Reforming Tort Reform: Is There Substance to the Seventh Amendment?

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REFORMING TORT REFORM: IS THERE SUBSTANCE TO THE SEVENTH AMENDMENT?

To date, the United States Supreme Court has artfully avoided any pronouncement of what substantive jury functions are "preserved" by the right to trial by jury in suits at common law, as guaranteed by the seventh amendment to the Constitution. In general terms, the Court has spoken grandly of the seventh amendment as a "fundamental guarantee of the rights and liberties of the people," of which "any seeming curtailment . . . should be scrutinized with the utmost care." However, the Court has yet to define in specific terms which substantive functions are so inherent to trial by jury, so elementary and necessary, that the seventh amendment preserves them from judicial or legislative encroachment. The Court's pronouncements concerning inherent jury functions speak to procedure only: a jury of six persons is constitutionally permissible; unanimity of verdict is required; and disputed questions of fact must be submitted to the jury. Most notable, however, is the Court's failure to define in clear terms what constitutes a disputed "question of fact," upon which a jury must rule in the absence of a waiver of a litigant's seventh amendment rights.

In the modern era of "tort reform," this uncertainty has raised the question of whether legislatures may properly apply limitations in the form of

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1. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII.
6. Baylis v. Travellers' Ins. Co., 113 U.S. 316, 321 (1885) (stating that trial of issues of fact without the intervention of a jury is permissible only where the parties waive their right to jury trial); see also Hodges. 106 U.S. at 412 ("It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done is secured by the Constitution of the United States.").
"damage caps" to the amount of damages a tort plaintiff may recover without intruding upon the function of the jury as trier of fact. Stated differently, the question is whether imposition of damage caps violates the doctrine of separation of powers as impermissible legislative interference with the function of the judiciary. 7

Underlying this central issue is the question of whether legislative empowerment to create and abolish causes of action equates to an unlimited license to modify common law causes of action, or whether the seventh amendment constitutionally limits such power in some fashion. If the legislative power is so limited, it raises a further question concerning the manner and extent of such limitation. If the legislative power is not so limited, it is necessary to question what procedural devices may be used in applying these damage-limiting provisions. As of January 1989, such damage-limiting provisions, in one form or another, were in effect in at least seventeen states. 8

The Amicus Curiae Committee of The Association of Trial Lawyers of America (ATLA) recently indicated that it intends to challenge damage caps based upon the

7. See Boyd v. Bulala, 647 F. Supp. 781, 790 (W.D. Va. 1986), recon. denied, 672 F. Supp. 915 (W.D. Va. 1987), appeal filed, Nos. 88-2055, 88-2056 (4th Cir. Mar. 1, 1988). In Boyd, Judge Michael saw the question of the extent of a plaintiff's injury, hence the damages to which he is entitled, as a question of fact reserved to the sound discretion of the jury. Id. at 788. The court held that the Virginia legislature's imposition of a medical malpractice damage cap, VA. CODE ANN. § 8.01-581.15 (Supp. 1988), intruded upon this function and thus violated the separation of powers between the legislature and the judiciary. Boyd, 647 F. Supp. at 790.

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seventh amendment or comparable state jury trial provisions,9 thus guaranteeing repeated litigation of these questions in various jurisdictions in the immediate and foreseeable future.

Because the Supreme Court has held that the seventh amendment does not apply to the states,10 the question of whether the seventh amendment bars damage caps might appear to be confined to federal law or those cases which find their way into the federal courts. The constitutions of 48 states, however, have civil jury trial provisions roughly analogous in form and substance to the seventh amendment.11 These state jury trial provisions are thus amenable to seventh amendment analysis.12

This Comment examines the scope of legislative power in light of seventh amendment jurisprudence as it directly applies to the federal government and, by analogy, to the states. In addition to examining the historical context and purposes of the seventh amendment, this Comment explores, in relation to the seventh amendment, the power of legislatures to modify, as opposed to the power to create or abolish, common law forms of action. Next, this Comment examines the applicability of the seventh amendment to statutory and treaty-created damage-limiting provisions, statutory provisions that create civil penalties, and the various procedural devices by which a damage award is judicially determined, altered or foreclosed. Finally, this

Comment concludes that reserving to the jury the determination of the quantum of damages in a common law action is the historically correct interpretation of the seventh amendment, and that judicial cognizance of a legislative power to limit the function of the jury in such an action by imposing damage caps is ill-founded and offensive to the letter, the spirit, the purpose, and the meaning of the seventh amendment.

I. INSURING THE INSURERS

The past fifteen years have seen the birth and continuance of a perceived "insurance crisis" which threatens the availability of essential health services. Some health care providers, in response to increasing premiums for malpractice insurance, have either discontinued or threatened to discontinue particularly high-risk medical services such as obstetrics and emergency medicine. Insurers argue that an explosion in tort litigation, marked by geometric increases both in the number of cases filed and in the amounts of damages awarded, underlies the crisis and makes increases in insurance premiums necessary. Accordingly, the insurers have vigorously lobbied legislatures for packages of alterations to state tort laws which generically come under the heading of "tort reform."

The provisions falling within the realm of tort reform include shortening statutes of limitation, limiting or eliminating minority status or other disabilities that toll the running of such statutes, creating medical malpractice review panels which screen or arbitrate medical malpractice claims, creating state-operated excess insurance funds, modifying or eliminating collat-

14. See id. An assessment of the merits of competing claims regarding the existence of such an "insurance crisis," or the decrease in or lack of certain services in response to this "crisis," is beyond the scope of this Comment.
15. Id.
17. See, e.g., N.C. GEN. STAT. § 1-15(c) (1983) (instituting a two-year statute of limitations coupled with four-year statute of repose in medical malpractice cases).
18. See, e.g., N.C. GEN. STAT. § 1-17(b) (1983) (eliminating minority status as a circumstance which tolls the running of the statute of limitations in medical malpractice actions). Formerly, North Carolina followed the general rule holding that the statute of limitations does not begin to run against the claim of an infant plaintiff until he or she reaches the age of majority. Cf. VA. CODE ANN. § 8.01-229 A. 1. (Supp. 1988) (statute of limitations does not run against claim of infant or incompetent).
eral source rules, modifying or eliminating rules pertaining to joint and several liability, prohibiting a plaintiff from demanding or suggesting a dollar amount in the ad damnum clause of his complaint, requiring damage awards in excess of a statutory amount to be paid in the form of a structured annuity, and limiting the amount of damages that a fact-finder may award. Within this latter category, "damage caps" fall into three basic subcategories: across-the-board limitations on the total recovery permissible in certain tort actions, usually medical malpractice; limitations upon the amount of noneconomic damages which may be awarded in such actions; and limitations upon noneconomic damages which a jury may award in any tort action. As of January 1989, at least seventeen states provided for some form of limitation on recoverable tort damages, of which at least nine apply only to medical malpractice claims.

Since the introduction of damage caps in the 1970's, victims of grievous torts, through their attorneys, have vigorously assailed such limitations in the courts, basing their arguments on federal due process, equal protection.

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21. See, e.g., FLA. STAT. ANN. § 627.7372 (1987) (applying to motor vehicle personal injury or wrongful death claims only). Under the traditional "collateral source" rule, evidence of compensation a plaintiff had received, or which was paid on his behalf, from collateral sources such as medical or disability insurance, workers' compensation, or employment or social welfare benefits, was inadmissible and such payments could not be used to offset the pecuniary liability of a defendant. By statute, some jurisdictions have provided for the admission of such evidence and the deduction of such payments from a plaintiff's award of damages. While this obviously avoids the possibility of "double recovery" on the part of a plaintiff, it creates a possibility of inadequate recovery unless accompanied by legislation which bars the subrogation claims of such collateral sources. Otherwise, a plaintiff may have his award reduced by the amount already paid by an insurer only to have the insurer then demand reimbursement from the damage award.

22. See, e.g., IND. CODE ANN. § 16-9.5-2-2 (Burns 1983) (limiting exposure of each joint tortfeasor in medical malpractice cases to $100,000, regardless of the size of the overall award).

23. See, e.g., UTAH CODE ANN. § 78-14-7 (1987) (medical malpractice complaint may demand "reasonable damages" only).


25. See, e.g., S.D. CODIFIED LAWS ANN. § 21-3-11 (1987) ($1,000,000 total available recovery in medical malpractice cases).

