SURVEY OF ILLINOIS LAW: STATUTORY DAMAGE EXCLUSIONS

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I. INTRODUCTION

The Illinois General Assembly may limit damages for certain claims by setting caps or by recognizing exclusions for certain or all damages via no duty or immunity statutes. Caps have been successfully challenged on separation of powers grounds.[1] Exclusions have traditionally been challenged on Illinois constitutional right to a remedy grounds, with early success in 1946, but with failures since 1958. The most recent failure occurred in the Illinois Second District Appellate Court case, *Murphy v. Colson*, decided in October of 2013.[2] Unfortunately, that ruling, and its predecessors, leaves some continuing uncertainties about right to remedy constraints on statutory damage exclusions and even greater uncertainties about other constitutional constraints. How might the right to remedy constrain future statutory damage exclusions for certain injuries or for certain claims? And what other constitutional principles constrain?

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1. *See, e.g.*, Lebron v. Gottlieb Memorial Hospital, 237 Ill. 2d 217 (2010). The separation of powers approach is critiqued, and alternative approaches suggested, in Jeffrey A. Parness, *State Damage Caps and Separation of Powers*, 116 PENN ST. L. REV. 145 (2011) (preferring a judicial rulemaking approach).
2. Murphy v. Colson, 2013 IL App (2d) 130291.

II. *MURPHY V. COLSON*

The damage exclusions challenged on right to remedy grounds in *Murphy* appear in the Alienation of Affections Act[3] and the Criminal Conversation Act,[4] which "contain parallel language."[5] The Acts each exclude "punitive, exemplary, vindictive, or aggravated damages."[6] These exclusions were not challenged. The Acts also each exclude "mental anguish . . . any injury to plaintiff's feelings; shame, humiliation, sorrow or mortification . . . defamation or injury to the good name and character of plaintiff or his or her spouse . . . [and] dishonor to plaintiff's family."[7] These nonpunitive damage exclusions were sustained in *Murphy* based on two Illinois Supreme Court precedents, in 1958 and 1960, which were said to limit a 1946 precedent.[8]

A. Pre-*Murphy* Precedents on Illinois Constitutional Remedial Rights

In 1946, in *Heck v. Schupp*,[9] the high court invalidated a statute banning all claims "based upon alienation of affections, criminal conversation, or breach of contract to marry."[10] Besides enactment contrary to the Illinois constitutional "one subject" mandate,[11] the statutes violated the Illinois constitutional right to a remedy as there was "no reason" to distinguish between contracts that do and do not involve marriage,[12] and because claims for criminal conversation and alienation of affections involve interests which all members of an affected family "have a right to protect,"[13] "clearly" falling within the constitutional remedial right and promoting the "sense of justice."[14]

Responding to *Heck* in 1997, the Illinois General Assembly passed the Alienation of Affections,[15] Breach of Promise (a.k.a. Agreement to Marry),[16]

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3. 740 ILL. COMP. STAT. 5/1 et seq. (2013).
4. 740 ILL. COMP. STAT. 50/1 et seq. (2013).
5. *Murphy*, 2013 IL App (2d) 130291, ¶ 19.
6. 740 ILL. COMP. STAT. 5/3 (Alienation of Affections) and 740 ILL. COMP. STAT. 50/3 (Criminal Conversation)
7. 740 ILL. COMP. STAT. 5/4 (Alienation of Affections) and 740 ILL. COMP. STAT. 50/4 (Criminal Conversation).
8. *Murphy*, 2013 IL App (2d) 130291, ¶¶ 18-31. Plaintiff conceded the constitutionality of the punitive damages exclusion. *Id.* at 12.
9. Heck v. Schupp, 394 Ill. 296 (1946) (Heart Balm Act, ILL. REV. STAT. 1943, ch. 38, pars. 246.1 and 246.2).
10. *Id.* at 299.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. 740 ILL. COMP. STAT. 5/1 et seq.
16. 740 ILL. COMP. STAT. 15/1 et seq.

and Criminal Conversation[17] Acts, each containing certain damage exclusions. In 1958, in *Smith v. Hill*, the court ruled on a woman's claim for breach of promise to marry against a man under the new Breach of Promise Act after she bore his child.[18] That Act limited recoverable damages to "actual damages."[19] The Act specifically excluded "punitive, exemplary, vindictive or aggravated damages."[20] This exclusion was sustained as there was "no vested right" to such damages.[21] *Heck* was distinguishable because in *Smith*, "actual damages" were recoverable.[22]

