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DAMAGE LIMITATIONS IN MEDICAL MALPRACTICE ACTIONS: NECESSARY LEGISLATION OR UNCONSTITUTIONAL DEPRIVATION?

“This is a world of compensations; and he who would be no slave must consent to have no slave. Those who deny freedom to others deserve it not for themselves, and, under a just God, cannot long retain it.”¹

I. INTRODUCTION

While the United States Supreme Court has not yet addressed whether damage limitations in medical malpractice actions violate any federal constitutional provisions, many state courts have been faced with this difficult question.² The problem of calculating the loss of a physical attribute or ability due to the mistake of a trusted physician is inherently difficult, and calculating compensation for noneconomic damages such as pain and suffering is even harder. This decision was traditionally left to twelve individuals who had been assaulted by opposing sides with charts, tables, estimations, and hypotheticals. This has resulted in both grossly under-compensated victims as well as awards that have fostered the creation of the nouveau riche. It is the latter of these results that has caught the eyes of lawmakers across the country. Numerous state legislatures have enacted statutes which limit the maximum amount of damages that can be awarded to plaintiffs in medical malpractice actions or have capped the amount of noneconomic damages that plaintiffs may recover. States that have not yet enacted such legislation are lobbied continuously for similar initiatives. South Carolina has not yet enacted any such damage limitations and this Comment argues that inaction is the best course of action. In addition to state controls, Congress is considering several bills that would

1. Letter from Abraham Lincoln, to H.L. Pierce and others (April 6, 1859) *reprinted in* JOHN BARTLETT, *FAMILIAR QUOTATIONS* 448 (Justin Kaplan ed., Little, Brown and Co. 1992) (emphasis added). While Lincoln was obviously addressing more prominent social problems of the times, his words are metaphorically relevant to the topic. His words are also somewhat ironic in that Lincoln was a prominent medical malpractice attorney during the first medical malpractice crisis in the United States. *See generally* ALLEN D. SPIEGEL, *A. LINCOLN, ESQUIRE: A SHREWD, SOPHISTICATED LAWYER IN HIS TIME* (Mercer Univ. Press 2002).

2. The United States Supreme Court has not heard a case that challenges a state's damage limitation statute, and currently no federal law limits damages, although several bills were considered in the 2002 congressional session and several bills are currently pending in the 2003 session. *See infra* note 13.

substantially limit the amount of damages medical malpractice victims are able to recover.

Why has this issue drawn so much attention from lawmakers? The perceived problem is that excessive damage recoveries by some malpractice victims are driving up the cost of medical malpractice insurance coverage to which any pragmatic physician is sure to subscribe and is legally obligated to maintain. Physicians complain about increasing premiums, and now some lawmakers are convinced that the cost is so high that many doctors cannot pay these premiums and subsequently cannot practice medicine. Lawmakers perceive this to be a public threat in that there will not be sufficient access to healthcare if there are not enough licensed and insured health care providers. The result has been that some states have enacted legislation to cap medical malpractice damages.

Part II of this Comment provides the background of the debate surrounding damage caps. In part, this section focuses on one state's comprehensive reform scheme and the judicial challenges to it, as well as highlighting legislation pending before Congress. Part III analyzes the constitutional problems as well as the practical effects of damage limitation reforms. Also, Part III discusses some other possible methods to address this perceived crisis. Finally, Part IV concludes that South Carolina should not implement a noneconomic damage cap for medical malpractice claims.

Statutes to cap damages are essentially quick fixes to a much deeper and more troublesome problem of an overall decline in quality of healthcare in recent years.³ These statutes have been struck down by many state courts in the recent years for several constitutional reasons.⁴ The basic constitutional argument against such damage limitations is that they violate the Equal Protection and Due Process rights guaranteed by the Fourteenth Amendment of the U.S. Constitution. Also, in some circumstances these laws violate a

3. See HARVEY F. WACHSMAN, M.D., J.D., *LETHAL MEDICINE: THE EPIDEMIC OF MEDICAL MALPRACTICE IN AMERICA* 173 (Henry Holt & Co. 1993) (“[T]he time has come for all parties seeking solutions to malpractice problems to recognize that the root cause of the current malpractice problem is the substantial number of injuries and other adverse results sustained by patients during the course of hospital and medical treatment.”).

