

4-28-2023

Putting the LHEPA Under the Knife: The Implications of the Gross Negligence Standard of Care for Medical Malpractice Actions During COVID-19's Public Health Emergency

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Putting the LHEPA Under the Knife: The Implications of the Gross Negligence Standard of Care for Medical Malpractice Actions During COVID-19’s Public Health Emergency

Baylee M. Smith*

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INTRODUCTION

Periodically, major catastrophic events create emergencies that greatly affect the public and its ability to receive effective health care.¹ Following Hurricane Katrina's landfall in August 2005, many medical facilities across southern Louisiana sustained devastating damage.² As a result, Governor Kathleen Blanco issued a series of executive orders declaring a public health emergency for a large portion of South Louisiana.³ Governor Blanco's emergency declaration effectuated the Louisiana Health Emergency Powers Act (LHEPA),⁴ which temporarily raised the normal standard of care for medical malpractice actions to "gross negligence" or "willful misconduct," unlike the normal standard of care, which is more similar to reasonableness.⁵

During Hurricane Katrina's public health emergency, a doctor operated on a patient at West Jefferson Medical Center for a pinched nerve—an injury unrelated to Hurricane Katrina.⁶ After experiencing extreme pain for several days, the patient underwent an x-ray, which revealed a foreign body (a sponge) inside of the patient.⁷ The patient filed a medical malpractice claim against the physician and medical center, including filing a request for a medical review panel (MRP)⁸ as required by Louisiana law.⁹ The medical review panel, which is a precursory requirement to a formal medical malpractice suit, issued an opinion that neither the surgeon nor the medical center engaged in gross negligence or willful misconduct in their treatment of the patient.¹⁰ The patient challenged the standard of care by alleging the ordinary standard of care for medical malpractice claims should apply because her care was unrelated to the public health emergency.¹¹ However, the court found that gross negligence or willful misconduct should not have a limited application to only malpractice claims related to the public health

1. *See generally* LA. REV. STAT. §§ 29:760–775 (2023).

2. *Lejeune v. Steck*, 138 So. 3d 1280, 1282 (La. Ct. App. 5th Cir. 2014).

3. *Id.*

4. LA. REV. STAT. §§ 29:760–775 (2023).

5. *Lejeune*, 138 So. 3d at 1282.

6. *Id.*

7. *Id.*

8. Under Louisiana law, the MRP hears claims of medical malpractice before any petition claiming such cause of action may be filed in state courts. LA. REV. STAT. § 40:1237.2 (2023).

9. *Lejeune*, 138 So. 3d at 1282.

10. *Id.*

11. *Id.*

emergency.¹² Therefore, the extremely high standard of care hindered the patient's claim following an event not only unrelated to the public health emergency, but also where a physician likely breached the ordinary standard of care.¹³ Like Katrina's public health emergency, the COVID-19 pandemic placed the state in its most recent state of emergency.¹⁴

On March 11, 2020, Governor John Bel Edwards's executive proclamation placed Louisiana in a condition of public health emergency in response to the coronavirus pandemic that lasted over two years.¹⁵ This executive order once again triggered the LHEPA, which indefinitely effectuated the gross negligence or willful misconduct standard of care ("the LHEPA standard") for medical malpractice actions across the state.¹⁶ As discussed above, the LHEPA standard is more demanding on plaintiffs' claims than the ordinary standard of care, as it requires the plaintiff to prove conduct more severe than negligent behavior.¹⁷ Since most Louisiana courts overwhelmingly decide medical malpractice cases in favor of the defendant,¹⁸ the LHEPA standard creates an unsurpassable barrier for plaintiffs to overcome in an area of law that is already unfavorable to plaintiffs.¹⁹ Additionally, Louisiana's public health

12. *Id.* at 1283; *see also* Pffner v. Correa, 643 So. 2d 1228, 1233–34 (La. 1994) (finding that negligence is so obvious in some situations, such as when a physician leaves a sponge in a patient's body, that an expert opinion is not needed); *Hastings v. Baton Rouge Gen. Hosp.*, 498 So. 2d 713, 719 (La. 1986).

13. *Lejeune*, 138 So. 3d at 1283.

14. La. Exec. Dep't Proclamation No. 25-JBE-2020 (Mar. 11, 2020) [hereinafter COVID Proclamation]; *see also* LA. REV. STAT. ANN. § 29:771(B)(2)(c)(i) (2020).

15. COVID Proclamation, *supra* note 14. The public health emergency was lifted on March 16, 2022, after two years of state of emergency. Office of the Governor, *With Cases and Hospitalizations Declining and Vaccines Widely Available, Gov. Edwards Will Not Renew COVID Public Health Emergency*, GOV. OF LA. (Mar. 14, 2022), <https://gov.louisiana.gov/index.cfm/newsroom/detail/3589> [<https://perma.cc/CN4F-CSPU>].

16. *Id.*

17. *See generally* Rabalais v. Nash, 952 So. 2d 653, 658 (La. 2007).

18. *See* Tony Tramontana, *Louisiana Medical Malpractice Rates Are 3rd Highest in U.S.*, J. ANTONIO TRAMONTANA, ATTN'Y AT L., <https://tramontanalaw.com/louisiana-medical-malpractice-rates-high/> [<https://perma.cc/B5SS-HCZW>] (last visited Mar. 9, 2023).

19. *See* L. Adam Thames, *Louisiana Health Care Provider Liability During a Pandemic*, 68 LA. BAR J. 24, 24 (2020); *see generally* LA. PATIENT'S COMP. FUND, PANEL STATISTICS, YEAR 2000–2021 (Sept. 24, 2021) (showing that the Patient Compensation Fund decides roughly over 80% of MRP requests that result

emergency order was one of the longest public health emergencies since the LHEPA's enactment.²⁰

This Comment will analyze the implications of the quasi-immunity created by the LHEPA standard,²¹ focusing on the possible effects on plaintiffs. The language of § 771(B)(2)(c)(i) of the LHEPA provides: “During a state of public health emergency, no health care provider shall be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of gross negligence or willful misconduct.”²² This language, as interpreted by Louisiana jurisprudence, applies to all health care professionals, even if they are providing health

in an opinion in favor of the defendant health care provider); *see also Rabalais*, 952 So. 2d at 658.

20. Governor Edwards initially issued the COVID-19 public health emergency order in March 2020 and continuously renewed it. *See* COVID Proclamation, *supra* note 14; La. Exec. Dep't Proclamation No. 38-JBE-2020 (Mar. 31, 2020); La. Exec. Dep't Proclamation No. 52-JBE-2020 (Apr. 30, 2020); La. Exec. Dep't Proclamation No. 58-JBE-2020 (May 14, 2020); La. Exec. Dep't Proclamation No. 75-JBE-2020 (June 4, 2020); La. Exec. Dep't Proclamation No. 83-JBE-2020 (June 25, 2020); La. Exec. Dep't Proclamation No. 96-JBE-2020 (July 23, 2020); La. Exec. Dep't Proclamation No. 101-JBE-2020 (Aug. 06, 2020); La. Exec. Dep't Proclamation No. 110-JBE-2020 (Aug. 26, 2020); La. Exec. Dep't Proclamation No. 117-JBE-2020 (Sept. 11, 2020); La. Exec. Dep't Proclamation No. 134-JBE-2020 (Oct. 08, 2020); La. Exec. Dep't Proclamation No. 158-JBE-2020 (Nov. 05, 2020); La. Exec. Dep't Proclamation No. 158-JBE-2020 (Nov. 13, 2020); La. Exec. Dep't Proclamation No. 174-JBE-2020 (Dec. 4, 2020); La. Exec. Dep't Proclamation No. 209-JBE-2020 (Dec. 29, 2020); La. Exec. Dep't Proclamation No. 6-JBE-2021 (Jan. 15, 2021); La. Exec. Dep't Proclamation No. 17-JBE-2021 (Feb. 11, 2021); La. Exec. Dep't Proclamation No. 29-JBE-2021 (Mar. 2, 2021); La. Exec. Dep't Proclamation No. 67-JBE-2021 (Apr. 1, 2021); La. Exec. Dep't Proclamation No. 79-JBE-2021 (Apr. 27, 2021); La. Exec. Dep't Proclamation No. 93-JBE-2021 (May 27, 2021); La. Exec. Dep't Proclamation No. 117-JBE-2021 (June 23, 2021); La. Exec. Dep't Proclamation No. 131-JBE-2021 (July 22, 2021); La. Exec. Dep't Proclamation No. 145-JBE-2021 (Aug. 9, 2021); La. Exec. Dep't Proclamation No. 203-JBE-2021 (Oct. 29, 2021); La. Exec. Dep't Proclamation No. 219-JBE-2021 (Nov. 29, 2021); La. Exec. Dep't Proclamation No. 234-JBE-2021 (Dec. 22, 2021); La. Exec. Dep't Proclamation No. 6-JBE-2022 (Jan. 19, 2022). The public health emergency order was not extended on March 16, 2022, thus ending the two-year span of the COVID public health emergency. *See* Office of the Governor, *supra* note 15.