In 1960, in *Siegall v. Solomon*,[23] the court ruled on a man's claim against another man under the Alienation of Affections Act. That Act allowed recovery of "actual damages," but denied recovery for not only "punitive, exemplary, vindictive or aggravated damages," but also for "mental anguish," plaintiff's "feelings," "shame, humiliation, sorrow, or mortification . . . defamation or injury to the good name or character of plaintiff or his or her spouse . . . [and] dishonor to plaintiff's family."[24] As the high court found no continuing allegations as to actual damages outside of the statutory damage exclusions,[25] it focused on whether those actual damage exclusions destroy "vested rights" and impair "the obligation of contract."[26] As to vested rights, the court deemed it could find "the contention abandoned."[27] Moreover, the court proceeded to find no deprivation of "vested rights" or of a remedy by which to recover for a wrong."[28] The court stated that it was "the modern view" that "rights of a husband in his wife's affections and society are not property within the due process clause, so as to prevent a State's regulation and control of such rights."[29] The court found *Smith* "indistinguishable" on the vested right issue.[30] It did rather sweepingly declare that under *Smith*, "a statute which

17. 740 ILL. COMP. STAT. 50/1 et seq.
18. Smith v. Hill, 12 Ill. 2d 588, 590-1 (1958).
19. *Id*. at 593 (ILL. REV. STAT. 1955, ch. 89, pars. 25-34).
20. *Id*. at 593.
21. *Id*. at 595.
22. *Id*. at 597. Actual damages for breaches of promises to marry are often not available in other American states. *See*, *e.g*., CAL. CIV. CODE § 43.4; MASS. GEN. LAWS ch. § 207, 47A; N.Y. CIV. RIGHTS LAW § 80-a; and OHIO REV. CODE ANN. § 2305.29. Evidently, there and elsewhere, state constitutional remedial rights do not exist or have not been litigated or have been read differently than in *Heck*.
23. Siegall v. Solomon 19 Ill. 2d 145, 147-8 (1960).
24. *Id*. at 147 (ILL. REV. STAT. 1947, chap. 68, pars. 34-7).
25. *Id*. at 148 ("No issue was raised as to whether any portion of the prayer embraced a claim for actual damages and thus we deem the question waived.").
26. *Id*. at 149.
27. *Id*. ("We . . . would be justified in deeming the contention abandoned.").
28. *Id.* at 148.
29. *Id*. at 149.
30. *Id*. ("From a standpoint of the constitutional issues raised, Smith . . . is indistinguishable from the present proceeding.").

does not prohibit an action, but merely denies certain damages as a basis for recovery, could not be in contravention" of the constitutional remedial right.[31] The court did not go further by explicitly declaring that the exclusion of only punitive damages, as in *Smith* where all actual damages seemingly were available, was comparable to the exclusion of punitive and some actual damages, as in *Siegall*. Further, the court did not expressly hold that the General Assembly could exclude certain actual damages for claims encompassing "vested rights," as with claims that, unlike alienation of affections, involve property, and in the "modern" sense warrant a sense of justice per *Heck*.

As noted in *Murphy*, the three Supreme Court precedents have been read to sustain broad General Assembly power to exclude certain actual damages for certain claims. Actual damage and punitive damage exclusions are sometimes not distinguished. In a 1970 alienation of affections case, the Illinois First District Appellate Court summarily opined that a claimant's mental illness treatment expenses, as well as the claimant's lost earnings and profits, were statutorily excluded.[32] In 1974, the Fourth District, in another alienation of affections case, simply followed the 1970 precedent.[33] And in 1981, in another alienation of affections case, the Second District found that losses of spousal income were recoverable as actual damages, but that losses of consortium were not recoverable.[34]

Other Supreme Court precedents, incidentally, recognize the constitutional remedial right may be also limited by immunizing certain defendants from liability, even where claimants with injuries caused by wrongs may be left with no one to sue and thus no remedy. In 1984 the Supreme Court sustained a statute abolishing earlier recognized tort liabilities for landowners, and their lessees and occupants, for injuries to snowmobilers caused by land conditions.[35] Then, in 1988, the court sustained a public transit authority's immunity from tort claims involving passengers assaulted by fellow passengers or others.[36] Thus, the Illinois constitutional right to "a certain remedy in the laws for all injuries and wrongs" bars neither certain immunity from liability nor certain damage exclusions.[37]