4. See, e.g., *Ray v. Anesthesia Assoc. of Mobile*, 674 So. 2d 525 (Ala. 1995) (holding a \$1,000,000 cap on recovery in medical malpractice action violated the plaintiff's right to access the courts and equal protection); *Moore v. Mobile Infirmary*, 592 So. 2d 156 (Ala. 1991) (holding a damage limitation of \$450,000 unconstitutional as a violation of a right to a trial by jury and equal protection); *Smith v. Dept. of Ins.*, 507 So. 2d 1080 (Fla. 1987) (holding a \$450,000 cap on noneconomic damages violates a plaintiff's right to access courts for redress of claims); *Jones v. State Bd. of Med.*, 555 P.2d 399 (Idaho 1976) (remanding for findings of fact pertinent to constitutional attacks on damage caps but finding a \$150,000 cap on recovery was facially arbitrary), *cert. denied*, 431 U.S. 914 (1977); *Wright v. Cent. Du Page Hosp.*, 347 N.E.2d 736 (Ill. 1976) (striking down a \$500,000 cap on recovery in medical malpractice actions as a violation of equal protection); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) (holding \$500,000 cap on recovery as violation of access to the courts and equal protection).

citizen's fundamental right of access to the courts and the right to a jury trial as guaranteed by the Seventh Amendment of the United States Constitution and various state constitutions. Furthermore, the practical effect of these statutes is contrary to the overall public policy of providing access to qualified healthcare professionals. Finally, some other methods of addressing this problem will be discussed with the hope that alternatives will be more effective in attaining the goal of limiting the amount of damage a negligent physician can cause, rather than limiting the amount of damages for which a physician can be held liable. It is for these reasons the South Carolina Legislature should not enact any type of damage limitations for medical malpractice actions.

II. BACKGROUND

The perceived need for medical malpractice reform began in the mid-1970s. It was at this point that medical malpractice insurers first began to notice losses and as a result many liability carriers left the medical malpractice market. This resulted in a so-called "crisis of availability" and many state legislatures passed the first reform measures to ease this crisis.⁵ Also, many "doctor-owned" carriers were founded to provide for the need for medical malpractice insurance and the crisis temporarily eased.⁶ Then, in the late 1970s a second insurance crisis began to emerge. This "crisis of affordability" continued through the mid-1980s and arguably to the present day.⁷ The tort reform movement spawned from this "crisis" produced legislation that was designed to reduce the possible amount of recovery. A common type of early legislation simply placed an upper limit or cap on the amount of damages which a medical malpractice plaintiff could recover.⁸

Later, more comprehensive reform was enacted that not only cap the amount of damages, but also link the cap on damages to a party's willingness to arbitrate the claim.⁹ These more comprehensive reforms also limit the amount of noneconomic damages that can be awarded in arbitration to \$250,000.¹⁰ It is this Florida system and its constitutional implications that will be discussed in further detail. Currently, even more progressive reform plans are being proposed, such as a system of enterprise liability. Under an enterprise liability system, the responsibility is placed on the organization that provides

5. See M. Roy Schwarz, M.D., *Liability Crisis: The Physicians' Viewpoint*, in *MEDICAL MALPRACTICE—TORT REFORM* 17 (James E. Hamner & B.R. Jennings eds., 1987).

6. *Id.*

7. *Id.*

8. See, e.g., CAL. CIV. CODE § 3333.2 (West 2001) (illustrating a typical maximum cap of damages a plaintiff may recover). This cap was originally enacted in 1975.

9. See FLA. STAT. ch. 766.209 (2001). This provision was originally enacted in 1988.

10. See FLA. STAT. ch. 766.207 (2001).

healthcare rather than on the individual doctors.¹¹ While such reforms are on the horizon, this Comment will analyze the constitutional challenges specific to statutory caps on damages and the arbitration provisions affecting these caps.

Presently, at least twenty-one states have statutes that cap the amount of damages a plaintiff may recover in a medical malpractice action. Of these, thirteen states have placed a cap on only noneconomic damages. But eight states have placed maximum recovery ceilings into effect that cap both economic and noneconomic damages.¹² In addition to these state initiatives, Congress is considering at least two bills that would, amidst other reform, cap noneconomic damages at \$250,000.¹³ Yet, despite all of the states that have enacted caps and the pending Congressional legislation, South Carolina has not enacted any cap on damages in medical malpractice actions. So why urge South Carolina lawmakers not to enact damage limitations now? Because the "battle" is on.¹⁴

Presently, two bills are pending before the South Carolina General Assembly that would cap noneconomic damages at \$250,000.¹⁵ Also, recent developments have brought this issue to the forefront of the public and the media's attention. South Carolina's largest newspaper headlined an article entitled "Doctors Protesting High Insurance Costs" on January 2, 2003, in which the author describes doctors in several states organizing and initiating

11. See U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, *IMPACT OF LEGAL REFORMS ON MEDICAL MALPRACTICE COSTS* 45 (1993).

12. See *id.* at 81; South Carolina has no such limitation. See also McCullough, Campbell & Lane, *Summary of Medical Malpractice Law*, at <http://www.mcandl.com/states.html> (last visited Sept. 7, 2003).

