriction on the “right of access” provided by Article 19 was significant enough to violate a medical malpractice claimant’s right to a jury trial. Id. at 300, 385 A.2d at 72. The added procedural burden was held to be a reasonable restriction on the claimant’s “right of access.” Id. at 299, 385 A.2d at 71.

While the interest of the severely injured patient in full recovery rather than partial recovery to the extent of $500,000, is great for the purpose of selecting the appropriate equal protection test, it is not greater than that of the children needing but being denied subsistence level support in Danridge, and is not greater than that of the injured plaintiff in Sidle who could recover nothing.

Id.
as Maryland’s PIRC.75 Apparently these courts would exact more scrutiny over legislation which limits a plaintiff’s total recovery of personal injury damages.76 In Fein v. Permanente Medical Group,77 the Supreme Court of California reasoned that the intangible nature of noneconomic damages leads to unpredictably large jury awards, thus forcing liability insurers to increase insurance premium costs to meet this eventuality.78 Thus, it is reasoned that a cap on noneconomic damages restores predictability and stability to the liability insurance industry.79 Exacting minimal scrutiny, these courts find ample justification for the legislature’s enactment of a statute which limits a personal injury plaintiff’s recovery of noneconomic damages.80

Other courts, recognizing that the right to recover noneconomic damages is an important right, have applied intermediate scrutiny to strike down their PIRCs. These courts refuse to distinguish between economic and noneconomic damages because noneconomic damages are imbued in the common law and are therefore as valid as economic damages.81 Such courts recognize that noneconomic damages allow


76. See Fein, 38 Cal.3d at 159-60, 695 P.2d at 681, 211 Cal. Rptr. at 384. The court stated, “No California case ... has ever suggested that the right to recover for such noneconomic injuries is constitutionally immune from legislative limitation or revision.” Id.


78. Id. at 163, 695 P.2d at 683, 211 Cal. Rptr. at 386. An American Bar Association report cited in Fein recommended that economic damages not be capped, but it expressly reserved the Association’s opinion on noneconomic damages caps. Id. at 160 n.17, 695 P.2d at 681 n.17, 211 Cal. Rptr. at 384 n.17.

79. Id. at 163, 695 P.2d at 683, 211 Cal. Rptr. at 386.

80. See Fein, 38 Cal.3d at 160, 695 P.2d at 681, 211 Cal. Rptr. at 384-85 (“Although reasonable persons can certainly disagree as to the wisdom of this provision, we cannot say that it is not rationally related to a legitimate state interest.”). See also Prendergast v. Nelson, 199 Neb. 97, 115, 156 N.W.2d 657, 669 (1977) (holding that the classifications are based on public policy and are only unconstitutional if they rest on grounds wholly irrelevant to meeting the state’s objective).

81. See Carson v. Maurer, 120 N.H. 925, 942, 424 A.2d 825, 837 (1980) (“It is only the award above out-of-pocket loss that is available to compensate in some way for the pain, suffering, physical impairment or disfigurement that the victim must endure until death.”). See also Fein, 38 Cal.3d at 171, 695 P.2d at 689, 211 Cal. Rptr. at 392 (Bird, C.J., dissenting). Former Chief Justice Bird, recognizing the fact that most large noneconomic awards occur where the victim is an infant or young adult, gauged the California’s cap’s effect on this group:

Spread out over the expected lifetime of a young person, $250,000 shrinks to insignificance. Injured infants are prohibited from recovering more than three or four thousand dollars per year, no matter how excruciating their pain, how truncated their lifespans, or how grotesque their disfigurement. Even this small figure will gradually decline as inflation erodes the real value of the allowable compensation.
compensation for real, albeit less tangible, injury.82

An example of a situation where noneconomic damages are important is where an attorney loses an arm due to some sort of medical negligence.83 Loss of income would be minimal because the attorney would still be able to practice law. Once initial medical costs are paid, future medical expenses would be negligible. The attorney’s quality of life, however, would be greatly diminished. Thus, the fact that a personal injury plaintiff may receive all of his economic damages in no way implies that he is fully compensated for his injuries.84

By severely restricting the amount of noneconomic damages a seriously injured plaintiff may recover, noneconomic damage PIRC's will indirectly and adversely affect the plaintiff's utilization of his economic damage award.85 Personal injury victims whose employment position may not warrant a substantial award for loss of income rely heavily on noneconomic damage recovery for recompense.86 Additionally, most personal injury plaintiffs rely on an adequate award of noneconomic damages to reimburse their counsel for legal services.87 For purposes of an equal protection analysis, no persuasive basis exists which justifies differentiating between economic and noneconomic damages. With both types of damages an important right is affected which warrants intermediate review.