26. See, e.g., VA. CODE ANN. § 8.01-581.15 (Supp. 1988) ($1,000,000, permissible recovery in medical malpractice cases).

27. See, e.g., UTAH CODE ANN. § 78-14-7.1 (1953) ($250,000, noneconomic damages in medical malpractice actions).


29. See supra note 8.

30. See, e.g., Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, appeal dismissed, 474 U.S. 892 (1985) (holding that due process is not offended so long as the legislation bears a rational relationship to a legitimate state interest); Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976) (rejecting argument that due process requires a quid pro quo where a right enjoyed at common law is legislatively abolished), cert.
tion,31 and seventh amendment grounds,32 as well as on state constitutional provisions.33 To date, the highest courts of five states have upheld such statutory caps34 while nine have stricken them as unconstitutional.35 Until re-


32. See, e.g., Boyd v. Bulala, 647 F. Supp. 781 (1986), recon. denied, 672 F. Supp. 915 (W.D. Va. 1987), appeal filed, Nos. 88-2055, 88-2056 (4th Cir. Mar. 1, 1988). Courts have invalidated damage caps on the basis of equal protection, due process, or on state constitutional grounds. See Jones, 97 Idaho 859, 555 P.2d 399; Haem, 756 P.2d 780; Carson, 120 N.H. 925, 424 A.2d 825; Arneson, 270 N.W.2d 125; Simon, 3 Ohio Op. 3d 164, 355 N.E.2d 903. See also cases cited infra note 33. However, plaintiffs have argued, with little success, that mandatory submission of a plaintiff's claim to a medical malpractice review or arbitration panel before the plaintiff may proceed in the courts constitutes a denial of the plaintiff's right to trial by jury. See Prendergast, 199 Neb. at 97, 256 N.W.2d at 657 (panel review upheld); Johnson, 273 Ind. at 374, 404 N.E.2d at 585 (same); Strykowski, 81 Wis. 2d at 491, 261 N.W.2d at 434 (same). But see Wright v. Central DuPage Hosp., 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (empowerment of review panel to make conclusions of law and fact held an unconstitutional intrusion into the function of the judiciary; hence, mandatory submission of a plaintiff's claim to such a panel denied plaintiff's right to trial by jury as secured by the state constitution); Arneson, 270 N.W.2d at 125 (holding that statutory provision requiring medical malpractice plaintiff to proceed in a separate non-jury action against the state patient trust fund, where he seeks to recover sums in excess of a defendant's maximum statutory liability limit of $100,000, violative of state constitutional guarantee of right to trial by jury).

Boyd marks the first case in which the argument was successfully raised that determination of the quantum of a plaintiff’s damages is a question of fact reserved to the sound discretion of the jury. 647 F. Supp. at 788. As of January, 1989, it is the only federal decision addressing the constitutionality of medical malpractice damage caps. The court based its findings upon both seventh amendment jurisprudence and the civil jury trial provision of the Virginia Constitution, which it found to be at least as expansive as that of the seventh amendment. Id. at 789.


34. See Fein, 38 Cal. 3d at 137, 695 P.2d at 665, 211 Cal. Rptr. at 368 (no violation of equal protection or due process where California statute is rationally related to legitimate state interest; tort victim has no basic property right in a particular measure of damages); Johnson, 273 Ind. at 374, 404 N.E.2d at 585 (no violation of equal protection, due process, right to trial by jury, or Indiana Constitution's "open courts" provision); Prendergast, 199 Neb. at 97, 256...
cently, attacks upon damage caps as violative of federal or state jury trial provisions have centered upon state medical malpractice review panels and the requirement that a plaintiff argue his claim before such a panel before proceeding in court. These attacks have largely been unsuccessful. However, in 1986, *Boyd v. Bulala*, a Virginia federal trial court opinion, recognized a new line of argument which the plaintiffs' bar has found appealing. *Boyd* held that the determination of the quantum of damages in a tort action is a question of fact inherently within the province of the jury and thus falls within the protection of the seventh amendment or comparable state jury trial provisions. This holding inevitably leads to the corollary

N.W.2d at 657 (Nebraska statutory classification of medical malpractice plaintiffs not discriminatory where it may be reasonably justified by any conceivable set of facts); *Strykowski*, 81 Wis. 2d at 491, 261 N.W.2d at 434 (no violation of equal protection or procedural due process; Wisconsin statute did not create unlawful delegation of judicial authority and did not impair right to trial by jury); *Etheridge v. Medical Center Hosps.*, 376 S.E.2d 525 (1989). See also infra note 40.

35. As of February 1989, the nine states whose highest courts have struck down damage caps are Florida, Kansas, Idaho, Illinois, Montana, New Hampshire, North Dakota, Texas, and Wyoming. See *Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987); *Bell*, 243 Kan. at 333, 757 P.2d at 251 (due process requires right to remedy; quid pro quo necessary where remedy is limited by Kansas statute); *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976) (statutory classification treating medical malpractice plaintiffs differently from other tort plaintiffs bears no fair and substantial relationship to a legitimate state objective), cert. denied, 431 U.S. 914 (1977), on remand, Nos. 55,527, 55,586 (4th Dist. Idaho Nov. 3, 1980); *Wright*, 63 Ill. 2d at 313, 347 N.E.2d at 736 (legislation constituted a special law in violation of the equal protection clause of the Illinois Constitution); *White*, 203 Mont. at 363, 661 P.2d at 1272 (limitation of liability of state or subdivisions thereof to economic damages of $300,000 held violative of Montana Constitution's guarantee of remedy for every injury); *Carson*, 120 N.H. at 925, 424 A.2d at 825 (classification limiting rights of medical malpractice plaintiffs not substantially related to legitimate governmental interest as required by New Hampshire constitution); *Arneson*, 270 N.W.2d at 125 (medical malpractice limitations arbitrary and violative of North Dakota Constitution's due process provision); *Lucas*, 757 S.W.2d at 687 (legislation violative of Texas "open courts" constitutional provision); *Hoem*, 756 P.2d at 780 (medical malpractice legislation violative of Wyoming equal protection guarantee; not rationally related to legitimate state interest).

Additionally, damage caps have been invalidated at the trial court level in two other states. See *Boyd*, 647 F. Supp. at 781 (quantum of damages is a question of fact reserved to the jury; damage-limiting provision constitutes impermissible legislative intrusion into jury function in violation of the seventh amendment and jury trial provision of Virginia Constitution); *Simon*, 3 Ohio Op. 3d at 164, 355 N.E.2d at 903 (damage limitation violative of state and federal equal protection guarantees; compulsory arbitration requirement violates right to trial by jury).

36. See cases cited supra note 32.

37. Id.


40. While *Boyd* is presently on appeal and thus of questionable vitality, its analysis and arguments are likely to be raised again in other jurisdictions in the months and years to come. *Id.* This is especially so in light of the recent decision of the Virginia Supreme Court in Ether-
that legislative attempts to limit damage awards violate the jury trial provision in question and are impermissible.

The counterargument denies that the determination of the amount of damages is inherently a jury function preserved by the seventh amendment or comparable state provision.\(^4\) It asserts, and at least one court has agreed, that legislatures may limit recoverable damages in such a fashion while retaining the common law nature of the plaintiff's cause of action.\(^4\) Proponents of this view correctly point out that other statutory compensation schemes, such as workers' compensation statutes;\(^4\) the Price-Anderson Act,\(^4\) which sets a cap on recoverable damages arising from nuclear accidents; and certain treaties,\(^4\) contain damage limitations. The Supreme Court has left unresolved a collateral question: whether a legislature must provide a quid pro quo\(^4\) when it seeks to limit recoverable damages in a

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Because the Montreal Agreement amends and supplements the provisions of the Warsaw Convention, the two are generally read together. References herein to the Warsaw Convention should be read, unless otherwise distinguished, to refer to the Warsaw Convention as supplemented by the Montreal Agreement.

46. The concept of quid pro quo was first introduced in New York Cent. R.R. Co. v. White, 243 U.S. 188 (1917). In upholding the New York state workmen's compensation law, which abrogated the common law of torts with regard to certain job-related injuries in favor of
common law right of action or replace the action with a statutory compensation scheme.