13. H.R. 5, 108th Cong. § 4 (2003) (pending in the Senate, passed in the House on March 13th, 2003). This bill is cleverly named the Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act of 2003. In addition to the \$250,000 cap it would also provide for a national one year statute of limitations and a three year statute of repose for medical malpractice claims. H.R. 321, 108th Cong. § 4 (2003) (pending in the House Judiciary Committee and named the Common Sense Medical Malpractice Reform Act of 2003). Congress considered several bills last session but did not pass any of these measures. See H.R. 4600, 107th Cong. § 4 (2002). This bill would not have preempted any state law setting a cap on noneconomic damages, either lower or higher than the \$250,000 cap. See also S. 1370, 107th Cong. § 6 (2001); H.R. 4942, 107th Cong. § 4 (2002); H.R. 1639, 107th Cong. § 4 (2001).

14. See Tanya Albert, *AMA Readies for Battle on Tort Reform*, AMEDNEWS.COM (July 8–15, 2002), at http://www.ama-assn.org/sci-pubs/amnews/pick_02/pr110708.htm (last visited Sept. 8, 2003). This online newspaper of the American Medical Association suggests the AMA is prepared to spend fifteen million dollars lobbying for tort reform this year. This effort is "calling for legislation at the state and federal levels." *Id.* Also, the AMA identifies South Carolina as a "state showing problem signs," so South Carolina is clearly within the AMA's sights. *Id.*

15. See S.B. 446, 115th Gen. Assem., Reg. Sess. (S.C. 2003) (pending in the Senate); H.R. 3744, 115th Gen. Assem., Reg. Sess. (S.C. 2003) (pending in the House). These bills are identical in language.

“walkouts” and “strikes.”¹⁶ This article was followed up by an article promisingly entitled “S.C. Malpractice Rates Some of Lowest in U.S.”¹⁷ However, the article indicated that while “[m]edical malpractice rates in South Carolina in 2002 were still among the nation’s lowest, . . . they were about four times the rates two years earlier.”¹⁸ Also, the South Carolina Court of Appeals recently upheld one of the largest medical malpractice verdicts in recent history.¹⁹ According to Dr. Duren Johnson, President of the South Carolina Medical Association, his organization is seeking to form a task force and he hopes “to enlist state lawmakers” to address this growing problem.²⁰ Given these recent events and the posturing of both the American Medical Association and the South Carolina Medical Association, the issue seems to be ripe for debate in South Carolina.²¹

With this in mind, consider one state’s statutory damage caps and the constitutional ramifications of such legislation. In the 1980s the Florida Legislature enacted a comprehensive set of medical malpractice reforms.²² That these reforms are basically unchanged to the present day.²³ Essentially, these reforms provide:

In arbitration, noneconomic damages [are] limited to \$250,000 per incident. Economic damages [are] limited to 80 percent of wage loss and loss of earning capacity and medical expenses, offset by collateral sources. If [a] defendant refuses to arbitrate, the claim will proceed to trial and there will be no limit on damages. In addition, if the plaintiff wins at trial, she will be awarded prejudgment interest and attorney fees up to 25 percent of [the] award. If claimant rejects arbitration, noneconomic damages at trial [are] limited to \$350,000. Economic damages [are] limited to 80 percent of wage losses and medical expenses.²⁴

16. Gavin McCormick, *Doctors Protesting High Insurance Costs*, THE STATE (Columbia, S.C.), Jan. 2, 2003, at A1.

17. Jim Duplessis, *S.C. Malpractice Rates Some of Lowest in U.S.*, THE STATE (Columbia, S.C.), Jan. 2, 2003, at A6.

18. *Id.*

19. *Burroughs v. Worsham*, 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002) (upholding a \$3.5 million verdict against doctor for failing to identify and diagnose a patient’s colon cancer).

20. Duplessis, *supra* note 17.

21. Yet, despite all of these developments, the total damages paid in South Carolina in 2002 was \$38.9 million, down from \$46.2 million in 2001. *See*, Press Release, Public Citizen, (July 8, 2003) at http://www.citizen.org/documents/SC_NPDB.pdf. Such figures cast doubt on the seriousness of the so-called medical malpractice insurance “crisis” in South Carolina.

22. FLA. STAT. ch. 766.207–766.209 (1988).

23. *See* FLA. STAT. ch. 766.207–766.209 (2001).

24. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, IMPACT OF LEGAL REFORMS ON MEDICAL MALPRACTICE COSTS 83 (1993) (internal citations omitted).

For the purposes of constitutional analysis, the most restrictive application of these statutes' operation must be assumed, i.e., a defendant has conceded liability and has requested arbitration. In this circumstance, the operation of the two statutory caps are triggered, capping noneconomic damages at \$250,000 if the plaintiff submits to arbitration, or capping noneconomic damages at \$350,000 if the plaintiff rejects voluntary arbitration and proceeds to trial.

