

CAPS ON RECOVERABLE DAMAGES UNCONSCIONABLE AND UNCONSTITUTIONAL

PERSPECTIVE:

“TRUTH, CRUSHED TO EARTH, SHALL RISE AGAIN.” (Bryant).

1. The general public thinks it's a good idea to cap damages. In fact, the goal should be to prevent damages altogether, say by preventing the tens of thousands of deaths due to medical negligence annually.¹ The problem is: DAMAGES HAVE NOT BEEN CAPPED. Damages from medical malpractice accrue to the victims, the widows, and orphans (and to their health insurers, family providers, or taxpayers who pay for their treatment or disability income) whether we like it or not. The laws do not cap THEIR damages. The cap is only on RECOVERIES, which merely prevents the injured victims, widows and orphans (and those who pay for the treatment or disability income) from being able to recover the full amount of their damages from the negligent physicians and hospitals. The so-called “cap on damages” protects negligent, for-profit, health care institutions and for-profit insurance companies. The “cap on damages” prevents judges and juries from carrying out their constitutional function. The “cap” removes the element of personal responsibility from the practice of medicine.

PERCEPTION VS. REALITY: As in all things, the public perception (including that of the legislature and the Supreme Court) has been molded by years of propaganda. The general public thinks there is no limit to what can be recovered in a lawsuit. They read about verdicts in Texas or New York and think the same happens everywhere, everyday, including in our own humble little insurance-protective kingdom. They are told that this medical malpractice law helps prevent “frivolous lawsuits”. The public does not know that every doctor believes that any lawsuit against him or her is necessarily frivolous. The public thinks that lawyers get rich by filing frivolous lawsuits. But no plan exists which pays the lawyer who sues on behalf of an injured victim on the same terms as the lawyer who represents the negligent doctor, win or lose. It is a mass hysteria. It is reason vs. mania. We must always be aware that mass hysteria is present; and that it is not new:

In the fifteenth century, the general public view was that the earth was flat, and that someone like Columbus would likely fall off the earth if he went far enough out to sea.

- In the seventeenth century, the literate few were those in the Catholic Church, which threatened Galileo with a life sentence of house arrest unless he renounced his heresy published in 1632, in which he supported Copernicus' theory that the earth revolved around the sun. Copernicus' theory had been officially declared as heresy in 1616.

¹ See “Medical Errors kill tens of thousands annually, panel says”, CNN report, November 30, 1999; <http://www.cnn.com/HEALTH/9911/29/medical.errors/>

In Germany in the 1930's and early 1940's, euthanasia (mercy killing) was promoted as a "treatment" for the mentally ill, handicapped, and useless citizens, which soon was easily extended to enemies of the Nazi party such as those of the Jewish persuasion.

In the United States, in 1950, McCarthyism swept through the leadership of this country and brought about changes in laws and in judicial decisions which still persist to this day {See the Feres doctrine² which has been extended to hold that the U.S. Army is immune from suit even for injuries to national guardsmen from medical malpractice while not on active duty³; and try to reconcile that case with the recent U.S. Supreme Court decision that President Clinton, a sitting U.S. President and Commander in Chief is not immune from civil suit or proceedings, Jones v. Clinton, 72 F.3d 1354 (C.A.8 (Ark.), 1996); and Clinton v. Jones, 117 S.Ct. 1636, 137 L.Ed.2d 945, 520 U.S 681 (1997)}.

2. HOW WE GOT HERE:

In Louisiana, caps on damages came into being based upon a fraudulent national advertising campaign by insurance interests, aided by hospital and medical groups who jumped on the bandwagon. [See "The Manufactured Crisis: liability insurance companies have created a crisis and dumped it on you." Consumer Reports, August, 1986; See also: "Insurance crisis? An expose of the Insurance Industry's Deceptive Media Campaign", Ed Bradley, CBS 60 Minutes, Jan. 10, 1988. For a brief summary of the corporate advertising campaign that brought about many so-called "reforms" check out "False Alarm by Stephanie Mencimer of *Washington Monthly*, which may be found at <http://www.washingtonmonthly.com/features/2004/0410.mencimer.html>.

The result of the advertising campaign: enormous insurance company profits; and a trend for juries to look for any evidence of weakness in a case and to put TNT into any holes.

THE WAY OUT:

Recent revelations about the sorry state of the medical services industry has opened a portal for a truthful advertising campaign to regain public confidence in the judicial system. **By removing the medical accountability, the system allowed profit-seeking companies to cut costs and increase profits, at the expense of patients and widows and orphans.** For centuries, the judicial system has been the best response to enforce individual responsibility in all types of human activities. The **legislative meddling** in the ability of juries and courts to decide issues has prevented the system from working properly. Since neither lawyers nor clients can afford a television advertising campaign or full page ads in national magazines, the victims of these corporate "reforms" must carry the banner by speaking to local civic groups, to friends, to clients, to other lawyers, and to judges; by writing letters to editors; by writing articles; etc. .

² Feres v. United States, 340 U.S. 135 (1950)

³ Schoemer v. U.S., #94-20793, U.S. Fifth Circuit Court of Appeal; 59 F. 3d 26 [CA5, Tex, 1995]

If you ask anyone whether damages in civil cases should be decided by a judge or jury **only after hearing the evidence** or should be decided 35 years in advance, **without any evidence**, by a group of people who fix a set scale for damages, that most would chose the judge/jury system. Yet, the La. Med. Mal. law grants to the 1975 legislature, without having heard the evidence, 35 years in advance, to set a damage scale which could not be exceeded in ANY case, no matter how grievous. How long into the future will this scale apply? Does this meet the requirements of DUE PROCESS OF LAW? Does this step on the province of the courts in our checks and balance system of government? **THE ANALYSIS OF SEPARATION OF POWERS [JUDICIAL VS. LEGISLATIVE POWER] IS THE PATH WHICH CAN FINALLY END THIS FIASCO. THERE ARE OTHER LEGISLATIVE AVENUES TO PROTECT NEGLIGENT HEALTH CARE PROVIDERS, SUCH AS CHAPTER 11 BANKRUPTCY.**