21. LA. REV. STAT. §§ 29:760–775 (2023). This Comment uses the phrase *quasi-immunity* to refer to immunity for health care providers created by the LHEPA standard.

22. *Id.* § 29:771(B)(2)(c)(i).

care completely unrelated to the emergency.²³ As the jurisprudence demonstrates, this language is too broad.

In *Lejeune v. Steck*, the Louisiana Fifth Circuit Court of Appeal found that § 771(B)(2)(c)(i) of the LHEPA²⁴ “does not provide for a limited set of health care providers.”²⁵ Plaintiff Mabel Daigle sued defendant John C. Steck, M.D., and alleged that he was grossly negligent in his medical care after he operated on Ms. Daigle and a sponge was later found in her body.²⁶ The court granted the defendant’s motion for summary judgment, finding that the evidence Ms. Daigle produced did not meet the burden of proof required under the LHEPA.²⁷ Ms. Daigle appealed, claiming that the LHEPA standard was inapplicable because her surgery was not related to Hurricane Katrina, which created the public health emergency.²⁸ The Fifth Circuit found no error in the trial court’s grant of summary judgment, ruling that the quasi-immunity for health care providers in the LHEPA was not so limited.²⁹ *Lejeune* demonstrates the wide breadth imposed by the LHEPA’s gross negligence standard, expanding the quasi-immunity to provide that all health care providers are broadly protected in any case during a public health emergency, even if the doctor commits an egregious omission, such as leaving a sponge in a patient.³⁰

A look into other jurisdictional approaches, as well as Louisiana’s homeland security legislation, provides guidance on how the Louisiana legislature should address the inequitable standard of care the LHEPA creates.³¹ Other states, including Texas, as well as federal law, limited the liability of health care professionals during the coronavirus pandemic but placed constraints on the limited liability: for example, only allowing the limited liability when treatment was related to COVID-19.³² This allows for the important protection of health care providers during public health emergencies, such as the extended one presented by COVID-19, without

23. *Lejeune v. Steck*, 138 So. 3d 1280, 1283 (La. Ct. App. 5th Cir. 2014).

24. *See* LA. REV. STAT. § 29:771(B)(2)(c)(i) (2023).

25. *Lejeune*, 138 So. 3d at 1283.

26. *Id.* at 1282.

27. *Id.* at 1283.

28. *Id.*

29. *Id.*

30. *See Pfiffner v. Correa*, 643 So. 2d 1228, 1233–34 (La. 1994); *Hastings v. Baton Rouge Gen. Hosp.*, 498 So. 2d 713, 719 (La. 1986).

31. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.155 (West 2023); Coronavirus Aid, Relief, and Economic Security Act (CARES Act), S. 3548, 116th Cong. § 4216 (2020) (enacted); *see also* LA. REV. STAT. § 29:725.1 (2023).

32. TEX. CIV. PRAC. & REM. CODE ANN. § 74.155 (West 2023); CARES Act, S. 3548, 116th Cong. § 4216 (2020) (enacted).

creating a blanket quasi-immunity that shields almost all medical professionals in all circumstances. Other states' legislation and even Louisiana's additional emergency legislation demonstrate that the Louisiana legislature should adopt a narrower version of limited liability for health care providers during public health emergencies in Louisiana. To rectify the challenges that the LHEPA creates, Louisiana should implement language in its public health emergency statute qualifying health care providers' limited liability to only protect treatment that is related to or part of the declared public health emergency.

Part I of this Comment provides an overview of the Louisiana Medical Malpractice Act (LMMA) and the LHEPA, focusing on the provisions relevant to the standard of care for health care professionals. Part II discusses the broad definition of the LHEPA that the Fifth Circuit Court of Appeal contemplated in *Lejeune v. Steck*. Part II also introduces two Louisiana appellate cases—*In re Medical Review Panel Proceeding of Welch* and *Sebble ex rel. Estate of Brown v. St. Luke's #2, LLC*—in which the plaintiffs challenge the gross negligence standard set forth in the LHEPA after Hurricane Katrina. Part III explores the issues resulting from the broad application of Louisiana Revised Statutes § 29:771(B)(2)(c)(i). Part IV contrasts Louisiana's provision providing limited liability for health care professionals—the LHEPA standard—to other states' legislation, federal law, and the Louisiana Homeland Security and Emergency Assistance and Disaster Act (LHSEAD) to provide guidance and highlight the inadequacy of the LHEPA approach. Part V argues for an adoption of narrower language to limit the quasi-immunity of health care providers to only treatment directly related to the coronavirus pandemic. It discusses the possible implications of both narrowing the language of Louisiana Revised Statutes § 29:771(B)(2)(c)(i) and failing to do so. This Comment concludes upon the previous findings and again offers a proposed amendment to this legislation that the Louisiana legislature should adopt to fix the overbreadth of the limited liability the LHEPA provides for health care providers.

I. MEDICAL MALPRACTICE, THE LHEPA, AND COVID-19 IN LOUISIANA

Each state has its own legislation governing the procedures and requirements of medical malpractice actions, and Louisiana's is found in the LMMA.³³ The LMMA provides guidance and precursory measures for all medical malpractice claims filed in the state.³⁴ However, special

33. See LA. REV. STAT. §§ 40:1231.1–1231.10 (2023).

34. See *id.*

legislation that provides for stricter provisions, such as the LHEPA, may supersede certain provisions of the LMMA.³⁵

A. The Louisiana Medical Malpractice Act

The LMMA is the standard legislation that governs the general law of medical malpractice actions in Louisiana.³⁶ The Louisiana legislature passed the LMMA in 1975 in an attempt to, first, address the crisis of sharply rising costs of medical malpractice insurance and, second, provide limited liability for health care providers through a provision that limits the amount of damages a plaintiff can recover.³⁷ The LMMA provides the correct procedures for bringing a medical malpractice claim against a health care provider and limits the amount of damages awardable to claimants to \$500,000.³⁸

Defined in the LMMA, *malpractice* is “any unintentional tort or any breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient”³⁹ Before a plaintiff can bring a medical malpractice claim to court in Louisiana, the LMMA requires the plaintiff file a request for a MRP if the health care professional is a “qualified health care provider.”⁴⁰ A qualified health care provider is one who is insured by a malpractice policy in the amount of at least \$100,000 per claim, has filed proof of that financial responsibility with the Patient Compensation Fund’s Oversight Board, and has paid the surcharge assessed by the LMMA.⁴¹ Thus, the LMMA protects health care providers who satisfy the LMMA’s specific criteria.

The MRP is made up of an attorney chairperson, who is non-voting and merely presides to procedurally monitor the proceedings, and three

35. *Burge v. State*, 54 So. 3d 1110, 1113 (La. 2011) (quoting *State v. Campbell*, 877 So. 2d 112, 118 (La. 2004)) (stating that “[i]t is a fundamental rule of statutory construction that when two statutes deal with the same subject matter, if there is a conflict, the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character”).

36. See generally LA. REV. STAT. §§ 40:1231.1–1231.10 (2023).

37. Emily Black Grey, *Louisiana Supreme Court Affirms Constitutionality of the Medical Malpractice Cap on Damages for the First Time in Nearly 20 Years*, BRAZEALE, SACHSE & WILSON, L.L.P. (July 2012), <https://www.bswllp.com/louisiana-supreme-court-affirms-constitutionality-of-the-medical-malpractice-cap-on-damages-for-the-first-time-in-nearly-20-years> [<https://perma.cc/X4PY-Z3SK>].