Shortly after the Florida Legislature enacted these statutes, parents brought a challenge on behalf of their minor daughter, who had been treated for a brain tumor at the University of Miami School of Medicine. As a result of the School's negligent acts, the young girl's right hand and forearm had to be amputated. In *University of Miami v. Echarte*,²⁵ the intermediate appellate court affirmed the decision of the trial court and found chapters 766.207 and 766.209 of the Florida Code unconstitutional under the state constitution. The trial court found that these statutes "violate the Echartes' constitutional rights of access to the court, rights to trial by jury, equal protection guarantees, and procedural and substantive due process rights."²⁶ While the appellate court affirmed the decision of the trial court, it did so on limited grounds, finding that the "statutes deny claimants the right of access to court." The court expressly declined to consider the other asserted grounds.²⁷

In affirming the decision of the trial court, the appellate court relied heavily on *Smith v. Department of Insurance*,²⁸ where the Florida Supreme Court concluded that an absolute \$450,000 cap on noneconomic damages in personal injury cases violates a citizen's constitutional right to access the courts. In *Smith*, the court reasoned that such a restriction on damages is not permissible unless one of two exceptions is met: "(1) providing a reasonable alternative remedy or commensurate benefit, or (2) legislative showing of overpowering public necessity for the abolishment of the right *and* no alternative method of meeting such a public necessity."²⁹ Applying this test, the *Escharte* appellate court determined that the statutory reforms in question failed "to provide 'a reasonable alternative to protect the rights of [medical malpractice victims] to redress for injuries.'"³⁰ The appellate court rejected arguments by the hospital that this reform provided commensurate benefits similar to the Workers' Compensation Law and Florida's No-Fault Automobile Insurance Act. The court described these measures as a "reasonable alternative to tort litigation" providing substantial benefits to those who participate in them.³¹ The appellate

25. 585 So. 2d 293 (Fla. Dist. Ct. App. 1991).

26. *Id.* at 296.

27. *Id.*

28. 507 So. 2d 1080 (Fla. 1987).

29. *Id.* at 1088 (citing the two exceptions provided in *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973)).

30. *Escharte*, 585 So. 2d at 298 (quoting *Kluger*, 281 So. 2d at 4).

31. *Id.* at 298-99.

court also found that more than a “benefit to society in general” is required.³² The medical malpractice victim must benefit personally in order to meet this first exception.³³ Next, the appellate court found that the statutory scheme did not meet the second exception because the legislature had not shown “an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.”³⁴ The court concluded that the legislature had based its findings on “hypothetical assumptions” and that “[s]uch assumptions provide an uncertain predicate for imposing a cap on noneconomic damages.”³⁵ Therefore, the legislature did not demonstrate the overpowering public necessity for enacting the statutory caps on noneconomic damages. For these reasons the Florida Court of Appeals found these statutes unconstitutional. However, the fight was not over.

Upon appeal, the Florida Supreme Court reversed the decision of the appellate court and concluded the statutory scheme was constitutional.³⁶ The court found that the statutory scheme *did* provide “a commensurate benefit to the plaintiff in exchange for the monetary cap.”³⁷ The supreme court found several benefits afforded to claimants including: 1) a defendant’s possible offer to submit to arbitration which provides the opportunity to recover without the risk of a civil trial, 2) the quickness of determining whether the defendant has any defenses with merit, 3) the saved cost of attorney and expert witness fees needed to otherwise prove liability, 4) the relaxed evidentiary standard for arbitration proceedings, and 5) the prompt payment of damages.³⁸ By finding that the statutory scheme provides a commensurate benefit, the court upheld the statutes. But the court went on to determine that even if the statutory scheme in question did not afford a commensurate benefit, it met the second prong of the test in that the legislature had shown an “overpowering public necessity.” The court found that overpowering public necessity in the Task Force Fact-Finding Report. This Report, citing a dramatic increase in malpractice insurance premiums, was adopted into the preamble of this statutory scheme.³⁹ Under the *Kluger* test, in addition to a finding of an “overpowering public necessity,” the court also must find that “no alternative method” for meeting the public necessity can be shown.⁴⁰ Upon further review of the Task Force Report, the court found that no “less onerous method exists.”⁴¹ The Echartes disputed this conclusion:

32. *Id.* at 299.

33. *Id.*

34. *Id.* at 300 (quoting *Kluger*, 281 So. 2d at 4).

35. *Id.* at 301.

36. *Univ. of Miami v. Escharte*, 618 So. 2d 189 (Fla. 1993).

37. *Id.* at 190.

38. *Id.* at 194.

39. *See id.* at 196.

40. *Kluger*, 281 So. 2d at 4.

41. *Escharte*, 618 So. 2d at 197.

