SMU | Dedman School of Law

SMU Law Review

Volume 57 | Issue 2 Article 8

2004

Torts - Texas' House Bill Four's Noneconomic Damage Caps Impose the Burden of Supporting the Medical Industry Solely upon Those Most Severely Injured and Therefore Most in Need of Compensation

Ashley Stewart

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation

Ashley Stewart, *Torts - Texas' House Bill Four's Noneconomic Damage Caps Impose the Burden of Supporting the Medical Industry Solely upon Those Most Severely Injured and Therefore Most in Need of Compensation*, 57 SMU L. Rev. 497 (2004)
https://scholar.smu.edu/smulr/vol57/iss2/8

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.

TORTS—TEXAS' HOUSE BILL FOUR'S NONECONOMIC DAMAGE CAPS IMPOSE THE BURDEN OF SUPPORTING THE MEDICAL INDUSTRY SOLELY UPON THOSE MOST SEVERELY INJURED AND THEREFORE MOST IN NEED OF COMPENSATION

Ashley Stewart

IN the name of "Tort Reform," Texas' 78th Legislature passed limitations on the amount of noneconomic damages that an injured plaintiff can recover in a medical malpractice claim. These damage caps should be found unconstitutional because they eliminate a deserving plaintiff's right to have a jury assess noneconomic damages, and they deny both an open court and equal protection to a severely injured plaintiff who is most in need of compensation. Even if the caps are constitutional, they have little connection to reducing frivolous claims or medical malpractice liability insurance premiums, yet their effect precludes the most critically injured victims from receiving full compensation for their injuries.

Section 74.301 of Texas House Bill Four amends the Medical Liability and Insurance Improvement Act of Texas as it applies to the liability of doctors and other health care providers.[1] The text of section 74.301 states the following:

> (A) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider other than a health care institution, the limit of civil liability for noneconomic damages of the physician or health care provider other than a health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant, regardless of the number of defendant physicians or health care providers other than a health care institution against whom the claim is asserted or the number of separate causes of action on which the claim is based.

1. House Comm. on Civil Practices Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. (2003), *available at* www.capitol.state.tx.us/hrofr/frame2.htm.

(B) In an action on a health care liability claim where final judgment is rendered against a single health care institution, the limit of civil liability for noneconomic damages inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant.
(C) In an action on a health care liability claim where final judgment is rendered against more than one health care institution, the limit of civil liability for noneconomic damages for each health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant and the limit of civil liability for noneconomic damages for all health care institutions, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $500,000 for each claimant.[2]

The caps apply to noneconomic damages, which include past and future physical pain and suffering, mental anguish and suffering, consortium, disfigurement, and any other nonpecuniary damages intended to compensate plaintiffs for the suffering they have experienced.[3] The Bill effectively limits a plaintiff's recovery of noneconomic damages to only $250,000, no matter how many health care professionals were negligent. Additionally, a plaintiff can only recover $250,000 in noneconomic damages if a health care institution was negligent, but this sum is inclusive of any award of damages resulting from the negligence of health care professionals for which the hospital is vicariously liable. Only when there is more than one health care institution liable can a plaintiff recover more than $250,000 in noneconomic damages, and even then that award can not exceed $500,000.[4]

Proponents of the limitations claim that physicians are facing large increases in their medical malpractice insurance costs because of the increases in the size of damage awards in medical malpractice suits.[5] They believe that the solution is a cap of $250,000 per claimant, per case on noneconomic damages, which would in turn lower medical malpractice insurance rates.[6] Some Texas physicians have limited their practices, retired early, or left the state due to the high cost of malpractice insurance.[7] Limits on noneconomic damages are the foundation of reformer's efforts to reduce medical malpractice rates because they assert that high verdicts in malpractice cases make it more expensive for insurers to cover policies.[8] Supporters say "[c]apping non-economic damages at reasonable

2. Tex. H.B. 4, 78th Leg., R.S. (2003).
3. *See* Lucas v. United States, 757 S.W.2d 687, 689 (Tex. 1988).
4. *See* Tex. H.B. 4, 78th Leg., R.S. (2003) (§ 74.301).
5. House Research Org., Focus Report of Constitutional Amendments Proposed for Sept. 2003 Ballot, H.R. 78-10, R.S., (Tex. 2003), *available at* www.capitol.state.tx.us/hrofr/focus/amend78.pdf.
6. *Id.* at 33.
7. House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. (2003), *available at* http://www.capitol.state.tx.us/hrofr/frame2.htm.
8. *Id.*

limits would encourage insurers to do business in Texas by ensuring that they would not incur massive losses because of large damage awards. As more insurers joined the market, competition would reduce premiums."[9] Based on California's experience with reduced insurance rates as a result of damages caps, supporters say that a $250,000 cap on non-economic damages in Texas would result in a substantial reduction in liability premiums over a period of years.[10]

