LOUISIANA MEDICAL MALPRACTICE INSURANCE

In 1975, in response to a perceived (as opposed to actual) "crisis" in medical malpractice insurance, the Louisiana Legislature adopted the Louisiana Medical Malpractice Act (La. R.S. 40:1299.41, et seq.; Act 817 of 1975) [hereinafter "MMA"]. The MMA was theorized as a give and take, like worker's compensation. In exchange for a dozen protections to negligent health care providers (and their "struggling" insurers) victims would receive the "benefit" of possibly having more claims insured. In affirming the cap on damages, the Louisiana Supreme Court said: "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."[1] In support of this statement, the Supreme Court referred to only two authorities, both of which did not exist when the MMA was passed. The first reference is to 50 Tul.L.R. 655 (1976) and the second is to a book published in 1990.

The authorities cited by the Supreme Court in support of the claim of "crisis" do not hold up to examination. The Tulane Law Review article does not refer to a "crisis". It does mention a "problem". The only reference to amounts of claims in the Tulane article is in footnote 22 which states that the dollar amount of damages has "risen radically", [referring to St. Paul Fire and Marine Insurance Company figures which showed that "…(T)he national average of claim payments made by (St. Paul Insurance) has increased from $6,705 in 1969 to $12,535 in 1974. (citations omitted). These figures are well above the average of $3,000 per paid claim found (by the Department of Health, Education, and Welfare) …"] (citations omitted). First of all, references to national averages do nothing to tell whether there is any problem in Louisiana. Secondly, even the national figures, without more information, are inadequate to define a problem. It is likely that the figures refer only to "claims paid" without taking into account the cases resolved with no payment. It is not clear if the numbers have been adjusted for inflation. It is not clear whether there was a steady rise or a comparison of two years with unusual numbers. Insurance companies are notorious for moving claims from one year to another. Claims in 1974 can be increased by not paying claims in 1973. The proof falls far short of demonstrating even a national problem, much less a Louisiana "crisis".

The second citation by the Supreme Court in Butler was to Medical Malpractice, a book by Louissell and Williams, vol 2., sec. 20.07 (1990). Much less than supporting the Supreme Court's view, the book is authority that no crisis existed:

> "… However, there is no proof to our knowledge that such actions and awards have risen disproportionately to the growth of the total activity (i.e., potential liability exposure) in the enterprise of health care, to monetary inflation, or to tort awards generally. If the cost of malpractice litigation is adversely influenced by attitudes changing toward greater litigiousness, then these factors require ever greater efforts at preventing or remedying the underlying causes of malpractice suits, in

preference to disturbing the basic structure of our tort system." (Louissel and Williams at p. 24)

And at page 43, Louissell and Williams conclude:

> "… Rules abridging the rights of patients … injured through the negligence of health care providers should be avoided; where already enacted, they should be re-examined. They raise serious constitutional questions as well as those of fairness. Random and impulsive substitution of other legal remedies for jury trials, instead of intensive efforts to minimize substandard medical care, actually threatens to aggravate the problem for the medical profession and its insurers. …"

The Louisiana Supreme Court had no trouble reading the rights guaranteed in the Louisiana Constitution as "not fundamental" [See Everett v. Goldman, 359 So. 2d 1256 (La. 1978). Other courts have found the same rights "fundamental".[2] The Utah Supreme Court said that the purpose of the constitutional provision 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 rarely are able to rally the political process to their aid." [3] So said the Utah Supreme Court in striking down the State cap on damages, which Utah's court said:

> "… substantially infringes upon those interests specifically protected by (the Utah constitution) … For that reason, the burden of demonstrating the constitutionality of the statute shifts to its proponents. The supporters of the legislation have not carried their burden. … In fact, … **they had no empirical evidence that damage awards in Utah have threatened the stability of any unit of government**. …" [4] (emphasis supplied; citations omitted).

If the Louisiana Supreme Court can read rights out of the Constitution by classifying them as "non-fundamental", then of what benefit is a written constitution to the people who adopted it by their vote? Of course, it should be noted that when the La. Supreme Court decided that the Act was Constitutional in 1978 in Everett v. Goldman, (supra), the only issue was the medical review panel process and the requirement that the ad damnum clause be omitted from the petition. Later supreme court decisions upholding caps on damages even for severely injured babies facing a lifetime of pain and disability have continued to pretend that the legislature knew what it was doing when it responded to the "crisis" in medical malpractice insurance and fashioned a "reasonable" response. The question is, when will the blinders be removed from the Court? Is the Supreme Court an equal branch of government or a sub-committee of the legislature? Once the little boy declares that the emperor is wearing no clothes, how long should the adults continue to pretend they don't notice the emperor's nakedness? Since the "crisis" which created special laws to protect negligent health care providers from paying legitimate claims has now been proven to never exist, at what point in time should the Supreme Court re-

examine the rationale keeping this farce on the books? The claim of "crisis" has been judicially debunked. See Whitnell v. Silverman, La. App. 4th Cir., No. 93-2468, 11/4/94, 646 So. 2d 989.