Finally, various procedural devices place the determination of the quantum of damages within the discretion of the court or remove the damage issue from a jury's consideration altogether. These devices include default judgment, remittitur as a condition of denial of motion for new trial, assessment of civil penalties provided by statute, directed verdict, and judgment notwithstanding the verdict. The mere fact that these proce-

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a statutory compensation scheme, the Court stated: "[I]t perhaps may be doubted whether the State could abolish all rights of action, on the one hand, or all defenses on the other, without setting up something adequate in their stead." Id. at 201. The White Court did not resolve the question of whether such a quid pro quo is constitutionally required where common law rights are abrogated by statute, nor has it been resolved to date. See Fein v. Permanente Medical Group, 474 U.S. 892 (1985) (White, J., dissenting). Within the context of damage caps, plaintiffs continue to make the argument that a quid pro quo is required; lower courts have divided on the subject. See infra note 109.

The most common of such statutes in derogation of common law rights are those involving workers' compensation, whereby an employer is strictly liable for job-related injuries and may not raise the traditional tort defenses of contributory negligence, assumption of risk, or the "fellow servant" rule. See, e.g., White, 243 U.S. at 193. The injured employee, on the other hand, is limited in his recovery to compensation set forth by statute. Id. Whether required or not, the quid pro quo is present where the employee is guaranteed a reasonable, albeit limited, recovery. In return for such limitation, the employee need not affirmatively prove negligence on the part of the employer, nor may the employer avail himself of the traditional negligence defenses.

It appears entirely plausible that the reason the Court has not decided whether a quid pro quo is constitutionally required is that most, if not all, statutes which abrogate common law rights of recovery in tort contain such a quid pro quo, usually in the form of strict liability or guarantee of recovery. Thus, the Court has not had to address the question. See infra notes 103-09 and accompanying text.


48. See Fein, 474 U.S. at 892-95 (White, J., dissenting) (arguing that this question, which was left open in the Court's decision in Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978), presented a substantial federal question which should be resolved by the Court, thus justifying retention of Court's jurisdiction); see also infra notes 107-09 and accompanying text.


52. See Fed. R. Civ. P. 50(a); see also Galloway v. United States, 319 U.S. 372 (1943).

dures exist within the scheme of federal civil procedure arguably strengthens the argument that jury determination of damages in common law actions is not so firmly entrenched in seventh amendment jurisprudence as to be inviolate. Proponents of damage caps may argue that a legislature's election to limit recoverable damages to promote what it deems to be a valuable social end is yet another instance where the seventh amendment does not require a jury trial. Damage cap proponents may even argue that the right of trial by jury does not encompass a jury determination of the quantum of damages in any instance; thus, the determination may be removed from a jury's consideration at the whim of the legislature.

II. "IN SUITS AT COMMON LAW . . . THE RIGHT OF TRIAL BY JURY SHALL BE PRESERVED."\textsuperscript{54}

The seventh amendment is unique in that, by its use of the term "preserved," it incorporates an external body of law governing trial by jury that existed at some time in the past. The Supreme Court has held that the term "preserved" refers to the "substance of right to a jury trial which existed under English common law when the amendment was adopted."\textsuperscript{55} Thus, whether a legislature may constitutionally limit the amount of damages that may be awarded in a common law action depends on whether jury assessment of the quantum of damages in a tort action was part of the "substance" of English common law in 1791 and, if so, whether it was intended to be preserved by the enactment of the seventh amendment.

Assessment of the quantum of damages as a function of the jury in actions at law was deeply entrenched in the common law of England at the time the seventh amendment was adopted.\textsuperscript{56} The common law required a jury to assess a plaintiff's damages whenever the amount sued for was an unliquidated or uncertain sum.\textsuperscript{57} "But the interlocutory judgments, most usually spoken of, are those incomplete judgments, whereby the right of the plaintiff is indeed established, but the quantum of damages sustained by him is not ascertained: which is a matter that cannot be done without the intervention of a jury."\textsuperscript{58}

With few exceptions,\textsuperscript{59} the main text of the Constitution secures no indi-

\textsuperscript{54} U.S. CONST. amend. VII.
\textsuperscript{56} 3 W. BLACKSTONE, COMMENTARIES *397.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} See, e.g., U.S. CONST. art. I, § 9 (prohibition of bills of attainder and ex post facto
vidual rights or liberties, but focuses upon defining the powers of government. The failure of the Constitutional Convention to include a bill of rights caused the anti-federalists to view the Constitution as pernicious and to oppose its ratification. The anti-federalist arguments opposing ratification of the Constitution emphasized its failure to provide for a right to a civil jury trial. The circumvention of the civil jury trial by the early colonial administrators' extensive use of vice-admiralty courts, one of the specific grievances enumerated in the Declaration of Independence, undoubtedly figured in the anti-federalists' concerns.

The colonists' insistence upon a right to a civil jury trial stems from a belief that occasionally judges and juries reach different results. Certainly a jury, applying the proper rule of law, could serve as a check on a corrupt judge who may apply an improper rule. While this checking power is the only justification for a civil jury trial that Alexander Hamilton found persuasive, there is evidence that the anti-federalists contemplated, at least in the context of cases of oppressive taxation, that a jury could step beyond the black-letter rule of law and serve as a check upon oppressive legislation. Put another way, a jury could, in appropriate circumstances, properly disregard the law in arriving at its determination. The anti-federalists, who were largely responsible for the implementation of the seventh amendment, did not contemplate that the civil jury trial provided a procedurally efficient means of resolving disputes and did not intend that it do so. Instead, the anti-federalists envisioned that a civil jury trial would function primarily to reach results which a judge could not or would not reach.

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61. Parklane, 439 U.S. at 342 (Rehnquist, J., dissenting); see also Wolfram, supra note 60, at 667-73.

62. The Declaration of Independence para. 1 (U.S. 1776); see also Parklane, 439 U.S. at 340 (Rehnquist, J., dissenting).

63. See Wolfram, supra note 60, at 671.

64. Id. at 709-10 (citing THE FEDERALIST No. 83, at 563-64 (A. Hamilton) (J. Cooke ed. 1961)).

65. Id. at 705-08.

66. Id. at 671. "The inconveniences of jury trial were accepted precisely because in important instances, through its ability to disregard substantive rules of law, a jury would reach a result that the judge could not or would not reach." Id.

67. Professor Wolfram sets forth as a secondary reason for the anti-federalists' support of the seventh amendment the necessity that jurors observe the demeanor of witnesses in the
The Bill of Rights was introduced into the first Congress in 1789. The seventh amendment became law on December 15, 1791. While the Supreme Court has held that the seventh amendment is not binding upon the states, almost all states have comparable constitutional provisions for jury trial in civil matters. These state provisions generally fall into three categories. Most clearly analogous to the seventh amendment, insofar as they refer to a body of law existing at the time of their adoption, are those which mandate that the right to trial by jury "shall remain inviolate." While less clearly analogous, the two remaining characterizations, that the right of trial by jury "shall be inviolate," and that this right "is held to be sacred," are also susceptible to seventh amendment analysis to the extent that the analysis addresses the substance of what constitutes trial by jury.

In federal courts, the right of trial by jury prevails in actions at, or analogous to, common law based upon diversity of citizenship jurisdiction, state law to the contrary notwithstanding. Further, the right to a jury trial may extend to causes of action created by statute if the causes of action are analogous to actions at common law as they were known in 1791, or if the statute expressly or impliedly provides the right.

III. "[J]URIES MUST ANSWER TO QUESTIONS OF FACT AND JUDGES TO QUESTIONS OF LAW."

Until the perceived insurance crisis of recent times, no one has seriously suggested that assessment of the amount of a plaintiff's damages in a common law case was taken in the form of deposition. Id. at 671 n.86.

68. U.S. CONST. amends. I-X.
71. See supra note 11. All states, with the exception of Colorado and Louisiana, have constitutional provisions guaranteeing a civil jury trial.
73. See, e.g., OKLA. CONST. art. II, § 19 ("shall be and remain inviolate"); S.C. CONST. art. I, § 14 ("shall be preserved inviolate").
74. See, e.g., VT. CONST. ch. I, art. 12 ("ought to be held sacred"); VA. CONST. art. I, § 11 (same).
77. See Sibley v. Fulton Dekalb Collection Serv., 677 F.2d 830, 832 (11th Cir. 1982).
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mon law action is anything but a question for the jury or that plaintiffs should be required to forego full compensation for their injuries for a public policy reason. The central issue is whether the seventh amendment affirmatively bars statutes limiting recoverable damages as an intrusion upon this jury function. Because "the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements,"79 the pivotal question is whether assessment of the quantum of damages in a common law action is such a "fundamental element."

A. How far is "not far enough?"

The proponents of tort reform make the strongest argument that the determination of the quantum of damages in a common law action is an inherent part of the seventh amendment, not in what they say, but in what they do not say. With rare exception, tort reform proponents still do not contend that the damage determination presents anything but a jury question except in those few instances where a legislature has chosen to impose a damage limitation. The premise that legislatures are so empowered necessarily underlies this position.