They point out that the Task Force's findings show that from 1975 to 1986, approximately 4% of all practicing physicians had two or more claims, but were responsible for 42.2% of the total amount of paid claims. Thus, the Echartes conclude that an alternative method to reducing claims would be to strengthen professional discipline of physicians with numerous claims.⁴²

The court even conceded that "[t]he reduction of the frequency and severity of malpractice would certainly diminish the amount of loss payments and subsequently medical malpractice rates."⁴³ But the court found there was no "less onerous alternative or less onerous method of meeting the crisis" and thus upheld the statutory scheme.⁴⁴

Two justices, including the chief justice, filed adamant dissenting opinions.⁴⁵ Chief Justice Barkett argued that this statutory scheme not only violated the claimant's right to access the courts, but also infringed on a right to a trial by jury and the Equal Protection Clauses of both the Florida and United States Constitutions.⁴⁶ Relying on the reasoning from *Smith v. Department of Insurance*,⁴⁷ she noted that the constitutional guarantee of access to the courts must be read in conjunction with the right to a jury trial:

Access to courts is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for, e.g., \$1,000,000, has not received a constitutional redress of injuries if the Legislature statutorily, and arbitrarily, caps the recovery at \$450,000. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right.⁴⁸

Additionally, Chief Justice Barkett found this statutory scheme to violate equal protection guarantees "by creating two classes of medical malpractice victims, those with serious injuries whose recovery is limited by the caps and those with minor injuries who receive full compensation."⁴⁹ She questioned how singling out victims with the most serious injuries and allowing them less than full

42. *Id.* (internal citation omitted).

43. *Id.*

44. *Id.*

45. *Id.* at 198, 199.

46. *Id.* at 198 (Barkett, C.J., dissenting).

47. 507 So. 2d 1080 (Fla. 1987).

48. *Escharte*, 618 So. 2d at 198 (Barkett, C.J., dissenting) (quoting *Smith*, 507 So. 2d at 1088-89).

49. *Id.*

recovery bears any relationship to the goal of ending the crisis in medical malpractice liability.⁵⁰ Finally, she concluded by reasoning “I cannot find that ‘no alternative method’ has been shown,” and thus the scheme failed the second prong of the *Kluger* test.⁵¹ So which side got it right?

III. DISCUSSION

The trial court and the two dissenting justices in the Florida Supreme Court demonstrated the proper constitutional reasoning under the state and federal constitutions. The majority opinion by the Florida Supreme Court ignores the longstanding principle, recognized by both Florida precedent as well as other states, of an individual’s right to fully recover for those injuries inflicted by negligent defendants. First and foremost, this statutory scheme violates a claimant’s right of access to the courts guaranteed by Article I, section 21 of the Florida Constitution, and the Seventh Amendment right to a trial by jury guaranteed by the United States Constitution.

Florida law clearly allows derogations of this right only if one of two exceptions has been met.⁵² The contention by the Florida Supreme Court that the minimal benefits afforded to claimants under this statutory scheme⁵³ suffice to allow for the derogation of the fundamental right to access to the courts is without merit. While this system affords “a commensurate benefit” to a claimant with lesser injuries, it fails to provide for, and in fact punishes, those unfortunate claimants whose noneconomic damages far exceed \$350,000. As noted by the appellate court, the benefits afforded to claimants under the Workers Compensation Law and the No-Fault Automobile Insurance Act are substantial. Under the former, injured workers can recover damages without having to endure the delay and burden of proving fault in tort litigation. Under the latter, those who maintain the required insurance are entitled to prompt recovery for their own economic loss and are protected from being held liable for noneconomic damages suffered by parties to the accident.⁵⁴ By contrast, under the Florida scheme, a grossly negligent defendant can limit a claimant’s damages by submitting to arbitration. As one dissenter points out, this is a classic case of “heads I win, tails you lose” because the benefit only inures to the defendant.⁵⁵ As such, this system provides for no real commensurate benefit to claimants and fails the first prong of the *Kluger* test.

50. *Id.*

51. *Id.* at 199.

52. *See Smith*, 507 So. 2d at 1088.

53. *See Escharte*, 618 So. 2d at 194 (listing the benefits of Florida’s damage limitation scheme).

54. *See Escharte*, 585 So. 2d at 298–99.

55. *Escharte*, 618 So. 2d at 200 (Shaw, J., dissenting).

