

2001

Heidi J. Judd, personally and as the natural parent
and guardian of Athan Montgomery for and on
behalf of Athan Montgomery v. Gregory Drezga,
M.D. : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Michael D. Zimmerman; Snell & Wilmer; David W. Slagle; Brian P. Miller; Snow, Christensen & Martineau; Attorneys for Appellee; Brent A. Burnett, Ass't Attorney General; Mark L. Shurtleff, Attorney General; Attorneys for Amicus.

Ralph L. Dewsnap; Paul M. Simmons; Dewsnap, King & Olsen; Attorneys for Appellants.

Recommended Citation

Brief of Appellant, *Judd v. Drezga*, No. 20010646 (Utah Court of Appeals, 2001).
https://digitalcommons.law.byu.edu/byu_ca2/3403

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH SUPREME COURT

HEIDI J. JUDD personally and as the
natural parent and guardian of ATHAN
MONTGOMERY for and on behalf of
ATHAN MONTGOMERY,

Plaintiffs and Appellants,

v.

GREGORY DREZGA, M.D.,

Defendant and Appellee.

BRIEF OF THE APPELLANTS

Case No. 20010646-SC

Priority No. 15

APPEAL FROM A FINAL JUDGMENT OF THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE ROGER A. LIVINGSTON PRESIDING

Michael D. Zimmerman
SNELL & WILMER
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101

David W. Slagle
Brian P. Miller
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Attorneys for Defendant and Appellee

Brent A. Burnett, Ass't Attorney General
Mark L. Shurtleff, Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Attorneys for Amicus State of Utah

Ralph L. Dewsnup (0876)
Paul M. Simmons (4668)
DEWSNUP, KING & OLSEN
2020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 533-0400
Attorneys for Plaintiffs and Appellants

IN THE UTAH SUPREME COURT

HEIDI J. JUDD personally and as the
natural parent and guardian of ATHAN
MONTGOMERY for and on behalf of
ATHAN MONTGOMERY,

Plaintiffs and Appellants,

v.

GREGORY DREZGA, M.D.,

Defendant and Appellee.

BRIEF OF THE APPELLANTS

Case No. 20010646-SC

Priority No. 15

APPEAL FROM A FINAL JUDGMENT OF THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE ROGER A. LIVINGSTON PRESIDING

Michael D. Zimmerman
SNELL & WILMER
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101

David W. Slagle
Brian P. Miller
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Attorneys for Defendant and Appellee

Brent A. Burnett, Ass't Attorney General
Mark L. Shurtleff, Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Attorneys for Amicus State of Utah

Ralph L. Dewsnup (0876)
Paul M. Simmons (4668)
DEWSNUP, KING & OLSEN
2020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 533-0400
Attorneys for Plaintiffs and Appellants

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption of the case on appeal, Tooele Valley Regional Medical Center was a defendant in the court below but was dismissed as a party before trial.

TABLE OF CONTENTS

Table of Authorities	iii
Jurisdiction	1
Issue	1
Standard of Review	2
Determinative Constitutional Provisions, Statutes or Rules	2
Statement of the Case	2
A. Nature of the Case, Course of Proceedings and Disposition in the Court Below	2
B. Statement of Facts	4
Summary of Argument	7
Argument	9
The Damage Cap Is Unconstitutional	9
I. The Damage Cap Violates the Open Courts Provision of the Utah Constitution, Article I, Section 11.	11
II. The Damage Cap Violates the Due Process Provision of the Utah Constitution, Article I, Section 7.	28
III. The Damage Cap Violates the Uniform Operation of the Laws Provision of the Utah Constitution, Article I, Section 24.	31
IV. The Damage Cap Violates the Constitutional Right to a Jury Trial in Civil Cases Guaranteed by Article I, Section 10 of the Utah Constitution.	40
V. The Damage Cap Violates the Separation-of-Powers Provision of the Utah Constitution, Article V, Section 1.	45

Conclusion	49
Certificate of Service	51
Addendum	52
Constitution of Utah, Article I, Section 7	53
Constitution of Utah, Article I, Section 10	53
Constitution of Utah, Article I, Section 11	53
Constitution of Utah, Article I, Section 24	53
Constitution of Utah, Article V, Section 1	53
Utah Code Ann. § 78-14-7.1	54

TABLE OF AUTHORITIES

Cases

<i>Agran v. Checker Taxi Co.</i> , 105 N.E.2d 713 (Ill. 1952)	48
<i>Arneson v. Olson</i> , 270 N.W.2d 125 (N.D. 1978)	24, 25, 40
<i>Bair v. Peck</i> , 811 P.2d 1176 (Kan. 1991)	23, 41
<i>Barry v. Edmunds</i> , 116 U.S. 550 (1886)	41
<i>Bastian v. King</i> , 661 P.2d 953 (Utah 1983)	44
<i>Berry v. Beech Aircraft Corp.</i> , 717 P.2d 670 (Utah 1985)	11, 12, 16, 18, 19, 25
<i>Best v. Taylor Mach. Works</i> , 689 N.E.2d 1057 (Ill. 1997)	25, 48, 49
<i>Botta v. Brunner</i> , 138 A.2d 713 (N.J. 1958)	17
<i>Bowers v. Commonwealth Dep't of Highways & Transp.</i> , 302 S.E.2d 511 (Va. 1983)	26
<i>Boyd v. Bulala</i> , 672 F. Supp. 915 (W.D. Va. 1987), <i>amended</i> , 678 F. Supp. 612 (W.D. Va. 1988), <i>aff'd in part, rev'd in part</i> , 877 F.2d 1191 (4th Cir. 1989)	41
<i>In re Boyer</i> , 636 P.2d 1085 (Utah 1981)	30
<i>Carson v. Maurer</i> , 424 A.2d 825 (N.H. 1980)	10, 23, 25, 27, 34, 39, 40
<i>Carter v. Kirk</i> , 628 N.E.2d 318 (Ill. App. Ct. 1993)	48
<i>Citizens' Club v. Welling</i> , 83 Utah 81, 27 P.2d 23 (1933)	46
<i>Colgrove v. Battin</i> , 413 U.S. 149 (1973)	41
<i>Condemarin v. University Hosp.</i> , 775 P.2d 348 (Utah 1989)	12, 13, 14, 15, 16, 17, 18, 25, 26, 28, 29, 30, 35, 36, 39, 41, 44, 45

<i>County Council for Montgomery County v. Investors Funding Corp.</i> , 312 A.2d 225 (Md. 1973)	47
<i>DeBry v. Noble</i> , 889 P.2d 428 (Utah 1995)	16
<i>Domann v. Pence</i> , 325 P.2d 321 (Kan. 1958)	44
<i>Duren v. Suburban Community Hosp.</i> , 495 N.E.2d 51 (Ohio C.P. 1985)	39
<i>Ernest v. Faler</i> , 697 P.2d 870 (Kan. 1985)	28
<i>Fabrigas v. Mostyn</i> , 96 Eng. Rep. 549 (C.P. 1774)	42
<i>Fein v. Permanente Med. Group</i> , 695 P.2d 665 (Cal.), <i>appeal dismissed</i> , 474 U.S. 892 (1985)	39
<i>Graley v. Satayatham</i> , 343 N.E.2d 832 (Ohio C.P. 1976)	26-27, 37
<i>Granfinanciera, S.A. v. Nordberg</i> , 492 U.S. 33 (1989)	44
<i>In re Handley's Estate</i> , 15 Utah 212, 49 P. 829 (1897)	46
<i>Hart v. Salt Lake County Comm'n</i> , 945 P.2d 125 (Utah Ct. App.), <i>cert. denied</i> , 953 P.2d 449 (Utah 1997)	16
<i>Hipwell ex rel. Jensen v. Sharp</i> , 858 P.2d 987 (Utah 1993)	14
<i>Holmes v. Morales</i> , 924 S.W.2d 920 (Tex. 1996)	46
<i>Horton v. Goldminer's Daughter</i> , 785 P.2d 1087 (Utah 1989)	11, 12
<i>International Harvester Credit Corp v. Pioneer Tractor & Implement, Inc.</i> , 626 P.2d 418 (Utah 1981)	40
<i>Jeanne v. Hawkes Hosp. of Mt. Carmel</i> , 598 N.E.2d 1174 (Ohio Ct. App.), <i>stay granted</i> , 573 N.E.2d 767 (Ohio), <i>appeal dismissed</i> , 579 N.E.2d 210 (Ohio 1991)	37, 45
<i>Jersey Maid Milk Prods. Co. v. Brock</i> , 91 P.2d 577 (Cal. 1939)	47

<i>Kansas Malpractice Victims Coalition v. Bell</i> , 757 P.2d 251 (Kan. 1988)	23, 41, 43, 45, 47-48
<i>Kennedy v. Oregon Short-Line R. Co.</i> , 18 Utah 325, 54 P. 988 (1898)	42, 49
<i>Kimball v. City of Grantsville</i> , 19 Utah 368, 57 P. 1 (1899)	46
<i>Lakin v. Sencon Prods., Inc.</i> , 987 P.2d 463 (Or. 1999)	41-42, 45
<i>Lee v. Gaufin</i> , 867 P.2d 572 (Utah 1993)	14, 16, 20-24, 25, 27, 28, 30, 31, 32, 35, 37-38
<i>Lucas v. United States</i> , 757 S.W.2d 687 (Tex. 1988)	12, 16, 18-19, 24, 25, 28, 38, 39, 47
<i>Lyon v. Burton</i> , 2000 UT 19, 5 P.3d 616	19
<i>McCorvey v. Utah State Dep't of Transp.</i> , 868 P.2d 41 (Utah 1993)	13, 16, 39
<i>Malan v. Lewis</i> , 693 P.2d 661 (Utah 1984)	31, 32, 35, 38
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803)	49
<i>Martin ex rel. Scoptur v. Richards</i> , 531 N.W.2d 70 (Wis. 1995)	24, 36, 39
<i>Mineer v. Board of Review of the Indus. Comm'n of Utah</i> , 572 P.2d 1364 (Utah 1977)	28
<i>Moore v. Mobile Infirmary Ass'n</i> , 592 So.2d 156 (Ala. 1995) .	17, 23, 24, 25, 40, 44-45
<i>Morris v. Savoy</i> , 576 N.E.2d 765 (Ohio 1991)	24, 25, 31, 34, 39
<i>Mountain Fuel Supply Co. v. Salt Lake City Corp.</i> , 752 P.2d 884 (Utah 1988)	35
<i>North Side Sash & Door Co. v. Goldstein</i> , 121 N.E. 563 (Ill. 1918)	43-44
<i>Paul v. Kirkendall</i> , 1 Utah 2d 1, 261 P.2d 670 (1953)	42, 44
<i>People v. Green</i> , 1 Utah 11 (1876)	16