38. *Id.*

39. LA. REV. STAT. § 40:1231.1(A)(13) (2023).

40. *Id.* § 40:1231.8.

41. *Id.* § 40:1231.2(A).

health care professionals.⁴² The MRP reviews the facts of each case and decides whether the acts or omissions of the defendant health care provider constitute a breach of the applicable standard of care, which is usually similar to a reasonableness analysis.⁴³ The MRP may not decide questions of fact; that role is exclusively for the fact-finder at trial.⁴⁴ The MRP process is designed to weed out frivolous claims without the delay or expense of full litigation.⁴⁵ While an adverse opinion does not completely preclude the plaintiff's suit, the adverse opinion is often detrimental to the plaintiff's claim.⁴⁶ If the plaintiff chooses to pursue formal litigation, the MRP's opinion can be used as an expert opinion at trial.⁴⁷

If the plaintiff does choose to pursue formal litigation, the LMMA also provides a damages cap for qualified health care providers.⁴⁸ The LMMA limits plaintiffs to a total recovery of \$500,000 from a medical malpractice action.⁴⁹ If a jury awards any amount of damages over \$100,000, the qualified health care provider is only responsible for up to \$100,000 of that amount.⁵⁰ The Patient Compensation Fund (PCF), set up by the LMMA, pays the rest of the sum.⁵¹ The legislature imposed this cap not only to limit the liability of qualified health care providers, but also to limit the sky-rocketing costs of medical insurance.⁵²

To succeed in a medical malpractice action at trial, the plaintiff must prove the applicable standard of care, a breach of that standard, and that the substandard care caused an injury that the plaintiff otherwise would not have suffered.⁵³ The plaintiff does not need to show that the doctor's conduct was the only cause of harm but must show by a preponderance of the evidence that the plaintiff suffered an injury because of the doctor's

42. *Id.* § 40:1231.8(A)(2), (C)(2).

43. *Id.* § 40:1231.8(G); *id.* § 40:1231.1(A)(13).

44. *Id.* § 40:1231.8(N)(6)(c).

45. RUSS M. HERMAN & JOSEPH E. CAIN, *MEDICAL MALPRACTICE ACT*, in 1 LA. PRAC. PERS. INJ. § 4:293 (2021).

46. *Id.* (citing *Beaucoudray v. Walsh*, 9 So. 3d 916 (La. Ct. App. 4th Cir. 2009)).

47. LA. REV. STAT. § 40:1231.8(H) (2023).

48. *Id.* § 40:1231.2(B)(1).

49. *Id.*

50. *Id.* § 40:1231.2(B)(1)–(2).

51. *Id.* § 40:1231.4(C).

52. Grey, *supra* note 37.

53. HERMAN & CAIN, *supra* note 45, § 4:293.

breach of the standard of care.⁵⁴ There is a default standard of care, but the standard may be changed due to extenuating circumstances.⁵⁵

The ordinary standard of care in medical malpractice actions is “[t]he degree of knowledge or skill possessed or the degree of care ordinarily exercised by [the specific type of health care provider] licensed to practice in the state of Louisiana and actively practicing in a similar community or locale and under similar circumstances”⁵⁶ This standard is more akin to a general negligence standard.⁵⁷ Because the standard of care in medical malpractice cases requires skill that lay persons do not ordinarily possess, the standard of care is usually proven through expert testimony; however, such testimony is not required in all instances.⁵⁸ For example, an expert opinion is not required in circumstances where the health care provider does an obviously careless act, such as amputating the wrong limb or leaving a foreign body inside the patient.⁵⁹

Under normal circumstances, a health care provider is not required to exercise the highest degree of care possible.⁶⁰ The health care provider’s duty is to exercise the degree of skill ordinarily employed by his or her peers under similar circumstances.⁶¹ The fact finder cannot consider hindsight or subsequent events when determining whether the health care provider met the standard of care.⁶² More specific medical malpractice statutes can supersede this default standard of care, including the LHEPA, which provides for elevated standards of care during public health emergencies and natural disasters.⁶³

B. The Louisiana Health Emergency Powers Act

The Louisiana legislature originally drafted the LHEPA in 2003 to provide a plan for public health emergencies.⁶⁴ A *public health emergency*, as the LHEPA defines, is:

54. *Id.*; *White v. Am. Int’l Group, Inc.*, 11 So. 3d 21, 23 (La. Ct. App. 5th Cir. 2009) (defining proof by a preponderance of the evidence as “taking the evidence as a whole, the fact to be proved is more probable than not”).

55. *Burge v. State*, 54 So. 3d 1110, 1113 (La. 2011).

56. LA. REV. STAT. § 9:2794(A)(1) (2023).

57. *Compare id.*, with LA. CIV. CODE art. 2315 (2023).

58. HERMAN & CAIN, *supra* note 45, § 4:293.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Burge v. State*, 54 So. 3d 1110, 1113 (La. 2011).

64. LA. REV. STAT. §§ 29:760–775 (2023).

[A]n occurrence or imminent threat of an illness or health condition that:

- (a) Is believed to be caused by any of the following:
 - (i) Bioterrorism.
 - (ii) The appearance of a novel or previously controlled or eradicated infectious agent or biological toxin.
 - (iii) A disaster, including but not limited to natural disasters such as hurricane, tornado, storm, flood, high winds, and other weather related events, forest and marsh fires, and man-made disasters, including but not limited to nuclear power plant incidents or nuclear attack, hazardous materials incidents, accidental release or chemical attack, oil spills, explosion, civil disturbances, public calamity, hostile military action, and other events related thereto.
- (b) Poses a high probability of any of the following harms:
 - (i) A large number of deaths in the affected population.
 - (ii) A large number of serious or long-term disabilities in the affected population.
 - (iii) Widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population.⁶⁵

This definition includes, for example, Hurricane Katrina and COVID-19.

The LHEPA allows the governor to declare a state of public health emergency after consulting public health authorities if he or she feels that Louisiana faces such a threat.⁶⁶ The governor usually declares a public health emergency through executive order and thereby effectuates the LHEPA.⁶⁷ The LHEPA not only provides for an emergency plan in the event of a public health emergency, but it also includes provisions of limited liability for the duration of the state of emergency.⁶⁸

The LHEPA contains many limited liability provisions, focusing on protecting certain people most likely to be closely involved with the public health emergency.⁶⁹ Section 771 of the LHEPA limits liability for many actors including the state, those who allow their real estate to be used as emergency shelters, and health care providers.⁷⁰ Specifically, § 771(B)(2)(c)(i) provides, “During a state of public health emergency, no

65. *Id.*

66. *Id.* § 29:766(A).

67. *See* Thames, *supra* note 19, at 24.

68. *See id.*

69. LA. REV. STAT. § 29:771 (2023).

70. *Id.*

health care provider shall be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of gross negligence or willful misconduct.”⁷¹

Gross negligence is not defined within the provisions of the LHEPA.⁷² However, the Louisiana Supreme Court indicated that generally “[g]ross negligence has been defined as the ‘want of even slight care and diligence’ and the ‘want of that diligence which even careless men are accustomed to exercise.’”⁷³ The court also defined gross negligence as the “entire absence of care” and the “utter disregard of the of [sic] prudence, amounting to complete neglect of the rights of others.”⁷⁴ The Louisiana Supreme Court also noted that gross negligence has a well-defined legal meaning distinctly separate, and different, from ordinary negligence.⁷⁵

The standard of gross negligence or willful misconduct is a significant deviation from the normal standard of care in medical malpractice actions.⁷⁶ This is a considerable deviation because it enacts a more burdensome standard for all medical malpractice actions, as opposed to the general reasonableness standard, which may bar plaintiffs’ claims that could be decided against the defendant health care provider.⁷⁷ The COVID-19 pandemic created a public health emergency across the globe, causing Governor Edwards to declare a state of emergency in Louisiana, thus triggering the LHEPA.⁷⁸

C. COVID-19 as a Public Health Emergency

The emergency the COVID-19 pandemic caused presented many unforeseen challenges to the world of health care and, thus, the realm of medical malpractice.⁷⁹ In February of 2020, the Center for Disease Control and Prevention (CDC) announced the first COVID-caused death in the

71. *Id.* § 29:771(B)(2)(c)(i).