If the rationale for the Medical Malpractice Act was the "insurance crisis" (which was nothing more than a successful propaganda campaign by the insurance industry)[5], then when it is easily demonstrated that there is no longer a "crisis", are the rights guaranteed by the Constitution enforceable again?

What if it were shown that IN LOUISIANA, as opposed to some national hysteria, the medical malpractice insurance industry was no longer in "crisis". {Assuming that there was ever a problem at all.} Is there a way? What if we examine the annual reports of LAMMICO (Louisiana Medical Mutual Insurance Company) which issues only medical malpractice insurance and only to Louisiana insureds? Would that give us a reasonable picture of what the Louisiana experience is? Probably so.

My first look at a LAMMICO report was the 1984 report. What an eye opener! $11.9 million in premiums and interest income. And only $440,563 in claims paid. Let me repeat:

	$11,917,819	premiums earned plus investment income
(-)	440,563	claims paid
	$11,477,256	available for operations, expenses, defense of cases, investigations, investment, etc.

LAMMICO declared a $3.2 million dollar "LOSS" for 1984.

I scratched my head. What is this? Then I studied the report more. It was an issue of SEMANTICS: "Loss incurred" vs. "loss paid". If a loss is "incurred", but it is not "paid", then it must just be some book entry. What is going on? Closer reading showed about 5 categories of "losses incurred". Only one entry reported claims "paid". Some study showed that the insurer encourages its insureds to report anything that might result in a claim being filed, whether or not a claim was eventually brought. As soon as a report is received, the insurer sets up a file, assigns a potential "liability" to the claim and assigns defense counsel. LAMMICO's "LOSS" included all of the "incurred" but not "paid" "losses". In other words: "reserves". In other words: "savings" set aside to pay claims which may or may not ever result in payment of money to a victim. There is nothing wrong with reserves. Insurers should have reserves sufficient to cover expected claims. The problem is calling a "reserve" a "loss". A reserve is an asset, not a "loss".

And I guess an insurer can never have enough "reserve". In the five year period from 1989 through 1993, LAMMICO earned premiums of $90,584,548. Claims paid and loss adjustment expenses for the same period totaled $20,817,654. Reserves were set at $56 million. This is 250% more than the total 5-year loss experience. At the time, LAMMICO was reporting that it expected that only 18% of claims would result in

payments to victims of malpractice, and that the average indemnity paid on each claim would be $29,216. $56 MILLION ought to more than cover that.

Over the years the reports become bulkier and more confusing, hiding useful information. It was clear that from 1984 - 1991, in no year did claims paid exceed the investment income of LAMMICO. So in 1992 and subsequent years reports, investment income is hidden in 50 page reports. If you study the reports enough the picture is one of a different sort of "crisis": stable claims paid (less than investment income each year), but outrageous premium income.

LAMMICO annual reports 1984-1997 show the following:

	PREMIUMS EARNED	Net Investment Income	Claims closed with Payment
1984	$9,717,874.00	$2,199,945.00	$440,563.00
1985	$11,612,106.00	$3,210,069.00	$1,525,311.00
1986	$12,265,800.00	$3,598,124.00	$3,515,962.00
1987	$10,550,626.00	$4,063,755.00	$1,775,814.00
1988	$14,807,970.00	$4,485,959.00	$3,494,537.00
1989	$17,100,355.00	$5,442,631.00	$3,144,443.00
1990	$17,583,683.00	$5,041,179.00	($1,944,442.00)
1991	$16,525,766.00	$6,310,739.00	($7,637,101.00)
1992	$19,429,644.00	$7,162,925.00	$3,732,179.00
1993	$17,363,445.00	$7,488,903.00	$4,584,886.00
1994	$21,150,133.00	$7,849,605.00	$4,171,698.00
1995	$20,033,467.00	$8,242,881.00	$4,435,203.00
1996	$21,436,512.00	$8,305.885.00	$4,140,809.00
1997	$20,449,276.00	$8,806,438.00	$4,604,786.00
TOTALS	$230,026,657.00	$82,209,038.00	$29,984,648.00

Note: 1990 and 1991 reflect receipt of re-insurance proceeds exceeding claims, resulting in a negative "claims paid" figure.

What is a "legitimate state interest"? If the purpose of the MMA caps on damages was to limit the rising insurance premiums, then why was there nothing in the act to limit or freeze insurance premiums? If the purpose was to keep "frivolous" lawsuits from being filed, then why place caps on meritorious suits? Caps do not apply to frivolous suits, only to those which have been tested by the fire of trial and appeal. Caps do not apply to stubbed toes, but to death cases and brain damaged babies.