Courts adopting a standard of intermediate scrutiny have placed greater reliance on the state constitution when determining that the right to full recovery is an important substantive right, the infringement of which merits more than a cursory examination.88 The application of intermediate scrutiny requires that the court discern the actual purpose of the legislation.89 The court then must examine whether the means em-

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82. *Carson*, 120 N.H. at 942, 424 A.2d at 837.
83. See *Moore & Hoff, A More Rational Compensation System for Medical Malpractice*, 49 LAW & CONTEMP. PROBS. 117, 123 [hereinafter *A More Rational Compensation System*].
84. *Id.* See also *A Consumer Perspective, supra* note 8, at 319. *A Consumer Perspective* discussed a proposal in Congress to abolish noneconomic damages and complained, “[P]eople would be worth only what they can earn, or what they cost in terms of net medical expense.” *Id.*
86. *Id.* See also *supra* nn. 81-84 and accompanying text.
87. *See Fein*, 38 Cal.3d at 160 n.17, 695 P.2d at 681 n.17, 211 Cal. Rptr. at 384 n.17.
88. *See Medical Malpractice Damages, supra* note 33, at 1603. In *Carson*, the court explicitly recognized that the state constitution may, in some instances, afford greater individual protections than the federal constitution. “[W]e are not confined to federal constitutional standards and are free to grant individuals more rights than the Federal Constitution requires.” 120 N.H. at 932, 424 A.2d at 831.
89. Critics charge that the utilization of the intermediate scrutiny test by the courts improperly allows them to sit as superlegislatures because it enables the courts to analyze the factual bases for the enaction of the legislation. *Medical Malpractice Damages, supra* note 33, at 1603-04. As one commentator has noted, however, the
ployed to effectuate this legitimate purpose bear a "fair and substantial" relationship to it.90 A state PIRC usually fails this analysis on at least one of two bases. Either the purpose or object being furthered is found invalid91 or the means employed in furthering a legitimate goal are found patently unreasonable.92 In the final analysis, these courts find that legislation which places a grave burden on a small number of catastrophically injured tort victims so that a benefit may be conferred on tortfeasors and their insurers must meet an important governmental interest to avoid being repugnant to the state constitution.

Maryland courts recognize that in some instances an equal protection review warrants greater scrutiny than the traditional rational basis test would afford.93 A heightened review standard has been applied or recognized in Maryland where legislative classifications significantly interfere in the areas of gender,94 illegitimacy,95 education,96 and the right to work within one's chosen vocation.97 In Attorney General v. Waldron,98 the Court of Appeals of Maryland stated that the equal protection standard of heightened review is applicable "when important personal rights, not yet held to merit strict scrutiny but deserving of more protection than a perfunctory review would accord, are affected by a legislative classification."99 Application of this analysis to Maryland's use of an intermediate scrutiny test acquires more validity when applied by a state court interpreting the state constitution than it does when utilized by a federal court. See supra note 68 and accompanying text.

90. See supra note 48 and accompanying text.
91. Arneson v. Olson, 270 N.W.2d 125, 136 (N.D. 1978) (no liability insurance crisis exists); Pfost v. State, 713 P.2d 495, 504 (Mont. 1985) (legislative finding was "so wild in speculation as to be on its face unacceptable").
92. The Carson court stated the point most succinctly: "It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation." Carson v. Mauer, 120 N.H. 925, 942, 424 A.2d 825, 837 (1985). See also Fein, 38 Cal.3d at 168, 695 P.2d at 687, 211 Cal. Rptr. at 390 (Bird, C.J., dissenting) ("In order to provide special relief to negligent health care providers and their insurers, MICRA arbitrarily singles out a few injured patients to be stripped of important and well-established protections against negligently inflicted harm.").
93. See supra note 46 and accompanying text.
96. See Hornbeck, 295 Md. at 652-53, 458 A.2d at 788 (Without expressly holding that the right to education is an important personal right, the court appears to have exacted minimal scrutiny only because the legislation did not significantly interfere with the right to education.).
97. Attorney General v. Waldron, 289 Md. 683, 426 A.2d 929 (1981). The heightened review standard is most clearly enunciated in Waldron. In that case the court of appeals allowed that mere regulation of an applicant's entry into the legal profession is subject to minimal scrutiny, but the denial of a person's right to practice law when he is otherwise fully qualified merits heightened review. Id. at 717, 426 A.2d at 948.
98. Id.
99. Id. at 713, 426 A.2d at 946.
PIRC leads to the conclusion that the right of personal injury victims to recover full compensatory damages is one that mandates more than a cursory review of the legislation and its purposes.100 Thus, the intermediate, “heightened review” standard is the appropriate standard of review for Maryland’s PIRC enactment.