72. *See* Thames, *supra* note 19, at 24.

73. Rabalais v. Nash, 952 So. 2d 653, 658 (La. 2007).

74. *Id.* (quoting *Hendry Corp. v. Aircraft Rescue Vessels*, 133 F. Supp. 198 (E.D. La. 1953)).

75. *Id.*

76. LA. REV. STAT. § 9:2794(A)(1) (2023).

77. *See generally id.* § 29:771(B)(2)(c)(i).

78. *See* COVID Proclamation, *supra* note 14.

79. *See generally* Thames, *supra* note 19, at 24.

United States.⁸⁰ Since then, the virus has infected millions of Americans.⁸¹ As of March 2023, over 1.1 million Americans have died from COVID-19.⁸²

On March 11, 2020, amid the rise of the pandemic, Governor John Bel Edwards issued an executive order declaring a public health emergency in the state of Louisiana.⁸³ Immediately, the executive order effectuated the LHEPA for the entire state.⁸⁴ The Governor renewed the public health emergency almost every month for two years following the emergence of the pandemic.⁸⁵ As a result, the applicable standard of care for medical malpractice claims from March 11, 2020 to March 16, 2022, was gross negligence or willful misconduct.⁸⁶ Thus, Governor Edwards's executive orders raised the standard of care from the normal negligence standard to gross negligence or willful misconduct for the longest period of time since the legislature passed the LHEPA.⁸⁷ There is a lack of guidance within the provisions of the LHEPA demonstrating how the heightened standard of care should apply; however, the Louisiana Fifth Circuit Court of Appeal provided some insight into how courts should apply the LHEPA standard in a landmark case following one of the most devastating disasters in Louisiana history.⁸⁸

II. EARLY JURISPRUDENCE AND RECENT DEVELOPMENTS

The Louisiana Fifth Circuit Court of Appeal provided guidance on this narrow issue in one monumental case following Hurricane Katrina.⁸⁹ In *Lejeune v. Steck*, the Fifth Circuit clarified the reach of the LHEPA and its modified standard of care for medical malpractice actions.⁹⁰ Until the

80. Kaitlin Sullivan, *A Brief History of COVID, 1 Year In*, EVERYDAY HEALTH (Feb. 19, 2021), <https://www.everydayhealth.com/coronavirus/a-brief-history-of-covid-one-year-in> [<https://perma.cc/X7WS-PZFD>].

81. *Id.*

82. *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Mar. 22, 2023, 3:13 PM ET), <https://covid.cdc.gov/covid-data-tracker/#data-tracker-home> [<https://perma.cc/GH9W-8GR6>].

83. COVID Proclamation, *supra* note 14.

84. Thames, *supra* note 19, at 24.

85. See discussion *supra* note 20 for a list of the applicable executive orders. See also Office of the Governor, *supra* note 15.

86. Thames, *supra* note 19, at 24.

87. See Office of the Governor, *supra* note 15; see also LA. REV. STAT. § 29:771(B)(2)(c)(i) (2023).

88. *Lejeune v. Steck*, 138 So. 3d 1280, 1282 (La. Ct. App. 5th Cir. 2014).

89. *Id.*

90. *Id.*

emergence of COVID-19, the application of the LHEPA standard generally had not been challenged. Following the two-year duration of the COVID-19 public health emergency, plaintiffs have begun challenging the application of this standard across the state.⁹¹

A. *Lejeune v. Steck*

Lejeune v. Steck is one of the only medical malpractice cases in Louisiana in which the gross negligence standard was at issue, and the factual history centers around one of the most devastating disasters in Louisiana history: Hurricane Katrina.⁹² Hurricane Katrina ravaged South Louisiana in August 2005.⁹³ This hurricane caused significant damage to the infrastructure of Southeast Louisiana, including health care facilities.⁹⁴ Governor Kathleen Blanco issued a series of executive orders in response to Hurricane Katrina, declaring a public health emergency until December 31, 2005.⁹⁵ This declaration effectuated the LHEPA until that date.⁹⁶ Governor Blanco's executive order thereby invoked the limited liability provisions set forth in the LHEPA, lowering the required standard of care for health care providers to the stringent gross negligence standard.⁹⁷

In November 2005, shortly after Governor Blanco's executive order, John C. Steck, M.D., operated on Ms. Mabel Daigle.⁹⁸ He performed a surgery for a pinched nerve.⁹⁹ After several days of intense pain, Ms. Daigle underwent an x-ray, which revealed a foreign object near the incision site.¹⁰⁰ Dr. Steck removed a sponge from Ms. Daigle during a second surgical procedure.¹⁰¹ Thereafter, Ms. Daigle filed a complaint with the Medical Review Board.¹⁰²

The MRP rendered a decision in September 2009, finding that "[t]he evidence [did] not support the conclusion that the defendants (West

91. See generally *In re Med. Rev. Panel of Welch (Welch I)*, No. 21-C-622, 2021 WL 5869131 (La. Ct. App. 5th Cir. Nov. 18, 2021); see also generally *Sebble ex rel. Est. of Brown v. St. Luke's #2, LLC*, No. 2022-CA-0620, 2023 WL 2364840 (La. Ct. App. 4th Cir. Mar. 6, 2023).

92. See *Thames*, *supra* note 19, at 24.

93. *Lejeune*, 138 So. 3d at 1282.

94. *Id.*

95. *Id.*

96. See *id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

Jefferson Medical Center and Dr. John C. Steck) failed to meet the applicable standard of care as charged in the complaint.”¹⁰³ The panel further stated that the prevailing standard of care was the LHEPA standard and that there was no evidence of gross negligence or willful misconduct.¹⁰⁴ Ms. Daigle filed her petition for damages in December 2009 against both Dr. Steck and West Jefferson Medical Center.¹⁰⁵

Ms. Daigle failed to request service on West Jefferson Medical Center, and the court dismissed West Jefferson from the suit in June 2010.¹⁰⁶ Dr. Steck filed a motion for summary judgment, arguing the applicability of the LHEPA standard.¹⁰⁷ He contended that the plaintiff was required to prove that he was grossly negligent or engaged in willful misconduct and that she did not present any expert witness as proof to establish such conduct.¹⁰⁸ Ms. Daigle argued, in rebuttal, that the State of Emergency Proclamation did not apply to surgery, medical providers, and patients that were not related to or part of Hurricane Katrina.¹⁰⁹ She furthered argued that Dr. Steck was grossly negligent and that her liability was established by the doctrine of *res ipsa loquitur*.¹¹⁰ She also introduced a medical report by Dr. K. Andrew Larson, a board-certified surgeon in practice in Palm Beach, Florida, which opined that “leaving a foreign body unintentionally in the patient then closing the operative site then discharging the patient home was a negligent act below the standard of care.”¹¹¹

In May 2013, the trial court denied the motion for summary judgment, giving Ms. Daigle additional time to submit evidence to support her burden of proof at trial.¹¹² Ms. Daigle submitted the previous report from Dr. Larson as well as another affidavit from him.¹¹³ On September 27, 2012, the trial court granted Dr. Steck’s renewed motion for summary judgment, finding that the evidence the plaintiff provided was insufficient to show that she could support her burden of proof at trial.¹¹⁴ Ms. Daigle appealed to the Fifth Circuit Court of Appeal.¹¹⁵

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

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

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

112. *Id.* at 1282–83.

113. *Id.* at 1283.