Even conceding that legislatures enjoy broad powers to amend or alter common law forms of action, it does not necessarily follow that such power is unlimited or that the mere imposition of a damage cap suffices to remove the question of damages from the jury's consideration.80 The seventh amendment preserves the right to a jury trial in "suits at common law." In determining whether a suit is one at common law, or analogous thereto, the Supreme Court has held that "the nature of the issue to be tried" controls.81 In cases where the question of a litigant's right to a jury trial arises, courts must look to the nature of the remedy sought in reaching their determination.82 If common law, as it existed in 1791, provided the remedy sought, the seventh amendment guarantees the litigant the right to trial by jury.83 If

80. See, e.g., Sibley, 677 F.2d at 833-34 (seventh amendment requires that right of trial by jury be preserved in statutory cause of action where the claim involves rights and remedies of the sort traditionally enforced in an action at law).
83. See Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 477 (1830) ("In a just sense, the [seventh] amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction . . . ."); overruled on other grounds, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
equity or admiralty provided the remedy sought, the seventh amendment does not apply.\textsuperscript{84}

Thus, for seventh amendment purposes, a minor alteration to a common law form of action generally fails to alter that action to the extent that it loses its common law character and falls beyond the scope of the seventh amendment.\textsuperscript{85} So long as the underlying remedy was cognizable at common law, the seventh amendment continues to apply. This leads inevitably to the question of how far a legislature must go in altering a common law form of action before seventh amendment constraints upon the legislative power cease to apply. Where the legislative action in question is the mere imposition of a damage cap, the question is reduced to one of whether the legislature has effectively transmuted the nature of the issue from one cognizable at common law to one alien to the courts of 1791. Proponents of broad legislative power to impose damage caps have looked to United States Supreme Court dictum for support.

The Supreme Court has stated in support of the right of a legislature to alter tenets of the common law that “[a] person has no property, no vested interest, in any rule of the common law . . . but the law itself, as a rule of conduct, may be changed at the will, or even the whim, of the Legislature.”\textsuperscript{86} Some lower courts have read this language expansively as implying an almost unlimited legislative empowerment to alter common law rights of action and, specifically, to enact damage-limiting statutes in common law tort actions.\textsuperscript{87} These courts, however, have extracted the language in question from a narrow quotation in \textit{Munn v. Illinois},\textsuperscript{88} a case dealing with a

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\item \textsuperscript{84} Ross, 396 U.S. at 533 (quoting Parsons, 28 U.S. (3 Pet.) at 447).
\item \textsuperscript{86} Munn v. Illinois, 94 U.S. 113, 134 (1877).
\item \textsuperscript{87} See Johnson v. St. Vincent Hosp., Inc., 273 Ind. 374, 386, 404 N.E.2d 585, 593-94 (1980) (relying on \textit{Munn} in holding that the legislature may modify a common law right of action by imposition of a medical malpractice damage cap); Prendergast v. Nelson, 199 Neb. 97, 106, 256 N.W.2d 657, 663 (1977) (equating the right of a legislature to create or abolish common law forms of action with a right to modify such rights); \textit{see also} Jones v. State Bd. of Medicine, 97 Idaho 859, 869, 555 P.2d 399, 409 (1976) (citing \textit{Munn} but questioning the efficacy of Idaho’s medical malpractice damage cap in equal protection terms and remanding for further findings of fact), \textit{cert. denied}, 431 U.S. 914 (1977), \textit{on remand}, Nos. 55,527, 55,586 (4th Dist. Idaho Nov. 3, 1980) (declaring damage cap unconstitutional).
\item \textsuperscript{88} 94 U.S. at 134:
  
  But a mere common-law regulation of \textit{trade or business} may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim of the legislature, \textit{unless prevented by constitutional limitations}. Indeed, the great office of statutes is to remedy defects in the common law as they are
\end{itemize}
legislature’s power to regulate rates at public grain warehouses — an economic regulation far removed from seventh amendment considerations. Read in context, the Court’s language does not appear to support a reading so expansive as to justify limiting jury consideration of the quantum of damages in a common law action. Despite lower courts’ reliance upon the central portion of the quote to find such justification, nothing in the Supreme Court’s subsequent treatment of the language indicates its approval of such an expansive interpretation. As a result, those who rely upon this “Munn misconception” do so on a questionable and perhaps misguided basis. A more thorough examination of legislative empowerment reveals less extensive legislative authority.

A legislature may undoubtedly abolish a common law form of action and replace it with a compensation scheme or other statutory remedy. Similarly, a legislature may define or abolish legal duties or defenses, allocate burdens of proof among litigants, create or abolish presumptions, and developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

Id. (emphasis added).


90. The central portion of the Munn quote has been cited in three majority opinions. In Duke Power Co. v. Carolina Env’tl Study Group, Inc., 438 U.S. 59 (1978), the passage was quoted in support of the premise that the “Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object.” Id. at 88 n.32 (quoting Silver v. Silver, 280 U.S. 117, 122 (1929)). This premise obviously does not address the question of modification of existing common law rights. The Munn quote was also cited in Second Employers’ Liability Cases, 223 U.S. 1, 50 (1912), in construing the constitutionality of a workers’ compensation program, see supra note 46 and accompanying text, and in Hurtado v. California, 110 U.S. 516, 532-33 (1884), holding that a California statute that permitted the institution of criminal proceedings by information rather than indictment was not constitutionally offensive.

Additionally, the Munn passage has been cited in one dissenting opinion, Loretto v. Telepromter Manhattan CATV Corp., 458 U.S. 419, 454 (1982) (Blackmun, J. dissenting), and in one concurring opinion, PruneYard Shopping Center v. Robins, 447 U.S. 74, 92-93 (1980) (Marshall, J., concurring).

91. See, e.g., New York Cent. R.R. Co. v. White, 243 U.S. 188 (1917) (upholding New York state workmen’s compensation law which replaced common law damages with statutory compensation scheme and held an employer strictly liable for most job-related injuries).

92. Id. (recognizing power of state to disallow defenses of contributory negligence, assumption of risk, and “fellow servant rule” in workmen’s compensation scheme).

93. See Palmer v. Hoffman, 318 U.S. 109, 117 (1943) (tacitly recognizing such state power; “The burden of establishing contributory negligence is a question of local law. . .”).

94. See Hammond Packing Co. v. Arkansas, 212 U.S. 322, 350-51 (1909) (recognizing the
statutorily define the elements of recoverable damages,\textsuperscript{95} or how they are to be paid,\textsuperscript{96} without running afoul of the seventh amendment. In examining whether the seventh amendment limits legislative power to alter a common law form of action solely by the imposition of a damage cap, a review of other legislation containing damage-limiting provisions is instructive.

The Warsaw Convention, as supplemented by the Montreal Agreement,\textsuperscript{97} limits recoverable damages for property loss or damage or personal injury on international air voyages to $75,000; the Price-Anderson Act\textsuperscript{98} limits recoverable damages in the event of an accident at a federally licensed nuclear power plant to $560,000,000 in the aggregate;\textsuperscript{99} federal workers' compensation statutes, such as the Longshoremen's and Harbor Workers' Compensation Act,\textsuperscript{100} replace common law damages with compensation schemes.\textsuperscript{101} Each has been held to be inoffensive to the seventh amendment.\textsuperscript{102} In each instance, the court recognized the power of the legislature to limit damages in such fashion. However, each is distinguishable from legislation which baldly limits the recovery a plaintiff may enjoy without otherwise altering the common law nature of the action or the plaintiff's burdens thereunder.

First, each of these statutes or treaties provides the plaintiff a quid pro quo,\textsuperscript{103} most often in the form of a reduced burden of proof or a guarantee of recovery. The Warsaw Convention subjects the air carrier to strict liability for loss, damage, or injury arising under its provisions.\textsuperscript{104} Similarly, strict

\textsuperscript{95} See, e.g., ARIZ. REV. STAT. ANN. § 14-3110 (1956) (prohibiting award of damages for pain and suffering where tort victim dies prior to final adjudication of case).

\textsuperscript{96} See, e.g., DEL. CODE ANN. tit. 18, § 6864 (1975) (certain medical malpractice damages to be paid in the form of structured annuity).

\textsuperscript{97} Warsaw Convention, supra note 45.


\textsuperscript{99} Id. § 2210(c).