Furthermore, the Florida Supreme Court's contention that this scheme meets the second exception of the *Kluger* test is also without merit. While the Task Force Report did show rising malpractice insurance rates of a critical nature, which may qualify as an overwhelming public necessity, the report also indicated that vigorous professional management of medical malpractice could also curtail the crisis. Remember, the legislature has the burden of showing that no alternative method to meet the public necessity exists.⁵⁶ Despite this burden of proof, the *Eschartes* offered a portion of the Task Force report that indicated the rising liability crisis could be curtailed by tight disciplinary control over physicians.⁵⁷ Some reports estimate that at least five percent of the nation's doctors are considered unfit to practice.⁵⁸ Logically, it would follow that strict disciplinary oversight of these reckless few would curtail a crisis. Nonetheless, the *Eschartes* majority upheld this legislation by utilizing the wrong test. The majority concluded there was no "less onerous alternative." Instead, the court should have required the state to prove that "no alternative method" existed. The court's conclusion failed to recognize the policy behind the second prong of the test—only allowing the derogation of claimant's fundamental rights as a last resort. Because this scheme fails to meet either of the two exceptions of the *Kluger* test, it violates Article I, section 21 of the Florida State Constitution.

In addition to violating a claimant's right to the courts, the statutory scheme also denies claimants with serious debilitating injuries equal protection under the law.⁵⁹ As Chief Justice Barkett highlighted, such an arbitrary cap creates two classes of victims: "those with serious injuries whose recovery is limited by the caps and those with minor injuries who receive full compensation."⁶⁰ This is contrary to longstanding Florida law that "similarly situated persons are equal under the law and must be treated alike," because only the most seriously injured persons, with damages in excess of the cap, would bear the burden of reducing the overall cost.⁶¹ Fundamental to constitutional validity is the notion that "[s]tatutory classifications must bear some reasonable relationship to a permissive legislative objective and not be discriminatory, arbitrary, or oppressive."⁶² Chapter 766.207(7)(b) of the Florida Code seeks to limit noneconomic damages to a maximum of \$250,000 in arbitration and provides that such damages shall be made proportional to the claimant's capacity to enjoy life.⁶³ A claimant with fifty percent reduction in capacity to enjoy life would be awarded only \$125,000 pursuant to this provision. Therefore, in order

56. See *Smith*, 507 So. 2d at 1088.

57. See *Escharte*, 618 So. 2d at 197.

58. See WACHSMAN, *supra* note 3, at 7.

59. See U.S. CONST. amend. XIV, § 1; FLA. CONST. art. I, § 2.

60. *Escharte*, 618 So. 2d at 198 (Barkett, C.J., dissenting).

61. *Id.*

62. *Id.*

63. FLA. STAT. ch. 766.207(7)(b) (2001).

to collect a mere \$250,000 in noneconomic damages a claimant must have absolutely no capacity to enjoy life. Such provisions are not only oppressive and arbitrary, but are an outrageous derogation of a plaintiff's right to recover fully for his injuries. The Florida legislature has arbitrarily chosen to draw a line at \$250,000 so that any claimant with lesser injuries may recover fully, but any claimant with greater injury may only recover partially. Such legislation is inherently arbitrary in making such a distinction. Some courts have concluded that this line drawing creates a facially discriminatory classification.⁶⁴ Another court stated that "[i]t is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are the most severely injured and therefore most in need of compensation."⁶⁵ The singling out of the most seriously injured claimants to bear the burden of reducing the overall liability crisis is a violation of Equal Protection provisions of both the Florida and the United States Constitutions.

Damage limitation reforms setting a maximum amount of recovery likely have severe constitutional problems under South Carolina law. Article I, section 14 of the South Carolina Constitution provides "[t]he right to a trial by jury shall be preserved inviolate."⁶⁶ In construing this provision the Supreme Court of South Carolina has declared there is "no question as to the legal right of [a] plaintiff, in [an] action in tort for unliquidated damages, to have the amount of damages properly determined by a jury."⁶⁷ Also, Article I, section 3 of the South Carolina Constitution provides "[t]he privileges and immunities of citizens of this state . . . shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."⁶⁸ Further, the Supreme Court of South Carolina has vigorously enforced the guarantee of equal protection where the legislature has drawn seemingly arbitrary lines between otherwise similarly situated persons.⁶⁹ As such, it appears that under South Carolina law these

64. See *Jones v. State Bd. of Med.*, 555 P.2d 399, 411 (Idaho 1976) (describing a classification based on the degree of injury and damage suffered as discriminatory on its face).

65. *Lucas v. United States*, 757 S.W.2d 687, 692 (Tex. 1988).

66. S.C. CONST. art. I, § 14.

67. *Hatchell v. McCracken*, 243 S.C. 45, 51, 132 S.E.2d 7, 10 (1963).