3. NO BASIS FOR THE LA. MEDICAL MALPRACTICE ACT. The La. S. Ct. has stated that: “Although a subject of debate, the existence of a **medical malpractice insurance crisis** was widely acknowledged when Louisiana’s Medical Malpractice Act of 1975 was passed.” Butler v. Flint Goodrich Hospital, La. S. Ct., 1992, No. 92-CC-0559, 607 So. 2d 517; 10/19/92. Dennis, J. dissented 11/10/92; rehearing denied 11/10/92. (EMPHASIS SUPPLIED). The only two sources cited by the Supreme Court in support of this claim were published AFTER 1975, and neither one contains support for the claim that an insurance crisis was “widely acknowledged”. This view has been completely debunked. Read Whitnell v. Silverman; La. App. 4th Cir., #93-2468, 11/4/94, 646 So. 2d 989. For additional references check my website article “Louisiana Medical Malpractice Insurance - Must Read” at www.schrumpf-law.com, also printed in the two part article published in The Advocate, LTLA magazine, January and February, 1999.

SPECIAL LEGISLATION: The Caps do not apply to the doctor who kills his patient with his car while driving and talking to his stockbroker on his cell phone; it only applies if the doctor uses his scalpel or is asleep or drunk when he should be looking at x-rays. Thus, the legislature is willing to allow market forces to take their course in every area except medical malpractice. Is this because doctors are better lobbyists than victims? Or is it only an insurance issue?

“It is hard to imagine a statutory provision that more blatantly favors a special class than one that limits the damages an injured person may recover from a (physician). No such consideration is afforded any other professional who negligently injures another person.”

(If the “reforms” benefiting health care providers were intended to be the first step in a plan to resolve an insurance “crisis”, then in the ... years since the act was first adopted, why has it not been extended to) “the torts of accountants, airlines, architects, barbers, bandits, banks, bus drivers, cooks, dog owners, engineers, financial advisors, horse trainers, golfers, hotel keepers, inebriates, jailers, kidnappers, lawyers, etc.”

Justice Russell, dissent, in Etheridge v. Medical Center Hospitals, 376 S.E. 2d 525 (Va., 1989), at pp. 536-7.

La. Constitution of 1974, Article III, Section 12 (A) (7) prohibits special legislation “... granting to any private corporation, association, or individual, any special or exclusive right, privilege, or immunity.”

INSURANCE RATE RELIEF? The La. PCF was supposed to provide low-cost insurance relief to physicians in order to maximize insurance coverage. ON ITS FACE the act DOES NOT do this because the PCF is required to charge rates based upon sound actuarial principles. [La. R.S. 40:1299.44 A. (2)(b)] Thus, the rates charged to physicians for the excess coverage over \$100,000.00 up to \$500,000.00 must, by law, be equal to the premiums which would have been charged by a commercial insurer. Accordingly, in exchange for paying premiums to an insurer for a \$100,000 primary policy, plus premium surcharges to the PCF for the coverage over \$100,000, the physician's liability is limited to a total of \$500,000, ALL OF WHICH IS INSURED. **No physician who has taken the time to be qualified has any risk of any personal responsibility** for any amount of damages. Removal of personal responsibility has proven to be THE WRONG ANSWER.

2. MISNOMER: CAPPING DAMAGES OR CAPPING RECOVERY? The insurance industry has been so successful in framing the debate by using false claims of frivolous lawsuits. Attorneys who represent malpractice victims must be prepared at every moment to speak to community organizations, friends, news media, and be armed with the information necessary to sway public opinion. "THE EMPEROR IS WEARING NO CLOTHES." Remember the Fable about the emperor who was duped into believing that for a huge amount of gold delivered to the weavers, they would weave a golden garment which would appear as gold to the wise but would be invisible to the ignorant and stupid. The emperor was parading naked through the streets when a small child stated the obvious. **We need to state the obvious.** We have all been duped. Victims' recoveries were capped; we have delivered the gold to the insurance industry. But the goal of reducing insurance premiums was not met because nothing in the law capped insurance premiums; nothing capped insurance profits; in fact; **INSURANCE PROFITEERING WAS LOCKED IN AND APPROVED AT THE EXPENSE OF VICTIMS.** The legislature took away the judicial power and the judiciary laid down and let the legislature do it.

Even malpractice lawyers use the shorthand name "caps on damages" to refer to the complex legislation which prevents courts from performing their duty and obstructs victims from receiving their legal remedy. There is a problem in this language. It was selected by the enemies of people. It is actually a CAP ON RECOVERIES. As one law review article put it:

"We sacrifice human lives so that a handful of incompetent doctors can afford to buy expensive cars." ["A Free Market Analysis of the Effects of Medical Malpractice Cap Statutes: Can We Afford to Live With Inefficient Doctors?" Cleckley, Franklin D., and Hariharan, Govind, W. Va. Law Review, Vol. 94, 1991, p. 60].

LEGISLATIVE ALTERNATIVE.

One of the greatest misunderstandings of the public and the judiciary is that the present Louisiana cap on damages applies to everything except future medical bills. Therefore, if the loss of earnings in a case is \$500,000, then there is nothing left for loss of consortium, pain and suffering, wrongful death, disfigurement, scarring, disability, survival damages, etc.. If any legislation is proposed, perhaps limiting the cap to "non-economic damages" would be one ameliorative means of reducing the gruesome effect of the cap on damages.

