"Does This Hurt?": Constitutional Challenges of Damage Caps and the Review Panel Process in Medical Malpractice Actions in Louisiana

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I. INTRODUCTION

For the past two decades, the United States has wrestled with what some call the "medical malpractice crisis." This crisis was caused by an increase in the number of malpractice suits filed against physicians as well as the corresponding increase in malpractice insurance premiums which physicians subsequently faced. This combination of malpractice suits and malpractice insurance premium increases forced many physicians to abandon their specialty, to pass the increased cost of insurance premiums to their patients, or to in effect self-insure themselves.

Faced with this crisis, several states, including Louisiana, passed legislation that places a cap on the amount of monetary damages awardable to a victim of medical malpractice.1 In an effort to reduce the number of medical malpractice suits brought against physicians, the Louisiana legislature limited the amount of monetary damages recoverable in such suits. In addition to providing insulation against excessive damage awards, the legislation was also intended to alleviate problems encountered by physicians in acquiring medical malpractice insurance by stabilizing the rates of such insurance.

Questions, however, regarding the constitutionality of such legislation have arisen. This comment will focus on the constitutionality of statutorily imposed limitations on recovery for medical malpractice claims and the process by which medical malpractice victims must submit their claims to a medical review panel before a court can render a judgement regarding compensation. Specifically, this work will emphasize how the United States Supreme Court, Louisiana courts, and courts of other states address these issues.

II. CAPS ON DAMAGE AWARDS

A. Lack of Substantial Federal Question

In *Fein v. Permanente Medical Group*, the constitutionality of limiting recovery for medical malpractice actions reached the United States Supreme Court. The case involved the constitutionality of California's statute limiting recovery for non-economic losses, such as pain and suffering, to $250,000. With three dissents, the California Supreme Court found that the imposed limitation on recovery did not violate the Equal Protection or Due Process clauses of the United States Constitution. Upon this finding, the plaintiff-appellants appealed to the United States Supreme Court. Impliedly, the California Supreme Court did not consider equal protection or due process claims under the California State Constitution.

In a one sentence opinion issued in *Fein v. Permanente Medical Group*, the United States Supreme Court stated: "The appeal is dismissed for want of a substantial federal question." Therefore, based upon the denial of the appeal, one might conclude by implication that the United States Supreme Court does not believe that caps on non-economic losses regarding medical malpractice awards violate equal protection or due process aspects of the United States Constitution.

Justice White, however, registered a vigorous dissent over the denial of the writ. As Justice White stated, California joined Indiana as one of only two states upholding the constitutionality of damage limitations of this type. In summarizing his dissent, Justice White said:

Whether due process requires a legislatively enacted compensation scheme to be a *quid pro quo* for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several states. The issue is important, and is deserving of this Court's review. Moreover, given the continued national concern over the "malpractice crisis," it is likely that more states will enact similar types of limitations, and that the issue will recur. I find, therefore, that the federal question presented by this appeal is sub-

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2. 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (Cal. 1985).
5. Id. at 892, 106 S. Ct. at 214.
6. Id. at 893, 106 S. Ct. at 215. The opinion was issued in 1985. As of the publication date of the opinion, Texas, New Hampshire, North Dakota and Ohio had found similar statutes unconstitutional on federal constitutional grounds.
statal, and dissent from the Court's conclusion to the contrary.\textsuperscript{7}

As Justice White predicted, the issue of the constitutionality of capping medical malpractice awards has recurred among the courts of several additional states, including Louisiana. However, because it appears that the United States Supreme Court will not consider the issue for lack of a substantial federal question, the importance of the interpretation of the constitutionality of such legislation by state courts is greatly increased. With this consideration in mind, an examination of the Louisiana statutes capping awards for medical malpractice actions and state court interpretations of their constitutionality is appropriate.

\textbf{B. Louisiana Statutes and Judicial Interpretation}

Louisiana law provides that the total amount recoverable, exclusive of future medical care, for all malpractice claims shall not exceed $500,000.\textsuperscript{8} Until April 1, 1990, no eligible health care provider was responsible for any amount in excess of $100,000 for injuries or death to any one patient that resulted from any act of malpractice.\textsuperscript{9} However, the Louisiana legislature recently amended this section so that the health care provider is now responsible for legal interest on the amount up to $100,000.\textsuperscript{10} The remainder of any award in excess of $100,000 is payable from the Louisiana Patients Compensation Fund (LPCF).\textsuperscript{11} The Act impliedly limits the total amount payable from the LPCF to $400,000.\textsuperscript{12}

Claimants have challenged the statutory limitation placed on recovery for acts of medical malpractice on equal protection grounds. Specifically, the language of the state constitutional clause regarding equal protection reads as follows:

\begin{quote}
No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.\textsuperscript{13}
\end{quote}

\textsuperscript{7} Id. at 894-95, 106 S. Ct. at 216.
\textsuperscript{8} La. R.S. 40:1299.42(B)(1) (Supp. 1991). The $500,000 amount does not include amounts for future medical care or related benefits under La. R.S. 40:1299.43.
\textsuperscript{10} Id.
\textsuperscript{13} La. Const. art. 1, § 3.
As Professor Hargrave has pointed out, the 1921 Louisiana Constitution had no equal protection clause. Additionally, this section expands the equal protection guarantee of the Fourteenth Amendment of the United States Constitution. This addition to the 1974 Louisiana Constitution demonstrates the Louisiana legislature's intent to increase protections available to its citizens to a level above that found in the 1921 Louisiana Constitution.