State supreme courts have struck down more than seventy tort reform laws on state constitutional grounds.[11] Caps on noneconomic damages have been held unconstitutional because such statutes violate the fundamental right to trial by jury.[12] The right to trial by jury includes the right to have the jury determine all factual issues, including the assessment of damages to which a plaintiff may be entitled.[13] One court noted that a "jury is consigned under the constitution the ultimate power to weigh the evidence and determine the facts—the amount of damages in a particular case is an ultimate fact."[14] These states have determined that an automatic damage cap is unconstitutional because it impermissibly infringes on the right to a jury trial by preventing the jury from awarding compensation exceeding the statutory limit.[15]

Limitations on noneconomic damages also violate the open courts provision in state constitutions because such limits infringe on a plaintiff's guaranteed right to obtain full redress for injuries caused by another's wrongful conduct.[16] Courts including the Texas Supreme Court have held that a limit on noneconomic damages violated a victim's constitu-

9. House Research Org., Focus Report of Constitutional Amendments Proposed for Sept. 2003 Ballot, H.R. 78-10, R.S. (Tex. 2003), *available at* http://www.capitol.state.tx.us/hrofr/focus/amend78.pdf.

10. *Id.*

11. Victor E. Schwartz & Barry M. Parsons, *Judicial Nullification of Legislative Action Continues*, 16 No. 10 PROD. LIAB. L. & STRATEGY 4 (1998).

12. Sofie v. Fibreboard Corp., 771 P.2d 711, 720 (Wash. 1989) (holding statute which limited noneconomic damages unconstitutional since the statute violated the right to trial by jury); Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 164 (Ala. 1991) (holding that a $400,000 limit on noneconomic damages in medical malpractice cases violated a plaintiff's right to a jury trial); Henderson v. Ala. Power Co., 627 So. 2d 878, 893-94 (Ala. 1993) (holding that a provision of the Alabama Tort Reform Act limiting awards of punitive damages to $250,000 violated the guarantee of trial by jury) *overruled by*, *Ex parte* Apicella, 809 So. 2d 865 (Ala. 2001); State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1091 (Ohio 1999) (holding statute which established limits on punitive damages in tort actions to the lesser of $100,000 or three times the amount of compensatory damages awarded, violated the right to trial by jury); Kan. Malpractice Victims Coalition v. Bell, 757 P.2d 251, 263-64 (Kan. 1988) (holding statutes setting caps on recoverable damages for medical malpractice actions are unconstitutional based upon an infringement of the jury trial right). *But cf.* Samsel v. Wheller Transp. Servs., Inc., 789 P.2d 541 (Kan. 1990) (determining that damage cap for pain and suffering did not alter the right to jury trial or deprive an injured party of a right to a jury to determine and award economic damages), *overruled by* Bair v. peck, 811 P.2d 1176 (Kan. 1991).

13. Miller v. Wikel Mfg. Co., 545 N.E.2d 76, 81 (Ohio 1989).

14. *Sofie*, 771 P.2d at 716-17.

15. *Moore*, 592 So. 2d at 164.

16. Lucas v. United States, 757 S.W.2d 687, 690 (Tex. 1988) (holding statutory cap on medical malpractice damages for the purpose of reducing malpractice premium rates was unconstitutional as it violated the open courts doctrine, which guarantees meaningful ac-

tional right to access to the courts.[17] Many courts have also held that it was a violation of the constitutional guarantee of equal protection for a statute to limit noneconomic damages recoverable in a medical malpractice action.[18] One court reasoned that by "balancing the direct and palpable burden placed upon catastrophically injured victims of medical malpractice against the indirect and speculative benefit that may be conferred on society," such statutes violate the equal protection provision found in most state constitutions.[19] Statutes that cap noneconomic damages do not provide equal protection to "those who are most severely maltreated and, thus, most deserving of relief. Unlike the less severely injured, who receive full and just compensation, the catastrophically injured victim of medical malpractice is denied any expectation of compensation beyond the statutory limit."[20]

House Bill Four, section 74.301 should be found unconstitutional on the grounds that it violates a plaintiff's right to trial by jury, right to an open court, and right to equal protection.[21] The Texas Supreme Court has already held that a similar cap violated the open courts provision in the Texas Constitution.[22] Supporters of the cap believe that Proposition 12, which was narrowly passed by the Texas voters, will prevent the supreme court from finding that this cap is unconstitutional.[23] Besides that, they claim that "a cap on noneconomic damages would not limit a patient's right to redress [because] [i]t would not limit the amount a patient could be compensated for actual losses and damages."[24] However,

> a tort victim "gains" nothing from the jury's award for economic loss, since that money merely replaces that which he has actually lost. It is only the award above the out-of-pocket loss that is available to compensate in some way for the pain, suffering, physical impairment or disfigurement that the victim must endure until death.[25]

---

cess to courts); Smith v. Dep't of Ins., 507 So. 2d 1080, 1083 (Fla. 1987) (holding $450,000 limit on noneconomic damages violated the open courts provision).

