

TORT REFORM UNDER CONSTITUTIONAL FIRE

I. INTRODUCTION

Nearly fifty years ago, tort reform was born and states started capping damages for victims of medical malpractice. In response, injured plaintiffs began challenging noneconomic damage caps on various constitutional grounds—particularly equal protection. Although equal protection challenges involve varying state statutes and differing factual circumstances, there are common questions woven throughout. Does a law that treats negligently injured persons differently from those who are less injured by the same negligent conduct deny the first group equal protection of the laws? If so, does a rational basis exist for such differential treatment?

While some courts have struck down laws limiting damages as unconstitutional, the majority of courts have rejected these challenges.¹ Plaintiffs, nonetheless, continue to raise constitutional attacks against laws limiting noneconomic recovery.² Consequently, the battle over tort reform in medical malpractice litigation—particularly concerning caps on noneconomic damages—remains fierce. This Article summarizes the pending constitutional challenges against these caps in various states, highlights the recent success of plaintiffs in challenging these statutes, and advocates that these decisions should serve as red flags for state legislatures to consider restructuring their medical malpractice noneconomic damage caps.

II. CONSTITUTIONAL CHALLENGES

Tort reforms designed to limit damages in medical malpractice cases are currently under constitutional fire in various states across the nation.³ Since the medical malpractice tort reform movement began, caps on noneconomic damages have been attacked on various constitutional grounds, including equal protection, the right to a jury trial, separation of

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¹ Eric S. Goodheart, *Two Tiers of Plaintiffs: How North Carolina's Tort Reform Efforts Discriminate Against Low-Income Plaintiffs*, 96 N.C. L. REV. 512, 540 (2018).

2. See *infra* section II.

3. Y. Peter Kang, *Four Tort Reform Challenges to Watch*, LAW360 (Jan. 29, 2018), <https://www.law360.com/articles/1002005/4-tort-reform-challenges-to-watch>.

powers, and due process.⁴ Generally, courts have rejected these challenges and upheld the laws as constitutional.⁵

Although not bound by the United States Supreme Court's three-tier equal protection standard—strict scrutiny, intermediate scrutiny, and rational basis—state courts generally have employed rational basis review to uphold noneconomic damage caps under their respective state constitutions.⁶ Florida, Alabama, and New Hampshire are the only states where noneconomic damage caps have not survived equal protection challenges.⁷ In *Carson v. Maurer*,⁸ the Supreme Court of New Hampshire found rational basis review inappropriate because of the important rights involved with medical malpractice damages.⁹ Consequently, the court invalidated the noneconomic damages cap under a version of intermediate scrutiny—requiring that the “challenged classifications are reasonable and have a fair and substantial relation to the object of the legislation.”¹⁰

Plaintiffs in North Dakota and Wisconsin have, however, recently enjoyed success at the trial court and lower appellate court levels by asserting that the caps violate equal protection.¹¹ Both the North Dakota trial court and Wisconsin Court of Appeals invalidated noneconomic damage caps under rational basis review after determining that the caps were not rationally related to achieving the legislatures' stated goals of healthcare reform.¹² Colorado's cap on noneconomic damages has also been challenged as unconstitutional under the state constitution's equal

4. Goodheart, *supra* note 1, at 540.

5. See *Constitutional Challenges to State Caps on Non-economic Damages*, AM. MED. ASS'N, https://www.ama-assn.org/sites/default/files/media-browser/public/arc-public/arc-constitutional-challenges_1.pdf (listing states' determinations of the constitutionality of noneconomic damages caps).

6. Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. MED. & ETHICS 515, 522 (2005) (“Under rationality review, a state law will be upheld as long as the classification has a rational relationship to a legitimate government objective.”).

7. Goodheart, *supra* note 1, at 539; see also *North Broward Hosp. Dist. v. Kalitan*, 219 So.3d 49, 50 (Fla. 2017); *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156, 170 (Ala. 1991); *Brannigan v. Usitalo*, 587 A.2d 1232, 1233 (N.H. 1991). The Wisconsin Supreme Court struck down a noneconomic damages cap for violating the state constitution's equal protection clause. *Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 455 (Wis. 2005). In response to *Ferdon*, the state legislature amended the statutory cap on noneconomic damages to \$750,000, which was recently struck down by the Court of Appeals of Wisconsin. See *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 901 N.W.2d 782, 794 (2017), review granted, 905 N.W.2d 840; WIS. STAT. § 893.55 (2006).

8. 424 A.2d 825, 830 (N.H. 1980).