114. *Id.*

115. *Id.*

The Fifth Circuit's decision in this case substantially affected the application of the gross negligence standard set forth in the LHEPA.¹¹⁶ On appeal, Ms. Daigle disputed the trial court's application of the LHEPA standard, arguing it was not applicable because her operation was in no way related to Hurricane Katrina.¹¹⁷ She also contended that the trial court did not properly consider the doctrine of fault as stated in Louisiana Civil Code article 2315.¹¹⁸ Additionally, she argued that the doctrines of negligence per se and *res ipsa loquitur* were applicable in the case.¹¹⁹

Under a de novo review, the Fifth Circuit affirmed the trial court's granting of Dr. Steck's motion for summary judgment.¹²⁰ Importantly, the court found that Louisiana Revised Statutes § 29:771(B)(2)(c) "does not provide for a limited set of health care providers, nor does it limit its application to only those medical personnel rendering emergency assistance voluntarily due to the emergency in the area."¹²¹ The court also found that the burden of proof set forth in the medical malpractice statutes prevails over the standard for general negligence set forth in Louisiana Civil Code article 2315.¹²² Further, it reasoned that the burden of proof set forth by the LHEPA during a declaration of a public health emergency prevails over the more general medical malpractice statutes.¹²³ Therefore, Ms. Daigle was required to prove that Dr. Steck was engaged in either gross negligence or willful misconduct.¹²⁴ Ms. Daigle was unable to meet her burden of proof and was therefore denied recovery for the injury she sustained when the surgeon left a surgical sponge in her body.¹²⁵

In its opinion, the Fifth Circuit provided an important definition of gross negligence, as such a definition is not found anywhere in the provisions of the LHEPA.¹²⁶ Using the definition set forth in *Rabalais v. Nash*, the court found that there was no clear distinction between willful,

116. *See generally id.*

117. *Id.*

118. *Id. See also* Hightower v. Dr. Pepper Bottling Co. of Shreveport, Inc., 117 So. 2d 642, 654 (La. Ct. App. 2d Cir. 1959) ("This article . . . provides the causes giving rise to tort actions and denominates persons who possess the right to assert such causes of action, as well as the preferences among the different categories of such claimants.").

119. *Lejeune*, 138 So. 3d at 1283.

120. *Id.* at 1285–86.

121. *Id.* at 1283.

122. *Id.* at 1284.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

wanton, or reckless conduct and gross negligence.¹²⁷ The court found that gross negligence includes the “want of even slight care and diligence”; “want of that diligence which even careless men are accustomed to exercise”; “entire absence of care”; “utter disregard of the of prudence [sic], amounting to complete neglect of the rights of others”; or an “extreme departure from ordinary care or the want of even scant care.”¹²⁸

The court held that, considering the lack of sufficient evidence presented by Ms. Daigle, the trial court did not err in granting summary judgment.¹²⁹ The Louisiana Supreme Court denied a writ to review this case.¹³⁰ Following this decision, the gross negligence standard set forth in § 771(B)(2)(c)(i) applies to care or treatment not related to or part of public health emergencies that cause the implementation of this standard of care.¹³¹ However, recent jurisprudential developments show that plaintiffs are challenging the LHEPA standard in the context of COVID-19.

B. *In re* Medical Review Panel Proceeding of Welch

*In re Medical Review Panel Proceeding of Welch*¹³² demonstrates that the LHEPA standard poses a challenge to plaintiffs; in response, they are challenging it.¹³³ Plaintiffs Kathleen Welch and her husband filed a request for formation of a medical review panel in December of 2020, naming Dr. Kenneth Williams, Bridgepoint Healthcare LA, LLC, United Medical Physical Rehabilitation Hospitals, and Dr. Michael Russo as defendant health care providers.¹³⁴ The plaintiffs filed this request in connection with the medical treatment that Mrs. Welch received between April 16, 2020, and May 6, 2020.¹³⁵ The defendants asked the attorney chairperson of the appointed MRP to apply the LHEPA standard to the case at hand, as at least part of the actions that gave rise to the plaintiffs’ claim occurred during the public health emergency caused by COVID-19.¹³⁶ In response, the attorney chairperson stated that “[he] would need a judge to order

127. *Id.*

128. *Id.* (citing *Rabalais v. Nash*, 952 So. 2d 653, 658 (La. 2007)).

129. *Id.* at 1285.

130. *Lejeune*, 138 So. 3d 1280 (La. Ct. App. 5th Cir. 2014), *writ denied sub nom.*, *Daigle v. Steck*, 149 So. 3d 800 (La. 2014).

131. *Lejeune*, 138 So. 3d. at 1283.

132. *In re Med. Rev. Panel of Welch*, No. 21-C-622, 2021 WL 5869131 (La. Ct. App. 5th Cir. Nov. 18, 2021).

133. *See generally id.*

134. *Id.* at *1.

135. *Id.*

136. *See id.* at *2.

[him] to instruct the expert panelists differently” than the provisions of the Louisiana Medical Malpractice Act.¹³⁷

Counsel for one of the defendants filed a petition for declaratory judgment and a motion to enforce compliance with the LMMA, requesting the district court issue an order declaring, as a matter of law, that the standard of care as set forth by the LHEPA was applicable to any of the plaintiffs’ allegations of medical malpractice taking place after the March 11, 2020 declaration of a public health emergency.¹³⁸ The trial court denied the petition for declaratory judgment but granted the motion to enforce compliance with the LMMA.¹³⁹ The trial court ordered the attorney chairman of the MRP to consider the governor’s emergency order and any and all case law when deciding the applicable standard of care.¹⁴⁰ The plaintiffs filed a writ application seeking to reverse the trial court’s ruling granting the motion to enforce compliance with the LMMA.¹⁴¹ The plaintiffs argued that the gross negligence standard set forth in the LHEPA goes against legislative intent, leads to absurd results, and is unconstitutional.¹⁴²

The Fifth Circuit denied the plaintiffs’ writ, as well as a writ filed by counsel for Dr. Williams.¹⁴³ However, the Fifth Circuit issued an opinion in response to Dr. Williams’s writ application that essentially supported the application of the LHEPA statute.¹⁴⁴

137. *Id.* (alterations in original).

138. *Id.*

139. *Id.* at *3.

140. *Id.*

141. *Id.* at *4.

142. *Id.*

143. *Id.*; *In re Med. Rev. Panel of Welch*, No. 21-C-624, 2022 WL 242683, at *1 (La. Ct. App. 5th Cir. Jan. 26, 2022).

144. *Welch I*, 2021 WL 5869131, at *5. In holding that the trial court could not instruct the attorney chairman of the medical review panel to not consider the LHEPA standard and allowing the LHEPA standard to be considered by the medical review panel as an applicable standard of care, the court stated:

Here . . . Dr. Williams petitioned the trial court to enforce Mr. Chawla’s compliance with the LMMA. The trial court granted Dr. Williams’ motion, and ordered Mr. Chawla to perform his statutory duty to advise the panel concerning the law regarding what standards of care may be applied to the Welches’ claims of medical malpractice considering Governor Edward’s executive order declaring a state of public health emergency and other applicable case law. We find no error in the trial court’s ruling.

Id.

Non-majority opinions, however, importantly contest this position. For example, Judge Windhorst's concurrence in *In re Welch*—the plaintiff's writ application case—is instructive. He writes, “The *medical* standard of care is wholly distinct from the *legal* standard or evidentiary showing which must be met in a medical malpractice case.”¹⁴⁵ While the Supreme Court of Louisiana also denied the plaintiff's writ,¹⁴⁶ Justice Hughes dissented, stating:

I would grant the writ to address the constitutionality of La. R.S. 29:771(B)(2)(c)(i), which the lower courts did not. It is absurd to change the standard of care for every medical malpractice case even though the case may have nothing to do with the reasons an emergency was declared. The statute may obviously be overbroad in its application.¹⁴⁷

However, since the Supreme Court did not rule on the issue definitively, other plaintiffs may challenge the LHEPA standard elsewhere.

C. *Sebble on Behalf of Estate of Brown v. St. Luke's #2*

The Louisiana Fourth Circuit Court of Appeal has recently chimed in on applicability of the LHEPA standard in *Sebble ex rel. Estate of Brown v. St. Luke's #2, LLC*.¹⁴⁸ In this case, Vivian Lee Brown was admitted to St. Luke's Living Center, a nursing facility in New Orleans, in November 2019.¹⁴⁹ For various medical reasons, Ms. Brown faced a substantial risk of pressure ulcers.¹⁵⁰ Shortly after Ms. Brown's admission to St. Luke's, the COVID-19 pandemic began.¹⁵¹ In May 2020, Ms. Brown was admitted to East Jefferson General Hospital, where she had extremely severe pressure ulcers, stopped eating, became seriously dehydrated, and showed signs of malnourishment.¹⁵² Ms. Brown had surgery to treat the wounds.¹⁵³

Ms. Brown was discharged to another facility, Bridgepoint Continuing Care Hospital, in June 2020, where she had become severely anemic and

145. *In re Welch*, 2022 WL 242683, at *6–8 (Windhorst, J., concurring).