c. **Heightened Review Applied**

Under “heightened review” a legislative enactment that severely infringes on the rights of catastrophically injured tort victims to recover all compensatory damages from adjudicated tortfeasors must bear a fair and substantial relationship to the alleviation of any liability insurance crisis.101 Before an examination of the means utilized in lessening the crisis can be undertaken, the goal itself must be analyzed to determine if, in fact, a liability insurance crisis does exist in the state of Maryland.102

An examination of the liability insurance industry, with particular reference to the industry’s impact on health care providers, leads to the conclusion that the purpose of the statute is legitimate. Although it may be debated whether insurance companies actually need to raise premiums in order to turn a reasonable profit,103 there can be no dispute that the increased premiums themselves have generated a bona fide insurance problem in Maryland.104 Health care providers, in particular, are adversely affected by rising insurance costs.105 The probable loss of qualified medical personnel would have an adverse impact on all citizens of the state. Legislation to alleviate the problem, therefore, appears to be appropriate.

Under a heightened review equal protection analysis, the courts must examine the relationship between the legislation enacted and the object of the legislature’s actions.106 Consequently, some attention must


101. See supra note 48 and accompanying text.

102. See Medical Malpractice Damages, supra note 33, at 1593 (“[M]eans scrutiny analysis requires that convincing evidence of a crisis be submitted to the legislature and be the basis for the enactment of the statute.”).

103. See supra note 8. A report to the Pennsylvania legislature provides some startling conclusions: Large premium rate increases since 1983 are due to the fact that premium rates were inadequate from 1977-81, the cost of malpractice insurance as a percentage of total health costs has been declining since 1976, and, finally, “the cost of malpractice insurance is an insignificant contributor to total health care costs.” The Pennsylvania Experience, XVIX Md. Bar Journal 11 (Jan. 1986).


106. See supra notes 89-90 and accompanying text.
be given to the purported objectives of PIRCs. Various supporting arguments are advanced by proponents of PIRC legislation. Perhaps the most persuasive argument is that state PIRCs provide needed relief to the insurance industry by reducing the uncertainty and overall cost of doing business. 107 Theoretically, this reduction in cost is passed on to those insured and, eventually, to the consumer. 108

Evidence exists that supports the first part of the above argument, namely, that PIRCs reduce costs to the liability insurance industry. 109 Persuasive evidence also indicates, however, that the reduction in costs is minimal and, in any case, is not passed on to the consumer by the liability insurer. 110 Although a recent survey of medical malpractice claims in several states indicates that the reduction in severity of damages attributable to PIRCs is approximately twenty-two percent, 111 the enactment of PIRCs and other restrictive tort legislation has not substantially affected liability insurance rates in those states. 112 Locally, less than one month after Maryland’s PIRC was enacted, Maryland’s largest medical insurance underwriter increased its rates by fifty percent. 113 The insurance industry estimates that the PIRCs effect on insurance premium rates in Maryland will not be felt for at least three years. 114

Assuming for the moment that Maryland’s PIRC on noneconomic

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107. Danzon, The Frequency and Severity of Medical Malpractice Claims: New Evidence, 49 LAW & CONTEMP. PROBS. (No. 2) 58, 76-77 (“Because large awards account for a disproportionate fraction of total dollars, . . . caps that severely reduce the few large dollar awards can have a significant impact on the average and on the total payout.”) [hereinafter Danzon]. This argument is asserted most vigorously when the PIRC limits only noneconomic damages: “The open-ended nature of such damages makes them a particular problem from the standpoint of achieving predictability. Unlike economic damages, which can be predicted within a given range, noneconomic damages are entirely subjective and unpredictable.” Insurance Profitability — The Facts, Insurance Services Offices, ch. 4, at 7 (1986).

108. But see Sia, Tort Reform Clamor Anticipated, at D2, col. 4 (Less than one month after the cap’s enactment, the largest medical malpractice insurer requested and received a fifty percent increase in premium rates.). The chief executive officer of Maryland Mutual has stated that the enactment of its recommendations will reduce the expected increase by only thirty percent, Liability Insurance Issues, supra note 104, at 6.