9. *Id.*

10. *Id.* at 831. The Supreme Court of New Hampshire later overruled *Carson* to the extent that it employed this version of intermediate scrutiny. See *Cnty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 762 (2007).

11. Kang, *supra* note 3.

12. *Id.* On June 27, 2018, the Supreme Court of Wisconsin reversed the appellate court and held that the noneconomic damages cap is constitutional. *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, No. 2014AP2812, 2018 WL 3132486, at *1 (Wis. June 27, 2018).

protection clause.¹³ This Part summarizes the recent constitutional challenges plaintiffs have raised against statutory limitations on noneconomic recovery in medical malpractice litigation.

A. North Dakota

In *Condon v. St. Alexius Medical Center*,¹⁴ a trial judge recently held that North Dakota Century Code Section 32-42-02¹⁵—a statute capping noneconomic damages at \$500,000 in medical malpractice cases—is unconstitutional.¹⁶ As a result of a negligently performed surgery, Condon, a thirty-five year old woman, suffered a disabling stroke.¹⁷ The jury determined that the physician-defendant in the case negligently cut the main artery supplying blood to Condon’s brain during a lymph node biopsy.¹⁸ Consequently, the severance of the artery caused a stroke and paralysis, which left Condon with limited use of her upper and lower left extremities.¹⁹ In addition, medical experts opined that the effects of Condon’s brain injury would likely worsen over time.²⁰

The jury awarded Condon \$3.5 million in damages—\$2 million for economic loss and \$1.5 million for noneconomic loss, which included emotional distress and pain and suffering.²¹ Subsequently, the defendants, St. Alexius Medical Center and Dr. Michael Booth, moved to reduce the verdict pursuant to North Dakota’s statutory cap on noneconomic damages, which limits recovery of such damages to \$500,000.²² In response, Condon argued that the law violated the state constitution’s equal protection clause because the cap discriminated against plaintiffs who cannot establish large economic loss—particularly children and stay-at-home parents.²³ Moreover, Condon’s attorney explained that the noneconomic damages cap gave the most negligent physicians the great-

13. See *Smith v. Surgery Center at Lone Tree*, 2017 WL 3610797 (Colo. Dist. Ct. May 26, 2017); see also COLO. CONST. art. II, § 25.

14. 08-2014-CV-1904 (Jan. 9, 2018).

15. N.D. CENT. CODE § 32-42-02 (“With respect to a health care malpractice action or claim, the total amount of compensation that may be awarded to a claimant or members of the claimant’s family for noneconomic damage resulting from an injury alleged under the action or claim may not exceed five hundred thousand dollars, regardless of the number of health care providers and other defendants against whom the action or claim is brought or the number of actions or claims brought with respect to the injury. With respect to actions heard by a jury, the jury may not be informed of the limitation contained in this section. If necessary, the court shall reduce the damages awarded by a jury to comply with the limitation in this section.”).

16. Kang, *supra* note 3.

17. *North Dakota Malpractice Damages Law Ruled Unconstitutional*, AP NEWS (Jan. 10 2018), <https://apnews.com/b678e55df5bf4af4accfce8c93fd3437>.

18. Amy Dalrymple, *N.D. Law Limiting Damages in Malpractice Cases Ruled Unconstitutional*, BISMARCK TRIBUNE (Jan. 9, 2018), http://bismarcktribune.com/news/local/bismarck/n-d-law-limiting-damages-in-malpractice-cases-ruled-unconstitutional/article_d9be1b4a-f753-56c6-8775-f8d1c317c9c.html.

19. *Id.*

20. *See id.*

21. *Id.*

22. Kang, *supra* note 3.

23. *North Dakota Malpractice Damages Law Ruled Unconstitutional*, *supra* note 17.

est reprieve: “The greater the harm caused by the negligent doctor, the greater the discount.”²⁴

South Central Judicial District Judge Cynthia Feland denied the defendants’ motion.²⁵ In her 29-page ruling, Judge Feland explained that the statutory cap failed rational basis review:

The noneconomic damage cap in Section 32-42-02 does not pass the rational basis test because in the context of persons catastrophically injured by medical negligence, it is unreasonable and arbitrary to limit their recovery in a speculative experiment where there is no evidence of an availability or cost crisis problem for medical malpractice insurance in North Dakota.²⁶