17. *Lucas*, 757 S.W.2d at 687, 690; *Smith*, 507 So. 2d at 1087-89.

18. Carson v. Maurer, 424 A.2d 825, 836-38 (N.H. 1980) (holding that a statute imposing a $250,000 limit on the amount of noneconomic damages a medical malpractice plaintiff could recover violated the equal protection guarantee); Arneson v. Olson, 270 N.W.2d 125, 135-36 (N.D. 1978) (holding $300,000 ceiling violated equal protection clause); *Moore*, 592 So. 2d at 170 (holding $400,000 limitation on damages for noneconomic loss in medical malpractice cases violated principle of equal protection).

19. *Moore*, 592 So. 2d at 170.

20. *Id.* at 169.

21. *See* TEX. CONST. art. I, §§ 3, 13, 15.

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

23. *Lucas*, 757 S.W.3d at 687. (Proposition 12, passed September 13, 2003, adds sec. 66 to Art. 3 of the Texas Constitution, authorizing the Legislature to set limits on damages, except economic damages) (House Research Org., Focus Report of Constitutional Amendments Proposed for Sept. 2003 Ballot, H.R. 78-10, R.S. (Tex. 2003), *available at* http://www.capitol.state.tx.us/hrofr/focus/amend78.pdf).

24. House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. (2003), *available at* http://www.capitol.state.tx.us/hrofr/frame2.htm. .

25. Carson v. Maurer, 424 A.2d 825, 837 (N.H. 1980).

A jury is the proper mode for assessing these types of damages, and any imposed maximum on these damages violates the constitutional right to trial by jury. Additionally, supporters of the limit claim that "the cap proposed by Article 10 of [House Bill Four] would not violate the Open Courts Doctrine because the limit on damages would be in exchange for access to health care."[26] However, "[t]he trade of damage caps for enhanced access to health care is insufficient to withstand a constitutional challenge because there is no guarantee that reducing access to courts in this way would increase access to health care."[27] Moreover, any cap violates the equal protection clause by placing an arbitrary value on human life, which diminishes the value of the lives of women, children, the elderly, and the disabled. This bill equates a person's life with the amount of money they earn, which clearly discriminates against individuals whose value exceeds their income.[28]

Should the Texas Supreme Court uphold the constitutionality of these damage caps, they should still be repealed because arbitrary damage caps are not the answer to the claimed medical malpractice insurance "crisis." While the correlation between damage caps and the reduction of health care costs is, at best, indirect and remote, by contrast, the burden imposed by the caps on the rights of individuals to receive compensation for serious injuries is direct and concrete.[29] Statistics show that there is little or no connection between high insurance premiums and medical malpractice claims.[30] A study conducted by the United States General Accounting Office found that "[d]espite the fact that statutory reform, including damage caps, had been in place for nearly 10 years in some states, . . . in the period 'from 1983 to 1985, total medical malpractice insurance costs for physicians and hospitals *rose* from $2.5 billion to $4.7 billion.'"[31] Statistics from the Texas Board of Medical Examiners show that the number of malpractice cases and the size of claim payments in Texas have decreased, even as liability premiums doubled or tripled.[32] Weiss Ratings, Inc., which rates the safety of financial institutions including insurance carriers, found that malpractice premiums increased faster in states with caps than in states without them.[33] It found that "[i]n 19 states that implemented caps during [a] 12-year period, physicians suffered a 48.2 percent jump in median premiums. . . . However, surprisingly, in 32 states *without* caps, the pace of increase was actually somewhat *slower*, as pre-

26. House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. (2003), *available at* http://www.capitol.state.tx.us/hrofr/frame2.htm.

27. *Id.*

28. *Id.*

29. Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 168-69 (Ala. 1991).

30. *See id.* at 167-68.

31. *Id.* at 167 (emphasis added) (quoting General Accounting Office, Medical Malpractice: Insurance Cost Increased but Varied Among Physicians and Hospitals, HRD-86-112, at 2 (Sept. 1986).

32. Terry Maxon, *Studies on Medical-Malpractice Caps Offer Conflicting Results in Texas Debate*, DALLAS MORNING NEWS, Sept. 6, 2003, at A1.