109. See supra note 107.

110. “Where the total of all settlements and awards amounts to about one-third of the premiums paid, a fact which is utilized as a major argument against the malpractice suit, an occasional reduced award can have little impact [upon the cost of malpractice insurance].” Redlich, supra note 10, at 322. See also The Pennsylvania Experience, supra note 103, at 17 (this type of tort reform is merely a cost shifting device). A report from the Insurance Information Institute provided that industry profits for 1986 stood at $11 billion, an increase of six-hundred percent over 1985. McNatt, New Solutions Needed for Maryland’s Insurance ‘Crisis’, Baltimore Evening Sun, Jan. 13, 1987, at A8, col. 1.

111. See Danzon, supra note 107, at 76-77.


113. Id.

damages will result in savings for either liability insurers, their insured, or both, mere economic savings alone cannot justify the implementation of legislation that affects important personal rights, especially in the context of intermediate scrutiny. Because even the most invidious legislation can be justified by proponents on economic grounds, PIRC supporters will need to proffer other arguments to support the legislation's constitutionality if it is to withstand intermediate review.

Some proponents of state PIRCs have argued that their enactment serves to eliminate frivolous lawsuits. This theory is illogical, however, because PIRCs have an adverse effect only on the victorious plaintiff's recovery of his damages in full. Moreover, sufficient safeguards — including the screening of cases by mandatory arbitration and the availability of a malicious prosecution remedy — currently exist to combat frivolous lawsuits. The actual effect of PIRCs is less laudable. The uncertainty surrounding the application of PIRCs will be used as leverage by defendants against severely injured plaintiffs in forcing settlement for much less than full recovery for their injuries.

Proponents further argue that the recovery limitation remedies a "lottery-like atmosphere" in the courtroom where sympathetic juries

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115. See Attorney General v. Waldron, 289 Md. 683, 724, 426 A.2d 929, 951 (1981). "Undeniably, [the legislation in question] can save the State a bit of money, but we will not engage in tautological equal protection analysis by deducing purpose from result." Id.

It appears, however, that PIRCs enacted in other states do not provide significant long term relief to tortfeasors. See Angoff and Hunter, How Far Have We Come in Solving the 'Liability Crisis?', Baltimore Evening Sun, Jan. 25, 1987, A 11, col. 1. Professor Redlich has offered one possible reason why PIRCs do not significantly affect insurance rates:

As a cost-saving device, this type of legislation is illusory. If one desired, for example, to minimize height as a factor in college basketball, barring 8'6" players would obviously change nothing. Most of the states establishing ceilings acted in this manner. Those states in which awards were traditionally large did not enact this particular remedy with the exception of Illinois, whose attempt was invalidated before its effective date.

Assuming a limit that was in fact lower than awards made by juries in a particular jurisdiction, one would nevertheless have to conclude, upon even cursory analysis, that there would be little if any impact upon the cost of malpractice insurance. Where the total of all settlements and awards amounts to about one-third of the premiums paid, a fact which is utilized as a major argument against the malpractice suit, an occasional reduced award can have little impact.


117. See Arneson v. Olson, 270 N.W.2d 125, 127 (N.D. 1978) (preamble to the statute in question listed its purposes, including the elimination of the expense involved in nonmeritorious claims).

118. Redlich, supra note 10, at 324 ("[T]hey [PIRCs] are often aimed at penalizing those with good cases.").


120. See Practice Tips — The Noneconomic Damages Cap, XIX Maryland Bar Journal 14, 15 (July 1986).
award grossly excessive compensation to personal injury plaintiffs for their injuries.121 Aside from underestimating the capability of the juries to reach well-reasoned conclusions as to the proper measure of damages, this argument ignores established and increasingly utilized safeguards such as remittitur and judgments notwithstanding the verdict in cases where the verdict and/or award are inconsistent with the evidence.122 This argument also ignores the fact that a medical arbitration panel of three persons, one of whom is a health care provider, initially determines the claim’s validity.123 Only twenty percent of the arbitration panel’s decisions are appealed to the circuit court for a possible jury trial.124

Finally, the argument is made that PIRCs are necessary to preserve the quality and adequacy of medical care.125 This circuitous reasoning does not survive careful analysis. Although the quality of medical care may be correlated to the cost to health providers in providing that care, the constitutional validity of state PIRCs cannot be evaluated from a strictly economic standpoint.126 Moreover, it is patently illogical to maintain that PIRCs preserve the quality of medical care by limiting the liability of physicians guilty of medical malpractice.127 It is inconceiv-

121. See A More Rational Compensation System, supra note 83, at 117 (“windfall recoveries for the few plaintiffs who win the lottery of litigation”); Smith, supra note 36, at 195-96 (analogizing the “medical malpractice litigation rush” and “million dollar jury verdicts” to last century’s gold rush).