<i>Ransom v. New-York & Erie R.R. Co.</i> , 15 N.Y. 415 (1857)	10, 17, 35-36
<i>Ray v. Anesthesia Assocs. of Mobile, P.C.</i> , 674 So.2d 525 (Ala. 1995)	40, 45
<i>Ray v. Parker</i> , 101 P.2d 665 (Cal. 1940)	47
<i>Reuwer v. Hunter</i> , 684 F. Supp. 1340 (W.D. Va. 1988)	41, 45
<i>Rosenthal v. Harker</i> , 56 Utah 113, 189 P. 666 (1920)	42-43
<i>Ross v. Schackel</i> , 920 P.2d 1159 (Utah 1996)	2
<i>Smith v. Department of Ins.</i> , 507 So.2d 1080 (Fla. 1987)	12, 17, 19, 28, 32, 45
<i>Smith v. Goodwill Indus. of the Miami Valley, Inc.</i> , 720 N.E.2d 203 (Ohio Ct. App. 1998), <i>appeal dismissed</i> , 707 N.E.2d 515 (Ohio 1999)	46-47
<i>Sofie v. Febreboard Corp.</i> , 771 P.2d 711 <i>amended on other grounds</i> , 780 P.2d 260 (Wash. 1989)	42, 44, 45, 47, 48, 49
<i>Stamp v. Union Pac. R.R. Co.</i> , 5 Utah 2d 397, 303 P.2d 279 (1956)	48-49
<i>Stickle v. Union Pac. R.R. Co.</i> , 122 Utah 477, 251 P.2d 867 (1952)	40
<i>Strahler v. St. Luke's Hosp.</i> , 706 S.W.2d 7 (Mo. 1986)	27
<i>Swayne v. L.D.S. Soc. Servs.</i> , 795 P.2d 637 (Utah 1990)	29
<i>Timpanogos Planning & Water Management Agency v. Central Utah Water Conservancy Dist.</i> , 690 P.2d 562 (Utah 1984)	46
<i>Townsend v. Hughes</i> , 86 Eng. Rep. 994 (C.P. 1677)	42
<i>Velarde v. Board of Review of Indus. Comm'n of Utah</i> , 831 P.2d 123 (Utah Ct. App. 1992)	19
<i>Wells v. Children's Aid Soc'y of Utah</i> , 681 P.2d 199 (Utah 1984)	29-30
<i>Wright v. Central DePage Hosp. Ass'n</i> , 347 N.E.2d 736 (Ill. 1976)	16, 18, 25, 39

<i>Zions First Nat'l Bank v. Rocky Mountain Irrigation, Inc.</i> , 795 P.2d 658 (Utah 1990)	40
--	----

Constitutional Provisions

UTAH CONST. art. I, § 7	1, 2, 16, 28, 49, 53
UTAH CONST. art. I, § 10	1, 2, 8, 16, 29, 38, 40, 45, 49, 53
UTAH CONST. art. I, § 11 ..	1, 2, 7, 11, 12, 13, 14, 15, 16, 17, 18, 28, 29, 35, 38, 49, 53
UTAH CONST. art. I, § 24	1, 2, 8, 16, 29, 31, 35, 40, 49, 53
UTAH CONST. art. V, § 1	1, 2, 8, 45-46, 49, 53

Statutes

1976 Utah Laws ch. 23	20
1986 Utah Laws ch. 205, § 1	9
2001 Utah Laws ch. 246	9
UTAH CODE ANN. § 63-30-3 (1986)	13
UTAH CODE ANN. § 63-30-29 (repealed 1983)	13
UTAH CODE ANN. § 63-30-34 (1986 & Supp. 1988))	13
UTAH CODE ANN. § 78-2-2(3)(j) (Supp. 2001)	1
UTAH CODE ANN. §§ 78-14-1 through -16 (1996 & Supp. 2001)	3
UTAH CODE ANN. § 78-14-2	20
UTAH CODE ANN. § 78-14-4 (1996)	19
UTAH CODE ANN. § 78-14-4.5 (1996 & Supp. 2001)	19
UTAH CODE ANN. § 78-14-5 (1996 & Supp. 2001)	19

UTAH CODE ANN. § 78-14-7.1 (1996)	1, 2, 3, 7, 9, 15, 45, 47, 49, 54
UTAH CODE ANN. § 78-14-8 (1996)	19
UTAH CODE ANN. § 78-14-12 (1996 & Supp. 2001)	19
UTAH CODE ANN. § 78-14-13 (1996)	19
UTAH CODE ANN. § 78-14-14 (1996)	19

Other Authorities

3 BLACKSTONE, WILLIAM. COMMENTARIES *398	42
Chamallas, Martha. <i>Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument</i> , 63 FORDHAM L. REV. 73 (1994)	33
Ingber, Stanley. <i>Rethinking Intangible Injuries: A Focus on Remedy</i> , 73 CAL. L. REV. 772 (1985)	26
Koenig, Thomas, & Michael Rustad. <i>His and Her Tort Reform: Gender Injustice in Disguise</i> , 70 WASH. L. REV. 1 (1995)	33
1 LOUISELL, DAVID W., & HAROLD WILLIAMS, MEDICAL MALPRACTICE ¶ 8.01[1] (2001)	16-17
Lund, John Roland. <i>Medical Malpractice Legislation: Rx for Utah</i> , 11 J. CONTEMP. L. 287 (1984)	27
MCCORMICK, CHARLES T. HANDBOOK ON THE LAW OF DAMAGES § 6, at 24 (1935)	42
Magleby, James E. <i>The Constitutionality of Utah's Medical Malpractice Damages Cap Under the Utah Constitution</i> , 21 J. CONTEMP. L. 217 (1995)	11, 19
Meyer, Stephen K. Comment, <i>The California Statutory Cap on Noneconomic Damages in Medical Malpractice Claims: Implications on the Right to a Trial by Jury</i> , 32 SANTA CLARA L. REV. 1197 (1992)	43

Ruda, Lisa M. Note, <i>Caps on Noneconomic Damages and the Female Plaintiff: Heeding the Warning Signs</i> , 44 CASE W. RES. L. REV. 197 (1993)	33
Taragin, Mark I., et al. <i>The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims</i> , 117 ANNALS OF INTERNAL MEDICINE 780 (1992)	24

JURISDICTION

This court has jurisdiction over this appeal pursuant to section 78-2-2(3)(j) of the Utah Code Annotated.

ISSUE

The Utah Health Care Malpractice Act limits the amount of damages that may be awarded in a medical malpractice action for such noneconomic harm as pain and suffering to \$250,000, regardless of the nature, extent and duration of the plaintiff's injuries. *See* UTAH CODE ANN. § 78-14-7.1 (the "damage cap"). Is the damage cap constitutional? Specifically,

1. Does the damage cap violate the Utah Constitution's guarantee of a right to a remedy for injury to one's person, UTAH CONST. art. I, § 11?
2. Does the damage cap violate the Utah Constitution's guarantee of due process, UTAH CONST. art. I, § 7?
3. Does the damage cap violate the Utah Constitution's guarantee of uniform operation of the laws, UTAH CONST. art. I, § 24?
4. Does the damage cap violate the Utah Constitution's guarantee of the right to a jury trial, UTAH CONST. art. I, § 10?
5. Does the damage cap violate the separation-of-powers provision of the Utah Constitution, UTAH CONST. art. V, § 1?

The issue of the damage cap's constitutionality was raised in the plaintiffs' memorandum in opposition to the defendant's motion to reduce the jury verdict prior to entry of judgment (Record ("R.") 447-572), and at the hearing on that motion (*see* R. 810).

STANDARD OF REVIEW

The constitutionality of the damage cap is a question of law, which this court reviews for correctness, granting no deference to the trial court's conclusion. *See, e.g., Ross v. Schackel*, 920 P.2d 1159, 1162 (Utah 1996).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES OR RULES

The following constitutional provisions and statute are determinative of the issues on appeal: Utah Constitution, article I, sections 7, 10, 11 and 24, and article V, section 1; Utah Code Ann. § 78-14-7.1. These provisions are set out in the addendum.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition in the Court Below.

This is a medical malpractice action. Plaintiff Athan Montgomery suffered significant brain damage at his birth in May 1997 when the defendant, Dr. Gregory Drezga, a private physician, improperly used forceps in an attempt to deliver Athan. (*See*

R. 1-9.) Athan's mother, Heidi Judd, brought this action on his behalf. Following a four-day jury trial in December 2000, the trial court granted the plaintiffs' motion for a directed verdict, finding Dr. Drezga negligent as a matter of law and further finding that his negligence was the proximate cause of some injury to Athan. (R. 809, at 761.) The jury then found that Athan, who was three and a half years old at the time of trial, had sustained the following damages as a proximate result of Dr. Drezga's negligence:

Past Special Damages	\$22,735.30
Future Special Damages	\$1,000,000.00
General Damages	<u>\$1,250,000.00</u>
TOTAL DAMAGES:	\$2,272,735.30

(R. 360.) A judgment was entered for this amount. (R. 370-72.)

Dr. Drezga filed a motion to reduce the general damages to \$250,000 pursuant to section 78-14-7.1 of the Utah Health Care Malpractice Act, UTAH CODE ANN. §§ 78-14-1 through -16. (R. 364-68.) The plaintiffs opposed the reduction, claiming that section 78-14-7.1 was unconstitutional. (R. 447-73.) Following a hearing (R. 810), the trial court granted Dr. Drezga's motion (R. 782) and reduced the general damages by \$1 million, to \$250,000 (R. 784-85). On July 16, 2001, the court entered an Amended Judgment in the amount of \$1,181,829.40 plus costs and interest. (R. 786-88.) The plaintiffs have appealed from the Amended Judgment. (R. 792-93.) Dr. Drezga has not cross-appealed

either the district court's directed verdict holding him liable as a matter of law or the jury's verdict finding that Athan has suffered \$1,250,000 in general damages.

B. Statement of Facts

The following facts were largely undisputed.

On May 15, 1997, the defendant, Dr. Drezga improperly induced labor in Heidi Judd. (R. 807, at 195-96, 207-08.) Heidi's baby, Athan Montgomery, was still high in the birth canal when his heart rate became dangerously low, because Athan's head was too large to come down any farther (*see* R. 807, at 214-15, 225, 229). Dr. Drezga tried to deliver Athan using forceps. (R. 806, at 95.) The forceps Dr. Drezga used were "medical antiques" (R. 806, at 145) of a type that had not been used generally for over ten years because they put too much pressure on the fetus's head (R. 806, at 138-40). Dr. Drezga positioned the forceps on Athan's head, braced himself by putting his feet against the delivery bed and pulled "[v]ery hard." (R. 806, at 99-101.) The forceps came apart, and Dr. Drezga flew backwards against the wall of the delivery room. (R. 806, at 100-01.) Dr. Drezga tried the forceps again. He did not do a vaginal examination to determine the position of Athan's head but simply replaced the forceps and resumed his "violent yanking." (R. 806, at 103-04.) According to the expert trial testimony, the proper placement of the forceps is very important; a physician should not attempt a forceps delivery unless he is absolutely sure where the forceps are. (R. 807, at 217-18, 235-40.)

As it turned out, the forceps were not properly placed. (R. 807, at 190, 251-52.) Heidi's mother and aunt were standing by the side of the bed, holding Heidi by her arms. Dr. Drezga pulled so hard that he pulled all three women forward. He would have pulled Heidi off the bed if her mother and aunt had not been holding her, but they were able to pull her back up on the bed again. (R. 806, at 163-66; R. 807, at 363; R. 808, at 572.) Again the forceps came apart. (R. 806, at 164.) Athan was then delivered by Caesarean section. (R. 806, at 102-03.)

The unrebutted evidence at trial showed that Dr. Drezga violated the standard of care for forceps deliveries (*e.g.*, R. 807, at 190, 225, 238-42, 251-52), and the court granted the plaintiffs a directed verdict on the issues of Dr. Drezga's negligence and proximate cause (R. 809, at 761). Dr. Drezga has not appealed that ruling.