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31. *Id.*
32. Kniznik v. Quick, 130 Ill. App. 2d 273, 289 (1st Dist. 1970) (cited in Murphy v. Colson, 2013 IL App (2d) 130291, ¶ 31).
33. Wheeler v. Fox, 16 Ill. App. 3d 1089, 1093 (4th Dist. 1974) (cited in Murphy v. Colson, 2013 IL App (2d) 130291, ¶ 31).
34. Coulter v. Renshaw, 94 Ill. App. 3d 93, 95-97 (2nd Dist. 1981) (disagreeing with the dictum in *Kniznik*, 130 Ill. App. 2d 273, 280).
35. Ostergren v. Forest Preserve Dist., 104 Ill. 2d 128 (1984).
36. Bilyk v. Chicago Transit Auth., 125 Ill. 2d 230, 247 (1988) (immunity statute, as in Ostergren, may foreclose an injured person from pursuing any cause of action though an immunized person was negligent).
37. *Id.* at 245.

B. The *Murphy* Ruling

As noted, in *Murphy* the actual, or noneconomic compensatory, damage exclusions in the Alienation of Affections and Criminal Conversation Acts were challenged.[38] A former husband sued his former wife's alleged paramour under the Acts, as well as for intentional infliction of emotional distress.[39]

In *Murphy*, plaintiff essentially acknowledged strict application of the *Siegall* ruling would bar his argument.[40] Nontheless, he urged *Siegall* was "implicitly overruled by subsequent supreme court rulings" which held unconstitutional certain noneconomic statutory damage caps.[41] The *Murphy* court deemed these rulings were not "controlling,"[42] finding inapplicable their foundations in separation of powers and special legislation rationales.[43] The *Murphy* court deemed that damage caps were not always analogous to damage exclusions.[44]

The *Murphy* court reviewed the damage cap rulings in light of *Heck*, *Smith* and *Siegall*. As to the latter three cases, the courts' peripheral observations leave certain remedial right questions unresolved. The *Murphy* court noted, "interestingly," the dissent in the later caps case observed that nothing in the separation of powers doctrine precludes the General Assembly from eliminating all noneconomic damages in medical malpractice actions.[45] However, the *Murphy* court did not recognize that in the first caps case, the high court observed that "legislative limits upon certain types of damages may be permitted, such as damages recoverable in statutory causes of action."[46] Medical malpractice actions are not statutory causes of action in Illinois.[47]

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38. Plaintiff accepted "the Acts' exclusion of punitive damages." *Murphy*, 2013 IL App (2d) 130291, ¶ 12.
39. *Id*. at ¶ 5 (the claim for intentional distress infliction was not at issue).
40. *Id*. at ¶ 14.
41. *Id*. at ¶ 14 (referencing both Best v. Taylor Machine Works, 179 Ill. 2d 367 (1997).
42. *Id*. at ¶ 14.
43. *Id*. at ¶¶ 33-42.
44. *Id*. at ¶ 35.
45. *Id*. at ¶ 34.
46. *Best*, 179 Ill. 2d at 415.
47. Wright v. Central DuPage Hospital Association, 63 Ill.2d 313, 347 N.E.2d 736 (1976) (in striking statutory damage limits on special legislation grounds, court finds medical malpractice claims, unlike dramshop claims, are not "purely statutory " and thus are not "subject to recovery limitations imposed by the legislature"). The phrase "statutory cause of action" thus does not simply refer to a cause of action or a claim that is set out in statute. Rather, it encompasses a claim whose general procedures significantly lie within special statutes outside the Civil Practice Law (i.e., Article II of the Illinois Code of Civil Procedure, per 735 ILL. COMP. STAT. 5/1-101(b)) and are often deemed "sui generis" (i.e., People ex rel. Daley v. Fitzgerald, 123 Ill. 2d 175 (1989) (juvenile delinquency and post-conviction relief proceedings are "sui generis")). Here, the General Assembly may cut off a claimant's right to pursue a statutory remedy having no counterpart in common law. As the court said in CPM Productions v. Mobb Deep, Inc., 742 N.E.2d 393, 397 (1st Dist. 2000):

In the second caps case, the *Murphy* majority noted that *Siegall* was deemed to have not been undermined.[48] In that caps case the court did recognize the General Assembly could alter the common law and change or limit available remedies, but only within constitutional bounds.[49] The second case drew upon the first caps case[50] where the only example of a precedent recognizing such legislative authority involved the Worker's Compensation Act. This Compensation Act not only involves damage limits, but also removal of claims entirely from the Circuit Court authority—a far different legislative exercise than a damage cap or a damage exclusion in a circuit court civil action (particularly an action with deep roots in common law and not a statutory cause of action).[51]