122. See Duren v. Suburban Community Hosp., 24 Ohio Misc. 2d 25, 482 N.E.2d 1358 (1985). After holding that the Ohio PIRC was unconstitutional, the court entered remittitur reducing the plaintiff’s award from $1,000,000 to $500,000. Id. at 34; 482 N.E.2d at 1368. The ABA House of Representatives at the ABA mid-year meeting proposed that ceilings on noneconomic damages should not be enacted. “Instead, trial and appellate courts should make greater use of their power of remittitur or additur for verdicts that are excessive or inadequate compared to community expectations.” ABA Ok’s Tort Reform Plan, ABA JOURNAL, 18, (Apr. 1, 1987). See also Redlich, supra note 10, at 323. Florida’s comprehensive medical malpractice legislation includes a provision allowing the trial court to examine a jury’s award and determine whether it is inadequate or excessive. Fla. Stat. Ann. § 768.49 (West 1982). The legislature cautions that the statute does not give the courts carte blanche to interfere with reasonable jury awards: “The Legislature recognizes that the reasonable actions of a jury are a fundamental precept of American jurisprudence and that such actions should be disturbed or modified with caution and discretion. § 768.49(6). But see § 768.80 (Florida’s recently enacted $450,000 limitation on noneconomic damages).


124. Id. Most decisions appealed from the arbitration panel consist of large monetary awards to the personal injury plaintiff; the health care provider’s insurer appeals. Id.


126. See supra notes 115-16 and accompanying text.

127. A much simpler way of preserving quality medical care is for the medical profession to toughen an almost nonexistent disciplinary policy against malpracticing physicians. See Miller, Report Ranks Maryland Low in Disciplining Doctors, Baltimore Evening Sun, Dec. 28, 1986, at A1, col. 2 (In Maryland, no medical licenses were revoked in 1985. Nationally, 100,000 Americans are injured or die each year as a result of medical negligence.)
able that the enactment of a state PIRC will induce greater vigilance among the medical profession; quite the opposite is more likely.

This brief survey of the purported objectives of PIRC legislation reveals that Maryland's legislation is unlikely to achieve its objectives for numerous reasons: (1) the noneconomic damage recovery limitation affects only the most seriously injured plaintiffs; (2) the limitation's potential economic benefits are not readily ascertainable; (3) many other less drastic and potentially more effective remedies are available; and (4) seriously injured tort victims are not even remotely the cause of any liability insurance crisis which may exist. Because the recovery limitation bears no "fair and substantial" relationship to an important governmental objective, the cap clearly discriminates between personal injury victims, depriving the most seriously injured victims of a potentially large portion of their compensatory damages. Therefore, under a heightened review analysis, the noneconomic damages limitation violates the equal protection principles embodied in Article 24 of the Maryland Declaration of Rights.128

C. Due Process Challenges

By denying a personal injury plaintiff his right to recover noneconomic damages above the $350,000 limitation, Maryland's

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128. Some courts have attacked the constitutionality of PIRC's on the ground that PIRC's are "special legislation". This attack is similar to the equal protection attack in that special legislation is legislation that favors one group of persons over a similarly situated group.

Illinois invalidated its PIRC on the sole basis that the legislation granted a special privilege to malpracticing health care providers and their insurers to the exclusion of other tortfeasors. See Wright, 63 Ill. 2d at 329-30, 347 N.E.2d at 743. Cf. Arneson v. Olson, 270 N.W.2d 125, 136-37 (N.D. 1978) (where court did not rule on appellee's special law challenge, finding that the limitation was unconstitutional on equal protection grounds).

Maryland’s constitution prohibits the legislature from enacting special laws that favor one group of persons over a similarly situated group. Mo. CONST. art. III, § 33. The provision reads in part: "And the General Assembly shall pass no special law, for any case, for which provision has been made, by an existing General Law." Id. It may be that in enacting section 11-108, the General Assembly avoided creating an issue on this constitutional provision because section 11-108 applies in all cases where personal injury has occurred, not just medical malpractice cases. Md. CTs. & JUD. PROC. CODE ANN. § 11-108(b). On the other hand, one commentator has argued that such legislation still may be subject to attack as special legislation on the ground that an arbitrary damage limitation treats members of a legislatively created class — personal injury victims — differently. See Legislative Larceny, supra note 10, at 97 (The level set for state damage limitations is unarguably discriminatory; because analysis under a constitutional special law provision clearly mirrors an equal protection analysis, the limitations should be examined within an equal protection framework.). See also Smith, supra note 36, at 216.