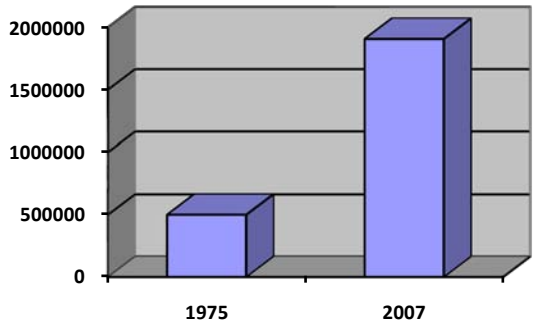
SEPARATION OF POWERS

We have been experiencing a dearth of courage on the judicial front; a willingness on the part of judges to let the legislature have its way rather than standing for the rights guaranteed to individuals in the Constitution. Not all courts have been so timid.

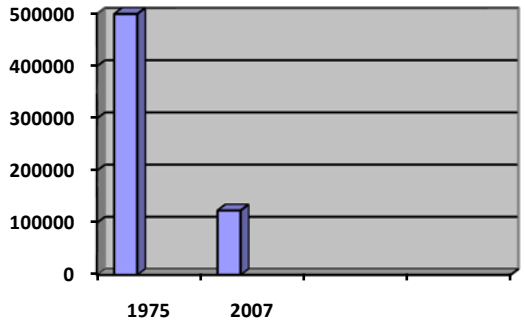
In declaring the Texas caps on damages unconstitutional, the Texas Supreme Court in Lucas v. United States, 757 S.W. 2d 687 (Tex., 1988), said at page 691:

> "In the context of persons catastrophically injured by medical negligence, we believe it is unreasonable and arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease. (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." (emphasis supplied).

How low is too low to be reasonable? **The Louisiana cap was set at $500,000 in 1975 and is not indexed for inflation. If it were adjusted for inflation, the La. "cap" was worth only $167,624 in 1997.** Inflation has further ratcheted the "cap" value down to $123,523 in 2007. Had the "cap" been adjusted for inflation it would be $1.9 million in 2007. To see the current value of the cap if it were adjusted for the effects of inflation, go to an inflation calculator, such as http://www.westegg.com/inflation/



Needed to adjust cap for inflation.



Constant dollar value of cap in 2007

How low can the cap be set and still meet the "fairness" requirement of our Constitution? The answer should be: No cap is constitutional. In striking down the Florida cap on non-economic damages, the Florida Supreme Court stated in Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987), at page 1089:

> "… (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."

Compare Colorado's general cap of $400,000 per occurrence (not medical). A state employee negligently shoved a 6.7 ton boulder off a cliff, hitting a tour bus. Nine dead, 34 seriously injured persons shared $400,000 (about $11,700 each). Colorado State Claims Board of the Division of Risk Management v. DeFoor, 824 P. 2d 783, 60 U.S.L.W. 2507, 1992 WL 16099 (Colo.). Wow! That's fair?

Saying that the legislature "had a reason" to adopt the caps (the hysteria regarding the insurance crisis), is not the same as saying that the classification which the legislature adopted is "rational". Furthermore, it begs the question whether the "remedy" will achieve its stated goal of bringing insurance rates down to an affordable level. Nothing in the statute caps or limits insurance rates.

Physicians who testified in 1975 before the legislative committee later entered into a stipulation in a judicial proceeding that they could have paid the costs of premiums out of their operational income in 1975. **In fact, in 1975, when the MMA was passed, according to testimony of Ed Hodge, then Manager of St. Paul Fire and Marine Insurance Co., Louisiana's medical malpractice premiums ranked 25th in the nation (dead center of the fifty states)**.

The cost of medical malpractice insurance has been shown to be less than two percent of the total cost of medical practice in Idaho[6] and less than one percent in Texas.[7] Can Louisiana be far out of line? No study has been offered to show Louisiana experience in this area. Yet, even with **no evidence** to support the cap on damages, constitutional rights of Louisiana victims have been abrogated. Where are the Courts? Where are the protectors of the Constitution?

The effect on LAMMICO has been outstanding. According to the website of LAMMICO, their net worth has been increasing annually, they have been selling policies providing (combined with the PCF's $400,000 over $100,000 layer) up to $1,000,000 in coverage to its insured's since 1992. LAMMICO is doing so well it is proposing new legislation to do away with the PCF and to adopt a Constitutional Amendment to bring on Texas style "reform" which basically puts malpractice litigation out of business (allowing the insurers to sell policies on which no claims will likely be made. LAMMICO is also expanding it profit base into Arkansas. "Caps" are great for the insurance sellers.