146. *Welch I*, 2021 WL 5869131, writ denied, 336 So. 3d 451 (La. 2022).

147. *In re Med. Rev. Panel Proc. of Welch*, 336 So. 3d 451 (La. 2022) (Hughes, J., dissenting).

148. *Sebble ex rel. Est. of Brown v. St. Luke's #2, LLC*, No. 2022-CA-0620, 2023 WL 2364840 (La. Ct. App. 4th Cir. Mar. 6, 2023).

149. *Id.* at *1.

150. Pressure ulcers are also known as bedsores. *See id.*

151. *Id.*

152. *Id.* at *2.

153. *Id.*

used a feeding tube.¹⁵⁴ On June 24, 2020, Ms. Brown suffered cardiopulmonary arrest and was transferred to West Jefferson Medical Center, where she died the same day.¹⁵⁵ Monica Sebble, Ms. Brown's granddaughter, subsequently filed a request for an MRP with the PCF.¹⁵⁶

After filing a petition to instate discovery in the Orleans Civil District court, Ms. Sebble filed a petition for declaratory judgment on October 21, 2021, seeking to have the district court declare that the immunity provided under the LHEPA standard was inapplicable at the MRP stage.¹⁵⁷ Ms. Sebble asked the court to preclude the attorney chairman from instructing the panel members to consider the LHEPA standard when determining whether the defendants had breached the standard of care in their treatment of Ms. Brown.¹⁵⁸ Bridgeport filed an answer and reconventional demand, denying the allegations and requesting that the LHEPA standard be applied at the MRP stage.¹⁵⁹ Upon cross-motions for summary judgment filed by both parties, the district court granted Ms. Sebble's motion for summary judgment, holding that the LHEPA standard was not applicable to the MRP stage.¹⁶⁰

The Louisiana Fourth Circuit Court of Appeal affirmed the trial court.¹⁶¹ The court denied to follow *Lejeune*, differentiating between the medical standard of care and the legal standard or evidentiary showing.¹⁶² The court here found the LHEPA standard to be a legal standard, reserved for determination by the trier of fact.¹⁶³ Thus, there is now a circuit split among Louisiana appellate courts involving the application of the LHEPA standard.¹⁶⁴

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at *11.

162. *Id.* at *6. The Fourth Circuit is agreeing with this argument within Judge Windhorst's concurrence in *In re Med. Rev. Panel of Welch*, No. 21-C-624, 2022 WL 242683, at *6–8 (La. Ct. App. 5th Cir. Jan. 26, 2022) (Windhorst, J., concurring).

163. *Sebble ex rel. Est. of Brown*, 2023 WL 2364840, at *7.

164. The Louisiana Third Circuit Court of Appeal has also held that the LHEPA standard applies over the more general provisions of the LMMA during a state of public health emergency. *See Whitehead v. Christus Health Cent. La.*, 344 So. 3d 91 (La. Ct. App. 3d Cir. 2022).

III. THE ISSUE ILLUSTRATED

The overbreadth of health care provider quasi-immunity within the LHEPA causes issues in medical malpractice law, as demonstrated by a drop in MRP requests and through recent litigation.¹⁶⁵ The gross negligence standard creates an impossibly high burden of proof that can deter plaintiffs from bringing their claims, especially if the claims are completely unrelated to the public health emergency. Louisiana courts decide most medical malpractice actions in favor of the medical professional even without an overly burdensome standard of care.¹⁶⁶ In 2019, roughly 81% of MRPs were decided in favor of the defendant.¹⁶⁷ This trend consistently appears.¹⁶⁸ In 2018, about 80% of panels with decisions were rendered in favor of the medical provider, and in 2017, that figure was 79%.¹⁶⁹ With the LHEPA standard of care, it is likely that an even higher percentage of MRPs will render opinions in favor of health care professionals.

Additionally, medical malpractice claims have decreased since the institution of the LHEPA in response to the COVID-19 pandemic.¹⁷⁰ From 2012 to 2019, litigants filed roughly 1,300–1,400 MRP requests every year.¹⁷¹ In 2020, plaintiffs filed over 1,300 MRP requests.¹⁷² Because of the one-year prescriptive period of medical malpractice cases,¹⁷³ these are most likely cases that occurred in 2019, before the implementation of the LHEPA. Plaintiffs filed only 1,004 MRP requests in 2021.¹⁷⁴ Plaintiffs filed only 1,199 in 2022.¹⁷⁵ This is a sharp decline in panel requests, and almost all claims were those arising out of events where the LHEPA raised

165. See generally LA. PATIENT'S COMP. FUND, *supra* note 19; *In re Med. Rev. Panel of Welch*, No. 21-C-622, 2021 WL 5869131 (La. Ct. App. 5th Cir. Nov. 18, 2021); *Sebble ex rel. Est. of Brown*, 2023 WL 2364840.

166. See Grey, *supra* note 37; see also LA. PATIENT'S COMP. FUND, *supra* note 19.

167. LA. PATIENT'S COMP. FUND, *supra* note 19.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. LA. REV. STAT. § 9:5628(A) (2023).

174. LA. PATIENT'S COMP. FUND, *supra* note 19.

175. LA. PATIENT'S COMP. FUND, PANEL STATISTICS, YEAR 2022 (Mar. 9, 2023).

the standard of care to gross negligence or willful misconduct.¹⁷⁶ Looking at the current trends, there is likely a causal connection between the LHEPA standard of gross negligence and the drop in medical malpractice cases filed. Another contributing cause could include the pause on elective surgeries as well.¹⁷⁷

Plaintiffs contest the LHEPA standard of care in court arguing that it goes against legislative intent, leads to absurd consequences, and is unconstitutional.¹⁷⁸ In *In re Medical Review Panel Proceeding of Welch*, the plaintiffs asserted that the language and current application of § 771(B)(2)(c)(i) of the LHEPA is contrary to the legislative intent behind the LHEPA and will lead to absurd consequences.¹⁷⁹ The stated purpose of the LHEPA is to protect Louisiana citizens' health and safety.¹⁸⁰ The purpose of the LHEPA standard is to shield health care providers, whose conduct is impacted by a public health emergency, from liability.¹⁸¹ Plaintiffs argued that, as it is interpreted and applied under the current jurisprudence, Louisiana Revised Statutes § 29:771(B)(2)(c)(i) will lead to absurd consequences and overbroad interpretation.¹⁸²

The plaintiffs also argued that the gross negligence standard under the LHEPA is unconstitutional.¹⁸³ Their main argument was that Louisiana Revised Statutes § 29:771(B)(2)(c)(i) deprives plaintiffs of due process and the adequate remedy provision of article 1, § 22 of the Louisiana Constitution.¹⁸⁴ The plaintiffs argued that if the gross negligence standard is applied to situations unrelated to the public health emergency, the LHEPA standard denies tort victims an adequate remedy under due

176. See COVID Proclamation, *supra* note 14, which triggered the LHEPA standard for all medical malpractice cases during the state of public health emergency.

177. *Id.*; LA. DEP'T OF HEALTH: OFF. OF PUB. HEALTH, STATE HEALTH OFFICER RELEASES EMERGENCY ORDER ON MEDICAL & SURGICAL PROCEDURES; DENTAL VISITS, PROCEDURES, & SURGERIES; & OTHER HEALTHCARE SERVICES (May 21, 2021). The pause of elective surgeries due to COVID-19 may be a contributing factor, but the pause on the elective surgeries did not last nearly as long as the LHEPA standard was in place. *Id.*; Office of the Governor, *supra* note 15. Thus, it is likely not as large of a contributing factor in the decline of MRP requests filed.

178. See generally *In re Med. Rev. Panel of Welch*, No. 21-C-622, 2021 WL 5869131 (La. Ct. App. 5th Cir. Nov. 18, 2021).

179. *Id.* at *4.

180. LA. REV. STAT. § 29:761 (2023).

181. *Id.* § 29:771(B)(2)(c)(i).

182. *Welch I*, 2021 WL 5869131, at *4.