\textsuperscript{100} 33 U.S.C. §§ 901-950 (1982).

\textsuperscript{101} Id. §§ 906, 908-909.


\textsuperscript{103} See supra note 46.

\textsuperscript{104} Warsaw Convention, supra note 45, at arts. 17-18(1). However, the Convention permits two defenses to claims made under its provisions: contributory negligence, id. at art. 21; and proof by the carrier that all necessary measures were taken to prevent the injury or that it was unavoidable, id. at art. 20(1). These defenses were abolished by the Montreal Agreement, supra note 45, and strict liability is now imposed. See infra note 121.
liability prevails in workers' compensation statutes,105 and the Price-Anderson Act requires the nuclear power plant operator to waive all legal defenses in the event of a substantial nuclear accident.106

The Supreme Court has never held that a statute which displaces a common law right of recovery and limits recoverable damages must, in the interest of due process, provide such a quid pro quo.107 Similarly, the Court has never held that such a quid pro quo is not required.108 Lower courts are divided on the subject.109 Despite the Supreme Court's silence on the question, it is sufficient for purposes of this analysis to note that the major damage-limiting statutes all provide such a quid pro quo and are thus distinguishable from a statute which merely “caps” recoverable damages while granting no concession to the plaintiff.

Additionally, both the Price-Anderson Act110 and the Longshoremen's and Harbor Workers' Compensation Act111 create compensation schemes in derogation of common law damage remedies. Characteristics of common law tort actions which have been legislatively abrogated include the plaintiff's burden of proving negligence on the part of the tortfeasor,112 the ability of the tortfeasor to assert some (or any) common law defenses,113 the absence of guaranteed collectability of recovery,114 and the absence of limitations upon recoverable damages.115 Because such compensation schemes were unknown to the common law of torts, the courts have viewed them as forms of action which have sufficiently lost, through extensive legislative modification, their common law character. This extensive legislative modification of common law tort actions has transformed them into creatures of

108. Id.
109. See State ex rel. Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978) (rejecting necessity of quid pro quo because it is not mandated by decisions of the Supreme Court); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977) (holding that due process does not require quid pro quo and pointing out that, in return for the limitation, the plaintiff is assured collection of a damage award through the state assurance fund); see also Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) (holding that quid pro quo is required under the state constitution).
112. See, e.g., id. § 904(b).
113. See, e.g., id. § 905(a).
114. See, e.g., id. § 904(a).
115. See, e.g., id. § 909.
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statute, to which the seventh amendment does not necessarily apply.\textsuperscript{116} It may be said that such legislative modification has gone "far enough" to remove these actions from the purview of the seventh amendment.\textsuperscript{117}

By contrast, the mere imposition of a damage cap does not relieve the plaintiff of proving every element of his claim as it was known at common law, nor does it guarantee a recovery where the common law guaranteed none. Similarly, a damage cap does not limit or eliminate defenses which the tortfeasor may raise in his behalf. Insofar as damage caps merely limit recoverable damages without providing a compensation scheme or other statutory remedy, they bear a greater similarity to the limitations imposed by the Warsaw Convention,\textsuperscript{118} as supplemented by the Montreal Agreement.\textsuperscript{119} This appears to suggest a broad legislative empowerment to limit recoverable damages by the simple imposition of a damage cap.

However, the Warsaw Convention imposes strict liability upon the air carrier for loss, damage, or injury.\textsuperscript{120} Thus, in addition to placing a limit upon recoverable damages, it modifies the plaintiff's burden of proving negligence on the part of the tortfeasor, a common law tort characteristic.\textsuperscript{121} Further, the nature of the underlying transaction between the air carrier and the putative plaintiff differs significantly from that which exists between tortfeasor and negligently injured plaintiff. The air carrier and passenger or shipper are in privity of contract either for passage or shipment of goods,\textsuperscript{122} whereas in most instances, a tortfeasor and negligently injured plaintiff are legal strangers. Medical malpractice claims\textsuperscript{123} possess some elements of contract

\begin{itemize}
\item \textsuperscript{117} Id.
\item \textsuperscript{118} Warsaw Convention, supra note 45.
\item \textsuperscript{119} Montreal Agreement, supra note 45.
\item \textsuperscript{120} See supra note 104.
\item \textsuperscript{121} See Pierre v. Eastern Airlines, Inc., 152 F. Supp. 486 (D. N.J. 1957). While not addressing the requirement, or lack thereof, of a quid pro quo, District Judge Meaney relied heavily upon the existence of a quid pro quo in upholding the Warsaw Convention against seventh amendment attack. "A reasonable quid pro quo is provided in the alteration of necessity for proof of negligence as it existed before the acceptance of the Warsaw Convention." Id. at 489. \textit{Pierre} is the only case to date which has addressed the Convention's limitation of damages with respect to the seventh amendment. The original Convention permitted two defenses by the air carrier; however, the Montreal Agreement, supra note 45, modified the Convention to eliminate these defenses. See Doere and Co. v. Deutsche Lufthansa Aktiengeellschaft, 855 F.2d 385 (7th Cir. 1988); \textit{In re Korean Air Lines Disaster of Sept. 1, 1983}, 829 F.2d 1171 (D.C. Cir. 1987); supra note 104.
\item \textsuperscript{122} See \textit{In re Aircrash in Bali, Indonesia} on Apr. 22, 1974, 684 F.2d 1301 (9th Cir. 1982).
\item \textsuperscript{123} See Rittenhouse v. Mabry, 832 F.2d 1380, 1383 (5th Cir. 1987) (physician/patient relationship may be viewed as contractual).
\end{itemize}
in the underlying transaction, but virtual necessity causes people to seek medical treatment in most instances.

In contrast, the underlying transaction which gives rise to a claim governed by the Warsaw Convention arises from convenience or commercial expediency. Necessity rarely, if ever, dictates that one travel or ship goods by international air carrier. To avail itself of the protection of the Convention, the air carrier must provide, in ten-point type, notice of the damage limitation on the passenger ticket or bill of lading.\textsuperscript{124} In the context of contract, this notice may be viewed as a disclaimer, which the air passenger or shipper accepts as a condition of the transaction and which will be enforced provided the notice is statutorily adequate.\textsuperscript{125} This view suggests a voluntary waiver of the plaintiff’s right to recovery in excess of the amount prescribed, rather than a broad legislative empowerment to limit recoverable damages. In contrast to an action under the Warsaw Convention, the plaintiff in a common law tort action subject to a legislatively imposed damage cap does not enjoy the benefit of strict liability, nor does the limitation of recoverable damages arise from a voluntary waiver of damages in excess of the limitation.

While not imposing a cap on damages, a second type of statute, commonly dealing with environmental concerns,\textsuperscript{126} calls for civil penalties\textsuperscript{127} for violation of its provisions. Likening such penalties to a criminal fine, the Supreme Court has held that assessment of the amount of such penalty is not a fundamental incident of trial by jury and that Congress may authorize determination of the amount of such penalty by the court.\textsuperscript{128}

\textbf{B. Procedural Devices}

Assuming that legislatures may properly enact damage caps without running afoul of the seventh amendment, a question necessarily arises as to the

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\item \textsuperscript{124} Montreal Agreement, \textit{supra} note 45.
\item \textsuperscript{125} See In re Air Crash Disaster at Warsaw, Poland on Mar. 14, 1980, 705 F.2d 85, 91 (2d Cir.), cert. denied, 464 U.S. 845 (1983).
\item \textsuperscript{127} \textit{Id.} at § 1319(d). While a civil penalty is statutory in nature and conceptually different from common law damages, the Supreme Court has given what is possibly an indication that it may find, in a proper case, that determination of damages by a jury is not mandated by the seventh amendment. "We have been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial." \textit{Tull} v. United States, 481 U.S. 412, 426 n.9 (1987). The Court, however, cites no authority in support of this premise and gives no indication as to how it might be reconciled with its earlier pronouncements in \textit{Dimick} v. \textit{Schiedt}, 293 U.S. 474, 486 (1935). For the moment, this question remains open and any attempt to extend the reasoning of \textit{Tull} to arguments concerning common law damages is speculative.
\item \textsuperscript{128} See \textit{Tull}, 481 U.S. at 426 (citing Atcheson v. Everett, 98 Eng. Rep. 1142 (K.B. 1775)).
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\end{footnotesize}
means used to apply the caps. Either the jury is instructed that it may find damages only up to the amount of the limitation, or the jury is left free to find damages in any amount, but the damages are then reduced by the court to comply with the cap.\textsuperscript{129} The first approach is self-contradictory. It concedes that determination of the quantum of damages is a factual issue to be decided by the jury, then denies this view by impeding the jury from fully deciding the question. Apart from the inherent self-contradiction, such direct limitation of the jury's function runs contrary to existing seventh amendment jurisprudence.\textsuperscript{130} As such, a direct limitation on the jury's determination presents an undesirable approach to containing damage awards within statutory limitations.