Judge Feland found that the legislative history behind the cap revealed that the law’s enactment was based on unsupported assumptions and speculation.²⁷ Further, the record failed to explain how a \$500,000 cap on noneconomic damages would accomplish the legislature’s stated purpose of increasing access to healthcare, improving the quality of care, and controlling medical malpractice insurance premium prices.²⁸ Accordingly, Judge Feland held that the cap unreasonably and arbitrarily limits damages for the most catastrophically injured patients of medical malpractice and, thus, denies this group equal protection of the laws.²⁹

B. Wisconsin

In November 2017, the Wisconsin Supreme Court announced that it would determine the constitutionality of the state’s cap on noneconomic damages following the decision by a lower appellate court to strike down the cap on equal protection grounds.³⁰ In *Mayo v. Wisconsin Injured Patients and Families Company Fund*,³¹ Ascaris Mayo visited the emergency room at Columbia St. Mary’s Hospital in Milwaukee, presenting high fever and abdominal pain.³² The physician’s assistant, Donald Gibson, included infection in his differential diagnosis, and at trial he admitted Mayo’s symptoms satisfied the criteria for Systemic Inflammatory Response Syndrome.³³ Neither Gibson nor the attending physician, Dr. Wyatt Jaffe, informed Mayo about the diagnosis.³⁴ Further, neither medical professional informed Mayo about treatment for the infection—

24. Dalrymple, *supra* note 18.

25. Kang, *supra* note 3.

26. *Id.*

27. Dalrymple, *supra* note 18.

28. *Id.*

29. Kang, *supra* note 3.

30. *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 901 N.W.2d 782 (Wis. App. 2017), *review granted*, 905 N.W.2d 840.

31. *Id.*

32. *Id.* at 785.

33. *Id.*

34. *Id.*

namely antibiotics—and simply told Mayo to follow up with her gynecologist.³⁵ When Mayo’s condition worsened, she visited a different emergency room the next day where medical professionals diagnosed her with a septic infection.³⁶ The sepsis ultimately caused major organ failure and resulted in dry gangrene, requiring amputation of all four of Mayo’s extremities.³⁷

At trial, the jury found neither Dr. Jaffe nor Gibson medically negligent but determined that both professionals failed to provide informed consent to Mayo regarding diagnosis and treatment options for her infection.³⁸ The jury awarded Ascaris Mayo \$15,000,000 in noneconomic damages and Antonio Mayo \$1,500,000 for loss of consortium.³⁹ Following trial, the Wisconsin Injured Patients and Families Compensation Fund, one of the defendants, filed a motion seeking to reduce the verdict pursuant to Wisconsin’s statutory damages cap,⁴⁰ which limits noneconomic recovery to \$750,000.⁴¹ The trial court found the law did not facially violate the state’s equal protection guarantee but determined the cap was unconstitutional as applied to Mayo’s case.⁴² On appeal, the Fund challenged the trial court’s determination as it applied to the Mayos.⁴³ Likewise, the Mayos argued that the cap facially violates the state constitution by denying catastrophically injured patients equal protection rights.⁴⁴

The Court of Appeals of Wisconsin found the state high court’s analysis in *Ferdon v. Wisconsin Patients Company Fund*⁴⁵—a 2005 decision where the Wisconsin Supreme Court struck down a \$350,000 noneconomic damages cap as unconstitutional—controlled.⁴⁶ The court of appeals, like the supreme court in *Ferdon*, found no rational basis between the noneconomic damage cap and the lawmakers’ stated goals of keeping insurance costs low, reducing defensive medicine, or preventing physicians from migrating to other states.⁴⁷ Data in the record, the appellate court noted, indicated that “the existence or non-existence of a noneconomic damages cap has no demonstrably consistent effect on physician retention *anywhere*. Data demonstrates that many states with no caps on noneconomic damages actually have higher physician retention

35. *Id.*

36. *Id.* at 785–86.

37. *Id.* at 786.

38. *Id.*

39. *Id.*

40. Wis. Stat. § 893.55 (2017).

41. *Mayo*, 901 N.W.2d at 786.

42. *Id.*

43. *Id.*

44. *Id.* at 786–87.

45. 701 N.W.2d 440, 455 (Wis. 2005).

46. *Mayo*, 901 N.W.2d at 788–91 (explaining the previous noneconomic damages cap limited recovery to \$350,000 and the current statute capped damages at \$750,000); *see also supra* note 7.