Perhaps the most famous, confusing, and misconstrued opinion regarding the constitutionality of caps placed on medical malpractice damage awards arose in *Sibley v. Board of Supervisors of Louisiana State University.* In *Sibley,* a 19 year old psychiatric patient at the Louisiana State University Medical Center in Shreveport, Louisiana suffered massive brain damage, resulting from an anticholinergic reaction which caused cardio-pulmonary arrest. The parents of the woman filed suit against the Board of Supervisors for the woman's injuries.

At this point, a significant aspect of the *Sibley* case should be noted. *Sibley* involved acts of medical malpractice by state employees, as well as the independent negligence of the Board of Supervisors, but not acts of medical malpractice by private physicians. The statutory provisions governing malpractice by state employees and malpractice by private physicians differ, but each essentially accomplishes the same goals.

While the goals of capping medical malpractice awards include insuring an adequate supply of physicians and stabilizing medical malpractice insurance rates, the state also has some self-serving interests. Of particular importance is the state's interest in protecting its coffers. Additionally, the state may have considered capping damage awards as a preferable alternative to the elimination of tort claims against health care professionals where the state would essentially be forced to step in and provide medical care to all of its citizens. Though these goals seem to be important considerations, they appear to have had little impact on the court's decision in *Sibley.*

In *Sibley,* the trial court found for the injured claimant, but limited the liability of the defendant to $500,000 pursuant to the appropriate medical malpractice statute. The First Circuit Court of Appeal affirmed

15. Hargrave, supra note 14, at 23.
16. 446 So. 2d 760 (La. App. 1st Cir. 1983), aff'd, 462 So. 2d 149, on reh'g, 477 So. 2d 1094 (1985), on remand, 490 So. 2d 307 (La. App. 1st Cir.), writ denied, 496 So. 2d 325 (1986).
17. 477 So. 2d at 1098.
the decision of the trial court, as did the Louisiana Supreme Court in its initial hearing. On rehearing, however, the Louisiana Supreme Court radically changed its initial opinion.

In a majority opinion composed of three concurrences and one partial concurrence, the Louisiana Supreme Court found that the medical malpractice award cap did not apply to the independent negligence of the Board of Supervisors, but rather only to the malpractice of the physicians or other health care professionals actually rendering the care. In support of this position, Justice Dennis wrote:

The act clearly does not prohibit or affect judgments based on the negligence of anyone except physicians and other [health care] professionals providing medical and related health care services.

That the legislative aim was so limited is clear from the careful definition and connection of terms in the statute.\(^{19}\)

The court went on to find that the claimant fell within a class of people disadvantaged by “physical classification” within the meaning of the statute. The court then remanded the case to the court of appeal for a determination of the constitutionality of the statute.

Perhaps the most important contribution of Sibley concerned the pronouncement by the Louisiana Supreme Court that the federal “three-tier” level of scrutiny (strict, intermediate and minimal) used in determining the constitutionality of a statute was inappropriate for application to the Louisiana Constitution. Due to the somewhat vague nature of the opinion, however, some confusion has arisen as to what method and level of scrutiny Louisiana courts should apply in determining the constitutionality of statutes within the framework of the Louisiana Constitution.\(^{20}\)

In the opinion, Justice Dennis hinted at the level of scrutiny he found applicable, but failed to provide a definitive standard. After criticizing the “three-tier” federal model, he wrote:

Also, as we will endeavor to demonstrate, the state constitution calls for more than minimal scrutiny of certain types of classifications, and assigns the state the burden of showing that such legislation is not arbitrary, capricious, or unreasonable.\(^{21}\)

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19. 477 So. 2d at 1100.

20. Justice Dennis suggests that: “A workable alternative to the multi-level system, according to a respectable group of scholars and jurists, would be a comprehensive system based upon the unitary standard announced in Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) which in all instances would inquire whether there is ‘an appropriate governmental interest suitably furthered’ by the governmental action in question.” 477 So. 2d at 1107.

21. Id.
Later, Justice Dennis seemed to apply this analysis to the equal protection guarantee found in article I, section 3 of the Louisiana State Constitution.22 In any light, this author believes that the appropriate standard for determining the constitutionality of challenged legislation that restricts an avenue of recovery should be that the state must affirmatively show that the legislation in question furthers some appropriate state interest and is not arbitrary, capricious, or unreasonable in nature.