COMPETING STUDIES RE: EFFECTS OF TORT REFORM:

We must withstand the tendency to be suckered into a debate about whether “tort reform” reduces insurance rates. If you limit the amount of insurance coverage a physician has to purchase, it SHOULD reduce rates to some extent. A physician buying \$100,000 in liability coverage SHOULD pay less than a physician purchasing \$1 million in coverage. But, in Louisiana the insurers are NOT limited. For instance, LAMMICO has been selling \$1 Million dollars liability policies (in conjunction with the \$400,000 PCF layer of coverage) since 1992. See the American College of Surgeons professional library report at http://www.facs.org/about_college/acsdept/prolib_program/0699a.html

which compares the lower insurance rates in California after MICRA (Medical Injury Compensation Reform Act of 1975) which capped non-economic damages at \$250,000, compared to much higher rates for coverage in New York, Florida, and Michigan, without “limits”. The difference here is that the insurer’s risk is greatly reduced. In other words, the risk is transferred from the negligent physician to the victim and to the public.

On the other hand, there are reports that tort reform does not reduce insurance rates sufficiently to make any meaningful difference in the cost of medical services. One report says that tort reform laws have failed to reduce insurance **rates** in any place they have been adopted. [The Insurance Services Office, a group that helps insurance companies set rates from state to state, in a report in The Charleston Gazette online, (West Virginia), July 18, 1999: in a study commissioned by Citizens for Corporate Accountability and Individual Rights, showed that so-called tort-reform laws have done little or nothing to halt or lower insurance costs. Insurance “loss costs ... did not seem to be affected by whether the state had enacted sweeping tort reform measures, moderate measures, or no measures at all.”]⁴ See also the Idaho Supreme Court case, discussed below, in which the proof indicated that the cost of malpractice insurance was less than 2% of the operating cost of a medical practice, therefore the effect of caps on damages would not be sufficient to measure and claims that insurance costs would be effected by tort reform were refuted. See also the Texas joint medical/legal study indicating that malpractice insurance amounted to less than 1% of the cost of a medical practice; and that so-called reforms would not have a measurable effect. [Medical and Hospital Professional Liability, Joint Study by the Texas Hospital Association, Texas Medical Association, and Texas Trial Lawyers Association, referred to at Texas Bar Journal, Vol. 55, No. 9.

The issue is not will rates go up or down. **WHY EXPECT INSURERS TO REDUCE RATES WHEN THE LAW DOES NOT REQUIRE IT?** Nothing in the Louisiana Medical

⁴ The opposing argument is that substantial savings in PREMIUMS has occurred because of caps on damages. But this argument is like comparing the cost of a \$10,000 policy against a \$100,000 policy of liability insurance. Sure the cheaper limit costs less. Insurance savings should be measured by **rates for the same coverage**. Otherwise you are comparing apples and oranges. For the opposing view, see http://www.facs.org/about_college/acsdept/prolib_program/0699a.html in which two doctors from the American College of Surgeons claim that premiums in California (where the Medical Injury Compensation Act of 1975 {MICRA} limits damages to \$250,000 are less than “average” premiums in each specialty area in New York, Florida, and Michigan where there are no caps (at least at the time of this writing).

Malpractice Act required any single insurer to give up a cent of profit, nor to reduce reserves to any particular level, nor to attempt to settle a claim, nor to mediate claims, nor to take any action to ameliorate valid claims, nor to pay a penalty for bad faith defenses or for delaying settlements or even for fraudulently hiding records. Under the Louisiana Medical Malpractice Act, it is as if the legislature and the courts have acknowledged that any patient who would file a claim against a physician or hospital must be filing a frivolous claim and should be delayed, prevented, and required to jump through hoops until the victim finally quits in exasperation. A patient must file a petition to institute a claim (by which his claim lives or dies) but the defendant health care provider need not even answer or take any position. Not even a plea of not guilty.

The issue must be framed as this: **IS THE DETERMINATION OF DAMAGES A LEGISLATIVE OR A JUDICIAL FUNCTION?** The legislature may protect physicians, negligent and competent alike, by passing legislation making medical equipment and supplies exempt from seizure, by exempting a certain portion of income from seizure, by establishing methods for mediation of disputes, or by providing aid to physicians to purchase coverage, or any other of multiple ways, etc. But when it comes down to hearing evidence and awarding damages, this is a judicial function for which the legislature is ill suited.

II. HOW HAS THE LA. SUPREME COURT REACTED TO CONSTITUTIONAL CHALLENGES TO THE ACT?

At every opportunity, the La. Supreme Court first tries to avoid the issue, then finds the Act would be unconstitutional but for (fill in the blank with some imagined or infinitesimally unimportant factor)⁵.

1. Everett v. Goldman, 359 So. 2d 1256 (La. 1978) rejected a challenge to the medical review panel procedure holding that the right to proceed to a court determination was “not fundamental”. *[Other jurisdictions would disagree; furthermore, where does the La. Constitution separate these fundamental and not-so-fundamental rights? I have been unable to locate this dichotomy in my copy of the Constitution. Note also that the provisions of the MMA are severable. While the medical review panel procedure might be upheld as a reasonable pre-requisite for filing suit, the caps on damages may well be stricken as an intrusion on the judicial function.] Gratuitous editorial comment supplied by author.*
2. Butler v. Flint Goodrich Hospital, La. S. Ct., 1992, No. 92-CC-0559, 607 So. 2d 517; 10/19/92. Dennis, J. dissented 11/10/92; rehearing denied 11/10/92, upheld a challenge to constitutionality citing plaintiffs' failure to demonstrate a constitutional violation of equal protection, due process or adequate remedy.
3. Williams v. State, Dept. of Health and Hospitals, 97-0055 (La.12/2/97), 703 So.2d 579. The plaintiffs in Williams, a medical malpractice suit, attacked the constitutionality of the \$500,000.00 cap in favor of the state. The trial court determined that the portion of

⁵ The Louisiana Association of Business and Industry and the various insurance and medical organizations has made this a political issue by contributing to individual justices' campaigns. It is NOT political. We must insist that

LSA-R.S. 40:1299.39 which imposes the \$500,000.00 statutory medical malpractice cap on damages awarded against a state health care provider contravenes Article XII, Section 10(A). The state then directly appealed to the supreme court and contended, in part, that LSA-R.S. 40:1299.39 is constitutional because it does not contravene the proscription against sovereign immunity.