The MMA does not cap the victim's damages, only the victim's recovery. That means that the lifetime of pain, suffering and disability go on and the victim gets the full "joy" of experiencing them, but the victim is not allowed to recover tort damages as measured by the judge, jury, and appellate courts to be fair and appropriate. At the same time, nothing caps the premiums collected by the insurers, nor the profits, nor the rise in

assets of the insurers. There are no punitive damages, so insurers need not worry about being arbitrary and capricious in refusing to settle legitimate claims. Insurers can pay defense lawyers to defend the most defenseless claims until the victims throw in the towel and accept what is offered, or until a court awards the "cap". No risk for insurers, only victims have risks. This "reform" leads to more litigation; fewer settlements.

The provisions of the La. MMA are severable. Even if the medical review panel requirements are upheld as reasonable, the cap on damages cannot be supported under any rational theory.

What is the rational basis of caps on damages? The purpose as stated in one Law Review article makes it crystal clear: "We … sacrifice human lives so that a handful of incompetent doctors can afford to buy expensive cars." [8] In "A Free Market Analysis of the Effects of Medical Malpractice Cap Statutes: Can We Afford to Live with Inefficient Doctors?" the authors urged the repeal of statutes capping damages. Using empirical studies, the authors show that, despite the adoption of caps on damages (and other so-called "reforms") health care cost as a percentage of gross national product has continued to increase (p. 31); **"no study has revealed that the reforms have had a significant impact on medical malpractice insurance costs."** (p. 32); incompetent doctors continued to practice their negligence (p. 37). The study finds (at pp. 49-50) that "Medical malpractice damage cap statutes are fundamentally antithetical to the three primary objectives of tort law:, that is, damage caps: (1) do not punish wrongdoers, (2) encourage potentially harmful activities, and (3) deny full compensation to accident victims." The conclusion: "**Medical malpractice damage caps increase the probability of a patient suffering negligent injury or death by a treating doctor."** [9] Generally, a large number of malpractice claims are brought against a small number of doctors. These are the doctors being protected by caps on damages and being allowed to continue to practice their negligence on an unsuspecting and unprotected public.

"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." [10]

Justice Russell of the Virginia Supreme Court posed the question: 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 twelve 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." [11]

We know the answer. The question is, does the judiciary have the courage to follow their oath to support and defend the Constitution? For the foreseeable future it appears that the powers of insurance and big business will continue to control the

legislature. Our forefathers foresaw that there would be periods of time when an idea or a fad swept through the public, carrying the legislature or the administrative branch with it. It was for just such occasions that an independent judiciary was interposed to protect the public from its own zeal. It was for just such a reason that a bill of rights was written guaranteeing TO THE PEOPLE certain rights. I looked it up in my dictionary: "people" . "human beings, not individually known." [The dictionary did not say: People: corporations and insurance companies"].

Let us hope that the judges of this state resolve that their names may be known in history as standing up for the written Constitution. Let our judges have no fear of the battle which may be waged by the powerful economic forces wanting to preserve their unfair advantage. May our judges secure their place in history by enforcing the rights of the most severely injured to have their claims heard and decided in a court of law, after consideration of the evidence; rather than pre-judged by a legislature nearly three decades ago.

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[1] Butler v. Flint Goodrich Hospital, La. S.Ct. 1992, No. 92-CC-0559, 607 So. 2d 517; 10/19/92; Dennis, J. dissent 11/10/92; rehearing denied 11/10/92.

[2] Pfost v. State, 219 Mont. 206, 713 P. 2d 495 (1985); Ernest v. Faler, 237 Kan. 125, 697 P. 2d 870 (1985); and Condemarin v. University Hospital, 775 P. 2d 348 (Utah, 1989).

[3] Condemarin v. University Hospital, 775 P. 2d 348 (Utah, 1989), at page 357.

[4] Id., at page 368.

[5] See Consumer Reports, August, 1986: "THE MANUFACTURED CRISIS: liability insurance companies have created a crisis and dumped it on you."

[6] See this and other findings in Jones v. State Board of Medicine, 97 Idaho 859, 555 P. 2d 399 (1976) in which the Idaho Supreme Court resoundingly refuted every hysterical claim with factual evidence showing that there was NO rational basis for a cap on damages.

[7] Medical and Hospital Professional Liability, Joint study by the Texas Hospital Association, Texas Medical Association, and Texas Trial Lawyers Association, referred to at Vol 55, No. 9, Texas Bar Journal.

[8] "A Free Market Analysis of the Effects of Medical Malpractice Damage Cap Statutes: Can We Afford to Live With Inefficient Doctors?", Cleckley, Franklin D. and Hariharan, Govind, W. Va. Law Review, Vol. 94, 1991, pp. 11-71.

[9] Id., p. 60

[10] "Medical Malpractice Statutes: Special Protection for a Privileged Few?", 12 N. Ky. Law Rev. 295, 313 (1985)

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