The alternative is to leave the jury free to reach a determination of damages and, if excessive, to judicially reduce the amount to comply with the statutory limitation by use of some procedural device. Various procedural devices already exist which permit a court to alter a damage award, decide the award itself, or remove it altogether from the consideration of the jury. These devices may be viewed as supporting a broad legislative empowerment to cap damage awards. The fact that the jury need not determine the quantum of damages in common law actions in all instances arguably supports the premise that a legislature may enact a damage cap without offending the seventh amendment. A closer analysis, however, demonstrates that the existence of these procedural devices does not support such a broad view of legislative power.

I. Remittitur

Remittitur is a device whereby a court, in the face of a defendant's motion for a new trial, may require a plaintiff to "remit" a portion of a favorable verdict in return for denial of the defendant's motion.\textsuperscript{131} As first announced by Justice Story,\textsuperscript{132} a plaintiff's remission of that portion of a verdict deemed by the court to be excessive may be imposed as a condition of denying a defendant's motion for a new trial and proper determination of the quantum

\textsuperscript{129} A third alternative, the Louisiana practice of having the court assess the quantum of damages, was expressly rejected as contrary to the seventh amendment when sought to be applied in a diversity of citizenship case. Gillen v. Phoenix Indem. Co., 198 F.2d 147, 150-52 (5th Cir. 1952); see also Chatzicharalambus v. Petit, 73 F.R.D. 417 (E.D. La. 1977).

\textsuperscript{130} See Adams v. Ford Motor Credit Co., 556 F.2d 737, 740 (5th Cir. 1977) ("The right of a plaintiff to have this fact issue [of damages] decided by a jury devolves from the Seventh Amendment to the Constitution. . ."); see also Baylis v. Travellers' Ins. Co., 113 U.S. 316, 320-21 (1885) (without a waiver of seventh amendment right, the court errs if it substitutes itself for the jury in determination of factual issues).

\textsuperscript{131} See Dirnick, 293 U.S. at 476.

\textsuperscript{132} Blunt v. Little, 3 F. Cas. 760 (C.C.D. Mass. 1822) (No. 1578).
of damages by a new jury. Over a century later, the Supreme Court questioned whether this practice denied a litigant's right to a jury trial and whether there is sound historical basis for the practice so as to incorporate it within the seventh amendment as part of the common law of England as it existed in 1791. Notwithstanding its doubts, the Court in *Dimick v. Schiedt* stated in dictum that the practice would not be disturbed largely because it had been part of federal jurisprudence for over one hundred years at the time the Court considered it. Thus, remittitur does not violate the seventh amendment.

Remittitur, however, is proper only where a jury verdict "is palpably and grossly excessive." Under this standard, the verdict must be so contrary to or unsupported by the evidence as to indicate passion on the part of the jury in reaching the verdict; it must be unconscionable. Moreover, the court is without power to enter a judgment for a lesser amount absent the plaintiff's consent to remit. Thus, it is not presently within the courts' inherent power over judgments to apply remittitur where evidence supports a jury verdict. Remittitur rests upon the evidence peculiar to the individual case before the court and exists as a means of providing post-judgment relief from an excessive award rendered by a runaway jury. Therefore, the court's reduction of an excessive verdict to comport with a statutory limitation, where the verdict is otherwise reasonable and supported by the evidence, is without procedural precedent under the doctrine of remittitur.

To use remittitur as a means of reducing a verdict for a public policy purpose, such as caps on damages, would require an expansion of the doctrine. In addition to requiring the court to reduce an otherwise proper damage award, the use of remittitur would require the court to apply remittitur absent the consent of the plaintiff. This practice is without precedent. The Supreme Court has indicated that, based upon the questionable inclusion of the doctrine in federal jurisprudence, such expansion of the doctrine of remittitur is not to be considered.

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133. *Id.*; see also *Fed. R. Civ. P.* 59(a).
134. *Dimick*, 293 U.S. at 484.
135. *Id.* at 476.
136. *Id.* at 474.
137. *Id.* at 484.
138. *Id.* at 486.
140. See *Ouachita Nat'l Bank v. Tosco Corp.*, 716 F.2d 485, 488 (8th Cir. 1983).
141. *Becker Bros. v. United States*, 7 F.2d 3, 8 (2d Cir. 1925).
142. *Dimick*, 293 U.S. at 474.
2. Default Judgment

Unlike remittitur, the device of default judgment leaves determination of the quantum of damages to the court without intervention of a jury in some instances. The existence of default judgment suggests that determination of the amount of damages is not an inherent jury function or, at least, that this determination may, in some instances, be removed from the jury’s consideration. As presently known, default judgment applies only where a defendant fails to appear and defend, or as a punitive measure where a defendant fails to make or cooperate in discovery. In the absence of denial of a plaintiff’s allegations, no disputed question of fact can be presented to a jury, at least as to the defendant’s liability. The plaintiff’s allegations are construed as having been admitted. Where the damages sued upon are for a sum certain or for an amount that may be made certain by computation, the clerk may enter judgment in that amount. In all other cases, only the court may enter judgment, after it determines the amount of the plaintiff’s damages. Federal Rule of Civil Procedure 55 provides that the court “shall accord the right of trial by jury to the parties when and as required by any statute of the United States.” The rule provides no other guidance concerning the question of a plaintiff’s right to a jury determination of damages in such a situation. The few cases which address the question of default judgment in relation to a litigant’s right to trial by jury have done so from the perspective of the defaulting defendant, finding no deprivation of that right.

Nevertheless, this court in a very special sense is charged with the duty of construing and upholding the Constitution; and in the discharge of that important duty, it ever must be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land.

Id. at 485.

143. See generally Raymond v. Danbury & N.R. Co., 20 F. Cas. 332 (C.C.D. Conn. 1877) (No. 11,593).

144. See FED. R. CIV. P. 55(a).

145. See FED. R. CIV. P. 37(b)(2)(C). Analytically, a defendant may be deemed in default, despite the fact that he has appeared in the action, if he has failed to participate in the litigation in any meaningful manner. See, e.g., Randolph v. Barrett, 41 U.S. (16 Pet.) 138, 142 (1842) (default judgment proper where defendant failed to proceed following unsuccessful plea in abatement). Entry of default judgment under Rule 37 is the most severe of the discovery sanctions and may only be resorted to when the errant defendant has disobeyed a court order compelling discovery. FED. R. CIV. P. 37(b).


147. See Geddes v. United Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977).

148. FED. R. CIV. P. 55(b)(1).

149. Id. 55(b)(2).

150. Id.

151. See Bass v. Hoagland, 172 F.2d 205 (5th Cir.), cert. denied, 338 U.S. 816 (1949);
Case authority exists for the proposition that, where an action is brought for a sum certain or a liquidated debt, judgment may be entered without the intervention of a jury without offending the seventh amendment. Where, however, as in a tort action, damages are not readily ascertainable, no authority exists that speaks to the existence or nonexistence of a plaintiff's absolute right to a jury determination of damages. The existence of such an undeclared right would comport with the common law of 1791 and would create no seventh amendment problem. Should the courts find in future decisions that the seventh amendment does not encompass such a right, the finding would be in derogation of the common law of England as it existed at the time of the adoption of the seventh amendment. Such a finding would indicate either the courts' belief that this element of the English common law was not intended to be adopted as part and parcel of the seventh amendment, or a belief that courts, and possibly legislatures, may properly modify common law rights which are constitutionally preserved.

While no authority exists for the premise that the seventh amendment provides plaintiffs the right to a jury assessment of unliquidated damages where a defendant defaults, the federal courts of appeal have found that the right to a jury determination of unliquidated damages, as a general matter, is constitutionally required. Conversely, the Supreme Court has held in one instance that declared rights preserved under the seventh amendment may be legislatively modified. This supports the "broad empowerment" position advocated by proponents of damage caps.

Fidelity & Deposit Co. v. United States, 187 U.S. 315 (1902); Raymond v. Danbury & N.R. Co., 20 F. Cas. 332 (C.C.D. Conn. 1877) (No. 11,593); see also Cropley v. Vogeler, 2 App. D.C. 28 (1893).