183. *Id.*

184. *Id.*

process of law.¹⁸⁵ The Fifth Circuit denied both plaintiffs' and defendant's writs but did not suggest that the LHEPA standard was unconstitutional.¹⁸⁶ While the Fifth Circuit already applied Louisiana Revised Statutes § 29:771(B)(2)(c)(i) broadly,¹⁸⁷ there is now a circuit split among Louisiana courts that results in an inconsistent application of the LHEPA standard.¹⁸⁸

There are many possible approaches to the problems that the expansive application of the LHEPA standard causes. Legislation of other jurisdictions, as well as other Louisiana emergency legislation, provides important guidance on how to avoid overbroad quasi-immunity for health care providers.¹⁸⁹ It is important to look to the approaches of federal law, Texas law, and the LHSEAD in an attempt to find the best solution to the LHEPA standard's near-total blanket immunity.

IV. COMPARATIVE PERSPECTIVE

As discussed earlier, many states have their own medical malpractice legislation governing the procedure of this type of claim.¹⁹⁰ Similarly, many states have their own emergency legislation for a variety of emergency situations that alter the standard of care.¹⁹¹ Many states and the federal government passed or effectuated special laws in response to the COVID-19 pandemic.¹⁹² Looking to these provisions is beneficial because it sheds light on how Louisiana can and should limit its application of the LHEPA standard during public health emergencies.

A. Federal Law

Both the federal government and Louisiana's western neighbor, Texas, enacted emergency legislation during the COVID-19 pandemic, which limited the liability of health care practitioners for injuries and claims related to the public health emergency; however, these provisions

185. *Id.*

186. *Id.*

187. *Lejeune v. Steck*, 138 So. 3d 1280, 1283 (La. Ct. App. 5th Cir. 2014).

188. *Compare Welch I*, 2021 WL 5869131, *with In re Med. Rev. Panel of Welch*, No. 21-C-624, 2022 WL 242683 (La. Ct. App. 5th Cir. Jan. 26, 2022).

189. *See generally* CARES Act, S. 3548, 116th Cong. § 4216 (2020) (enacted); TEX. CIV. PRAC. & REM. CODE ANN. § 74.155 (West 2023); LA. REV. STAT. §§ 29:721–721 (2023).

190. TEX. CIV. PRAC. & REM. CODE ANN. § 74.155 (West 2023).

191. *Id.*

192. *Id.*; CARES Act, S. 3548, 116th Cong. § 4216 (2020) (enacted).

contain narrower language than the LHEPA standard.¹⁹³ For example, federal law only limits the immunity of health care professionals to those providing care related to COVID-19.¹⁹⁴ The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), passed by Congress in the wake of the rise of COVID-19 in the United States, also limits the liability of health care providers.¹⁹⁵ The CARES Act provides that a health care provider that voluntarily provides health care services related to the COVID-19 pandemic will not be held liable except in the case of gross negligence; willful, criminal, or reckless conduct; flagrant indifference; or while under the influence of alcohol or drugs.¹⁹⁶ The professional is required to have provided health care services in response to the public health emergency, therefore narrowing the application of the immunity.¹⁹⁷

B. Texas

Texas's limited liability statute provides:

Except in a case of reckless conduct or intentional, willful, or wanton misconduct, a . . . health care provider . . . is not liable for an injury, including economic and noneconomic damages, or death arising from care, treatment, or failure to provide care or treatment relating to or impacted by a pandemic disease or a disaster declaration related to a pandemic disease¹⁹⁸

This is only the case if the physician can prove that the “disease was a producing cause” of the actions giving rise to the claim or if “the individual who suffered injury or death” was suffering from the disease at the time of the action giving rise to the claim.¹⁹⁹ The normal standard of care for non-emergency medical malpractice actions in Texas is general negligence.²⁰⁰ Like Louisiana's statute, Texas's statute imposes a higher burden on plaintiffs than its non-emergency standard.²⁰¹ Although Texas's

193. *See generally* CARES Act, S. 3548, 116th Cong. § 4216 (2020) (enacted); TEX. CIV. PRAC. & REM. CODE ANN. § 74.155 (West 2023); LA. REV. STAT. §§ 29:721–721 (2023).

194. CARES Act, S. 3548, 116th Cong. § 4216 (2020) (enacted).

195. *Id.*

196. *Id.*

197. *Id.*

198. TEX. CIV. PRAC. & REM. CODE ANN. § 74.155 (West 2023).

199. *Id.*

200. *Id.* § 74.101.

201. *Compare* LA. REV. STAT. § 29:771(B)(2)(c)(i) (2023), *with* TEX. CIV. PRAC. & REM. CODE ANN. § 74.155 (West 2023).

standard of care for cases involving COVID-19 provides limited liability that is imperative for health care providers while treating a novel disease, Texas's standard differs from the LHEPA standard because Texas's statute does not broadly burden plaintiffs in all medical malpractice claims during a state of medical emergency.²⁰²

All of this legislation limits the COVID-19-related limited liability for medical providers to situations related to the public health emergency.²⁰³ However, Louisiana's legislation does not limit its quasi-immunity to only cases involving the public health emergency like the legislation of other jurisdictions.²⁰⁴ The CARES Act and Texas statute demonstrate narrower immunities than Louisiana's provision but still provide for the important limited liability for health care providers during unprecedented times.²⁰⁵ These examples provide helpful guidance on how the LHEPA standard could be narrowed. Although looking at other jurisdictions is helpful, looking at how Louisiana has interpreted its other emergency legislation can help inform the legislature's opinion too.

C. Other Louisiana Emergency Legislation

The LHSEAD²⁰⁶ is another emergency act in Louisiana that provides limited liability for health care providers.²⁰⁷ The Louisiana legislature enacted the LHSEAD to adequately deal with "the occurrence of emergencies and disasters of unprecedented size and destructiveness," such as terrorist events or other hostile actions, fires, floods, earthquakes and other natural or manmade disasters.²⁰⁸ Section 735.1 of this Act provides limited liability to health care providers.²⁰⁹ This emergency legislation states that any health care provider

who in good faith voluntarily renders emergency care or first aid to assist persons injured as a result of the emergency shall not be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of gross negligence or

202. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.155 (West 2023).

203. *Id.*

204. See LA. REV. STAT. § 29:771(B)(2)(c)(i) (2023).

205. TEX. CIV. PRAC. & REM. CODE ANN. § 74.155 (West 2023); CARES Act, S. 3548, 116th Cong. § 4216 (2020) (enacted).

206. LA. REV. STAT. §§ 29:721–723 (2023).

207. *Id.* § 29:735.1.

208. *Id.* § 29:722.

209. *Id.* § 29:735.1.

willful misconduct.²¹⁰

The LHSEAD has been enacted in many instances of natural disasters, such as tropical storms and hurricanes.²¹¹ Courts have upheld important limited liability provided by the LHSEAD,²¹² but this quasi-immunity is almost always invoked in cases where the plaintiff's claim is involved in some way with the disaster or emergency response thereafter.²¹³ This emergency statute, drafted by the Louisiana legislature and interpreted by Louisiana jurisprudence, is limited to the treatment of persons injured as a result of the emergency.²¹⁴ However, it still provides substantial limited liability for health care providers during a state of emergency.²¹⁵

V. THE SOLUTION

The extreme reach of the LHEPA standard regarding medical malpractice actions causes an issue; however, there is a simple fix that could solve the issue with this statutory provision. As other jurisdictions' approaches demonstrate, a simple addition to the language of the LHEPA standard would limit the magnitude of the provision, thus allowing plaintiffs with non-emergency related medical malpractice claims to bring such claims without facing the unsurpassable barrier that the LHEPA standard presents.²¹⁶

A. Amending Section 771 of the LHEPA

The solution to the overbroad application of the gross negligence standard provided by the LHEPA is a small change in language. The Louisiana legislature should amend Louisiana Revised Statutes § 29:771(B)(2)(c)(i) to only apply to situations related to or part of the public health emergency. The language should read:

During a state of public health emergency, no health care provider

210. *Id.*

211. See Peter M. Mansfield, *Natural Disaster and Government Torts: Immunity for Delictual Injury After Disaster Damage*, 63 LOY. L. REV. 247, 251–53 (2017) (discussing cases in which the governor enacted LHSEAD in response to Tropical Storm Frances and Hurricane Katrina).