> Although the legislature has no authority to limit the original jurisdiction of the circuit courts to hear justiciable matters, it may create a justiciable matter—and thereby expand the jurisdiction of the circuit court—by enacting a statute that creates rights or duties that did not exist, and had no counterpart, in the common law or equity . . . While the circuit court's original jurisdiction to adjudicate the matter derives from the constitution in such instances, the justiciable matter itself is defined by the statute . . . The legislature may define the justiciable matter in such a manner as to limit or preclude the circuit court's authority, and where the justiciable matter is so defined, the circuit court is governed by the rules of limited jurisdiction and must proceed within the strictures of the statute . . . That is, since the justiciable matter is statutory in origin, the legislature may impose non-waivable conditions precedent to the circuit court's exercise of jurisdiction.
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> *See also* Strukoff v. Strukoff, 76 Ill. 2d 53 (1979) (special statutory procedures "not uncommon" in marriage dissolution, adoption, eminent domain and taxpayer cases); 735 ILL. COMP. STAT. 5/1-108(b) (recognizing governance of special statutory procedures outside Code of Civil Procedure); and ILL. SUP. CT. R. 1 (court rules "govern all proceedings in the trial court, except to the extent that the procedure in a particular kind of action is regulated by a statute other than the Civil Practice Law"). *And see* McKeown v. Homoya, 209 Ill. App. 959, 154 Ill. Dec. 528, 568 N.E.2d 528, 529 (5th Dist. 1991) (in finding no constitutional remedial right at issue, court observes: "Because the Dramshop Act is a purely statutory cause of action, the legislature can choose to abrogate available remedies through subsequent legislation . . . More importantly, as the legislature is the only entity with power to set the terms of recovery and liability without interference from the courts for an action unknown at common law, the freedom with which we may act to alleviate perceived injustices is thereby restricted."). Outside of Illinois, statutory causes of action are expressly delineated, as in the Comment to Rule 1-001 of the New Mexico Rules of Civil Procedure (special cases and proceedings include election; probate; Workers' Compensation; zoning; arbitration; declaratory judgment; adoption; garnishment; certain tax matters; and condemnation). *See also* Sanders v, Ahmed, 364 S.W.3d 195, 202-04 (Mo. 2012) (rejecting jury trial challenge to statutory cap on noneconomic damages for Wrongful Death claim as such a claim, even when involving medical malpractice prompting death, is a statutory cause, not a common law cause) and Watts v. Lester E. Cox Medical Centers, 376 S.W.3d 633 (Mo. 2012) (state constitutional right to trial by jury renders invalid a statutory cap on noneconomic damages in cases involving medical negligence), as well as Schroeder v. Weighall, 316 P.3d 482 (Wash. 2014) (statute tolling minor's claims, except those in medical malpractice, violates state constitutional "privileges or immunities" clause as medical malpractice is "rooted in the common law tradition" and statute is not sustainable as more than a rational basis is needed [i.e., a "reasonable ground" which may not be a legislative choice based on rational speculation unsupported by evidence or empirical data]).

48. *Murphy*, 2013 IL App (2d) 130291, ¶ 36.
49. Lebron v. Gottlieb Memorial Hospital, 237 Ill. 2d 217, 245 (2010).
50. *Id*.
51. *Id*. at 245 (citing *Best*, 179 Ill. 2d at 408, which cited Gran Trunk Western Ry. Co. v. Industrial Comm., 291 Ill. 167 (1919)) (described in *Best* "as an instance of the legislature's valid exercise of

C. Other Pre-*Murphy* Precedents on Illinois Constitutional Constraints on Statutory Damage Exclusions

Beyond the Illinois constitutional remedial right, the *Murphy* court[52] recognized there were other Illinois constitutional constraints on statutory damage limits. Another limit was separation of powers which has twice served to invalidate statutory damage caps.[53] Here, certain actual damages are not wholly excluded, but rather are subject to a cap to be imposed by a trial judge upon a jury verdict exceeding the cap, which was unknown to the jurors.[54] Such a damage limit has been viewed as "legislative remittitur" that "unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive with the meaning of the law."[55]

Another constitutional constraint on statutory damage limits is the mandate against special legislation, which the *Murphy* court noted has "the same standards as an equal protection challenge."[56] To prevail, a claimant must show an arbitrary statutory classification discriminating in favor of a select group to the exclusion of others similarly situated when they all pursue