153. See W. Blackstone, supra note 56, at *397.

154. See Korbut v. Keystone Shipping Co., 380 F.2d 352, 354 (5th Cir. 1967) (violation of the seventh amendment for the court to substitute its judgment for that of the jury where the jurors could not agree on the amount of damages); Gillen v. Phoenix Indem. Co., 198 F.2d 147, 151-52 (5th Cir. 1952) (substantive state law providing for judicial assessment of damages in personal injury actions held not binding upon the federal courts); E.C. Gerhard, 298 F. at 268 ("It is only where an action is brought for a sum certain, or which can be rendered certain by computation, that judgment for damages may be entered by the court without a jury under the Seventh Amendment."). But see Swofford v. B & W, Inc., 336 F.2d 406 (5th Cir. 1964) (no seventh amendment requirement of jury trial in claims for punitive damages or attorney's fees), cert. denied, 379 U.S. 962 (1965).

3. Directed Verdict, Judgment Notwithstanding the Verdict, and Summary Judgment

The Federal Rules of Civil Procedure also provide for the devices of directed verdict,\textsuperscript{156} judgment notwithstanding the verdict,\textsuperscript{157} and summary judgment.\textsuperscript{158} These devices serve in some instances to remove the question of damages from the jury's consideration or to permit the court to disregard the jury’s determination. Such devices, however, differ conceptually from recognition of a judicial or legislative power to determine the quantum of recoverable damages and go only to the sufficiency of evidence required to submit an issue to the jury.\textsuperscript{159} Where the court directs a verdict or enters judgment notwithstanding the verdict, it has determined as a matter of law that the litigant bearing the burden of proof has failed to do so\textsuperscript{160} or, if the moving party bears the burden of proof, that that party has done so in such overwhelming fashion as to preclude any defense to the evidence presented.\textsuperscript{161} Thus, the court withdraws from the jury not the question of the quantum of damages, but the question of whether the plaintiff is entitled to recover any damages, or a particular element of damages, at all.

Summary judgment, while conceptually similar to directed verdict and judgment notwithstanding the verdict, does not go to the sufficiency of a plaintiff’s evidence, but presupposes that there are no controverted questions of fact for jury resolution.\textsuperscript{162} Unlike a directed verdict and judgment notwithstanding the verdict, summary judgment looks to the questions of law presented.\textsuperscript{163} When, after eliminating the points upon which the parties are in agreement, a disputed issue is reduced to one or more questions of law, no factual questions remain which require jury determination.\textsuperscript{164}

While any ties these devices may have to the common law of 1791 are questionable at best, common law at that time did recognize the principle that an issue may be withdrawn from a jury’s consideration by the use of

\textsuperscript{156} See Fed. R. Civ. P. 50(a).
\textsuperscript{157} See id. 50(b)-(d).
\textsuperscript{158} See id. 56.
\textsuperscript{160} See Perkin-Elmer Corp. v. Computervision Corp., 732 F.2d 888, 893 (Fed. Cir. 1984), cert. denied, 469 U.S. 857 (1985); Rochester Civic Theater, Inc. v. Ramsay, 368 F.2d 748, 752 (8th Cir. 1966).
\textsuperscript{161} See Service Auto Supply Co. v. Harte & Co., 533 F.2d 23, 24-25 (1st Cir. 1976).
\textsuperscript{162} See Whitsell v. Alexander, 229 F.2d 47, 48 (7th Cir.), cert. denied, 351 U.S. 932 (1956).
\textsuperscript{164} Id.
Proponents of tort reform may be heartened by the form, if not the substance, of the Supreme Court's decision in Galloway v. United States, insofar as it lends recognition to the new device of directed verdict in derogation of the common law. This recognition would imply the propriety of introducing a new procedural device whereby damages awarded by a jury in excess of a statutory limitation may be reduced. It must be recognized, however, that the "novation" of directed verdict is procedural in nature, a substitute for the antiquated device of demurrer, and thus not necessarily preserved by the seventh amendment. The adoption of the Federal Rules of Civil Procedure in 1938, concurrently with the adoption of the directed verdict, effectively abolished the common law device of demurrer. Moreover, the demurrer and directed verdict are similar in application and effect, affording a litigant no greater or lesser rights than were afforded under the common law of England as it existed in 1791.

In sum, remittitur, directed verdict, summary judgment, judgment notwithstanding the verdict, and default judgment, as these devices presently exist, do not provide a vehicle for judicial reduction of a jury award in excess of a statutory limitation. Nor do any of these devices permit removal of the question of the quantum of damages in a common law action from the jury's consideration. These results can only be accomplished through the creation of a new procedural device or the unprecedented expansion of an existing one, assuming that limitation of damages is not to be accomplished by directly limiting the deliberations of the jury with regard to the damage question.

IV. Is There Substance to the Seventh Amendment?

As with direct limitations upon the deliberative function of the jury, it is self-contradictory to permit a court to accept only that part of a damage award which comports with a statutory limitation. Both means of limiting damages simultaneously affirm and deny the function of the jury as trier of fact. Assuming, however, that legislatures may properly enact statutes that baldly limit recoverable damages in a common law action, and presuming

166. Id.
168. FED. R. CIV. P. 7(c).
169. Id. 50(a).
170. See supra notes 131-69 and accompanying text.
171. Id.
172. See supra notes 129-31 and accompanying text.
further that some procedural device may be created or expanded to implement damage caps without offending the seventh amendment, the most troubling concern of all arises. If a legislature may so remove the damage issue from the purview of the jury, then, what, if any, substantive rights are preserved from the reach of legislatures by the seventh amendment?

The Supreme Court speaks in resplendent terms when addressing the significance of the seventh amendment to our constitutional form of government. In practice, however, the Court has continued to limit the seventh amendment's application in individual circumstances, asserting that the seventh amendment preserves only the bare substance of the right to trial by jury. In distinguishing such individual circumstances from its own elusive concept of the core of rights preserved by the seventh amendment, the Court has succeeded in identifying only certain instances which fall within or without the scope of seventh amendment protection. It has not, however, defined the scope of this protection.

Similarly, the Court has not demarcated a clear line between matters of substance, which the seventh amendment may protect, and matters of procedure, which are not protected. Nor has the Court indicated upon which side of this line jury determination of a plaintiff's damages falls. The Court has never addressed the issue in specific terms, holding only that the seventh amendment commands unanimity of verdict, submission of questions of

173. See supra text accompanying notes 2-3.
174. See infra text accompanying notes 186-91.
175. Ex parte Peterson, 253 U.S. 300 (1920):
The command of the Seventh Amendment that the "right to trial by jury shall be preserved" does not require that old forms of practice and procedure be retained. It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

Id. at 309-10 (citations & footnote omitted); see also supra note 79 and accompanying text.
176. See generally Annotation, Supreme Court's Construction of Seventh Amendment's Guaranty of Right to Trial by Jury, 40 L. Ed. 2d 846, 855-59 (1974).
fact to a jury, and the present requirement of six jurors in a civil action. It is difficult to characterize either the existence or extent of a plaintiff’s unliquidated injuries as anything other than questions of fact which must be submitted to a jury. The proponents of damage-limiting statutory provisions do not argue that the assessment of damages should be removed entirely from the province of the jury. Instead, they urge that limitations be placed on the jury’s discretion in this regard. Yet at least one court has held that “[t]he measuring of damages by a jury . . . would seem to be a matter of practice rather than of right.”

The prevailing view among the federal circuits considering the question is that the determination of the quantum of damages in a common law action is uniquely a jury function. The Supreme Court has implied likewise. Moreover, the practice of submitting the assessment of damages to a jury was well-entrenched in the common law of England at the time the seventh amendment was adopted. The idea that a jury might determine damages only within legislatively prescribed boundaries was as alien to the common law as the notion that a court might reject any part of a jury verdict supported by the evidence. If it is possible to reconcile legislative power to enact bald damage caps in common law forms of action with the common

178. Baylis v. Travellers’ Ins. Co., 113 U.S. 316, 321 (1885) (stating that trial of issues of fact without the intervention of a jury is permissible only where the parties waive their right to jury trial); see also Hodges v. Easton, 106 U.S. 408, 412 (1882) (“It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done is secured by the Constitution of the United States.”).

179. Colgrove v. Battin, 413 U.S. 149, 159-60 (1973) (criticizing Capital Traction Co. v. Hof, 174 U.S. 1 (1899), which stated that the seventh amendment requires a jury of 12); see also supra note 155.