The special legislation argument is likely to fail in Maryland. Even if the legislation were found to provide a special benefit or burden to the legislatively created class of personal injury victims, it would only be struck down if there were already general laws designed to remedy the problem. Cities Serv. Co. v. Governor, 290 Md. 553, 567, 431 A.2d 663, 671 (1981). No such general laws exist.
noneconomic damages cap is also subject to a substantive due process attack under Article 24 of Maryland's Declaration of Rights and the 14th Amendment of the United States Constitution. Under traditional substantive due process analysis, a statute is examined in an extremely deferential light and will be struck down only if it is arbitrary and unreasonable. However, some state courts have held that when a common law right to recover damages for personal injury is abrogated, due process is violated unless a corresponding substitute or *quid pro quo* is provided. With the demise of federal substantive due process, the *quid pro quo* doctrine had largely fallen into disuse, but the doctrine was revived in *Duke Power Co. v. Carolina Environmental Study Group*. In *Duke Power*, the Supreme Court upheld a legislatively created $560 million dollar limitation on liability for nuclear accidents resulting from the operation of federally licensed privately run nuclear power plants. The Court held that the statute was not irrational or arbitrary. In determining the reasonableness of the statute, the Court did not decide whether a *quid pro quo* is constitutionally required when a common law right is legislatively abrogated. The Court did hold, however, that a *quid pro quo* was provided, in large part due to explicit congressional assurances regarding the availability of the fund, as well as a congressional commitment to take further action to protect the public in the remote event of a major nuclear accident.

As discussed in the section on equal protection, a few state courts have analogized to the decision in *Duke Power* to justify upholding their respective state PIRCs as constitutional. These courts fail to recog-


134. *Id.* at 84-85. The Court acknowledged that dollar limitations in the context examined in *Duke Power* are almost always arbitrary, but this type of arbitrariness does not necessarily constitutionally flaw the legislation under examination. *Id.* at 86.

135. *Id.* at 88.

136. *Id.* at 90-92. The Court also noted that under the Act victims are afforded immediate payments prior to the determination of the extent of their injuries, private nuclear power plant operators are required to waive their defenses, and plaintiffs are not required to show fault. The Court concluded, therefore, that a *quid pro quo* was provided. *Id.*

137. See *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585; *Sibley v. Board of Supervisors*, 462 So. 2d 149 (La.), *remanded on rehearing*, 477 So. 2d 1094 (1985). On rehearing, the Supreme Court of Louisiana articulated a constitutional standard for the trial court to utilize which appears to be the equivalent of an intermediate
nize the major differences between the statute examined in *Duke Power* and a state PIRC. The policy behind the statute examined in *Duke Power* is readily distinguishable from that motivating state PIRC's. In addition to disregarding the plain differences in the circumstances which existed in *Duke Power*, state courts relying on *Duke Power* to uphold the constitutionality of their PIRCs under a substantive due process analysis invariably ignore any independent examination under their state constitutions.

State courts have split on the issue of whether a *quid pro quo* must be given when the common law right to full recovery for personal injury in tort is limited by the legislature. A few state courts have held that a societal *quid pro quo* is established by the decrease in liability insurance costs and by the corresponding consumer cost reductions which presumably result from the implementation of a state PIRC. This argument is bolstered in states which have enacted comprehensive legislation in this area, especially where the legislation provides for a patients' compensation fund designed to guarantee at least some monetary recovery for personal injury victims. The societal *quid pro quo* argument, however, has been roundly rejected by several courts. Consumer medical cost reductions are not markedly evident in states with PIRCs. Even if they were, this societal *quid pro quo* is hollow solace to seriously injured tort victims. In states without any legislative guarantee of a minimum
tort recovery for personal injury victims, the societal *quid pro quo* argument is simply eviscerated.

A Maryland court examining section 11-108 within a substantive due process framework should weigh heavily the nonexistence of a *quid pro quo*. Without the availability of a *quid pro quo*, the statute should be struck down under Article 24 of the Maryland Declaration of Rights as an unreasonable denial of due process. The equal protection arguments already discussed also serve to supplement a due process attack. As once observed by the Court of Appeals of Maryland, "there is no practical distinction between the grounds on which the two contentions [of equal protection and due process] are argued, and determination of one will resolve the other."  