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the police power in limiting liability of an employer for injuries sustained by an employee during the course of his or her employment"). Differences between common law claims protected by the Illinois constitutional remedial right and unprotected statutory claims also are important when courts consider whether to apply retroactively a new, and shorter, statutory time period within which to sue. *See, e.g*., Orlicki v. McCarthy, 4 Ill.2d 342, 122 N.E.2d 513 (1954) (amendment to Liquor Control Act applied retroactively; court recognizes "the concept of 'vested right' is fraught with vagaries that defy precise definition" though no such right had been found in a Wrongful Death Act claim for a death occurring outside of Illinois); People v. Robinson, 140 Ill. App. 3d 29, 94 Ill. Dec. 387, 487 N.E.2d 1264 (4th Dist. 1986) (employing *Orlicki* in a statutory postconviction relief case which was not derived from common law); *and* Moore v. Jackson Park Hospital, 95 Ill.2d 223, 69 Ill. Dec. 191, 447 N.E.2d 408 (1983) (distinguishing *Orlicki* as here "these plaintiffs' actions . . . were recognized at common law).

Outside of Illinois, other state constitutional remedial rights have yielded to damage limits for claims pursued in the general jurisdiction trial courts, but at times only after a determination is made that the common law modification "is reasonably necessary in the public interest to promote the public welfare" and there is a General Assembly substitution of "an adequate statutory remedy for the modification to the individual right at issue." Miller v. Johnson, 289 P.3d 1098, 1113-14 (Kan. 2012) (upholding statutory cap on noneconomic damages in medical malpractice actions when challenged on constitutional jury trial and remedial right grounds).

52. *Murphy*, 2013 IL App (2d) 130291, ¶¶ 32-42.

53. *Best*, 179 Ill. 2d at 384 (invalidating a $500,000 cap on non-economic damages in all common law, statutory or other actions for damages on account of death, bodily injury or physical damage to property based on negligence, or product liability) and *Lebron*, 237 Ill. 2d at 228 (invalidating a $1,000,000 cap on an award against a hospital and a $500,000 cap on an award against a physician for non-economic damages arising out of medical malpractice).

54. *Best*, 179 Ill. 2d at 414 (cap is "mandatory"); *Lebron*, 237 Ill. 2d at 229.

55. *Best*, 179 Ill. 2d at 414 (quoted in *Lebron*, 237 Ill. 2d at 235).

56. *Murphy*, 2013 IL App (2d) 130291, ¶ 39 (citing *Best*, 179 Ill. 2d at 393). The special legislation constraint is found in Ill. Const., art. IV, §13.

the same claim.[57] Damage caps can be such an invalid classification, but under *Murphy*, damage exclusions usually cannot.[58]

The jury trial right constraint on statutory damage limits was not recognized in *Murphy*. In *Best*, the first damage cap invalidation case, the high court specifically noted its failure to determine whether the jury trial right could invalidate a statutory damage cap. It noted that elsewhere a comparable state constitutional bar operates.[59]

In Illinois, a post-*Best* statutory damage cap, set out in percentage of fault, has been upheld. In *Unzicker v. Kraft Food Ingredients Corp*.,[60] the court sustained a statute modifying the common law rule of joint and several liability by establishing only several liability for nonmedical damages for any tortfeaser whose percentage of total attributable fault was less than twenty five percent.[61] The plaintiff in *Unzicker* would never fully recover noneconomic damages as the party primarily responsible (99%) for fault was the plaintiff's employer, whose monetary responsibilities were limited by the worker's compensation scheme.[62] This ruling was untouched in the second damage cap case, *Lebron*,[63] where the court found the statute did not prompt a judgment at variance with a jury determination and did not supplant a trial judge's role in limiting jury awards deemed excessive under the evidence. In *Unzicker*, as in *Murphy*, the Illinois constitutional jury trial right was not expressly considered.[64]