68. S.C. CONST. art. I, § 3 (merging the due process and equal protection guarantees into one clause).

69. See *Hanvey v. Oconee Mem'l Hosp.*, 308 S.C. 1, 416 S.E.2d 623 (1992) (finding a statute that limited the liability of charitable hospitals to \$100,000 violated equal protection where another statute limited the liability of all other charitable organizations to \$200,000, because there was no rational basis for this distinction); *Marley v. Kirby*, 271 S.C. 122, 245 S.E.2d 604 (1978) (finding a comparative negligence statute that applies only to motor vehicle accidents constitutionally defective because there was no rational justification for singling out persons injured in automobile accidents as different from all others injured in negligence torts); *Broom v. Truluck*, 270 S.C. 227, 241 S.E.2d 739 (1978) (holding that a statute of repose violated equal protection where no rational basis appeared for making distinction between architects, engineers, and contractors on one hand, and owners and manufacturers on the other, when granting the

reforms would present the same constitutional problems highlighted by the Florida courts, namely, that these damage caps violate a plaintiff's constitutional rights to a jury trial, due process of law, and equal protection under the law.

The prospect of a federal cap on the amount of damages recoverable in medical malpractice actions is uncertain. While the reform is speculative, its passage would have constitutional implications. It seems highly unlikely that the United States Supreme Court would strike down any national reform because, absent special circumstances, the lowest level of scrutiny is applied to this kind of tort reform.⁷⁰ The review of such legislation under the Due Process Clause is limited only to whether the legislature has been "arbitrary or irrational" in enacting the statute.⁷¹ Additionally, the Court does not pry into the wisdom of legislation and only requires a "reasonable basis for passing the statute."⁷² The review is essentially the same under the Equal Protection Clause.⁷³ Absent a suspect classification the rule is:

[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant . . . to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection clause requires only a rational means to serve a legitimate end.⁷⁴

Upon comparison, it is clear that state constitutional provisions are much more restrictive in this area of the law than the United States Constitution.

However, at least two arguments could still be made that national damages caps are unconstitutional. First, there is a plausible argument that Congress does not have the authority under our Constitution to enact these limitations and that this subject is more properly addressed by state legislatures. Congress will attempt to base its authority in the Commerce Clause of Article I, section 8.⁷⁵ The United States Supreme Court has typically construed the power given to

former immunity from suit after ten years for negligence to the improvement of real property).

70. See OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, IMPACT OF LEGAL REFORMS ON MEDICAL MALPRACTICE COSTS 99 (1993).

71. See *id.* (referencing *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978)). Of course, it could be argued that drawing a line at \$250,000 is inherently arbitrary.

72. *Id.*

73. See *id.*

74. *City of Cleburne v. Texas*, 473 U.S. 432, 441-42 (1985).

75. See H.R. 5, 108th Cong. § 2 (2003).

Congress under the Commerce Clause broadly.⁷⁶ However, recently the Supreme Court has narrowed its view of the power conferred on Congress by the Commerce Clause. Accordingly, the Court invalidated legislation based on the Commerce Clause in *United States v. Lopez*⁷⁷ and *United States v. Morrison*.⁷⁸ Given these recent decisions, it is unclear whether the Supreme Court would invalidate federal legislation implementing damages caps in medical malpractice actions.

A second constitutional problem with national reform may be constitutional challenges based on the Tenth Amendment. Although the United States Constitution is the “supreme law of the land,”⁷⁹ the Tenth Amendment may suggest that the right to address the perceived medical malpractice crisis has been reserved to the states. However, in *Garcia v. San Antonio Metropolitan Transit Authority*,⁸⁰ the Court held that the Fair Labor Standards Act applied to state agencies despite the Tenth Amendment and the fact that states traditionally regulated these areas.⁸¹ Thus, this argument is not likely to succeed, and any such national cap will likely be upheld.

Aside from the constitutional reasons, states should not enact damage limitations statutes because these statutes have undesirable practical effects.⁸² Statutory schemes such as the Florida scheme discussed previously allow negligent physicians and their insurance carriers to escape from complete liability. This is contrary to a fundamental purpose of tort law, which is to encourage the avoidance of injury by the imposition of complete liability.⁸³ The result is substandard healthcare, allowing careless physicians and healthcare providers to inflict more injury than if they had been held completely liable for their negligent acts. Generally, the goal of healthcare reform is to provide adequate access to the healthcare system to all members of society.⁸⁴ Rather, the goal should be to provide access to adequate and *competent* healthcare to

76. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding the application of a federal production quota, founded on the Interstate Commerce Clause, to a farmer who grew only a small crop of winter wheat intended primarily for his personal consumption).

77. 514 U.S. 549 (1995) (invalidating a federal statute prohibiting the possession of a gun in the vicinity of a schoolyard).

78. 529 U.S. 598 (2000) (invalidating a provision of the Violence Against Women Act that permitted the victims of gender-motivated violence to sue their attackers in federal court).

79. U.S. CONST. art. VI, § 2.

80. 469 U.S. 528 (1985).