The supreme court reversed the trial court on the basis that non-governmental tortfeasors are afforded the same substantive defenses as governmental tortfeasors. According to the Court, in prohibiting immunity [98-0038 La.App. 1 Cir. 17] liability as well as from suit, the framers of Article XII, Section 10(A) clearly intended that the state not be afforded substantive defenses, unavailable to private litigants, based simply on its governmental status. Williams, 703 So.2d at 582. Thus, if a statute imparts to the governmental tortfeasor the same limitation of liability that is provided to non-governmental tortfeasors who commit medical malpractice, then the statute is not violative of the proscription against sovereign immunity. In other words, sovereign immunity mandates that the law of the land be applied equally to the sovereign and the private litigant.”

Quotation from 727 So.2d 613, 98-0038 La.App. 1 Cir. 12/28/98, Batson v. South Louisiana Medical Center, (La.App. 1 Cir. 1998); Excerpt from page 727 So.2d 621

However, the state statute providing for limitations now allows recovery of economic losses such as wages and loss of earning capacity [La. R.S. 13:5106 B (1) and (2)]. This puts the civil and public “caps” on an un-even keel.

4. “Crier v. Whitecloud, 496 So.2d 305, 311 (La.1986), (requires this court) to uphold the constitutionality of LSA-R.S. 9:5628, even though it seems unfair for the claim for prescription to run before a claimant knows his cause of action exists. See also In re Medical Review Panel for Brown, 97-2803, pp. 7-8 (La.App. 4th Cir.7/1/98); 715 So.2d 1249; Martini v. Louisiana State University Medical Center-Shreveport, 28,167, p. 1 (La.App. 2nd Cir.1/22/97); 688 So.2d 642, 643. However, appellants cite Whitnell v. Silverman, 95-0112 (La.12/6/96); 686 So.2d 23, in support of their assertions. Appellants argue that while the supreme court in Whitnell rejected a constitutional challenge to LSA-R.S. 9:5628, it did so because the plaintiff's condition therein did not have a latency period in excess of three years. Appellants further cite to us the supreme court's language in Whitnell stating, "This ruling by the Court does not address the constitutionality of La.R.S. 9:5628 as it applies to individuals with diseases that have latency periods in excess of three years. The court has basically declined to decide on this issue because it is not presently before it." Whitnell v. Silverman, 686 So.2d at 29 n. 13.”

Quotation from 725 So.2d 7, 97-1970 La.App. 1 Cir. 9/25/98, Medical Review Panel of Harris, In re, (La.App. 1 Cir. 1998); Excerpt from pages 725 So.2d 8-725 So.2d 9

5. Future medical benefits are subject to multiple judicial proceedings following “original” jurisdiction of the PCF to consider, pay, or deny the medical benefits even after the future medical benefits have been judicially determined.

“Once health care providers admit that, in event of their liability, a patient is in need of future medical care and related benefits, the issue of amount of future medical care and related benefits is no longer relevant [95-2127 La.App. 4 Cir. 31]

because the issue falls within the exclusive original jurisdiction of the Patient's Compensation Fund and Oversight Board. La.R.S. 40:1299.43, subds. A, C, E(2), G(5); 40:1299.44, subd. A(2-4, 7); Kelty v. Brumfield, 633 So.2d 1210 (La.1994). 706 So.2d 618, 95-2127 La.App. 4 Cir. 1/21/98, Descant v. Administrators of Tulane Educational Fund, (La.App. 4 Cir. 1998); Excerpt from page 706 So.2d 636.

6. Williams v. State:

Medical malpractice action was commenced against state, and on remand, 671 So.2d 899, the Twenty-Fourth Judicial District Court, Parish of Jefferson, Patrick J., McCabe, J., ruled that statute which placed cap on damages awarded against state in medical malpractice cases was **unconstitutional**. Plaintiffs appealed. The Supreme Court, Knoll, J., held that statute which limited state's liability in medical malpractice cases to \$500,000 did not violate state constitution's proscription against sovereign immunity, because the state remedy was limited the same as the private remedy. 703 So.2d 579, Williams v. State, Dept. of Health and Hospitals, (La. 1997)

(It's okay to kill the Jews because the reich also kills the insane. Hitler)
(Private hangings by vigilantes are constitutional because the death penalty is approved by the state legislature.)

Don't tell me it's circular. Unsolicited Editorial comment.

But note that La. R.S. 13: 5106 B (1) and (2) now provide disparate limitations for public cases when compared to civil cases under La. R.S. 40:1299.42 B (1) and (2).

Dissent in Williams:

“... the legislative goal prompting the enactment of the statutory ceiling was to protect the public fisc. See Chamberlain, 624 So.2d at 878, citing comment, Limiting Strict Liability of Governmental Defendants: The Notice Requirement of the 1885 [97-0055 La. 6] Legislation, 46 La. L.Rev. 1197 (1986). However, as this court acknowledged in Chamberlain, it is not our role to consider the legislature's policy or wisdom in adopting the statute; our role is to determine only the applicability, legality and constitutionality of the statute. 703 So.2d 579, Williams v. State, Dept. of Health and Hospitals, (La. 1997)
----- Excerpt from page 703 So.2d 586.

7. Sibley II, [Sibley v. Board of Supervisors of La. ...], 477 So. 2d 1094 (La., 1985) held that the La. MMA discriminated against a class of individuals protected under the Louisiana Constitution of 1974, to wit: persons who are disabled due to physical condition; the case was remanded to give the state a chance to show a “legitimate state interest” ; however, the State wisely settled the case out of court before an evidentiary hearing could be held, paying an amount well in excess of the cap, but utilizing a carefully worded settlement agreement to save face (and prevent a determination by the Supreme Court that there was in fact no legitimate state interest involved in depriving injured victims of fair compensation.).