212. *Id.* at 252.

213. *Id.* at 252–53.

214. LA. REV. STAT. § 29:735.1 (2023).

215. *Id.*

216. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.155 (West 2023); CARES Act, S. 3548, 116th Cong. § 4216 (2020) (enacted).

shall be civilly liable for causing the death of, or injury to, any person or damage to any property *related to or part of the public health emergency* except in the event of gross negligence of willful misconduct.²¹⁷

This change would allow more cases to succeed when not related to the public health emergency while still providing further limited liability to those treating the coronavirus. This language would also avoid the seemingly broad language of the LHEPA standard in providing blanket immunity and the too limited language provided in the CARES Act.²¹⁸ It would implement the ordinary standard of care for those cases unrelated to the public health emergency, preventing the unnecessary application of the LHEPA standard of care.

A comparative perspective provides guidance on limiting the language of the LHEPA. Congress and Texas narrowed their limited liability statutes to only those claims related to the pandemic or volunteers.²¹⁹ This indicates that Louisiana could successfully adopt similar language that employs limited liability for health care providers during unprecedented time and avoids a blanket of immunity that covers all claims in all circumstances. The Louisiana legislature also already adopted limited immunity language in the LHSEAD. The LHSEAD confines the limited liability for health care providers to only injuries and claims related to the emergency situation.²²⁰ The LHSEAD demonstrates that the Louisiana legislature could successfully adopt narrower language and employ it in public health emergency situations, as other Louisiana emergency legislation adopted narrow limited liability language and still stands as law today.

B. Issues with Implementing the Amendment

Counterarguments to this proposal exist, but all arguments against limiting the language of Louisiana Revised Statutes § 29:771(B)(2)(c)(i) can be refuted. Determining what is related to or part of a public health emergency may be difficult. To some MRPs and fact-finders, it may be unclear what situations constitute being “related to or part of” public health

217. See LA. REV. STAT. § 29:771(B)(2)(c)(i) (2023) (emphasis added to show proposed amendment).

218. See *id.*; see also CARES Act, S. 3548, 116th Cong. § 4216 (2020) (enacted).

219. TEX. CIV. PRAC. & REM. CODE ANN. § 74.155 (West 2023); CARES Act, S. 3548, 116th Cong. § 4216 (2020) (enacted).

220. LA. REV. STAT. § 29:735.1 (2023).

emergencies. For example, if this approach was implemented during the COVID-19 state of emergency, some considerations MRPs and fact-finders would have had to take into account would have included: whether the patient was diagnosed with COVID-19 or any illness derivative of COVID-19 at the time of treatment; whether the medical facility in which the defendant health care provider was practicing was over-populated because of the influx of patients suffering from coronavirus; or whether the treatment was at all related to or derivative from the patient's past or present diagnosis of COVID-19. However, guidelines can be adopted to use in determining whether the gross negligence standard applies to the actions giving rise to the medical malpractice claim could solve this issue.

To solve any potential issues in deciding whether medical treatment may be considered "related to or part of" a public health emergency, the Louisiana legislature should incorporate examples of when the gross negligence standard should apply. One of the biggest concerns that should be addressed is when hospitals and other health care facilities are overpopulated or understaffed, or both, as that was a continuous concern during the COVID-19 pandemic.²²¹ The proposed amendment to the LHEPA standard could include language that demonstrates that MRPs and courts should apply the gross negligence standard in situations such as this, as well as when the patient is diagnosed with an illness subject to the state of emergency or suffering from complications from the illness.

There is also a significant policy consideration for the drafters of new, potential legislation to acknowledge: the heightened need for medical care during public health emergencies justifies the more stringent standard of care imposed by the LHEPA. The legislature intended the LHEPA to limit the liability of health care providers practicing during emergency situations because of the amount of unknown variables that could arise in such situations.²²² Narrowing the language of the LHEPA to limit the quasi-immunity of health care providers during public health emergencies would still provide the needed limited liability but would also allow plaintiffs to benefit from the ordinary standard of care when appropriate. There is already a great deal of limited liability provided to health care providers through the LMMA, including the damages cap, the requirement of a MRP proceeding, and the ordinary standard of care imposed by the LMMA.²²³ Narrowing the language of Louisiana Revised Statutes

221. See Associated Press, *Overwhelmed by COVID-19: A Day Inside a Louisiana Hospital*, U.S. NEWS (Aug. 11, 2021), <https://www.usnews.com/news/health-news/articles/2021-08-11/overwhelmed-by-covid-19-a-day-inside-a-louisiana-hospital> [<https://perma.cc/36XT-P7RP>].

222. See Thames, *supra* note 19, at 24.

223. See LA. REV. STAT. § 40:1231.2 (2023); *id.* § 40:1231.8.

§ 29:771(B)(2)(c)(i) does not take away all of the limited liability for health care providers in public health emergencies but only confines the limited liability to relevant and necessary situations. It is irrelevant, unnecessary, and arguably prejudicial to implement this quasi-immunity to injuries unrelated to or not part of the public health emergency.

C. Implications of Change and No Change

There are many potential implications of both changing the language of the LHEPA and failing to do so that are important to consider. If legislators narrowed the scope of § 29:771(B)(2)(c)(i), then the number of medical malpractice complaints will likely return to its higher pre-pandemic frequency. The LHEPA standard may deter plaintiffs; implementing the ordinary standard when the claim is unrelated to the public health emergency may avoid that deterrence. Health care professionals will still have limited liability when dealing with treatment of patients related to or part of public health emergencies and will still benefit from the protections of the LMMA as usual.

For example, consider if a plaintiff brought a medical malpractice claim against a health care provider, claiming that the health care provider was negligent in its care for the plaintiff's husband while he suffered from complications following a diagnosis of COVID-19, and the husband later died. If these events occurred while the LHEPA was in place, this particular health care provider would still be protected under the new version of the LHEPA because the death was related to the public health emergency. However, if a plaintiff filed a claim that a plastic surgeon left a foreign body within her while undergoing a purely cosmetic procedure, that health care provider would not be protected under the LHEPA because the claim was not related to an ongoing public health emergency. This would be an equitable solution because it is completely unnecessary for the plastic surgeon's negligence of leaving a foreign object in the patient to be protected because it has nothing to do with the ongoing public health emergency.

Because Louisiana Revised Statutes § 29:771(B)(2)(c)(i) remains unchanged, and the COVID-19 emergency order lasted over two years in Louisiana, the LHEPA standard was in effect for a significantly extended period of time. This may affect plaintiffs' decisions to make medical malpractice claims involving treatment during that time period. Also, more costly litigation contesting the standard, such as *Welch*, will likely continue.

CONCLUSION

The limited liability provided to health care providers through the LHEPA standard is simply too broad. It allows for all health care providers across the state of Louisiana to benefit from the quasi-immunity of a more stringent standard of care.²²⁴ The Louisiana legislature should narrow the language of this statute to only apply to actions arising out of or related to the public health emergency. Doing so will help prevent the deterrence of plaintiffs from filing medical malpractice actions, as shown by the drop in medical review panel requests, and will lower the difficulties posed by medical malpractice claims during the COVID-19 pandemic in a field of law in which it is already difficult to succeed.

Texas and the federal government adopted narrower language to apply limited liability for health care providers only in claims arising out of situations that are part of or related to COVID-19.²²⁵ Louisiana also previously adopted emergency legislation with narrower immunity for health care providers during natural disasters and other emergency situations, thus exhibiting that the Louisiana legislature should adopt similar language in the LHEPA. The broad application of the LHEPA's gross negligence standard of care creates a vast inequity in the realm of medical malpractice. Therefore, the Louisiana legislature should change the language of § 29:771(B)(2)(c)(i) to eliminate that inequity and provide that only the injuries related to or part of the public health emergency should be subject to the LHEPA standard. This will rectify the overbroad application of the gross negligence standard of care set forth in the LHEPA and allow inequities within the already difficult field of medical malpractice to be solved.

224. Compare *id.* § 29:771(B)(2)(c)(i), with *id.* § 9:2794(A)(1).

225. TEX. CIV. PRAC. & REM. CODE ANN. § 74.155 (West 2023); CARES Act, S. 3548, 116th Cong. § 4216 (2020) (enacted).