As a result of Dr. Drezga's negligence, Athan suffered a displaced, comminuted skull fracture. His broken skull caused bleeding within his brain (both subdural and epidural hematomas). (R. 807, at 256; R. 808, at 480-81, 491-92.) Athan had extensive bruising down the right side of his face, on the back of his head and down his neck. (R. 806, at 105, 133-34.) As a result of his traumatic brain injuries, Athan suffered left-sided hemiparesis, leaving his left side weak. (R. 808, at 465.) He does not clutch anything with his left hand or arm and drags his left leg. (R. 806, at 167-69; R. 808, at 560, 563.) His brain injuries caused seizures, one as recently as three months before trial, and he is at risk for seizures in the future. (*See* R. 806, at 167; R. 808, at 451, 565.) Athan has

problems with balance and spatial awareness. He stumbles, falls and bumps his head a lot. (See R. 806, at 168; R. 807, at 309-10; R. 808, at 560.) Athan's brain injuries have also caused permanent cognitive deficits. He scored in the lowest percentile in various categories in the Batelle Developmental Inventory, including problem-solving, reasoning, memory, attention and adaptive or self-help skills. (See R. 807, at 296, 303-06. See also R. 808, at 548.) He has a limited attention span and poor impulse control. (R. 807, at 308-10, 339-40, 347; R. 808, at 510-11, 561.) Athan also has speech problems, making it difficult to understand him. (R. 806, at 169; R. 807, at 315, 338, 341-46; R. 808, at 513-14.) At the time of trial, Athan was three and a half years old and still was not toilet trained. (R. 806, at 168.) Dr. Sam Goldstein, a neuropsychologist, testified that Athan is developing at about two-thirds the rate of normal children and that his disabilities will become more apparent as he gets older. (R. 808, at 503-04, 509, 517-18.) Athan's life expectancy at the time of trial was 70.9 more years. (R. 297.)

After four days of evidence, the court instructed the jury, "It is your duty to award the plaintiff, Athan Montgomery, such damages, if any, that you find from a preponderance of the evidence, will *fairly and adequately* compensate him for the injury and damage sustained." (R. 294 (emphasis added); see also R. 809, at 777.) Dr. Drezga did not object to this instruction (R. 809, at 769-70), but in fact had requested essentially the same language (R. 355).

The jury returned a verdict for the plaintiffs, finding that Athan had suffered \$2,272,735.30 in total damages, including \$1,250,000 in general (noneconomic) damages. (R. 360.) A judgment was entered for these amounts. (R. 370-72.)

Dr. Drezga has never challenged the sufficiency of the evidence to support the jury's verdict, nor has he claimed that the verdict was the result of passion or prejudice. Instead, he asked the trial court to reduce the jury's award of general damages from \$1,250,000 to \$250,000 on the grounds that section 78-14-7.1 of the Utah Health Care Malpractice Act limited general damages in a medical malpractice action to a total of \$250,000. (*See* R. 364-68.) After briefing and a hearing, the trial court granted Dr. Drezga's motion. (R. 782-85.) Based on its decision, the trial court entered an Amended Judgment in the total amount of \$1,181,829.40 plus costs and interest (R. 786-88), from which the plaintiffs have appealed (R. 792-93).

SUMMARY OF ARGUMENT

As applied in this case, the Utah Health Care Malpractice Act's damage cap, UTAH CODE ANN. § 78-14-7.1, violates various provisions of the Utah Constitution.

The damage cap violates the Utah Constitution's guarantee of a right to a remedy contained in article I, section 11, because it deprives Athan Montgomery of 80 percent of the remedy afforded him by due course of law and does not provide him an effective and reasonable alternative remedy. Moreover, abrogation of the remedy is not justified by a

clear social or economic evil to be eliminated, and even if there were such an evil, elimination of the remedy is an arbitrary and unreasonable means of achieving the objective. (Pt. I.)

The damage cap also violates due process, since it is not carefully drawn or reasonably necessary to secure an important or weighty governmental objective. (Pt. II.)

The damage cap violates the uniform operation of the laws provision of the Utah Constitution, article I, section 24, because it makes unreasonable classifications among categories of injured persons. It denies full recovery to those injured by doctors, while those injured by other tortfeasors are entitled to full recovery. It denies full recovery to those most seriously injured while allowing full recovery to those whose injuries are relatively minor. These classifications cannot be justified. (Pt. III.)

By abrogating the jury's determination of damages, the damage cap also violates the right to a jury trial in civil cases guaranteed by article I, section 10 of the Utah Constitution. (Pt. IV.)

Finally, by exercising powers properly belonging to the judicial department, the legislature violated the separation-of-powers provision of the Utah Constitution, article V, section 1, when it enacted the damage cap. (Pt. V.)

ARGUMENT

THE DAMAGE CAP IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE.

Based on section 78-14-7.1 of the Utah Health Care Malpractice Act, the trial court reduced the jury's award of general damages from \$1,250,000 to the generic amount of \$250,000, without regard for the nature, severity or duration of the injuries from which Athan Montgomery suffers. At the time Athan's claim arose, section 78-14-7.1 read:

In a malpractice action against a health care provider, an injured plaintiff may recover noneconomic losses to compensate for pain, suffering, and inconvenience. In no case shall the amount of damages awarded for such noneconomic loss exceed \$250,000. This limitation does not affect awards of punitive damages.

UTAH CODE ANN. § 78-14-7.1 (1996).¹ The damage cap applies regardless of whether a jury finds that a larger award is necessary to fully compensate the plaintiff. In fact, for plaintiffs whose injuries are minor, the cap will rarely, if ever, apply because the noneconomic damages awarded will generally be below the cap. The cap comes into play *only* in serious cases, when the jury awards noneconomic damages in excess of the cap *and* when the jury's award is supported by the evidence and would be upheld by both the

¹ The damage cap was enacted in 1986. *See* 1986 Utah Laws ch. 205, § 1. Before that, there was no damage cap in medical malpractice cases. The statute was amended in 2001 to increase the cap to \$400,000 for claims arising on or after July 1, 2001, and before July 1, 2002. The cap is adjusted for inflation each year thereafter. *See* 2001 Utah Laws ch. 246. Because Athan was injured between 1986 and 2001, the court reduced his noneconomic damages to \$250,000.

trial court and any reviewing courts. The more severely a plaintiff is injured, the greater the distorting effect of the damage cap.

Other courts have recognized the important role noneconomic damages play in cases such as this:

[A] tort victim “gains” nothing from the jury’s award for economic loss, since that money merely replaces that which he has actually lost. It is only the award above the 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.

Carson v. Maurer, 424 A.2d 825, 837 (N.H. 1980). *See also Ransom v. New-York & Erie R.R. Co.*, 15 N.Y. 415, 423 (1857) (if damages cannot be awarded except for pecuniary loss, “our law affords but a very inadequate remedy for injuries sustained”).

The general damages the jury awarded Athan Montgomery are the only compensation he will ever receive for a lifetime of physical and mental disabilities that Dr. Drezga’s negligence caused. The general damages were in an amount the jury believed would fairly and adequately compensate Athan for the permanent physical, mental and cognitive injuries that will affect him for the rest of his life--the next seventy years or so. By capping his general damages at \$250,000, the trial court deprived Athan of 80 percent of the remedy awarded him by due course of law. The trial court’s action violated several provisions of the Utah Constitution.

I. The Damage Cap Violates the Right-to-a-Remedy Provision of the Utah Constitution, Article I, Section 11.

Article I, section 11 of the Utah Constitution provides in relevant part: “All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay” This provision (also referred to at times as the “open courts” provision) was not intended as “an empty gesture”; it was meant to impose some limitation on the power of the legislature to change legal rights. *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 675 (Utah 1985). It is meant for the benefit of people like Athan Montgomery, “who are injured in their persons, property or reputations since they are generally isolated in society, belong to no identifiable group, and rarely are able to rally the political process to their aid.” *Id.* at 676 (citation omitted). *See also Horton v. Goldminer’s Daughter*, 785 P.2d 1087, 1093 (Utah 1989) (“the framers of our Constitution . . . placed the open courts provision in the Utah Constitution to protect important individual rights against legislative power”); James E. Magleby, *The Constitutionality of Utah’s Medical Malpractice Damages Cap Under the Utah Constitution*, 21 J. CONTEMP. L. 217, 226 (1995) (“In simple terms, the open courts provision is designed to protect those most affected by tort reform--the injured plaintiff”). As this Court explained in *Horton*:

The protection of such basic personal interests [as a remedy for injuries to one’s person] from the power of temporary majorities to infringe them is a primary function of a constitution. Certainly, the right to the protection of

the law for one's person, property, and reputation is a right that is as essential to the happiness of an individual as is liberty. While democracy is the mainspring of our republican form of government, the founders of this state and this nation knew that certain basic rights could be rooted in law more effectively than can be accomplished by relying on the sometimes fickle goodwill of the popular organs of government for their protection.

785 P.2d at 1091. For that reason, under article I, section 11, "an individual [may] not be arbitrarily deprived of effective remedies designed to protect basic individual rights."

Berry, 717 P.2d at 675.

The term "remedy" used in article I, section 11, means "the full, fair, and complete remedy provided by the common law." *Condemarin v. University Hosp.*, 775 P.2d 348, 372 (Utah 1989) (per Stewart, J.) (citations omitted). It does not distinguish between economic and noneconomic damages, nor does it suggest that the right to a remedy may be limited to claims above or below a particular figure. *See Smith v. Department of Ins.*, 507 So.2d 1080, 1087 (Fla. 1987) (construing the open courts provision of the Florida Constitution). It guarantees meaningful access to the courts "whether or not liability [insurance] rates are high." *See Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988).

The Malpractice Act's damage cap violates the right-to-a-remedy provision of the Utah Constitution, article I, section 11. *Condemarin, v. University Hosp.*, 775 P.2d 348, 357-58 (Utah 1989) (per Durham, J.).

In *Condemarin*, this court held the Utah Governmental Immunity Act's damage cap then in effect unconstitutional as applied to the University Hospital.² See 775 P.2d at 366 (per Durham, J.). See also *McCorvey v. Utah State Dep't of Transp.*, 868 P.2d 41, 47 (Utah 1993). Justices Durham and Zimmerman would have held that the recovery limits statutes and section 63-30-3,³ operating together, were unconstitutional under a due process analysis. See 775 P.2d at 364. Justice Stewart would have held the damage cap unconstitutional as applied to the University Hospital because it violated equal protection. *Id.* at 369 (per Stewart, J.).

Although the three justices in the majority in *Condemarin* did not agree on the best constitutional analysis, they all agreed on some points. First, they all agreed that the right to a remedy for damages to one's person was an important substantive right protected by article I, section 11 of the Utah Constitution. See, e.g., 775 P.2d at 360 (Durham, J.) (the right to recover for personal injuries is "an important substantive right"), 366, 368 (Zimmerman, J.) (article I, section 11 provides "substantive protections" to "every

² *Condemarin* involved the \$100,000 limitation found in former sections 63-30-29 and -34, which the main opinion referred to collectively as the "recovery limits statutes." 775 P.2d at 348 n.1 (per Durham, J.). The Governmental Immunity Act has since been amended, but the analysis of the justices in the majority did not appear to depend on any differences between the former statutory scheme and current section 63-30-34. See, e.g., *id.* at 370 n.1 (Stewart, J., concurring) ("My analysis . . . is the same under either the current statute or its predecessor").