8. There are other cases but this paper is getting too long already.

III. HOW HAVE OTHER STATES HANDLED CONSTITUTIONALITY CLAIMS

[Some states, like Louisiana thus-far, have upheld the constitutionality of their “tort reform” (*I prefer to call it “tort deform”*) legislation. Those decisions are not discussed here.

*When a judicial system refined by over two centuries of legal wisdom is scrapped by a legislative fiat relying only on hysteria and without any evidence to support it [See Whitnell v. Silverman, supra] it is a sad situation reminiscent of Copernicus, Galileo, Nazi Germany and the United States during the McCarthy era]. It is even sadder to compare the civics lessons we learned in high school about the three **independent and equal branches** of government to some recent judicial decisions which make some courts seem to be the pandering, weakened puppet of well-financed political action groups which groups are not entitled to a single vote in any election. The judiciary is the last resort to REASON from a legislative process filled with passion, emotion, and political financial support. But without courageous individual justices, judicial power is meaningless.*

As of December, 1998, only 23 states had some form of caps on damages in medical malpractice cases. http://www.facs.org/about_college/acsdept/prolib_program/0699a.html (url no longer accessible).

*However, cap statutes in at least three of the states on this list have recently been declared unconstitutional: Indiana, Ohio, and Oregon. This is in a constant state of flux. It is recommended that **SEPARATION OF POWERS** is THE argument with the most lasting stay power. Let the legislature look for other cures than judicial interference.*

Decisions from some of the other states holding portions of Medical Malpractice and Caps on Damages unconstitutional.

A. **OHIO:** State ex rel Ohio Academy of Trial Lawyers v. Sheward, No. 97-2419, 1999 WL 617856 (Ohio, 1999): striking down the Ohio Tort Reform law in its entirety based upon separation of powers grounds and upon the Ohio Constitution’s “single-subject” requirement for legislation. See discussion in “Ohio Tort Reform Measure Overturned”, TRIAL, Nov., 1999, pp. 66-73. The decision may be viewed/downloaded at http://www.sconet.ohio.gov/Special/Tort_Reform.html

See also Morris v. Savoy, 61 Ohio St. 3rd 683, 576 N.E. 2d 765 (1991) holding the \$200,000 cap on medical malpractice damages unconstitutional on due process grounds: No evidence of a rational connection between jury awards and malpractice insurance rates and it was arbitrary and capricious to impose the cost of any benefit to the public upon a class “consisting of those most severely injured by medical malpractice.”

B. **ILLINOIS:** Best v. Taylor Machine Works, Nos. 81890-81893, 1997 WL 777822, (Ill, Dec. 18, 1997) 179 Ill.2d 367, 228 Ill.Dec. 636, 689 N.E.2d 1057 (1997), holding the ENTIRE Civil

Justice Reform Act unconstitutional on grounds of “separation of powers” (holding that it is the province of the judiciary rather than the legislature to decide issues of damages, including the amounts).

C. **INDIANA:** Martin v. Richey, No. 53S04-9805-CV-271 (Indiana, July 8, 1999) ___ __ ___, holding a two-year statute of limitations unconstitutional because it required a plaintiff to file suit before the plaintiff could reasonably know that malpractice occurred and caused damage (an undiagnosed breast cancer case).

D. **OREGON.** Lakin v. Senco Products, Inc., No. S44110 (Oregon, July 15, 1999) Lakin v. Senco Products, 329 Or 62, 987 P.2d 463 (Or., 1997; re-issued 1999). The Oregon Supreme Court **unanimously** held the \$500,000 cap on non-economic damages “eviscerates” the state constitution’s right to trial by jury. [Note: new legislation has already been submitted to the Oregon legislature by “tort reform” advocates].

E. **TEXAS:** Lucas v. United States, 757 S.W. 2d 687 (Tex., 1988) held the \$500,000 cap on damages unconstitutional (as a violation of the Texas Constitution’s right to trial by jury, except in wrongful death cases (which the Tx. S. Ct. said was a statutory creation and that caps would be upheld in wrongful death cases)

“In the context of persons catastrophically injured by medical negligence, we believe it is unreasonable and arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease. (The) Texas Constitution ... guarantees meaningful access to the courts whether or not liability rates are high. As to the legislature’s stated purpose to ‘assure that awards are rationally related to actual damages,’ ... we simply note that it is a power properly attached to the judicial and not the legislative branch of government. ... (W)e hold it is unreasonable and arbitrary for the legislature to conclude that arbitrary damages caps, applicable to all claimants no matter how seriously injured, will help assure a rational relationship between actual damages and amounts awarded.”

Pending in Texas: Horizon/CMS Healthcare Corp. v. Auldis, on the issue of whether the Texas Caps (which adjusted for inflation now stand at \$1,350,000) apply only to actual damages and not to punitive damages.

F. **FLORIDA:** Smith v. Department of Insurance, 507 So. 2d 1080 (Fla., 1987) Striking down the Florida cap on non-economic damages on grounds of separation of powers:

“... (I)f the legislature may constitutionally cap recovery at \$450,000, there is no discernible reason why it could not cap the recovery at some other figure, perhaps \$50,000, or \$1,000, or even \$1. None of these caps ... would ‘totally’ abolish the right of access to the courts.”

G. **MONTANA:** Pfost v. State, 219 Mont. 206, 713 P. 2d 495 (1985) declaring medical malpractice limitations unconstitutional because “fundamental right” of access to courts was abridged.

See also: White v. State, 203 Mont. 363, 661 P. 2d 1272 (1983) and

Meech v. Hillhaven West, Inc., 238 Mont. 21, 776 P. 2d 488 (1989).

but presently re-enacted as Mont. Code Ann. Sec. 25-9-411 (1997) limiting damages to \$250,000 non-economic only.