47. *Mayo*, 901 N.W.2d at 791.

rates than Wisconsin.”⁴⁸ Ultimately, the court agreed with the Mayos and declared the cap facially unconstitutional, extending the trial court’s decision to all medical malpractice cases.⁴⁹

On June 27, 2018, the Supreme Court of Wisconsin reversed, finding the noneconomic damages cap neither facially unconstitutional nor unconstitutional as applied to the Mayos.⁵⁰ The Wisconsin high court determined that “rational basis is the proper standard by which to judge the constitutionality of Wis. Stat. § 893.55.”⁵¹ Accordingly, the court overruled *Ferdon* because it “erroneously invaded the province of the legislature and applied an erroneous standard of review”—a form of rational basis with bite.⁵² The court explained that the legislature’s policy choice was rational because it was concerned about “massive noneconomic damages awards” that are “unpredictable and often based on emotion,” desired a plan for accessible healthcare, and provided a mechanism to ensure injured patients were compensated for their injuries.⁵³ Thus, the Supreme Court of Wisconsin held that the law satisfied rational basis review.⁵⁴

C. Colorado

There is currently a constitutional challenge against Colorado’s noneconomic damages cap for medical malpractice cases pending in a state trial court.⁵⁵ In September 2013, Robbin Smith visited the Surgery Center at Lone Tree for treatment of pain in her lower back.⁵⁶ Smith’s physician performed a transforaminal epidural steroid injection with a particulate steroid, despite the drug’s warning label indicating it should not be used for epidural injections.⁵⁷ Immediately following the injection, Smith became permanently paralyzed from the waist down.⁵⁸ After being transferred to another medical center, Smith’s MRI showed that the paralysis resulted from a spinal cord infarct—i.e., a stroke—that severed blood flow to her spine.⁵⁹ Smith never regained function or feeling below the waist, has no control of her bladder, and requires constant care.⁶⁰

48. *Id.*

49. *Id.* at 786–87, 794.

50. *Mayo v. Wis. Injured Patients & Families Comp. Fund*, No. 2014AP2812, 2018 WL 3132486, at *1 (Wis. June 27, 2018).

51. *Id.*

52. *Id.* (according to the Wisconsin Supreme Court, *Ferdon* improperly “threw all of the principles of rational basis aside. It created an intermediate level of review that it called rational basis with teeth, or meaningful rational basis”) (internal quotations omitted). *Id.* at *6–7.

53. *Id.* at *11.

54. *Id.* at *11–13.

55. *See Smith v. Surgery Center at Lone Tree*, 2017 WL 3610797 (Colo. Dist. Ct. 2017).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

On March 23, 2015, the jury rendered a verdict against Lone Tree, finding the medical center negligent both in treating Smith and in failing to obtain informed consent about the procedure.⁶¹ The jury awarded Robbin Smith \$4,905,000 in total economic damages and \$6,500,000 in noneconomic damages, and it awarded Ed Smith \$3,500,000 for past and future noneconomic damages.⁶² Colorado's statutory cap on noneconomic damages in medical malpractice cases,⁶³ however, limits recovery of such damages to \$300,000.⁶⁴ Accordingly, the plaintiffs have filed a motion to declare the damages cap unconstitutional on several grounds, including the Seventh Amendment right to a jury trial, the right to access to the courts, the prohibition on special legislation, and equal protection.⁶⁵

In their motion, the plaintiffs asserted that the noneconomic damage cap violates the U.S. Constitution's guarantee of the right to a jury trial⁶⁶ because the cap disregards the prerogative of the jury in making binding factual determinations of damages.⁶⁷ Additionally, the plaintiffs argued that the cap infringes the constitutional right of access to the courts because it eradicates loss of consortium claims by the spouse of the physically injured victim when the harm is catastrophic.⁶⁸ The cap also, the plaintiffs noted, violates the special legislation prohibition by restricting damages against health care providers in an arbitrary manner that negligent defendants in other types of cases do not enjoy.⁶⁹ And finally, the plaintiffs contended that the cap violates equal protection "by treating married plaintiffs less favorably than an unmarried plaintiff, by treating more catastrophically injured plaintiffs less favorably than

61. *Id.*

62. *Id.* This is the second largest award for medical negligence in Colorado history. Monica Mendoza, *Paralyzed Woman Wins \$14.9 Million Malpractice Verdict*, DENVER BUS. J. (Apr. 6, 2017), <https://www.bizjournals.com/denver/news/2017/04/06/colorado-paralyzed-woman-wins-14-9-million.html>.