³ That section extended to governmental entities immunity from suit for any injury resulting from the operation of a government-owned hospital.

person’ of a ‘remedy by due course of law’ for ‘an injury done to him [or her] in his [or her] person’”; this right is one “to which the Utah Constitution’s drafters assigned a degree of sanctity”), & 372, 373 (Stewart, J.) (article I, section 11 protects “the right to a full remedy for a personal injury,” which is an “important” if not “fundamental” right).

Second, all three justices agreed that the statutory cap on damages interferes with that right. *Id.* at 358, 363 (Durham, J.), 368 (Zimmerman, J.) & 372 (Stewart, J.).

Third, they all agreed that, because the statute impinges on a constitutional right, the presumption in favor of constitutionality disappears, and heightened scrutiny is required, whether the Court analyzes the statute under due process or equal protection. *See id.* at 354-56 (Durham, J.) (“heightened,” “intermediate” or “realistic” review required), 368 (Zimmerman, J.) (“careful scrutiny” required, and “the burden of demonstrating the constitutionality of the statute shifts to its proponents”), & 372, 373 (Stewart, J.) (the appropriate standard “has more bite than the minimum scrutiny standard”). *See also Lee v. Gaufin*, 867 P.2d 572, 591 (Utah 1993) (Zimmerman, J., concurring in the result) (when the Court has found that a statute limits a right protected by article I, section 11, “we have, *de facto*, shifted from a presumption that the limiting statute is constitutional to a presumption that the statute is unconstitutional”); *Hipwell ex rel. Jensen v. Sharp*, 858 P.2d 987, 988-89 n.4 (Utah 1993) (in *Condemarin*, a “majority of the court agreed that because the open courts clause was implicated, the cap must be analyzed under a heightened level of scrutiny for constitutional purposes”).

Fourth, they all agreed that there was no basis for concluding that the damage cap was necessary to protect the stability of government or to preserve the public treasury. *See Condemarin*, 775 P.2d at 363 (Durham, J.), 368-69 (Zimmerman, J.), & 373-74 (Stewart, J.).

Finally, they all agreed that the statutory cap, which places the burden of protecting the public treasury on those most seriously injured and hence most in need of a remedy, is an unjustified intrusion on the constitutional right to a remedy under article I, section 11. *See id.* at 361, 363-64 (Durham, J.), 366, 368 (Zimmerman, J.) & 369, 370, 374 (Stewart, J.).

Similarly, as explained more fully below, Athan Montgomery's right to a remedy for damages done to his person is an important substantive right protected by article I, section 11, and the damage cap, section 78-14-7.1, unjustifiably interferes with that right. Therefore, the presumption of constitutionality disappears, and heightened scrutiny is required. The damage cap cannot be justified by the need to protect the health-care industry. The malpractice cap, which places the burden of protecting that industry on a helpless three-year-old boy with significant brain damage, is an unjustified intrusion on the constitutional right to a remedy.

The court in *Condemarin* concluded that the Governmental Immunity Act's damage cap deprived the plaintiffs in that case of an effective remedy because at common law the plaintiffs would have been able to sue the University Hospital for unlimited

damages. *See* 775 P.2d at 349-52, 357-60 (Durham, J.). *See also* *McCorvey*, 868 P.2d at 47.⁴ Although article I, section 11 does not constitutionalize the common law, *see* *Berry*, 717 P.2d at 676, the scope of the protections afforded by article I, section 11 must be viewed in light of the remedies that were available and the immunities that existed when the Utah Constitution was adopted, *DeBry v. Noble*, 889 P.2d 428, 435 (Utah 1995).

The common law, which was in force in Utah when the Utah Constitution was adopted, *see* *People v. Green*, 1 Utah 11, 13 (1876), recognized a right of action against a physician who injured another through his lack of skill and care. *See, e.g.,* *Wright v. Central DuPage Hosp. Ass'n*, 347 N.E.2d 736, 742 (Ill. 1976); *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988); 1 DAVID W. LOUISELL & HAROLD WILLIAMS,

⁴ In *McCorvey*, the dissenting justices in *Condemarin*--Chief Justice Hall and Justice Howe--reaffirmed that a person injured by a governmental entity's exercise of a nonessential or proprietary function had a "common law right to recover fully." 868 P.2d at 47. *A fortiori*, a person injured by the negligence of a private actor, such as Dr. Drezga, also has a fundamental, common-law right to a full recovery that is protected by article I, section 11. *See also* *Lee*, 867 P.2d at 581 ("a person has a constitutional right to a remedy for an injury to one's person"); *Condemarin*, 775 P.2d at 372 (article I, section 11 protects "the right to a full remedy for a personal injury") (per Stewart, J.).

This Court distinguished *Condemarin* in *McCorvey*, a case involving the improper maintenance of a public road, and upheld the Governmental Immunity Act's damage cap against challenges under article I, sections 7, 10, 11 and 24 of the Utah Constitution. *See* 868 P.2d at 47-48. The Court reasoned that, "[b]ecause no right existed at common law to recover from the state for injuries arising out of the state's maintenance of public roadways, the legislature is free to limit the state's liability in that area without implicating the open courts clause and its concomitant heightened scrutiny." *Id.* at 48. The *McCorvey* Court did not analyze article I, section 11 separately. The Utah Court of Appeals followed *McCorvey* in *Hart v. Salt Lake County Commission*, 945 P.2d 125, 137-39, *cert. denied*, 953 P.2d 449 (Utah 1997), another case involving negligent roadway design and maintenance. Again, the court did not analyze article I, section 11 separately.

MEDICAL MALPRACTICE ¶ 8.01[1] (2001). That right included the right to recover for pain and suffering. *See, e.g., Moore v. Mobile Infirmary Ass’n*, 592 So.2d 156, 159 (Ala. 1995); *Ransom v. New-York & Erie R.R. Co.*, 15 N.Y. 415, 417 (1857) (“it has always been understood by the courts and by the profession, that the personal sufferings of the injured party, constitute a legitimate element in assessing damages for” personal injury). There was no limit on the amount of damages a malpractice plaintiff could recover. *See, e.g., Smith v. Department of Ins.*, 507 So.2d 1080, 1087 (Fla. 1987) (a right to sue on and recover noneconomic damages of any amount existed when the Florida Constitution was adopted); *Botta v. Brunner*, 138 A.2d 713, 718 (N.J. 1958) (“For hundreds of years, the measure of damages for pain and suffering following in the wake of a personal injury has been ‘fair and reasonable compensation’”); *Condemarin*, 775 P.2d at 354 (per Durham, J) (it is a “fundamental principle of American law that victims of wrongful or negligent acts should be compensated to the extent that they have been harmed”) & 372 (per Stewart, J.) (article I, section 11 protects “the right to a full remedy for a personal injury”). Because the right to recover the full amount of one’s damages for pain and suffering was well established at common law and when Utah’s constitution was adopted, the framers of the constitution must have intended article I, section 11 to protect that right from legislative abridgement.

Although the legislature may restrict or even abrogate common-law rights, for such restrictions to comply with article I, section 11, they must pass a two-part test: First, the law must provide an injured person

an effective and reasonable alternative remedy . . . for vindication of his constitutional interest. The benefit provided must be substantially equal in value or other benefit to the remedy abrogated in providing essentially comparable substantive protection to one's person, property, or reputation, although the form of the substitute remedy may be different. . . .

Second, if there is no substitute or alternative remedy provided, abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means of achieving the objective.

Berry, 717 P.2d at 680. *Cf. Condemarin*, 775 P.2d at 358 (per Durham, J.) (“A legislative determination to interfere with, limit, or abrogate the availability of remedies for injuries to [one's] person . . . requires an important state interest and a rational means of implementation. The greater the intrusion upon the constitutionally protected interest, the greater and more explicit the state's reasons must be.”).

The Malpractice Act's damage cap takes away or limits an injured person's remedies without providing any alternative remedy, let alone “an effective and reasonable” alternative remedy, “substantially equal in value or other benefit to the remedy abrogated.” *See, e.g., Wright*, 347 N.E.2d at 742-43 (legislation that establishes a monetary limit on a victim's recovery and offers him no *quid pro quo* cannot be analogized to workers' compensation or similar systems); *Lucas*, 757 S.W.2d at 692 (“A

plaintiff who receives a jury verdict for, e.g., \$1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery”) (quoting *Smith*, 507 So.2d at 1088); Magleby, *supra*, 21 J. CONTEMP. L. at 232 (“the Malpractice Cap does not provide an alternative remedy to those injured by medical malpractice”) (footnote omitted). A limited recovery of only a fraction of the plaintiff’s actual damages (in this case, a mere 20 percent) is, by definition, not a full, fair, or complete alternative remedy. *Cf. Lyon v. Burton*, 2000 UT 19, ¶ 53, 5 P.3d 616 (per Stewart, J.) (“to the extent the damages awarded . . . exceed the statutory limitation, as in this case, the substitute remedy is by definition not equal to the remedy abrogated”). An injured person receives no other benefit or alternate procedure to ensure speedy compensation or remove procedural burdens. In fact, under the Malpractice Act, the statute of limitations is shortened and procedural hurdles and defenses are added, in addition to damages being limited. *See* UTAH CODE ANN. §§ 78-14-4, -4.5, -5, -8, -12, -13 & -14. The more severe the plaintiff’s injury and the greater the resulting damages, the more the plaintiff’s right to a fair and full remedy is curtailed, without providing any alternative remedy.

Because the damage cap deprives Athan Montgomery of his full remedy without providing a substantially equal alternative remedy, the burden shifts to Dr. Drezga to show the cap’s constitutionality under the second prong of the *Berry* test. *See Velarde v. Board of Review of Indus. Comm’n of Utah*, 831 P.2d 123, 128 n.8 (Utah Ct. App. 1992).

Dr. Drezga cannot meet his burden because abrogation of the remedy cannot be justified by a clear social or economic evil to be eliminated.

The damage cap itself offers no justification for its limitation on an injured person's right to recover for his injuries. The original Malpractice Act, which was passed in 1976, was meant "to curb rising malpractice insurance rates, ensure the availability of malpractice insurance, and reduce the cost of health care." *Lee v. Gaufin*, 867 P.2d 572, 576 (Utah 1993) (citing UTAH CODE ANN. § 78-14-2). As originally passed, however, the Malpractice Act contained no limitation on an injured person's right to recover full damages for all the harm suffered. *See* 1976 Utah Laws ch. 23.

This Court considered the legislature's stated justification for the Malpractice Act in *Lee v. Gaufin* and found it did not justify cutting off an injured minor's right to bring a medical malpractice action before the minor reached majority. 867 P.2d at 583-89. The Court's reasoning in *Lee* shows that the asserted justification for the act also does not justify depriving an injured minor of the remedy afforded him by due course of law.

The Court in *Lee* started by reviewing the so-called medical malpractice crisis of the 1970s and 1980s, when malpractice premiums "escalated significantly." *Id.* at 583. The Court noted that the "crisis" was "widely attributed to significant increases in the number of malpractice lawsuits filed against physicians and hospitals and the size of damages awards by juries," but added that "the evidence for the asserted causes was largely anecdotal" and that "little effort was made to investigate empirically the real

causes of the malpractice insurance crisis.” *Id.* at 583-84. “In time,” the Court continued, “the presumed causes of the ‘malpractice crisis’ were challenged, as was the efficacy of the legislative responses,” and “a number of courts held that the crisis did not warrant restricting the rights of individuals injured by malpractice.” *Id.* at 584 (citations omitted).