- H. **KANSAS:** Ernest v. Faler, 237 Kan. 125, 697 P. 2d 870 (1985); Cap unconstitutional because right to judicial determination of claims is a “fundamental right” [Cf, La. S.Ct., Everett v. Goldman, supra].
- I. **UTAH:** Condemarin v. University Hospital, 775 P. 2d 348 (Utah, 1989) In striking down the cap on damages against political subdivisions of the state, the Utah Supreme Court said the purpose of the constitutional provision (reserving rights under common law to the people) was to “... impose some limitation on the power of the legislature (to create new rules of law and abrogate old ones) for the benefit of persons who are injured ... since they are generally isolated in society, belong to no identifiable group, and are rarely able to rally the political process to their aid....” The Supreme Court further stated that “...(proponents of the cap) had no empirical evidence that damage awards in Utah have threatened the stability of any unit of government.”
- J. **IDAHO:** Jones v. State Board of Medicine, 97 Idaho 859, 555 P. 2d 399 (1976), found the Idaho cap on damages had an obvious discrimination and remanded to the trial court for taking of evidence as to whether there was a violation of equal protection. The trial court, following the “means-scrutiny” test of Craig v. Boren, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), found that there was no basis in fact to support the claim of “crisis” and the statute did not have a fair and substantial relation to the achievement of the objective of the statute. FOR an EXCELLENT ANALYSIS OF WHAT LOUISIANA COURTS SHOULD HAVE DONE ; and HOW TO PREPARE TO TRY A CLAIM ON CONSTITUTIONAL ISSUES, obtain a copy of the trial court opinion in this case, 4th Judicial District Court, Ada County, Idaho, Docket No. 55527 and 55586, Judge J. Ray Durtschi, November 3, 1980; plaintiff’s counsel: Lloyd J. Webb.
- K. **NORTH DAKOTA:** Arneson v. Olsen, 270 N. W. 2d 125 (N.D. 1978) found the state’s cap on damages unconstitutional on due process and equal protection grounds. : [An excellent opinion, read it.]
- L. **ALABAMA:** Moore v. Mobile Infirmary Association, 1991 Ala. 1001, No. 89-1098, 592 So. 2d 156, striking down Alabama’s \$400,000 cap on non-economic damages in medical malpractice cases under Alabama’s constitutional guarantees to right to trial by jury and right of equal protection. “... the majority of Courts reviewing challenges under the constitutions of their respective states have invalidated limitations on damages.”
- M. **WASHINGTON:** Sofie v. Fibreboard Corp., 771 P. 2d 711 (Wash., 1989) “... (B)ecause the jury’s province includes determining damages, this determination must affect the remedy. Otherwise, the constitutional protection is all shadow and no substance.” [striking down the cap on damages as an unconstitutional violation of the right to trial by jury.]

N. **NEW HAMPSHIRE:** Carson v. Maurer, 120 N. H. 925, 424 A. 2d 825 (1980) held that the \$250,000 cap on non-economic damages in medical malpractice cases was unconstitutional.

See also: Brannigan v. Usitalso, 134 N. H. 50, 587 A. 2d 1232 (1991) holding unconstitutional a \$875,000 cap on non-economic damages in personal injury cases.

O. **SOUTH DAKOTA:** Knowles v. U.S., 544 N. W. 2d 183 (S. D. 1996) struck down on state constitutional grounds a \$1,000,000 cap on all damages [However, this automatically revived a previous state law providing for a \$500,000 cap on non-economic damages. However, separate caps apply to each party plaintiff.]

P. **WISCONSIN:** Martin v. Richardson, 192 Wis. 156, 531 N. W. 2d 70 (1995) struck down as unconstitutional a previous cap statute insofar as it was applied retroactively. However a new cap statute, effective only after 5/25/95, presently provides for a cap of \$350,000 or \$500,000 (depending on status of the claimant), only in non-death cases, and the cap is adjusted for inflation annually.

Pending: VIRGINIA: Pulliam v. Coastal Emergency Services of Richmond, Inc. (attack on constitutionality of \$750,000 cap on all damages). See also KENTUCKY: (1991); McGuffey v. Hall 557 S.W.2d 401 (Ky.1977).

NOTE: Many states have NO Caps on damages. Ex: Arizona.

The Arizona Constitution prohibits the enactment of any law limiting the damages one may recover for personal injury or death.

IV. PLEADINGS REQUIRED.

IT IS NOT ENOUGH TO RAISE CONSTITUTIONAL ISSUES IN A MEMORANDUM OR IN AN APPELLATE BRIEF. IT MUST BE SPECIFICALLY PLEADED AND TRIED BY THE TRIAL COURT.

“Plaintiff did not raise this issue in her petition or in any other pleading as required by Vallo v. Gayle Oil Co., Inc., 646 So.2d 859 (La.1994). She raised it only in a memorandum. In that case the court stated that the issue of a statute's unconstitutionality may not be raised in a memorandum or brief. Consequently, the issue was not properly raised in the trial court and the trial court properly ignored it.

709 So.2d 266, 97-1654 La.App. 4 Cir. 3/4/98, Romaguera v. Overby, (La.App. 4 Cir. 1998); Excerpt from page 709 So.2d 268.

THE BASIS OF THE CLAIM OF UNCONSTITUTIONALITY MUST BE SPECIFICALLY PLEADED. THEREFORE, SHOTGUN ALL GROUNDS BECAUSE THE SUPREME COURT LIKES TO SKIRT THE ISSUE. DON'T GIVE THEM AN OUT.

“Medical malpractice plaintiff failed to specifically plead in trial court that statute imposing limit on state's liability in medical malpractice cases violated state constitution's

equal protection clause, such that plaintiff did not properly place constitutional issue before trial court. > LSA-Const. Art. 1, § 3; > LSA-R.S. 40:1299.39, subd. B.”
703 So.2d 579, Williams v. State, Dept. of Health and Hospitals, (La. 1997)

This article has been reviewed and updated October 7, 2008.
Oliver “Jackson” Schrupf
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My standard pleadings include the following allegations:

18.