**D. Right of Access to the Courts and "Full Remedy" Provisions**

Article 19 of Maryland's Declaration of Rights provides:

That every man, for any injury done to him, in his person or property, ought to have remedy by the course of the law of the land, and ought to have justice and right, freely without sale, fully without denial, and speedily without delay, according to the law of the land.

Similar provisions in other state constitutions have been relied upon in attacking state PIRCs as unconstitutional infringements of a person's right to "remedy . . . fully without denial." In *Smith v. Department of

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146. Prior to the enactment of section 11-108 of the Courts and Judicial Proceedings Article of the Maryland Code, the Maryland legislature established a medical liability insurance company. See MD. ANN. CODE art. 48A, §§ 548-56 (1986). Membership is not required to receive the benefit of the noneconomic damages cap. No state assurances have been given that personal injury victims will receive benefits or aid to compensate them for the enactment of the damage limitation. To the contrary, more comprehensive legislation has been enacted which will further erode the ability of personal injury plaintiffs to sue in tort. See supra note 17-18.


148. Md. Decl. of Rights, Art. 19 (adopted by convention in 1867). The date of a constitutional provision's enactment is important because common law causes of action in existence at the time are deemed to be acknowledged and protected under this provision. *Accord Hill* v. Fitzgerald, 304 Md. 689, 704, 501 A.2d 27, 34-35 (1985) (The shortening of a statute of limitations based on the discovery rule is not violative of Article 19 because the discovery rule was not adopted by Maryland until half a century after the adoption of Article 19.)

149. See *Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987); *Pfoest v. State*, 713 P.2d 495 (Mont. 1985) (right to full redress for injury is a fundamental right under a constitutional provision similar to Article 19). *But see Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976) (Plaintiff's argument that the statute violated the "full remedy" clause was rejected, but the issue of the statute's constitutionality on equal protection grounds was remanded to the trial court which held
Insurance, the Supreme Court of Florida struck down Florida’s $450,000 noneconomic damages cap as an unconstitutional infringement on the right of access to the courts for redress of injury. The court held that such a statute could survive constitutional examination only if an adequate alternative remedy was provided or where an “over-powering public necessity” compelled such measures and no alternative method for meeting that necessity exists. Two conceivable attacks may be raised based on Article 19. Either the noneconomic damages limitation so substantially interferes with Article 19 as to be deemed a constitutional infringement, or the constitutional provision presents persuasive evidence that the right to recover damages for personal injury is an important, if not fundamental, right for purposes of an equal protection analysis.

The outcome of an analysis under Article 19 and its full remedy provision is not clear. Although most decisions interpreting the provision in Maryland have examined it in a procedural due process context, the Court of Appeals of Maryland, in Hill v. Fitzgerald, implicitly recognized that the provision grants a fundamental right, significant interference of which merits strict scrutiny review. Notwithstanding, jurisdictions examining similar provisions in their state constitutions have rejected the argument that such a provision absolutely bars the legislature from limiting or abolishing common law causes of action or remedies.

IV. ALTERNATIVE SOLUTIONS TO THE LIABILITY INSURANCE PROBLEM

The first step a legislature must take in correcting the liability insur-
Inasmuch as credible evidence has been presented by both sides concerning the existence of a bona fide insurance crisis,\textsuperscript{159} the question merits detached and careful inquiry.

Although a major cause of the problem may be the bringing of harassing and frivolous law suits by some plaintiff's attorneys, many less drastic, well-reasoned solutions exist. In medical malpractice actions, the legislature could increase the plaintiff's burden of proving liability from a preponderance of the evidence standard to one requiring clear and convincing evidence.\textsuperscript{160} Sanctions could be stiffened against attorneys who bring patently frivolous law suits.\textsuperscript{161} In states which have not abolished \textit{ad damnum} clauses, the plaintiff and/or his attorney could be charged a surcharge or penalty on any gap between damages alleged and damages proven.\textsuperscript{162}

Remittitur and close appellate court review are safeguards already in existence that may be utilized more aggressively to reduce jury awards that are not consistent with the evidence presented.\textsuperscript{163} However, if the circumstances warrant a large award of monetary damages for economic and noneconomic injury, the jury's determination should not be disturbed by the trial or appellate court.