The Court continued: “When the Utah Health Care Malpractice Act was enacted, there was evidence before the Legislature that other states had experienced significant increases in the number of malpractice lawsuits and the size of verdicts. *However, there was no evidence of increased malpractice lawsuits or of greater verdicts in Utah.*” *Id.* at 584-85 (emphasis added). The Court cited statistics from a legislative report showing that, during the two and one-half years before the Malpractice Act was enacted, only twelve malpractice lawsuits had been disposed of in Third District Court, and, of those, only one resulted in a judgment for the plaintiff, of about \$10,000. *Id.* at 585 (citation omitted). In fact, medical malpractice claims against the three largest malpractice insurers in Utah had actually *decreased* from 1972 through 1974. *Id.*

The Court also cited statistics derived from the insurance industry itself for the period from 1975 to 1978. During that period, a total of 237 malpractice claims had been filed against Utah physicians, or less than 80 a year. Of those claims, only 84 resulted in payments of any kind to claimants, and the average payment was \$21,589. Only four payments exceeded \$100,000. *Id.* at 587 (citation omitted). Similarly, in the sixteen years since the damage cap was enacted, to the plaintiffs’ knowledge this is the first case

challenging the constitutionality of the damage cap that has reached a Utah appellate court.

The Court also quoted extensively from the floor debates on the 1976 act, which showed that the “the statutory findings were not true with respect to Utah” and that, “whatever the case was in . . . the nation as a whole, the Utah experience was different.”

Id. at 585. *See also id.* at 585-87.

The Court noted that, even after the Malpractice Act was enacted,

the experience in Utah continued to indicate that increases in insurance premiums were propelled largely by factors other than malpractice awards in Utah. By the end of 1983, the Utah Medical Insurance Association (UMIA), which is owned by Utah physicians and became Utah’s primary malpractice carrier, paid claims totaling \$2.6 million during the first five years of its existence. For 1983, however, UMIA claimed \$3.2 million in *unpaid* losses, nearly half its five-year total, thereby bringing its total of unpaid losses at the end of 1983 to approximately \$8.3 million. During the same five-year period, UMIA collected over \$13 million in premiums, or an average of \$2.6 million per year. In addition, UMIA earned \$4.3 million in investment income.

Id. at 587 n.24 (emphasis in original; citation omitted).

The Court noted that the Utah medical profession had itself identified the causes of increased health care costs for the period 1974-82 as follows:

- | | | |
|-----|---|-----|
| (a) | General inflation | 59% |
| (b) | Medical care inflation (over and above general inflation) | 11% |
| (c) | An increasing population | 8% |

- (d) Other factors including modern medical care financing, the effect of governmental health programs, an increasing aging population, new technology, and the legal climate 22%

Id. at 587. “Thus,” the Court concluded, “the dominant causes of increased health-care costs were factors other than increased malpractice insurance premiums,” which accounted for only “a fraction of the 22% attributed to the other factors and an even smaller fraction of the total causes.” *Id.*

Moreover, the Court noted, “notwithstanding the ‘tort reform’ legislation enacted in the 1970s, malpractice premiums have continued to rise, while the ratio of physicians’ malpractice insurance costs to physicians’ incomes nationally has not changed significantly,” staying “at about 1% of total health-care spending since 1976.” *Id.* at 587-88. Obviously, if malpractice premiums consistently account for only about 1 percent of total health care spending, tort reform measures aimed at reducing premiums, such as the damage cap, will have at best a negligible impact on the cost of health care. *See, e.g., Moore v. Mobile Infirmary Ass’n*, 592 So.2d 156, 168-69 (Ala. 1995); *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 259 (Kan. 1988), *disapproved of on other grounds by Bair v. Peck*, 811 P.2d 1176, 1191 (Kan. 1991); *Carson v. Maurer*, 424 A.2d 825, 836 (N.H. 1980).

This Court concluded in *Lee*:

In sum, the dramatic increases in medical malpractice insurance premiums and the increased costs of health care were not caused by significant increase in malpractice lawsuits or claims in Utah, by either adults or minors, or by significant increases in the size of jury verdicts. The

legislative means for solving the insurance problem by cutting off the malpractice claims of minors simply does not further the legislative objective.

867 P.2d at 588.⁵

Similarly, eliminating an injured minor's right to recover the full extent of his general damages does not further the legislature's stated objectives. The damage cap cannot be justified by "a clear social or economic evil to be eliminated," and even if there

⁵ This Court is not alone in finding that the asserted malpractice insurance crisis did not justify the legislative response. *See also Moore*, 592 So.2d at 167-68 (citing two studies, including one by the United States General Accounting Office, finding little correlation between tort reforms and medical malpractice insurance premiums and concluding that the correlation between a damage cap and the reduction of health-care costs to Alabama citizens "is, at best, indirect and remote"); *Arneson v. Olson*, 270 N.W.2d 125, 136 (N.D. 1978); *Morris v. Savoy*, 576 N.E.2d 765, 770-71 (Ohio 1991) (citing a 1987 study by the Insurance Service Organization concluding that savings from various tort reforms, including a \$250,000 cap on noneconomic damages, "were 'marginal to nonexistent'"); *Lucas*, 757 S.W.2d at 691 (citing a study concluding that there is no rational relationship between a damage cap and malpractice insurance premiums). *Cf. Martin ex rel. Scoptur v. Richards*, 531 N.W.2d 70, 89-90 (Wis. 1995) (citing a 1986 U.S. Department of Justice report showing that only 2.7% of all medical malpractice claimants receive noneconomic damages over \$100,000).

More recent studies have confirmed that the asserted justification for malpractice caps is not justified. One study reviewed 8,231 closed cases from the malpractice claim files of a physician-owned insurance company. Each claim was classified as "defensible," "indefensible" or "unclear." "Contrary to many perceptions," the study found that "physicians usually win cases in which physician care was deemed to meet community standards and that the severity of patient injury has little bearing on whether a physician loses a case." Mark I. Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANNALS OF INTERNAL MEDICINE 780, 780 (1992). Most injuries "do not enter the current malpractice resolution process," *id.* at 783 (footnote omitted), but for "the small number of cases that required a jury verdict, only 24% resulted in payment to the plaintiff and the severity of injury did not influence the probability of payment," *id.* at 782. The study concluded that "unjustified payments are probably uncommon." *Id.* at 780.

were such an evil, the cap is “an arbitrary or unreasonable means of achieving the objective.” *See Berry*, 717 P.2d at 680. *Accord Moore*, 592 So.2d at 170; *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1077 (Ill. 1997); *Wright*, 347 N.E.2d at 743; *Carson*, 424 A.2d at 837; *Morris*, 576 N.E.2d at 771; *Lucas*, 757 S.W.2d at 690. *See also Arneson*, 270 N.W.2d at 135-36 (limiting recovery by seriously injured claimants with meritorious claims does nothing to promote the aims of the statute or eliminate nonmeritorious or frivolous actions).

This Court has recognized that limitations on the rights of those most injured and most vulnerable are an arbitrary and impermissible way to try to solve social problems. *See, e.g., Condemarin*, 775 P.2d at 358 (Durham, J.) (suggesting that the disability the damage cap in that case sought to impose on individual rights “is too great to be justified by the benefits accomplished or . . . is simply an arbitrary and impermissible shifting of collective burdens to individual citizens”); *id.* at 374 (Stewart, J.) (the Immunity Act’s damage cap, “which operates *only* on those most seriously and severely injured, is an intrusion on a constitutional right that is not justified by whatever marginal enhancement of the legislative purpose flows from the statute”). As this Court said in *Lee*: “[E]ven if we were to assume that increased minors’ malpractice claims increased malpractice insurance premiums and costs of health care to some extent, that would not justify shifting the costs of malpractice injuries from health-care providers to injured children and their caretakers.” 867 P.2d at 588. The mere possibility that insurance premiums

could increase if a plaintiff is allowed full recovery for the damages suffered cannot outweigh the state's interest in protecting the plaintiff's constitutional right to recover: "the state has a greater interest in preserving a patient's right to pursue a malpractice claim against a physician than in the amount of liability premiums the physician might have to pay." *Bowers v. Commonwealth Dep't of Highways & Transp.*, 302 S.E.2d 511, 515 (Va. 1983).

Instead, capping damages against a negligent doctor *creates* a social and economic evil by destroying the deterrent effect of tort law and making those most seriously injured bear the burden of protecting negligent health-care providers from the natural results of their carelessness (namely, liability to the full extent of the harm caused). *See Condemarin*, 776 P.2d at 364-65 (per Durham, J.). *See also* Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 799 (1985) ("Unless the full costs of physical and emotional distress are properly internalized through tort law, the price of the activities that generated such injuries will insufficiently reflect their actual costs. In effect, victims or the public would subsidize the cost of high-risk activities, thereby leading to inadequate deterrence . . .") (footnote omitted). It allows the worst doctors to escape full accountability for their actions. As one court explained:

The extending of special litigation benefits to the medical profession certainly cannot be considered as relating to protection of the public health. On the contrary, the quality of health care may actually decline. To the extent that in tort actions of the malpractice type if the medical profession is less accountable than formerly, relaxation of medical standards may occur with the public the victim.

Graley v. Satayatham, 343 N.E.2d 832, 838 (Ohio C.P. 1976). The “cure selected by the legislature . . . [is] no less pernicious than the disease it was intended to remedy.” *Lee*, 867 P.2d at 588 (quoting *Strahler v. St. Luke’s Hosp.*, 706 S.W.2d 7, 11 (Mo. 1986)). “Society cannot escape its responsibility to provide justice by simply eliminating the rights of its citizens.” *Carson*, 424 A.2d at 838 (citation omitted).

A further problem with damage caps is “their insignificant impact on the overall situation.” John Roland Lund, *Medical Malpractice Legislation: Rx for Utah*, 11 J. CONTEMP. L. 287, 311 n.130 (1984). “Judgments exceeding the limit are too infrequent for a damage limit to effectively reduce the total malpractice liability.^[6] Most liability arises out of the more numerous but less serious claims. The ineffectiveness of damage limits combines with their constitutional problems to make them an unwise option.” *Id.* at 311-12 n.130. Thus, even if there were a clear social or economic evil, the damage cap is an unreasonable and arbitrary means of addressing the problem because it deprives a minuscule group of catastrophically injured people full compensation without any reasonable prospect for ensuring the desired stability in malpractice insurance and health care.

In short, as applied in this case, the malpractice cap abrogates an important common-law right without providing an alternative remedy and is an arbitrary and

⁶ As noted above, this is apparently the first time the damage cap has been challenged on appeal in over fifteen years of its existence.

unreasonable means of dealing with a perceived problem that this Court has found did not exist in Utah. The malpractice cap therefore violates article I, section 11 of the Utah Constitution.⁷

II. The Damage Cap Violates the Due Process Provision of the Utah Constitution, Article I, Section 7.

The damage cap also violates the due process provision of the Utah Constitution, article I, section 7. That provision states: “No person shall be deprived of life, liberty or property, without due process of law.”

Article I, section 7 of the Utah Constitution protects against the deprivation of rights protected by article I, section 11. *See Condemarin*, 775 P.2d at 358 (per Durham, J.), 367 (per Zimmerman, J.). The right to recover full damages for personal injuries is an important substantive right protected by article I, section 7. *See id.* at 360 (per Durham, J.), 368 (per Zimmerman, J.) (quoting *Ernest v. Faler*, 697 P.2d 870, 875 (Kan. 1985)).