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57. *Murphy*, 2013 IL App (2d) 130291, ¶ 42.
58. *Id*. (under *Best*, damage caps unfairly prevent "plaintiffs who had been greatly harmed from being fully compensated but did not prevent plaintiffs who had been minimally harmed from being fully compensated;" but under *Best*, in a damage exclusion setting, a court should not compare plaintiffs in one tort to plaintiffs in another tort who had endured a similar level and type of harm").
59. *Best*, 179 Ill. 2d at 414 (citing Sofie v. Fireboard Corp. 112 Wash. 2d 636 (1989) (finding a Washington statute unconstitutional). More recent non-Illinois precedents include *Watts*, 376 S.W.3d at 640-41 (citing *Sofie*, 112 Wash. 2d 636 and Taylor v. King, 345 S.W.3d 1237 (Ky. Ct. App. 2010).
60. Unzicker v. Kraft Food Ingredients Corp., 203 Ill. 2d 64 (2002).
61. The modification continues in a different form. 735 ILL. COMP. STAT. 5/2-1117 (fault assessments for plaintiff, the defendants sued by the plaintiff, and any third party defendant except the plaintiff's employer).
62. *Unzicker*, 203 Ill. 2d at 83-84.
63. *Lebron*, 237 Ill. 2d at 242-43.
64. *Unzicker*, 203 Ill. 2d at 83-95 (court did consider constitutional remedial right, special legislation and equal protection, separation of powers and due process). In the second damage cap invalidation case the high court may have been thinking of the Illinois constitutional jury trial right when it declined to comment on the constitutionality of several Illinois statutes "which limit common law liability." *Lebron* 237 Ill. 2d at 246-47.

III. ILLINOIS CONSTITUTIONAL CONSTRAINTS ON STATUTORY DAMAGE EXCLUSIONS AFTER *MURPHY*

In 2013, the Illinois Second District Appellate Court observed in *Murphy*, that Illinois Supreme Court precedents do not preclude the General Assembly from "eliminating all non-economic damages" in a medical malpractice action.[65] However, a more careful examination of precedents reveals that only in some settings are statutory damage exclusions appropriate. Comparably, complete damage exclusions prompted by statutory eliminations of causes of action, or establishments of immunities from causes of action, are also appropriate only sometimes.

Statutory damage exclusions for certain claims, as well as complete statutory bars to suit due to the absence under statute of any duty or the presence under statute of an immunity, seem generally authorized, notwithstanding the constitutional remedial right, only when the effected claim or damage request has no strong roots in the common law. Such roots at times are described as establishing a "vested right."

As to statutory damage exclusions, *Smith* established in 1958, that punitive damages may be barred as there is no "vested right" in them even where actual damages are recoverable.[66] *Siegall* established in 1960, that certain actual damages (such as "mental anguish") may be barred though other actual damages are recoverable.[67] Yet, *Siegall* should be read narrowly, as it excluded only certain actual damages for claims where there were no "vested rights."[68] More importantly, the statute in *Siegall* employed outdated, and seemingly substantively unconstitutional, "property" descriptions. Recall that *Siegall* involved a husband's claim involving the loss of his wife's affections and society, which she no longer chose to provide him because she was in a relationship with another man who the husband had sued.[69]

As to complete statutory bars to claims due to the lack of duty, *Heck* also involved, as in *Siegall*, a husband who sued his wife's suitor.[70] The court in 1946 sustained "the more grievance complaint" that the Heart Balm Act's elimination of all claims for alienation of affections and criminal conversation violated the constitutional remedial right.[71] The *Heck* court deemed the Act interfered with the husband's "contract of marriage" which

65. *Murphy*, 2013 IL App (2d) 130291, ¶ 34 (quoting the dissent in *Lebron*, 237 Ill. 2d at 283).
66. *Smith*, 12 Ill. 2d at 595.
67. *Siegall*, 19 Ill. 2d at 150.
68. *Id.* at 149.
69. *Id.* at 147-48.
70. *Heck*, 394 Ill. 2d at 297.
71. *Id.* at 299-300 (the lesser complaint involved the Illinois constitutional one subject matter rule for legislative enactments).

"has always been known in the law as a contract involving civil rights just as other contracts involve such rights."[72]

Seemingly, the contract of marriage was viewed differently in 1946 by *Heck*, than in 1960 by *Siegall*. The *Siegall* court—unlike the *Heck* court in—deemed marriage contracts as only "properly regarded in the law as a civil contract for some purposes," as marriage contracts, unlike many other contracts, "do not rest upon the agreement of the parties alone, but upon the general law of the State, statutory and common, which defines and prescribes those rights, duties and obligations."[73] Of course all contracts, to be enforceable or otherwise worthy of respect (as in a claim for interference with contractual rights), rest "upon the general law of the State."[74] Unsaid in *Siegall* was the evolving view that marriage no longer prompted a "vested" property interest in a husband, that no more could a wife be the chattel of her husband per contract. On the same day as it decided *Siegall*, the Illinois Supreme Court stated in *Heckendorn v. First National Bank of Ottawa*:

> At common law a married woman had no separate identity before the law; she was regarded as a chattel with neither property nor other rights which were enforceable against anyone. Her husband owned all her property and asserted all her legal and equitable rights.[75]