63. COLO. REV. STAT. § 13-64-302 (2018).

64. *Id.* ("The total amount recoverable for all damages for a course of care for all defendants in any civil action for damages in tort brought against a health care professional, as defined in section 13-64-202, or a health care institution, as defined in section 13-64-202, or as a result of binding arbitration, whether past damages, future damages, or a combination of both, shall not exceed one million dollars, present value per patient, including any claim for derivative noneconomic loss or injury, of which not more than two hundred fifty thousand dollars, present value per patient, including any derivative claim, shall be attributable to direct or derivative noneconomic loss or injury Effective July 1, 2003, the damages limitation of two hundred fifty thousand dollars described in paragraph (b) of this subsection (1) shall be increased to three hundred thousand dollars, which increased amount shall apply to acts or omissions occurring on or after said date. It is the intent of the general assembly that the increase reflect an adjustment for inflation to the damages limitation.").

65. *Smith*, 2017 WL 3610797.

66. U.S. CONST., amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.").

67. *Smith*, 2017 WL 3610797.

68. *Id.*

69. *Id.*

more mildly injured plaintiffs, and by treating medical malpractice plaintiffs less favorably than other personal-injury plaintiffs.”⁷⁰

The Colorado Supreme Court has previously addressed equal protection and right to civil jury trial challenges against Colorado’s noneconomic damages cap. In *Scholz v. Metro. Pathologists, P.C.*,⁷¹ the Colorado Supreme Court rejected a challenge against the cap, finding that the right to a civil jury trial did not exist under the state constitution.⁷² The court also found the cap constitutional under the equal protection clause because the Generally Assembly enacted the pertinent statute “in 1988 in response to legislative findings which indicated severe problems concerning health care availability due to the rising costs of malpractice insurance premiums in Colorado.”⁷³ In *Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*,⁷⁴ the Colorado Supreme Court reaffirmed that the state constitution did not provide the right to a jury trial in civil cases.⁷⁵ While the court elected not to revisit its equal protection determination in *Scholz*, it rejected an argument that the noneconomic damage cap violated the Fourteenth Amendment’s equal protection guarantee.⁷⁶

As of July 31, 2018, the trial judge in *Smith* has not ruled on the plaintiffs’ motion to declare the noneconomic damages cap unconstitutional.

III. STATE LEGISLATURES ON NOTICE

No matter how the courts ultimately rule in the cases above, the constitutional concerns presented by these pending challenges are red flags for state legislatures that reform is overdue in the area of noneconomic damage caps. While rigid caps on noneconomic damages may appease the healthcare industry, they appear neither well suited for lowering healthcare costs nor accomplishing the goals they were enacted to achieve.⁷⁷ As recognized by Judge Feland and the Wisconsin Court of Appeals, these caps also limit the recovery of catastrophically injured patients who may not have much in terms of economic loss. Despite this

70. *Id.*

71. 851 P.2d 901 (Colo. 1993).

72. *Id.* at 905–06.

73. *Id.* at 907.

74. 95 P.3d 571 (Colo. 2004).

75. *Id.* at 580.

76. *Id.* at 583–84.

77. See *Weiss Ratings: Caps Fail to Contain Malpractice Cost Increases*, S. FLA. BUS. J. (June 2, 2003), <http://www.bizjournals.com/southflorida/stories/2003/06/02/daily3.html?page=all> (finding that states with damages caps had higher medical malpractice insurance premium increases but states without caps maintained stable rates); Bradley A. Bauer, *Don't Stop 'Til the Medical Malpractice Victim Gets Enough: Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012), and *Why Caps on Noneconomic Damages Violate the Right to Trial by Jury in Medical Malpractice Case*, 38 S. Ill. U.L.J. 491, 492 (2014) (“[S]tudies by the non-partisan U.S. Government Accountability Office (GAO) indicated that, because of the multiple factors that go into whether medical malpractice premiums increase or decrease, there is no direct correlation between a cap on noneconomic damages and lower medical malpractice premium rates.”).

decision being reversed, the argument that rigid noneconomic damage caps deprive certain patients of equal protection under the laws undoubtedly has merit depending on the structure of the statute.

Considering the continued vitality of noneconomic damage caps in most states, it is unlikely—but not impossible—that most state supreme courts will not overturn these reforms anytime in the near future. Regardless, the viability of equal protection challenges against the rigid noneconomic damage caps in these states should put the legislatures on notice that reform is needed. This Article is not intended to offer a solution to the healthcare crisis or explore the options available to state legislatures in restructuring damage caps. Rather, the purpose is to identify aspects of medical malpractice reform currently under constitutional fire and highlight that the attacks against noneconomic damage caps do have merit. Accordingly, state legislatures should evaluate the reasonableness of their caps on noneconomic damages and restructure their statutes to ensure both that catastrophically patients are adequately compensated and that the relevant healthcare reform goals are accomplished.

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