Plaintiffs show that the defendants named herein, individually, jointly and severally and solidarily, were at fault pursuant to La. C.C. 2315, or alternatively, guilty of a "tort" as defined by La. R.S. 40:1299.41 A. (7) and by La.C.C. 2315 and guilty of "malpractice" as defined by R.S. 40:1299.41 A, (8), for the following non-exclusive particulars:

* * *

insert detailed allegations of fault. Note: allegations of NON-MEDICAL negligence may bring the conduct outside the medical malpractice cap, ex: administrative negligence.

* * *

19. (A)

UNCONSTITUTIONALITY OF CAPS ON DAMAGES
UNCONSTITUTIONALITY OF MEDICAL REVIEW PANEL

If any defendant shall be determined to be a qualified health care provider purportedly entitled to the limitations of liability of the La. Medical Malpractice Act, La. R.S. 40:1299.41, et seq., then it is here specifically alleged that any purported limitation on recovery in this type proceeding provided by La. R.S. 40:1299.42 B. (1) and (2); and the Medical Review Panel procedure provided by La. R.S. 40:1299.47 is unconstitutional under the United States Constitution and under the Louisiana Constitution of 1974, as violative of the right to trial by jury, the right to judicial determination of claims, the right to access to the Courts, the right to equal protection, and other rights therein guaranteed; and violative of Article I, Section 12 of the Louisiana constitution as a discrimination on the basis of physical condition; violative of Article I, Section 2, right to due process of law; violative of Article I, Section 22 right to access to the courts without unreasonable delay; and violative of the separation of powers provided by the Federal and State Constitutions since determination of and awarding damages is a judicial function to be carried out after consideration of the evidence in each case rather than a legislative function to be carried out in advance and without benefit of evidence; and violative of due process of law because other lawful protections of law exist for debtors who have been found to be liable for damages, but no protection is provided to victims of malpractice whose damages exceed the prior-determined legislative cap.

19. (B)

RICHARD IEYOUB, Attorney General of the State of Louisiana, insofar as the allegations of unconstitutionality of La. R.S. 40:1299.41, et seq.; and in accordance with the requirements of La. C.C.P. 1880 should be served with a copy of this pleading. Please serve Richard Ieyoub, Attorney General, Louisiana Department of Justice, Civil Division, P.O. Box 94005, Baton Rouge, LA. 70804 (One American Place, 301 Main Street, Suite 600, Baton Rouge, La.).

19. (C)

The claims of inapplicability of the Louisiana Medical Malpractice Law contained in paragraph (18) and the claims of unconstitutionality in this paragraph (19) should be severed and tried separately by the Court only after a factual determination that damages exceed the cap.

Reasoning behind these allegations:

- A. We never know which case may make it to the Supreme Court.
- B. Grounds for challenging a statute as unconstitutional must be stated in a petition in the trial court (it is not enough to raise it in a brief or on appeal). Cite: Vallo v. Gayle Oil, supra.
- C. The La. Attny General must be SERVED with a copy of the pleading and given an opportunity to participate in any hearing in which the trial court considers the constitutional issues. La. C.C.P. 1880.

When it goes up on appeal, be certain that the clerk includes proof of service on the Attny General in the record. La. C.C.P. 1880. The Court of Appeal can pretend it didn't happen if the service is not in the record, even if the record is supplemented with proof of original service on te AG.

NOTE: Cornett v. Moss Regional, 614 So. 2d 189 (La. App. 3rd Cir., 1993) Was wrong in declaring that the La. A.G. must be named as a PARTY. Only if the suit is for declaratory judgment must the A.G. be made a party defendant.

D. CANNOT SETTLE. IF YOU SETTLE WITH THE HEALTH CARE PROVIDER, THE CONSTITUTIONALITY ISSUE IS MOOT. Williams v. Kushner (La. 1989) 549 So. 2d 294.

E. SEVERANCE

I always move to sever the constitutional issues so that these can be tried at a separate hearing IF a judgment in excess of the cap is achieved. The State Attorney General has always been willing to agree to this procedure in the past.

F. PROOF

Please call or e-mail the entire section if you have a trial which looks like THE CASE to take to the Supreme Court. I'm sure we will all be glad to assist in collecting the evidence for the Constitutional Issues trial. We may be able to suggest an expert witness or two.

ATTACK ON EVERY POINT; TRUTH IS ON OUR SIDE::

1. Subpoena a representative of the **La. Commissioner of Insurance** to bring with him the official reports showing the premiums received, investment income, and actual claims paid of Louisiana Medical Mutual Insurance Company (LAMMICO). This will show that at least from 1984 through 1991 LAMMICO always made more in investments than it paid out in claims. (Probably still do, but the official reports are becoming more vague and difficult to interpret.) **NOTE: The Insurance Commissioner only keeps three years of reports, but if you call me, I might be able to locate reports going all the way back to 1984.** Compare the LAMMICO records to the legislative committee records adopting the Med-Mal statute and to the Law Review Article cited in Butler v. Flint Goodrich Hospital (supra) and a completely different "insurance crisis" appears: one of outrageous profits, "reserves" beyond the wildest imaginable liability; investment income; etc.

I am studying the La. PCF rate increase application for details which might also be helpful; see me later on this possibility.

2. Introduce a copy of the Act itself, especially the portion which requires the PCF to charge rates that are actuarially sound. [La. R.S. 40:1299.44 A. (2)(b)].

Also bring out the absence of any provision capping insurance premiums, profits, or investment income. Note that “reserves” may be set or re-set at any level without restriction. Compare the LAMMICO reserves which are several times the maximum liability historically over a five year period (even though we have only a three year statute of limitations).