The test of constitutionality under the due process clause is an end-means analysis. A statute violates substantive due process if it operates unequally or arbitrarily. *Mineer v. Board of Review of the Indus. Comm’n of Utah*, 572 P.2d 1364, 1366 (Utah 1977). The

⁷ For other cases holding damage caps unconstitutional under right-to-a-remedy or open-court provisions of state constitutions, see *Smith*, 507 So.2d at 1087-89 (\$450,000 cap on noneconomic damages in tort cases); *Lucas*, 757 S.W.2d at 690-92 (\$500,000 cap on damages other than medical and related expenses in medical malpractice cases).

deference normally given legislative valuations of ends and means disappears when a statute implicates important rights such as those protected by article I, section 11. As Justice Zimmerman explained in *Condemarin*:

To accord these rights the respect the drafters intended requires that we approach challenges to legislation alleged to infringe article I, section 11 differently than we otherwise view claims of unconstitutionality that are directed at ordinary economic legislation. Because the interests at stake are specifically protected by the constitution, the presumption of validity that normally attaches to legislative action must be reversed once it is shown that the enactment under scrutiny does, in fact, infringe upon the interests enumerated in article I, section 11. The burden then is upon the proponents of the legislation's validity to demonstrate that its restrictions on those rights are carefully drawn and supported by weighty considerations.

775 P.2d at 368 (Zimmerman, J., concurring in part) (citations omitted). Therefore,

under Utah constitutional analysis, if an interest or right of the people is given special sanctity by the constitution and that interest or right is infringed by a challenged statute, not only is a strict scrutiny standard applied, but also the presumption of validity normally accorded legislative action is reversed and the burden is imposed on the proponents of the legislation to justify the infringement.

Swayne v. L.D.S. Soc. Servs., 795 P.2d 637, 647 n.1 (Utah 1990) (Zimmerman, J., concurring & dissenting).⁸

The proponent of legislation infringing basic constitutional rights “must show (1) a compelling state interest in the result to be achieved and (2) that the means adopted are ‘narrowly tailored to achieve the basic statutory purpose.’” *Wells v. Children’s Aid Soc’y*

⁸ Heightened scrutiny is required not only because the damage cap violates article I, section 11, but also because it implicates rights under article I, sections 24 and 10 of the Utah Constitution, as explained more fully in points III and IV, *infra*.

of Utah, 681 P.2d 199, 206 (Utah 1984) (quoting *In re Boyer*, 636 P.2d 1085, 1090 (Utah 1981)). See also *Condemarin*, 775 P.2d at 363 (per Durham, J.) (“before the state is permitted to conserve those monies at the expense of seriously injured citizens, its citizens are entitled to a showing in the courts that a measure so drastic and arbitrary . . . is urgently and overwhelmingly necessary”).

A majority of this Court has already concluded that the asserted liability crisis and the fear of driving the government (in *Condemarin*) or the health-care industry (in *Lee*) out of business absent legislative intervention did not justify the intrusion on individual rights that the governmental damage cap and the Medical Malpractice Act’s limitations on minors’ rights imposed. See *Lee*, 867 P.2d at 588; *Condemarin*, 775 P.2d at 361-64 (per Durham, J.), 368-69 (per Zimmerman, J.), & 373-74 (per Stewart, J.). Indeed, the Court’s conclusion in *Lee* that cutting off the malpractice claims of minors does not actually and substantially further the policy of curbing and reducing malpractice premiums and ensuring reasonably priced health-care to the people of Utah suggests that arbitrarily limiting those claims is not a narrowly tailored means of achieving a compelling state interest.

The damage cap severely restricts an injured person’s constitutional rights. Because the most severely injured are the least adequately compensated, the damage cap frustrates not only the tort system’s goal of compensation but also equity. The injustice of the cap is particularly apparent in this case, where an innocent newborn who has

suffered catastrophic injuries that will affect him the rest of his life as a result of the clear liability of a private actor must bear the great brunt of his injuries while the malefactor who caused the injuries escapes the greater liability for the harm his actions have caused. Because it is an arbitrary, unjust and dubious means of achieving its presumed end, the damage cap violates the due process clause of the Utah Constitution. *Cf. Morris*, 576 N.E.2d at 771 (the Ohio cap of \$200,000 on general damages in medical malpractice cases violated due process “because it does not bear a real and substantial relation to public health or welfare and further because it is unreasonable and arbitrary”).

III. The Damage Cap Violates the Uniform Operation of the Laws Provision of the Utah Constitution, Article I, Section 24.

The Utah Constitution ensures the equal protection of the law through article I, section 24, which states: “All laws of a general nature shall have uniform operation.”

The constitutional guarantee of uniform operation of the law “militates against arbitrary laws that favor the interests of the politically powerful [e.g., the health-care industry] over the interests of the politically vulnerable [e.g., injured children].” *Lee v. Gaufin*, 867 P.2d 572, 581 (Utah 1993). The purpose of article I, section 24 is to assure that “persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same.” *Malan v. Lewis*, 693 P.2d 661, 669 (Utah 1984).

The provision protects against two types of discrimination: “First, a law must apply equally to all persons within a class. . . . Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute.” *Id.* at 670 (citations omitted).

The damage cap discriminates in several ways. First, the statute discriminates between victims of medical malpractice and victims of other torts. The latter are entitled to full compensation, while the former are not. The damage cap limits noneconomic damages in only a certain, narrow type of case (medical malpractice) and allows full recovery in all other types of actions, including cases where noneconomic damages may comprise the bulk of a plaintiff’s injury and could easily exceed \$250,000 (such as those dealing with damage to reputation, breach of fiduciary duty, bad faith, invasion of privacy, intentional and negligent infliction of emotional distress, to name just a few). In doing so, it favors the “politically powerful interests” of the medical community and insurance industry over the interests of the “politically vulnerable” victims of medical malpractice. *See Lee*, 867 P.2d at 581. The benefits of the statute “run in only one direction because the potential plaintiffs and defendants stand on different footing.” *Smith v. Department of Ins.*, 507 So.2d 1080, 1088 (Fla. 1987).

Second, the cap discriminates among victims of medical malpractice, between those whose injuries are primarily economic and those whose injuries are not. The former

are entitled to full compensation for their injuries, while the latter are not. For example, a plaintiff can recover fully for lost wages but not for the loss of a leg or a loved one.

Persons without significant economic damages are discriminated against simply because they do not work outside the home.

Third, among those suffering noneconomic injury, the cap discriminates between those whose injuries are minor and those seriously injured. The former are entitled to full compensation, while the most seriously injured are entitled to only a fraction of their losses.

The cap discriminates especially against plaintiffs such as Athan Montgomery and his mother. Limitations on noneconomic damages especially hurt brain-damaged babies and their caretakers. Because negligence during child birth typically causes a life-time of disability, such cases involve large awards of noneconomic damages.⁹

⁹ Others disproportionately affected by caps on noneconomic damages are women and minorities, who are less likely to suffer large economic losses and more likely to incur noneconomic harms. See, e.g., Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 84-85 (1994) (the “available empirical data” confirm “that awards received by women and minorities tend to be smaller than those received by white men,” and the disparity is only partly explained by lower awards for loss of future earning capacity); Lisa M. Ruda, Note, *Caps on Noneconomic Damages and the Female Plaintiff: Heeding the Warning Signs*, 44 CASE W. RES. L. REV. 197, 231-33 (1993). For example, one study showed that medical malpractice awards to women in punitive damage cases were almost three times more likely to include a pain and suffering component as awards to men, and the typical pain and suffering verdict for a woman was twice as large as that for a man, see Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 82-85 (1995), suggesting that “reforms limiting non-economic damages will affect more women than men,” *id.* at 85.

In short, the malpractice cap favors non-malpractice victims over malpractice victims and then favors the less injured over those most severely injured. Out of all tort victims, the statute singles out only malpractice victims for limitation, and out of malpractice victims, it then singles out only those who are the most severely injured, those whose general damages exceed \$250,000. The malpractice cap categorizes who is to receive full compensation and who is to receive only partial compensation according to the severity of their injuries. Ironically, it is only those few who are most severely injured and most in need of compensation who are denied full recovery. The physicians and other professionals whose past and future bills will be paid out of the plaintiff's recovery will be fully compensated. Yet Athan Montgomery, a three-year-old boy who will live with serious physical and cognitive impairments for his entire life as the result of Dr. Drezga's negligence, will not. The cap protects an adjudicated malefactor at the expense of an innocent child. The discrimination the damage cap imposes is especially invidious because its discriminatory effects operate on persons based on circumstances beyond their control and through no fault of their own. "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*, 424 A.2d at 837. *See also Morris*, 576 N.E.2d at 771 ("[I]t is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice") (citation omitted).

This Court has construed article I, section 24 to require heightened scrutiny when rights under article I, section 11 are implicated:

[A] statutory classification that discriminates against a person's constitutionally protected right to a remedy for personal injury under Article I, section 11 is constitutional only if it (1) is reasonable, (2) has more than a speculative tendency to further the legislative objective and, in fact, actually and substantially furthers a valid legislative purpose, and (3) is reasonably necessary to further a legitimate legislative goal.

Lee, 867 P.2d at 582-83 (citations omitted).¹⁰ If a statute fails *any* of these requirements, it is unconstitutional.

None of the classifications the damage cap makes can be justified under this standard. There is no rational basis to distinguish between economic damages and noneconomic damages and to limit the former but not the latter. Both are necessary to fully compensate an injured person:

[I]n most if not all actions for injuries to the person . . . , pecuniary damages will not afford a complete, or at least a specific compensation, for the reason that, by the use of money, the party injured cannot be restored to the condition, situation or standing he was in prior to the commission of the wrongful act producing the injury. . . . [P]ecuniary damages may compensate him for his loss of time and for the expenses incurred; but it cannot be contended for a moment that indemnity for the loss of time and expenses incurred will constitute a satisfaction for the whole injury, nor can any authority be found holding that the law will furnish no redress beyond

¹⁰ Even if the malpractice cap did not infringe on constitutionally protected rights and was considered merely economic legislation, Utah law would still require more heightened scrutiny than would be required under the Equal Protection Clause of the federal constitution. *See, e.g., Lee*, 867 P.2d at 577; *Condemarin*, 775 P.2d at 352 (per Durham, J.) (quoting *Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884, 889 (Utah 1988)); *Malan*, 693 P.2d at 670.

such indemnity. Bodily pain and suffering, more or less acute and intense, and more or less protracted, invariably result from and are directly and immediately caused by an injury to the person, and in many cases they are by far the least desirable consequences of the injury; and if the law affords no redress therefor, it falls short of giving compensation for injuries to a great[] extent

Ransom v. New-York & Erie R.R. Co., 15 N.Y. 415, 421 (1857). Other damages, such as those caused by “destroying an ornamental tree,” “a nuisance contiguous to the plaintiff’s dwelling,” or “libel, verbal slander, [and] seduction,” are just as uncertain of precise measurement as pain and suffering, *see id.* at 422, yet they are not subject to any cap. The trier of fact is equally capable of making a reasonable and accurate assessment of noneconomic damages as it is of determining such losses as future economic damages. Limitations on damages cannot constitutionally discriminate between those who suffer pain and loss of quality of life and those who suffer primarily economic damages.