Contrary to the arguments raised by the medical and insurance professions, the legal system is not the sole cause of any perceived crisis.\textsuperscript{164}

\begin{itemize}
\item \textsuperscript{158}In fact, the evidence available shows that there is no litigation explosion and that the average plaintiff's award is not increasing at an uncontrollable rate. \textit{See Liability Insurance Issues, supra} note 104, at 4-5 (The number of medical malpractice suits filed from 1975 to 1983 has increased at an annual rate of 3.4 percent; the average malpractice award increased by 3.9 percent per annum from 1981 through 1984 while the mid-point actually decreased at a rate of 3.5 percent.). Very little statistical information is available concerning the effect noneconomic damages have as a percentage of total awards and settlements. Redlich, \textit{supra} note 10, at 322-23.
\item \textsuperscript{159} \textit{See supra}, notes 7-8 and accompanying text.
\item \textsuperscript{160} Redlich, \textit{supra} note 10, at 325-332. The main problem with this idea is the real possibility that a jury will not perceive the quantitative difference in changing the burden of proof standard from a preponderence of the evidence to clear and convincing evidence. \textit{Id.} at 329.
\item \textsuperscript{161} \textit{Id.} at 332-34.
\item \textsuperscript{162} Professor Redlich proposes stiff sanctions for attorneys who pursue frivolous cases beyond a preliminary discovery period. Redlich, \textit{supra} note 10, at 333-34. To implement this sanction scheme, the defendant's records should be available to the plaintiff's attorney during the preliminary discovery period. \textit{Id.} This would enable the attorney to make an informed decision concerning the continuation of legal proceedings against the defendant. \textit{Id.}
\item \textsuperscript{163} \textit{See supra} note 122. "According to one study, done by the Rand Corporation's Institute for Civil Justice, half of the initial jury awards surveyed were reduced after the trial." \textit{The Manufactured Crisis}, Consumer Reports, Aug. 1986, at 545.
\item \textsuperscript{164} Evidence does exist, however, that supports the fact that "bad claims" represent about 40 percent of a liability insurer's loss adjustment expenses. \textit{Th: Pennsylvania Experience, supra} note 103, at 17.
\end{itemize}
The few in-depth studies of the problem indicate that the medical and insurance professions have also significantly contributed to the liability insurance problem.\textsuperscript{165} Measures should be taken within the medical profession to toughen disciplinary procedures and penalties against malpractice health care providers.\textsuperscript{166} Additionally, legislation needs to be implemented to correct problems of information disclosure and financial misdealings within a severely underregulated insurance industry.\textsuperscript{167}

A workable solution to the liability insurance crisis will require the cooperation of all three professions involved. True solutions can only be effected after a determination of the actual causes of the problem. An arbitrary cap on damage awards is too simplistic and harsh a solution to the crisis. Great care should be taken to limit or avoid placing the burden of correcting a complex problem on the innocent consumer.\textsuperscript{168}

V. CONCLUSION

Section 11-108 of Maryland's Courts and Judicial Proceedings Code should be struck down by the courts as unconstitutional. The statute violates state constitutional guarantees of equal protection and state and federal constitutional protections of one's right to a jury trial. It also may violate state constitutional guarantees of substantive due process. Personal injury victims should not be penalized for the negligence, recklessness, and incompetence of the medical profession, nor should insurance companies be permitted to bolster their profits to the detriment of personal injury victims. The poorly reasoned enactment of Maryland's PIRC should be nullified, if not by the legislature itself, then by the state judiciary.

\textit{James R. Andersen}

\underline{However, according to Jury Verdict Research, an Ohio firm, the median initial medical malpractice award increased at a rate lower than inflation between 1975 and 1984. }\textsuperscript{165} \textit{The Manufactured Crisis, Consumer Reports, Aug. 1986, at 546. In seventeen states studied by the National Center for State Courts, the average number of tort claims filed increased by 9 percent between 1978 and 1984; the population in those states increased by 8 percent during the same period. }\textit{Id.}

\underline{Miller, Report Ranks Maryland Low in Disciplining Doctors, Baltimore Evening Sun, Dec. 28, 1986 at A1, col. 2; Nader, Maybe Malpractice is One Cause of Malpractice Suits, Sept. 11, 1985 (reprinted in Liability Insurance Issues, supra note 104).}

\underline{"[T]here exists no comprehensive database containing the malpractice experience of individual health care providers. Incomplete information makes sound underwriting a virtual impossibility." }\textit{The Pennsylvania Experience, supra note 103, at 15. See also Redlich, supra note 10, at 336-37.}

\underline{See generally, A Consumer Perspective, supra note 65.}