81. *Id.*

82. In fact, many studies show that damage caps will not lower insurance costs for doctors. Dr. G. Richard Thompson, a Professor of Economics at Clemson University who recently conducted a study examining the effect of damage caps, has concluded that “if you look at states that have capped malpractice awards, insurance premiums continue to go up.” Paul Wachter, *S.C. Group Seeks Caps on Awards*, THE STATE (Columbia, S.C.), July 6, 2003 at A4.

83. See GEORGE C. CHRISTIE & JAMES E. MEEKS, CASES AND MATERIALS ON THE LAW OF TORTS 5 (2d ed. 1983).

84. See, e.g., FLA. STAT. ch. 766.201 (2002) (summarizing the intent of the legislature).

all members of society.

It seems that some kind of reform may be needed, but how can this be done without infringing on citizens' constitutional rights? One alternative is stricter discipline from within the medical profession. As pointed out in the Task Force Report in *Escharte*, a large percentage of injuries are produced by a relatively small number of doctors.⁸⁵ While this correlation can be partly explained by the fact that some doctors practice in high-risk fields, it is indisputable that some of this correlation is due to a number of substandard physicians and healthcare providers.⁸⁶ A recent government report released in July 2003 found that 3.9% of South Carolina doctors represented 61% of the state's malpractice payouts between 1990 and 2002.⁸⁷ This report also found that of the ninety-four doctors involved in three or more malpractice payouts, only fourteen have been disciplined.⁸⁸ Because so few doctors cause a great portion of the malpractice awards, it is reasonable to conclude that more stringent regulation from within the profession would directly target the source of the problem and effectively reduce the overall amount of liability—without infringing on citizens' constitutional rights.

Additionally, even if caps are indispensable to reduce the amount of liability, there are better methods of implementation than that which the Florida Legislature has chosen—methods that would not infringe on claimants' constitutional rights by providing for flexibility. A flexible statutory cap would operate to limit lesser claims to promote stability in the system, yet give judges discretion to exceed the cap in flagrant and extreme cases.⁸⁹ Also, a state statute controlling excessive awards by providing judicial guidelines for implementing remittitur or ordering a new trial in circumstances where damages are blatantly excessive could curtail the liability crisis. These types of statutes have been held constitutional.⁹⁰ Another possible method of reform would be a statute designed to reduce all medical malpractice awards by a reasonable percentage. For example, at the conclusion of the trial in which the jury has chosen to award the victim \$100,000, the court would reduce the verdict by, for example,

85. See *Univ. Of Miami v. Escharte*, 618 So. 2d 189, 197 (Fla. 1993).

86. See WACHSMAN, *supra* note 3, at 7. In his book, Dr. Wachsman, who holds both an M.D. and a J.D., estimates that "at least 5 percent of the nation's doctors are considered by medical authorities to be unfit to practice" and that "[t]hese physicians may account for tens of thousands of needless injuries and deaths each year because of unnecessary operations, botched procedures, faulty drug prescriptions, and inept diagnoses and treatments." *Id.*

87. Press Release, Public Citizen (July 8, 2003) at http://www.citizen.org/documents/SC_NPDB.pdf.

88. *Id.*

89. See, e.g., MASS. GEN. LAWS ch. 231, § 60H (2002) (providing for exceptions when plaintiff can show "special circumstances in the case which warrant a finding that imposition of such a limitation would deprive the plaintiff of just compensation for the injuries sustained").

90. See, e.g., *Gasparini v. Ctr. for Humanities*, 518 U.S. 415 (1996) (upholding a N.Y. statute under the Seventh Amendment where statute provided for new trial after excessive jury award).

ten percent, and render a final judgment of \$90,000 for the victim. While such a statute might be subject to the Due Process and jury trial constitutional problems discussed above, at least it would treat all victims equally under the law. Finally, inaction is better than the unconstitutional method of reform exemplified by the Florida statutory scheme. These rigid statutory caps violate the right to access the courts and the right to equal protection of those victims of serious incidents of medical malpractice. These limitations should not be enacted by the South Carolina Legislature, and if so enacted, should not be upheld by South Carolina courts.

IV. CONCLUSION

This is a world of compensations, and victims of medical malpractice should be completely compensated for their losses. State medical malpractice reforms that cap the amount of damages a victim may recover encounter several constitutional problems. Florida's statutory scheme of damage limitation violates not only a seriously injured victim's right to be treated equally under the law and right to complete compensation, but also restricts a claimant's fundamental right to access the courts for redress of injuries. In addition to the serious constitutional implications of these damage limitations, these statutes also have a negative practical effect on the quality of healthcare. Because there are other legislative alternatives that do not infringe on citizens' constitutional rights, such as stricter intra-discipline regulation of physicians, damage limitations should be a last resort. Meanwhile, states such as South Carolina that have no statutory caps on damages should not implement these questionable reforms, and courts should strike these caps down if such reforms are enacted.

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