The malpractice cap shifts the costs of malpractice injuries from those who provide substandard care to those vulnerable few who are the most severely injured. The Court in *Condemarin* already concluded that it is unreasonable to place on those most seriously injured the burden of protecting the public treasury. *See* 775 P.2d at 353, 361, 363 (per Durham, J.), 367-69 (per Zimmerman, J.) & 373-74 (per Stewart, J.). *See also, e.g., Martin ex rel. Scoptur v. Richards*, 531 N.W.2d 70, 92 (Wis. 1995) (even assuming that the tort system is “‘broke’ or at least badly in need of repair,” it is “neither fair nor equitable” to try “to fix that system at the sole expense of those most seriously injured”). There is even less justification for protecting doctors and their insurance companies from

liability for their negligence at the expense of those most seriously injured. As other courts have concluded:

There is no satisfactory reason for this separate and unequal treatment. There obviously is “no compelling governmental interest” unless it be argued that any segment of the public in financial distress be at least partly relieved of financial accountability for its negligence. To articulate the requirement is to demonstrate its absurdity, for at one time or another every type of profession or business undergoes difficult times, and it is not the business of government to manipulate the law so as to provide succor to one class, the medical, by depriving another, the malpracticed patients, of the equal protection mandated by the constitution. Even remaining within the area of the professions, it is notable that the special consideration given to the medical profession by these statutes is not given to lawyers . . . or others who are subject to malpractice suits.

Jeanne v. Hawkes Hosp. of Mt. Carmel, 598 N.E.2d 1174, 1180 (Ohio Ct. App.) (quoting *Graley v. Satayatham*, 343 N.E.2d 832, 837 (Ohio C.P. 1976)), *stay granted*, 573 N.E.2d 767 (Ohio), *appeal dismissed*, 579 N.E.2d 210 (Ohio 1991).

This Court in *Lee* found the causes of the so-called medical malpractice crisis-- “dramatic increases in medical malpractice insurance premiums and the increased costs of health care[--]were not caused by significant increases in malpractice lawsuits or claims in Utah . . . or by significant increases in the size of jury verdicts” and that the “legislative means for solving the insurance problem [in that case, “cutting off the malpractice claims of minors”] simply does not further the legislative objective.” 867 P.2d at 588. Similarly, limiting the amount of general damages a seriously injured plaintiff can recover has not and will not “actually and substantially further the policy of curbing and reducing malpractice premiums and of ensuring reasonably priced health-care services to the

people of Utah and is not necessary to accomplish those ends.” *Id.* See also *Malan*, 693 P.2d at 671 (“If the relationship of the classification to the statutory objectives is unreasonable or fanciful, the discrimination is unreasonable”) (citation omitted). Moreover, this Court in *Lee* added that, “even if we were to assume that increased minors’ malpractice claims increased malpractice insurance premiums and costs of health care to some extent, that would not justify shifting [as in this case] the costs of malpractice injuries from health-care providers to injured children and their caretakers.” 867 P.2d at 588. See also *Lucas*, 757 S.W.2d at 691 (“In the context of persons catastrophically injured by medical negligence, we believe it is unreasonable *and* arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease”) (emphasis in original).

Lee is dispositive of this case. Under *Lee*, a restriction on the right of a party to recover for injuries caused by medical malpractice is not reasonably necessary to further a legitimate legislative goal and does not substantially further a valid legislative purpose. Although *Lee* did not deal specifically with the Malpractice Act’s damage cap, the Court’s analysis of the analogous limitations provision undercuts any justification for the damage cap and its unequal treatment of injured persons.

Even if the damage cap did not infringe rights under article I, section 11 (*see supra* pt. I) and article I, section 10 (*see infra* pt. IV), it would still be unconstitutional even under the less demanding, rational-basis scrutiny. As other courts have recognized, it is

not only irrational and arbitrary, but also unfair “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*, 424 A.2d at 837. *Accord Wright*, 347 N.E.2d at 743; *Morris*, 576 N.E.2d at 771; *Martin*, 531 N.W.2d at 92; *Lucas*, 757 S.W.2d at 691. “Simply stated, the legislative scheme of shifting responsibility for loss from one of the most affluent segments of society to those who are most unable to sustain that burden, *i.e.*, horribly injured or maimed individuals, is not only inconceivable, but shocking to . . . [the] conscience.” *Duren v. Suburban Community Hosp.*, 495 N.E.2d 51, 56 (Ohio C.P. 1985). *See also Condemarin*, 775 P.2d at 355 (per Durham, J.) (“the singling out of [a] minuscule and vulnerable group” to bear the burden of reducing health care costs “violates even the most undemanding standard of underinclusiveness”) (quoting *Fein v. Permanente Med. Group*, 695 P.2d 665, 692 (Cal.) (Bird, C.J., dissenting), *appeal dismissed*, 474 U.S. 892 (1985)). A “discriminatory classification” that “unreasonably produces harsh results with respect to a few people” is the very “antithesis” of equal protection or uniform operation of the law. *McCorvey v. Utah State Dep’t of Transp.*, 868 P.2d 41, 49 (Utah 1993) (Stewart, J., concurring and dissenting). The damage cap shifts the risk of catastrophic injuries from the guilty to the innocent and thus violates equal protection.

Because the malpractice cap is not reasonably necessary to further a legitimate legislative goal, the cap violates the Utah Constitution's "uniform operation of the laws" provision, article I, section 24.¹¹

IV. The Damage Cap Violates the Constitutional Right to a Jury Trial in Civil Cases Guaranteed by Article I, Section 10 of the Utah Constitution.

Article I, section 10 of the Utah Constitution guarantees the right to a jury trial in civil cases. *See Zions First Nat'l Bank v. Rocky Mountain Irrigation, Inc.*, 795 P.2d 658, 661 (Utah 1990) (citing *International Harvester Credit Corp. v. Pioneer Tractor & Implement, Inc.*, 626 P.2d 418 (Utah 1981)). The jury is "deeply rooted in our basic democratic traditions and so important in the administration of justice, not only as a buffer between the state and the sovereign citizens of the state, but also as a means for rendering justice between citizens." *International Harvester*, 626 P.2d at 420. It is this Court's duty to "zealously protect and preserve" the right to jury trial. *Stickle v. Union Pac. R.R. Co.*, 122 Utah 477, 251 P.2d 867, 871 (1952).

¹¹ For other cases striking down damage caps on equal protection grounds, see *Ray v. Anesthesia Assocs. of Mobile, P.C.*, 674 So.2d 525, 526 (Ala. 1995) (\$1 million cap on damages in wrongful death actions against health-care providers); *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156, 165-71 (Ala. 1991) (\$400,000 cap on noneconomic damages in medical malpractice cases); *Carson*, 424 A.2d at 836-38 (\$250,000 cap on general damages in medical malpractice cases); *Arneson v. Olson*, 270 N.W.2d 125, 135-36 (N.D. 1978) (\$300,000 cap on total damages in medical malpractice actions).

Here, the trial court instructed the jury, without objection and at Dr. Drezga's request, that they were to award Athan Montgomery "such damages, if any, that you find from a preponderance of the evidence, will fairly and adequately compensate him for the injury and damage sustained." (R. 294.) The jury awarded Athan \$1,250,000 in general (noneconomic) damages. Dr. Drezga does not claim that this award was the result of passion or prejudice or that it was anything other than the amount that would "fairly and adequately compensate" Athan for the injuries he has sustained.

The determination of damages is part of the "substance of the common law right of trial by jury" guaranteed by the constitution. *See Condemarin*, 775 P.2d at 366 (per Durham, J.) (quoting *Boyd v. Bulala*, 672 F. Supp. 915, 921 (W.D. Va. 1987), *amended*, 678 F. Supp. 612 (W.D. Va. 1988), *aff'd in part, rev'd in part*, 877 F.2d 1191 (4th Cir. 1989), which in turn was quoting *Colgrove v. Battin*, 413 U.S. 149, 157 (1973)). *Accord Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 258 (Kan. 1988), *disapproved on other grounds by Bair v. Peck*, 811 P.2d 1176, 1191 (Kan. 1991). The role of determining damages has always been that of the jury. *See, e.g., Barry v. Edmunds*, 116 U.S. 550, 565 (1886) ("nothing is better settled than that, in . . . actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict"); *Reuwer v. Hunter*, 684 F. Supp. 1340, 1344 (W.D. Va. 1988) ("There can be no doubt that the determination of damages was the role of the jury at common law"); *Lakin v. Sencon Prods., Inc.*, 987 P.2d

463, 470 (Or. 1999) (“the assessment of damages was a function of a common law jury”); *Paul v. Kirkendall*, 1 Utah 2d 1, 261 P.2d 670, 671 (1953) (“The amount of the verdict is ordinarily a matter exclusively for the jury”); *Kennedy v. Oregon Short-Line R. Co.*, 18 Utah 325, 54 P. 988, 989 (1898) (“the amount of damages is a question of fact, to be found by the jury from all the evidence in the case”); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 721 (the “constitutional magnitude of the jury’s fact-finding province” includes “its role to determine damages”), *amended on other grounds*, 780 P.2d 260 (Wash. 1989); *Fabrigas v. Mostyn*, 96 Eng. Rep. 549, 549 (C.P. 1774) (“the jury (not the Court) are to estimate the adequate satisfaction” in actions to recover damages “for any personal wrong”); *Townsend v. Hughes*, 86 Eng. Rep. 994, 994-95 (C.P. 1677) (“in civil actions the plaintiff is to recover by way of compensation for the damages he hath sustained, and the jury are the proper judges thereof. . . . [B]y the law the jury are judges of the damages”); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 6, at 24 (1935) (“The amount of the damages . . . from the beginning of trial by jury, was a ‘fact’ to be found by the jurors”); 3 WILLIAM BLACKSTONE, COMMENTARIES *398 (“where damages are to be recovered, a jury must be called in to assess them; unless the defendant, to save charges, will confess the whole damages laid in the declaration”). This Court long ago recognized:

In cases of tort, like the one at bar, it is one of the fundamental principles of the law that the injured party is entitled to recover fair and adequate compensation, “and in the absence of allegations for special damages he is entitled to recover all the damages which are the necessary

and usual result of the injuries described in the complaint.” The amount to be awarded in a particular case is a question to be determined by the jury according to the particular facts and circumstances, under appropriate instructions given by the court.

Rosenthal v. Harker, 56 Utah 113, 189 P. 666, 667 (1920).

This is particularly true of noneconomic damages, the determination of which “is particularly suited to the jury since it alone may form a collective opinion concerning such an imprecise measurement” in a particular case. Stephen K. Meyer, Comment, *The California Statutory Cap on Noneconomic Damages in Medical Malpractice Claims: Implications on the Right to a Trial by Jury*, 32 SANTA CLARA L. REV. 1197, 1220 (1992). As another court has explained:

Pain and suffering have no known dimensions, mathematical or financial. There is no exact relationship between money and physical or mental injury or suffering, and the various factors involved are not capable of proof in dollars and cents. For this very practical reason the only standard for evaluation is such amount as reasonable persons estimate to be fair compensation for the injuries suffered, and the law has entrusted the administration of this criterion to the impartial conscience and judgment of jurors, who may be expected to act reasonably, intelligently and in harmony with the evidence.

Kansas Malpractice Victims, 757 P.2d at 260 (quoting *Domann v. Pence*, 325 P.2d 321, 325 (Kan. 1958)).