181. See supra note 130 and accompanying text.

182. See supra text accompanying notes 56, 152-53. Contrary to District Judge Meaney’s analysis in Pierre, under the common law as it was known to Blackstone, a jury was required by writ of enquiry to assess unliquidated damages even where a judgment of default was entered. See W. BLACKSTONE, supra note 56, at *397-98; see also supra note 121.

183. In Dimick v. Schiedt, 293 U.S. 474 (1935), the Court noted:

The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts. . . . Where the verdict returned by a jury is grossly and palpably excessive, it should not be permitted to stand; but in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact.

Id. at 486 (emphasis added).

184. See supra text accompanying notes 56, 152-53. Contrary to District Judge Meaney’s analysis in Pierre, under the common law as it was known to Blackstone, a jury was required by writ of enquiry to assess unliquidated damages even where a judgment of default was entered. See W. BLACKSTONE, supra note 56, at *397-98; see also supra note 121.

185. See W. BLACKSTONE, supra note 56, at *397-98.
law right to jury trial preserved by the seventh amendment, this reconciliation can only rest on the premise that determination of the quantum of damages is not an element of the common law jury trial that is preserved by the seventh amendment. Yet no mention of such an exclusion appears either in the wording of the amendment or in the history surrounding its adoption.

According to some Supreme Court Justices, the seventh amendment has been subject to an alarming degree of judicial erosion. Implementation of the directed verdict, the six-person jury, offensive use of collateral estoppel regarding issues that a defendant had no opportunity to present to a jury, and judicial determination of civil penalties have each been seen as eroding the seventh amendment guarantee of a right to trial by jury. Regardless of whether such practices constitute the pernicious threat to the seventh amendment that these Justices perceive, it is clear that the trend over the past fifty years has been to diminish the role of the jury in civil actions. This has been done, in some instances, in the name of judicial economy. Jury trials are inefficient, expensive, time-consuming, and cumbersome. However, the legislative history surrounding passage of the seventh amendment indicates that economy was not the motivating force behind the framers' insistence upon civil trial by jury, but rather that the framers recognized its inefficiency and nevertheless tenaciously insisted upon its inclusion in the Bill of Rights.

Practices sanctioned by these and other Supreme Court decisions have eroded the substantive rights preserved by the seventh amendment to their present minimal level. The Court's decisions in Galloway v. United States and Parklane Hosiery Co. v. Shore create or sanction exceptions to the function of the jury regarding the question of a defendant's liability to the injured plaintiff. Furthermore, the Court's decision in Colgrove v. Battin, which lends judicial sanction to legislative alteration of previously declared

188. Colgrove, 413 U.S. at 166 (Marshall, J., dissenting).
189. Parklane, 439 U.S. at 337 (Rehnquist, J., dissenting).
190. Tull, 481 U.S. at 427-28 (Scalia, J., dissenting).
191. See, e.g., Colgrove, 413 U.S. at 181-82 (Marshall, J., dissenting).
192. See Wolfram, supra note 60, at 671.
193. See supra text accompanying note 69.
seventh amendment rights, suggests authority for continued abrogation of the jury function. This trend indicates a likelihood that should the Supreme Court ever rule upon the constitutionality of statutes which merely limit recoverable damages in common law actions, the seventh amendment would be afforded little reverence.\textsuperscript{197}

If the seventh amendment's road to hell is paved with good intentions, as the saying goes, the legislative good intention of assuring affordable and available insurance and access to necessary medical services by imposing damage caps\textsuperscript{198} marks yet another milestone. If the courts legitimize legislative power to enact such caps, notwithstanding the seventh amendment, the gravity of the threat posed to seventh amendment guarantees becomes clearly evident only when one observes that a common law cause of action presents just two broad questions for the jury's determination: whether the defendant caused a legal injury to the plaintiff for which he may recover, and, if so, the extent of the injury to be compensated.\textsuperscript{199} Notwithstanding their honorable purpose, damage caps serve only to undermine the function of the jury with regard to the second question. Damage caps reduce the litigant's constitutional entitlement from one commanding that a jury reach a unanimous verdict on both the questions of liability and damages, to one requiring that a jury reach a unanimous verdict on the question of liability alone. Under this scheme, the jury reaches the question of damages only if not pre-empted by legislative fiat from doing so. If jury determination of the quantum of the plaintiff's unliquidated damages may be so limited, jury determination of the damage question shrinks to a mere practice rather than a constitutional entitlement. Most troubling of all is the thought that a statute can reduce a constitutional entitlement to the level of a mere practice. The Constitution quite clearly spells out the means for amending it.\textsuperscript{200} Simple legislation is not one of those means.

V. CONCLUSION

Assuming the genuineness of the alleged insurance crisis, the threat posed by curtailment of essential services is indeed worthy of legislative attention. However, the power of a legislature to preempt the function of a jury on the question of damages cannot be squared with any fair reading of the history and purpose of the seventh amendment. Apart from those provisions con-

\textsuperscript{197} See Tull v. United States, 481 U.S. 412, 426 n.9 (1987) (Possibly foreshadowing such treatment by stating: "We have been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial.").

\textsuperscript{198} See supra notes 13-14 and accompanying text.

\textsuperscript{199} See Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

\textsuperscript{200} U.S. CONST. art. V.
cerning "housekeeping," constitutional provisions either grant or limit powers of government. If the framers did not intend the seventh amendment to serve as a check upon the government's power to interfere with a litigant's right to a jury trial, it is incomprehensible that the provision was given the exalted status of a constitutional amendment when the framers could have enacted it as a mere procedural statute. If the framers did not intend for the seventh amendment to extend to the damage determination phase of an action, it is only slightly less incomprehensible that this argument has not been raised for almost 200 years. Nothing in the underlying history of the seventh amendment indicates that it was not intended to extend to the damage phase of common law actions. On the contrary, the essential function of the jury in determining the quantum of a plaintiff's damages was deeply entrenched in English common law — the touchstone of the seventh amendment — at the time of its adoption. Absent constitutional amendment, the seventh amendment cannot coexist with broad legislative empowerment to alter common law forms of action by the mere imposition of damage caps.

Acquiescence by the courts in legislative attempts to impose damage caps would serve only to limit and erode seventh amendment protections. Judicial recognition of an inherent power of legislatures to dictate the result a jury must reach, even in only a few specific instances, would be a radical departure from traditional seventh amendment jurisprudence. Judicial cognizance of a new procedural means, or the expansion of an existing means, to effectuate such an end would be equally unprincipled. A judicial charade which purports to send the question of damages to the jury, only to have the court reduce the jury's determination in order to comport with a statutory limitation, undermines not only the seventh amendment, but the credibility of the courts and legislatures as well. The courts should neither condone nor tolerate legislative attempts to create such a means of effectuating damage caps.

If the general welfare demands that damage awards in common law forms of action be limited in order to stem the curtailment of insurance and health services, the persons to make that decision are not the judges or the legislators, but the people of the states, at whose insistence the seventh amendment became part of the Constitution. Unless and until the people are persuaded to modify or repeal the seventh amendment, the courts should be watchful to preserve what substance remains of it and to assure that it stands, as intended, as a direct limitation upon unbridled legislative power.

Granting, for the sake of argument, the existence and social necessity of dealing with the present insurance crisis and the necessity or desirability of some aspects of tort reform, where the imposition of damage-limiting provi-
sions is concerned, the ends cannot justify the means. While the end of assuring the availability of affordable insurance to those who provide valuable services to society is desirable, if not necessary, this means of doing so is constitutionally infirm. The only manner in which the power of legislatures to enact such legislation may be legitimized is by undermining and eroding seventh amendment guarantees. If the courts permit this, the implications are grave. If one provision of the Constitution may be disregarded or subverted for purposes of social expediency, so might any provision, with the result that, while the Constitution remains the supreme law of the land, it does so only so far as legislative perception of social desirability permits. This is unacceptable, intolerable, and repugnant to the concept of constitutional government. Whether or not there is substance to the seventh amendment will depend upon how the courts address this issue in the months and years to come.\footnote{Postscript: Marking the first time the highest court of any state has invalidated a damage cap based upon the considerations addressed herein, the Supreme Court of Washington recently declared that state’s cap on noneconomic damages unconstitutional as violative of the civil jury trial provision contained in the state constitution. See Sofie v. Fibreboard Corp., 112 Wash. 2d 636, 771 P.2d 711 (Wash. 1989).}

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