Unmentioned in both 1960 opinions were the federal and Illinois constitutional rights (as with due process and equal protection) that were evolving to deny continuing adherence to earlier views of "vested" property rights in husbands, which were utilized in earlier cases involving Illinois constitutional remedial rights.[76]

If complete statutory bars for certain common law claims, and thus complete damage exclusions, founded on lack of duty are generally permitted notwithstanding the Illinois constitutional remedial right, the strongest

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72. *Id*. at 300.
73. *Siegall*, 19 Ill. 2d at 149-50.
74. *Id.* at 150.
75. Heckendorn v. First National Bank of Ottawa, 19 Ill. 2d 190, 192 (1960) (both *Siegall* and *Heckendorn* were initially decided on March 31, 1960).
76. Federal constitutional due process should likely play a far lesser role than Illinois constitutional due process should play where Illinois statutory damage exclusions are said to be limited by due process interests in life, liberty or property deprivations. *See, e.g.*, Elaine W. Shoeben, *Uncommon Law and the Bill of Rights: The Woes of Constitutionalizing State Common-Law Torts*, 1992 U. ILL. L. REV. 173, 187 (1992) ("The 'constitutionalization' of defamation has taught lessons relevant to the [U.S. Supreme] Court's decisions whether to provide minimal constitutional standards for other areas of common law, such as punitive damages. The Court should not lightly replace the common law process of growth and change with federal constitutional requirements. States can manage tort law with minimal supervision and should be allowed to do so.") Compare the more sympathetic, but still wary, John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 611-616 (2005) (guidelines suggested for enforcing a federal constitutional due process right to certain redress for torts).

precedent is (the often uncited) *Clarke v. Storchak*, finally decided by the Illinois Supreme Court in 1944.[77] In *Clarke*, the Illinois statute eliminating a gratuitous auto guest passenger's negligence (but not willful and wanton misconduct) claim against the host driver was sustained under the constitutional remedial right.[78] But, unlike Heck's marriage contract claim, the passenger's negligence claim cannot be characterized as having been jettisoned by other, later constitutional developments effectively modifying the constitutional remedial right. Nonetheless, *Clarke* may not permit wholesale statutory damage exclusions via no duty acts because the law at issue in *Clarke* was deemed—by the General Assembly—to be more valuable to gratuitous auto passengers than would be any continuing common law remedial right. Without the statutory damage exclusion for a negligence claim, the legislature was concerned that drivers who were "charitably inclined" to give free rides would "be restrained by fear of the consequences of their own charitable act."[79] Thus, effectively the interests of a few free ride passengers yielded to the interests of many, many other free ride passengers—a balance the court in *Clarke* found promoted "the best interests of people in their relations to each other."[80] By contrast, pedestrians (or passengers) hurt by (non-host) negligent auto drivers may not be able to be statutorily stripped of their common law remedies as many other pedestrians (or non-guest passengers) would not be benefitted. In some (but not all) ways, gratuitous passengers and their host drivers were treated like employees and their employers have been treated in the worker's compensation scheme. In the worker's scheme, some workers lost their common law claims in order to benefit all workers.[81] *Clarke* may allow damage limits, including limits on entire claims, for those injured persons with otherwise available constitutional remedial rights where new statutory benefits—of at least comparable value—are provided the broader classes of persons in which the injured reside. Statutory alterations of constitutional remedial rights seemingly may also be allowed when common law claims are deemed preempted by new written laws—which must significantly advance the interests of those whose common law claims are extinguished,[82] and

77. Clarke v. Storchak, 384 Ill. 564 (1943).
78. *Id*. at 571, 574-80.
79. *Id*. at 579.
80. *Id*. at 579.
81. *See, e.g.*, Grand Trunk Western Ry. Co. v. Industrial Comm'n, 291 Ill. 167, 174 (1919) ("The employee. . . is no longer able to recover as much as before in case of an injury growing out of the employer's negligence, but he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages . . . the employer is left without defense respecting the question of fault, but he is at the same time assured that the recovery is limited and that it goes directly to the relief of the designated beneficiary").
82. On a preempted common law claim *see, e.g.*, Robertson v. Travelers Ins. Co., 195 Ill.2d 441 (1983) (215 ILL. COMP. STAT. 5/155, on "vexatious and unreasonable" insurance company actions

where such extinctions are measured by a test more rigorous than rational basis.[83]