3. Use an **actuarial expert** to show that since rates are the same whether the PCF is selling the \$400,000 umbrella or a private insurer is selling it, there is in fact NO EFFECT whatsoever on the COST to the physician who carries a total of \$500,000.00 in coverage. The only effect is removal of PERSONAL RESPONSIBILITY of each physician or hospital from the risk of any uninsured event. There is no corresponding benefit to a patient of assurance of insurance coverage. (“Assurance of greater likelihood of insurance coverage” is an assumption which has previously been made by the Supreme Court without any evidence. Since there is no reduction in price to the health care provider, there is no greater likelihood that there will be coverage. In fact, since there is no personal responsibility at all on the part of physicians and hospitals, there is a greater likelihood that physicians will be UNDER-insured, because there is no risk on the health care provider.)

Also ask the actuarial expert whether insurance figures based upon NATIONAL AVERAGES should be used to evaluate the situation in Louisiana when actual figures are available for Louisiana. (Compare to the Supreme Court reference in Butler v. Flint Goodrich (supra) citing 50 Tul. Law Rev 655 (1976) footnote 22, referring to St. Paul Fire and Marine Insurance (national) average amount of damages which had “risen radically” ... “from \$6,705 in 1969 to \$12,535 in 1974.”

4. Use TESTIMONY OF A LAW PROFESSOR:

Prove that the La. Med. Mal law was adopted out of legislative HYSTERIA unsupported by any evidence of actual crisis. **Get the legislative committee hearing records** (These records may already be in Whitnell v. Silverman, (supra); not sure about this) Prove that NO EVIDENCE was introduced to the legislature in support of the Act or any of the allegations made about the “insurance crisis”.

Define “**People**” {the word is in our Constitution and amazingly, my dictionary does not seem to include corporations or insurance companies under the term. **Whose rights are they anyway?**}

Be sure to bring out that the med-mal law only applies to cases of proven negligence in which the health care provider has been shown to have been negligent and that the negligence was indeed the cause of damages in excess of \$500,000. The cap does NOTHING to limit or prevent frivolous lawsuits; it applies only to serious, valid claims.

Attempt to introduce:

Consumer Reports: THE MANUFACTURED CRISIS; Liability Insurance Companies have created a crisis and dumped it on you” (August, 1986)

Video: “Insurance crisis? An expose of the Insurance Industry’s Deceptive Media Campaign”, Ed Bradley, CBS 60 Minutes, Jan. 10, 1988

Louissel & Williams (the book cited in Butler v. Flint Goodrich as supposedly supporting the existence of a medical malpractice insurance “crisis”.

Law Review Articles and other reports indicating the “tort reforms” have had no real effect on insurance premiums, only on insurance profits.

5. Use an **Economist**. Translate the 1975 \$500,000 cap on damages into present day dollars. Use the chart published in LTLA Advocate showing the 1996 value of the \$500,000 cap is only \$176,000. (or update it to date of trial).

Compare the economic position of the insurance companies from 1975 to 2000+. Look at the reports of St. Paul Fire and Marine Insurance over the past 25 years.

Compare the effect of the cap on an actual medical malpractice victim who must purchase medical services today. Compare the dollar in 2000 to the dollar in 1975.

Read the dissents in all prior La. Supreme Court cases on med-mal caps and use any evidence suggested (some great arguments were made by the dissenting justices based upon the ABSENCE of evidence. Since the EVIDENCE actually is the opposite of what the majority has presumed, we might actually give the Supreme Court justices the courage to do what is right by making a record for them.

6. Demonstrate that there is NO ADVANTAGE given to victims of medical malpractice by the La. Med-Mal Act, therefore there is NO “quid pro quo” to offset the rights given up by victims of medical malpractice. (Read dissent in Williams v. Kushner; go down the list)

7. Show that the medical review panel requirement is severable from the cap on damages clause. Requiring prior review by a panel of doctors delays the right to go to court, but pre-limiting the damages takes away from the judicial system to very power to adjudicate and resolve issues.

8. Consider testimony of a Constitutional Law professor regarding separation of legislative, judicial and executive duties; historical functions of each, definition of judicial vs. legislative functions, etc.

9. Compare other jurisdictions which have declared caps unconstitutional.

10. ACTUARIAL / ECONOMIC EXPERT:

Prove that the La. Med. Mal Act has not had its intended effect of lowering premiums or reducing the cost of medical insurance to health care providers; compare apples to apples and oranges to oranges. It is not comparable to say insurance costs less where caps are in place (the risk is less so insurance should be lower). Demand proof that there is some effect on so-called “frivolous suits”; what is the benefit to a victim in a meritorious suit who wins a medical review panel decision? In fact, what benefit is it to settle for the \$100,000? None since Pendleton v. Barret. We should try every single case before the PCF gets involved.

The Act itself requires PCF to charge actuarially sound premium surcharges

NOTE: As a group, LTLA Med-Mal section needs to attempt to find out the data on the PCF rates, premiums, claims paid, reserves, sums transferred to the state treasury, amounts paid to defense counsel for frivolous defenses, etc. (*I am studying this at this time.*)

Compare the premiums for comparable health care providers in other states with \$500,000 coverage with the premiums paid by La. Health care providers who pay a premium on the first \$100,000 coverage, plus a surcharge for the next \$400,000.

Show proof that the cap has in effect reduced annually to what is now less than \$167,000 using 1975 dollars; meanwhile, insurance premiums and profits have continued to rise. There is no cap on insurance profits or premiums in the med-mal law. Therefore, the loss of victims translates directly into an increased profit for insurers;

Be sure to mention that the free market and free enterprise have a way of dealing with insurance rates, premiums, costs, AND negligent doctors. Doctors with good practice habits are likely to be sued less than doctors with poor habits; really bad doctors might have to spend a larger percentage of their income on insurance premiums or even go out of business. At least that is a positive effect that does not occur under the present system. These are the same market factors which apply to the physicians's liability on an automobile accident or a trip and fall accident in his office.

Mention studies that cost of med-mal premiums represents less than 1-2% of the cost of doing business for physicians

Closing thought:

“America never was America to me,
and yet, I swear this oath:
America will be.”
Joaquin d’Alba

**CAPS ON RECOVERABLE DAMAGES
UNCONSCIONABLE AND UNCONSTITUTIONAL**

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