The exclusive role of the jury in determining damages is further illustrated by the rule that, unless the constitutional right to a jury trial has been waived, an appellate court does not have the power to assess damages and enter judgment but can only remand the case for another trial. See, e.g., *North Side Sash & Door Co. v. Goldstein*, 121 N.E. 563,

564 (Ill. 1918) (citations omitted); *Bastian v. King*, 661 P.2d 953, 957 (Utah 1983) (where the findings did provide a proper basis for a damage award, the court had “no alternative but to remand the case for the entry of findings which support the damage award, or if the award is erroneous for a redetermination of damages”); *Paul*, 261 P.2d at 671 (“If inadequacy or excessiveness of the verdict . . . shows a disregard by the jury of the evidence or the instructions of the court as to the law applicable to the case as to satisfy the court that the verdict was rendered under such disregard or misapprehension of the evidence or influence of passion or prejudice, then the court may exercise its discretion in the interest of justice and grant a new trial”). In fact, the right to a jury trial prevents the legislature from withdrawing private tort claims from the judicial system. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51-52 (1989).

By limiting recovery, the damage cap “substantially diminishes the role of the jury in determining damages, *at least in cases such as this, where the proven damages far exceed the amount of the cap.*” *Condemarin*, 775 P.2d at 365-66 (per Durham, J.) (quoting *Boyd*, 672 F. Supp. at 919-20 (emphasis added) (further citations omitted)). *See also Sofie*, 771 P.2d at 712 (Washington’s cap on noneconomic damages in tort actions violated the state constitutional right to a jury trial because it “interferes with the jury’s traditional function to determine damages”). The statute requires the trial judge “summarily to disregard the jury’s assessment of the amount of noneconomic loss, that species of damages lying most peculiarly within the jury’s discretion.” *Moore v. Mobile*

Infirmity Ass'n, 592 So.2d 156, 163 (Ala. 1991). By arbitrarily modifying a jury's damage award without regard to the particular facts of the case, the damage cap undermines the jury's function. In fact, it "directly changes the outcome of a jury determination. The statute operates by taking a jury's finding of fact and altering it to conform to a predetermined formula." *Sofie*, 771 P.2d at 720. Such an arbitrary limit on the damages awarded by a jury seriously infringes the constitutional right to a jury trial. *See Condemarin*, 775 P.2d at 365 (per Durham, J.). Section 78-14-7.1 therefore violates article I, section 10 of the Utah Constitution.¹²

V. The Damage Cap Violates the Separation-of-Powers Provision of the Utah Constitution, Article V, Section 1.

Article V, section 1 of the Utah Constitution provides:

¹² For decisions from other jurisdictions invalidating damage caps on the grounds that they violate the constitutional right to a jury trial, see, e.g., *Ray v. Anesthesia Assocs.*, 674 So.2d 525, 526 (Ala. 1995) (\$1 million cap on punitive damages in a wrongful death action against a health-care provider); *Moore*, 592 So.2d at 164 (\$400,000 cap on noneconomic damages in medical malpractice cases); *Kansas Malpractice Victims*, 757 P.2d at 258-60 (\$250,000 cap on noneconomic losses in medical malpractice cases); *Jeanne v. Hawkes Hosp. of Mt. Carmel*, 598 N.E.2d 1174, 1180 (Ohio Ct. App.) (\$200,000 cap on general damages in medical malpractice cases), *appeal dismissed*, 579 N.E.2d 210 (Ohio 1991); *Lakin*, 987 P.2d at 467, 475 (\$500,000 cap on noneconomic damages in bodily injury cases); *Sofie*, 771 P.2d at 712 (cap on noneconomic damages, determined as a factor of the plaintiff's average annual wage and life expectancy, in personal injury actions). *See also Smith v. Department of Ins.*, 507 So.2d 1080, 1088-89 (Fla. 1987) (because a \$450,000 cap on noneconomic damages in tort cases arbitrarily caps the jury verdict, the plaintiff is not "receiving the constitutional benefit of a jury trial as we have heretofore understood that right").

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

The constitution forbids one department of government from exercising *any* power properly attached to another, except when expressly authorized by the constitution. The constitution entrusts the judicial power to the judiciary and not to the legislature. *See, e.g., In re Handley's Estate*, 15 Utah 212, 49 P. 829 (1897) (the constitution does not entrust any part of the state's judicial power to the legislature, with one exception--when the state senate is sitting as a court of impeachment). *See also Kimball v. City of Grantsville*, 19 Utah 368, 57 P. 1, 4 (1899) (each of the three departments of government is absolute within its sphere, and the apportionment of power to one department implies that neither of the other departments may exercise it).

The judicial power is “the power to hear and determine controversies between adverse parties and questions in litigation.” *Timpanogos Planning & Water Management Agency v. Central Utah Water Conservancy Dist.*, 690 P.2d 562, 569 (Utah 1984) (quoting *Citizens' Club v. Welling*, 83 Utah 81, 27 P.2d 23, 26 (1933)). It is the power to hear and determine justiciable controversies between litigants as they arise, on the facts and the applicable law. *See id.* (citations omitted). It includes the power to hear and decide issues of fact. *E.g., Holmes v. Morales*, 924 S.W.2d 920, 923 (Tex. 1996) (citations omitted). It necessarily involves “the exercise of judgment and discretion in

the determination of questions of right in specific cases affecting the interests of persons or property.”” *Smith v. Goodwill Indus. of the Miami Valley, Inc.*, 720 N.E.2d 203, 209 (Ohio Ct. App. 1998) (citation omitted), *appeal dismissed*, 707 N.E.2d 515 (Ohio 1999). The legislature cannot dictate to the judicial branch the result to be reached in a particular case. *See, e.g., Sofie v. Fibreboard Corp.*, 771 P.2d 711, 721 (Wash. 1989). It is the judiciary’s function to decide cases and controversies.

The power to fix the amount of damages to which an injured party is entitled is a judicial power. *See, e.g., Ray v. Parker*, 101 P.2d 665, 672-73 (Cal. 1940) (citing *Jersey Maid Milk Prods. Co. v. Brock*, 91 P.2d 577, 594 (Cal. 1939)); *County Council for Montgomery County v. Investors Funding Corp.*, 312 A.2d 225, 255 (Md. 1973) (Barnes, J., concurring in part, dissenting in part) (“Surely, it is a judicial power and function to fix the amount of damages resulting from tortious action”) (citations omitted). Similarly, the power to assure that awards are rationally related to actual damages “is a power properly attached to the judiciary and not the legislative branch of government.” *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988).

Section 78-14-7.1 is an unconstitutional usurpation of judicial power by the legislature. The legislature has usurped the functions of both the jury and the court by imposing a one-size-fits-all legislative remittitur, without regard for the facts of the case and the evidence. *Cf. Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 260 (Kan. 1988) (a medical malpractice damage cap “is, in effect, a statutory compulsory,

preestablished remittitur”). “For over a century it has been a traditional and inherent power of the judicial branch of government to apply the doctrine of remittitur, in appropriate and limited circumstances, to correct excessive jury verdicts.” *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1079 (Ill. 1997) (citations omitted). Remittitur is “a judicial determination” of recoverable damages. *Carter v. Kirk*, 628 N.E.2d 318, 324 (Ill. App. Ct. 1993). It is the result of a legal conclusion that the jury’s award of damages was wholly unsupported by the evidence, was obviously the result of passion or prejudice or shocked the *judicial* conscience. *See, e.g., Sofie*, 771 P.2d at 721. “The Legislature cannot make such case-by-case determinations.” *Id.*

A legislative remittitur is “fundamentally different” from a judicial remittitur. *Id.* The damage cap invades the province of the judiciary by depriving courts of their discretion to assess damages based on the particular facts of each case. “The legislature cannot direct the judiciary how cases shall be decided.” *Agran v. Checker Taxi Co.*, 105 N.E.2d 713, 715 (Ill. 1952). “[T]he rendition of judgments by the courts is one of the most important inherent judicial powers of the courts, and may not be surrounded by legislative rules regulating such determinations.” *Id.*

Even courts are generally powerless to reduce a jury’s award of damages without the consent of the affected party. If the plaintiff refuses to accept a remittitur, the court must generally order a new trial. *See, e.g., Best*, 689 N.E.2d at 1080; *Stamp v. Union Pac. R.R. Co.*, 5 Utah 2d 397, 303 P.2d 279, 283 (1956) (Crockett, J., concurring

specially); *id.* at 285 (Henriod, J., concurring in result); *Sofie*, 771 P.2d at 721. If there is evidence to support the jury's award of damages, even this court "is not at liberty, under the constitution of this state, to review alleged errors" *Kennedy v. Oregon Short-Line R. Co.*, 18 Utah 325, 54 P. 988, 989 (1898).

By fixing the amount of noneconomic damages a plaintiff may recover in medical malpractice cases, the legislature has exercised judicial power in violation of article V, section 1 of the Utah Constitution. Section 78-14-7.1 therefore violates the separation of powers under the Utah Constitution. *See also Best*, 689 N.E.2d at 1080-81 (a \$500,000 cap on noneconomic damages in personal injury cases violated the separation of powers doctrine by invading the power of the judiciary to limit excessive damage awards based on the specific circumstances of the award).

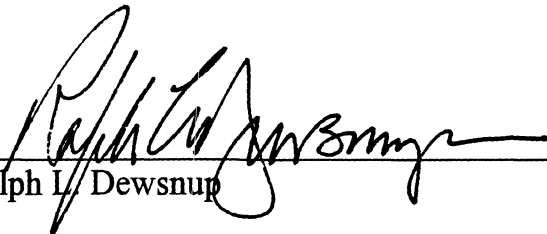
CONCLUSION

As Chief Justice John Marshall long ago said, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). In passing the Malpractice Act's damage cap, the legislature breached its duty to the public. The Malpractice Act's damage cap, UTAH CODE ANN. § 78-14-7.1, is unconstitutional. The cap violates article I, sections 7, 10, 11 and 24, as well as article V, section 1, of the Utah

Constitution. Therefore, the court should reverse the trial court's decision to limit the amount of the judgment, should vacate the amended judgment entered on July 16, 2001 (R. 786-88), and should reinstate the original judgment entered on December 19, 2000 (R. 370-72).

DATED this 17 day of May, 2002.

DEWSNUP, KING & OLSEN



Ralph L. Dewsnup

(Original signature)

CERTIFICATE OF SERVICE

This is to certify that on the 17 day of May, 2002, I caused two true and correct copies of the foregoing to be served by U.S. mail, first-class postage prepaid, on each of the following:

Michael D. Zimmerman
SNELL & WILMER
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101

David W. Slagle
Brian P. Miller
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145

Brent A. Burnett
Assistant Attorney General
Mark L. Shurtleff
Utah Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856

A handwritten signature in black ink, appearing to read "Raphael D. Montgomery", is written over a horizontal line.

(Original signature)

ADDENDUM

CONSTITUTION OF UTAH

Article I

Section 7.

No person shall be deprived of life, liberty or property, without due process of law.

Section 10.

In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

Section 11.

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Section 24.

All laws of a general nature shall have uniform operation.

Article V

Section 1.

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

UTAH CODE ANNOTATED (1996)

Section 78-14-7.1. Limitation of award of noneconomic damages in malpractice actions.

In a malpractice action against a health care provider, an injured plaintiff may recover noneconomic losses to compensate for pain, suffering, and inconvenience. In no case shall the amount of damages awarded for such noneconomic loss exceed \$250,000. This limitation does not affect awards of punitive damages.