Like complete statutory bars founded on no duty, claims against a certain defendant can be barred because an immunity is statutorily created. Not surprisingly, such bars have been sustained where a claimant has no vested property interest because there are no significant common law roots supporting the claim or because any common law roots have been made irrelevant by later constitutional law developments. Statutory immunity of one spouse from a civil tort action by the other spouse for a tort committed "during coverture" was sustained in the 1960 case, *Heckendorn v. First National Bank of Ottawa*, because the claim was "unknown to common law"[84] and because "no rights had vested" (i.e., the spouse had not been harmed, and thus had not sued or obtained a judgment, before the immunity was recognized).[85]

Statutory immunities for Illinois governments and governmental officials have been sustained because "the Illinois Constitution of 1970 abolished sovereign immunity, in Illinois, except as may be provided by our General Assembly through statutory law."[86] Provisions can be made legislatively for both state and local governments.[87] These provisions have been read not to incorporate the common law discretionary/ministerial distinction operating for the common law's public official immunity doctrine.[88]

Beyond the constitutional remedial right, other Illinois constitutional constraints can limit statutory damage exclusions, including separation of powers; due process; special legislation/equal protection; and jury trial rights. For now those limits seem less likely to be utilized by Illinois courts than the constitutional remedial right, at least when the exclusion operates for claims in Illinois circuit courts with deep roots in the common law; where there have

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regarding liability claims of their insureds, preempts tort claims for intentional inflictions of emotional distress).

83. On such a constitutional measure, *see, e.g.*, *Schroeder*, 316 P.3d at ¶ 15 ("reasonable ground," not "rational basis," test when statute alters common law claim subject to a state constitutional "privileges or immunities" clause).

84. *Heckendorn*, 19 Ill. 2d at 195.

85. *Id.*

86. Epstein v. Chicago Board of Education, 178 Ill.2d 370, 375 (1997).

87. *Id*. at 375 (General Assembly used its constitutional prerogative regarding sovereign immunity "with regard to local governmental units, through its retention of the Tort Immunity Act").

88. *Id*. at 580-82. Elsewhere, the application of an absolute privilege to governmental officials that leave aggrieved individuals without remedies had been sustained on "public interest" grounds without mention of any constitutional remedial or due process rights of the aggrieved individuals. *See, e.g.*, Jones v. State, 2013 WL 6795237, at 6 (Tenn. 2013) (in the Tennessee constitution, remedial rights are addressed in Article I, 17 which says: "every man, for injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law;" it goes on to differentiate remedial rights against governments by saying: "suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.").

been no subsequent overriding constitutional developments (as with sovereign immunity resurrections and invalidations of due process interests of husbands in possessing their wives as chattel); and thus where vested rights (i.e., due process?) may be found. However, exclusions could be sustained where claims are statutorily diverted to alternative[89] (to circuit court) forums, as done with certain employee claims via worker's compensation, or where classes of potential claimants are provided alternative and significant statutory benefits, as with guest passengers. However, diversions may be limited to so-called statutory causes of action, or at least to claims with no significant roots in common law (as might be true not only for ordinary employee tort claims against employers, but also for newly-fashioned employee claims against employers, as with race discrimination).[90]

IV. CONCLUSION

The Illinois constitutional remedial right constrains the General Assembly authority to exclude certain actual damages for certain claimants, or to exclude all actual damages for certain claimants via no duty or immunity laws. But, the constraints are not wholly clear.[91] Too often Illinois courts make overly broad pronouncements about legislative authority. A close examination of the 2013 Illinois Second District Appellate Court opinion in *Murphy v. Colson*, and of earlier Illinois Supreme Court precedents, reveals significant limits in the Illinois constitutional remedial right. The breadth of further constitutional limits (especially special legislation/equality and jury trial) remain far less clear.

89. In *Lebron*, 237 Ill. 2d at 283, Justice Karmeier, in dissent, suggested that the General Assembly not only could eliminate "all noneconomic damages in medical malpractice cases," but also could "abolish civil actions for medical malpractice completely and replace them with a claims system comparable to the one it has established for workers compensation."

90. On jury trial rights for common law claims, but not statutory causes of action, *see* Interstate Bankers Cas. Co. v. Hernandez, 2013 IL App (1st) 123035 (Illinois civil jury trial right applies to common law claims existing in 1970—when constitutional jury trial right was recognized anew; thus, jury trial rights can extend to claims that were not common law claims in 1870 when initial civil jury trial right was constitutionally recognized).

91. Nationwide, one experienced observer of the limits on state tort laws posed by comparable American state constitutional remedial rights described the precedents as a "morass," confessing "continued irresolution" and an inability "to provide final answers." Thomas R. Phillips (Chief Justice, Texas Supreme Court), *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1339, 1344-45 (2003).