33. *Id.*

miums rose by only 35.9 percent."[34] Government data also found that in 2000, malpractice insurance premiums constituted only 0.56 percent of all health care expenditures.[35]

Furthermore, limiting noneconomic damages to only $250,000 will not lower malpractice insurance nor reduce frivolous claims because such claims are not affected by a cap whose limit is higher than the damages they will likely receive. Several state supreme courts invalidating caps on equal protection grounds have found

> that the necessary relationship between the legislative goal of rate reduction and the means chosen to attain that goal is weak for two reasons: "First, paid-out damage awards constitute only a small part of total insurance premium costs. Second, and of primary importance, few individuals suffer noneconomic damages in excess of $250,000."[36]

Limitations on damages do "nothing toward the elimination of nonmeritorious claims. Restrictions on recovery may encourage physicians to . . . remain in practice, but do so only at the expense of claimants with meritorious claims."[37] According to the federal government's National Practitioner Data Bank, the median payment for a settlement in 2000 was only $125,000, and the median payment for a judgment was only $235,000.[38] Other government data found that the mean medical malpractice payout in 2002 was only $271,995.[39] Frivolous claims could be reduced, not by damage caps that are set higher than the amount a plaintiff is likely to recover anyway, but by a "loser pay" system.[40] This would ensure that only legitimate, meritorious claims are brought because a plaintiff who loses would have to pay the legal fees and court costs of the winning defendant.

The answer to "tort reform" lies not in arbitrary damage caps, but in regulation of the insurance industry and the doctors who are actually committing the malpractice. There is no guarantee that limiting the amount of noneconomic damages an injured plaintiff can receive will lower malpractice insurance rates. If House Bill Four is to stand, insurers should promise that these caps will result in lower premiums. The Bill should require that any reductions in tort costs be applied directly to re-

---

34. Weiss Ratings, Inc., *Medical Malpractice Caps: The Impact of Damage Caps on Physician Premiums*, *available at* www.citizen.org/print_article.cfm?ID=10038 (June 2, 2003).

35. Public Citizen, *New 2002 Government Data Dispute Malpractice Lawsuit "Crisis"*, *at* www.citizen.org/documents/NPDB_Data.pdf (July 7, 2003).

36. *See* Carson v. Maurer, 424 A.2d 825, 836 (N.H. 1980); Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 169 (Ala. 1991) (quoting Jenkins, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829, 951 (1979)).

37. Arneson v. Olson, 270 N.W.2d 125, 135-36 (N.D. 1978).

38. Public Citizen, *Medical Malpractice Award Trends: Believe Government Sources, Not Doctors*, *at* www.citizen.org/congress/civjus/medmal/articles.cfm?ID=8798 (Jan. 14, 2003).

39. PUBLIC CITIZEN, *supra* note 35.

40. House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. (2003), *available at* http://www.capitol.state.tx.us/horfr/frame2.htm.

ducing premium rates.[41] Additionally, insurance companies should only raise premiums for doctors who have actually been found negligent and have incurred a claim against their policies. Only one in eight preventable medical errors committed in hospitals actually results in a malpractice claim.[42] According to government data, only 15.9 percent of all doctors paid on a malpractice claim during the period of 1990-2002.[43] Furthermore, only 5.2 percent of doctors paid on two or more malpractice claims, yet these doctors were responsible for 55 percent of all payouts.[44] This data shows that it is only a small percentage of doctors are responsible for medical malpractice. The burden of reducing malpractice insurance should fall on their shoulders and not on the 84.1 percent of doctors who are doing their job correctly. Reform could also be achieved by reprimanding the doctors who commit malpractice. Surprisingly, only 10.7 percent of all doctors who incurred three or more malpractice payouts have been disciplined, and only 16.9 percent of those doctors who incurred five or more malpractice payouts have been disciplined.[45] According to the Texas State Board of Medical Examiners, the board received more than 6000 malpractice complaints against doctors between January 2001 and May 2002, yet opened *no* investigations during that period.[46] If negligent doctors are more closely monitored, the number of medical malpractice injuries will drop, thereby reducing the number of claims actually brought against doctors.

Section 74.301 of House Bill Four should be found unconstitutional because it strips a deserving plaintiff of constitutionally guaranteed rights to trial by jury, to an open court, and to equal protection. Even if such a cap is constitutional, arbitrary limitations on noneconomic damages are not the answer to tort reform because they do little to reduce malpractice insurance rates, yet cause harm by preventing the most deserving victims from gaining compensation for their injuries. The most catastrophically injured victims should not be forced to support the medical industry, the very entity which caused their injuries. The answer to lower premiums lies in regulating the insurance companies and negligent doctors.

41. *Id.*
42. Public Citizen, *Quick Facts on Medical Malpractice Issues—Frequency of Medical Malpractice Claims*, *at* www.citizen.org/congress/civjus/medmal/articles.cfm?ID=9125 (Mar. 4, 2003).
43. PUBLIC CITIZEN, *supra* note 35.
44. *Id.*
45. *Id.*
46. House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. (2003), *available at* http://www.capitol.state.tx.us/hrofr/frame2.htm.