The constitutionality of the cap was subsequently challenged on equal protection grounds at the appellate level in *LaMark v. NME Hospitals, Inc.* 23 In *LaMark*, a woman suffered hypoxic brain damage24 when she ceased to breathe for an undetermined period of time while recovering from surgery. After settling with the hospital for $100,000, the maximum statutory liability for the hospital,25 the family sought additional damages from the LPCF.26 The trial court granted a motion for summary judgment filed by the LPCF stating that the LPCF had paid the total maximum amount awardable to the plaintiffs ($400,000) together with applicable interest and costs. The plaintiffs appealed, asserting that the statute creates a class of claimants treated differently based upon the number of claimants per act of malpractice. In illustrating this claim, the court said:

For example, a malpractice victim who is the sole claimant in a suit and whose damages exceed $500,000.00 recovers the full limit of $500,000.00. But a malpractice victim with damages exceeding $500,000.00 whose claim is joined with the claims of five family members, all based on the same act of malpractice, recovers substantially less after the $500,000.00 is apportioned among the claimants.27

The court noted that the standard of review for challenged legislation was set forth by the Louisiana Supreme Court in *Sibley v. Board of Supervisors of Louisiana State University*.28 The court further noted that

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22. Id.
23. 542 So. 2d 753 (La. App. 4th Cir. 1989).
24. Hypoxia, as defined by Dorland's Illustrated Medical Dictionary (26th ed. 1981) is the reduction of oxygen supply to tissue below physiological levels despite adequate perfusion of the tissue by blood.
25. See supra text accompanying note 9.
27. 542 So. 2d at 755.
28. 477 So.2d 1094 (La. 1985). The standard set forth was as follows:
   Article I, Section 3 commands the courts to decline enforcement of a legislative classification of individuals in three different situations: (1) When the law classifies individuals by race or religious beliefs, it shall be repudiated completely; (2) When the statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, its enforcement shall be
the statute did not classify individuals by race, religious beliefs, birth, age, sex, culture, physical condition, or political beliefs. Therefore, it was incumbent upon the plaintiffs to prove that the statute did not further some appropriate state interest. The court stated that the plaintiffs failed to satisfy this burden of proof. The court also found that the statute furthered the purpose of providing affordable medical care for citizens of the state.

Furthermore, the court rejected the plaintiffs’ claim that the statutorily imposed cap should apply to a single act of malpractice rather than for all acts of malpractice involving a single patient. The court stated that the language of Louisiana Revised Statutes 40:1299.42(B)(1) makes it clear that its limitation applies to all claims by one patient. Citing Louisiana Civil Code article 9, the court then held that the clear language of the law should not be ignored in search of the intent of the legislature.

Shortly after the LaMark case, the Louisiana Supreme Court reconsidered the issue of medical malpractice claim caps in Williams v. Kushner. In Williams, a father brought suit against a physician for permanent injuries sustained by his infant at birth. Prior to trial, the plaintiff-father settled with the attending physician for the amount of $100,000. After a jury trial on the issue of quantum, the jury returned an unitemized verdict in the amount of $1,829,000 against the LPCF. After a hearing, the trial court reduced the award against the LPCF to $400,000 in accordance with the applicable statute.

The plaintiff appealed the trial court’s award reduction. Subsequently, the court of appeal affirmed the decision of the trial court. The Louisiana Supreme Court granted writs of certiorari to review the decision. In a per curiam opinion, the Louisiana Supreme Court affirmed the constitutionality of the limitation of recovery from the LPCF. The court apparently considered the fund a state-run insurance company. In the court’s opinion, this classification entitles the state to limit its liability in any amount it wishes. Furthermore, the court added that the LPCF refused unless the state or other advocate of the classification shows that the classification has a reasonable basis; (3) When the law classifies individuals on any other basis, it shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest.

477 So. 2d at 1107-08.
29. 542 So. 2d at 755.
30. Id.
31. Id. at 756.
32. 549 So. 2d 294 (La. 1989) (reh'g denied).
33. Id. at 295.
35. 549 So. 2d at 296. The court cited a 1988 decision of the Supreme Court of
exists as an affirmative act of the legislature providing supplemental recovery to victims of medical malpractice and is therefore not subject to the constitutional analysis set forth in Sibley. Hence, the court found that restricting a medical malpractice victim’s recovery from the LPCF to $400,000 is constitutional.

In an interesting twist, the court briefly speculated as to the constitutionality of limiting recovery against a health care provider to $100,000 within a general tort compensation scheme. In its opinion, as well as in an attached appendix, the court discussed how other states have addressed this vexing issue. The court eventually declined to address the issue, deeming it inappropriate to decide this particular question as the plaintiff’s suit against the physician had already been settled for $100,000. Therefore, the issue of the constitutionality of limiting the individual liability of qualified health care providers to $100,000 remains unsettled in Louisiana.

The final issue addressed by the court in Williams dealt with the availability of future medical expenses. Specifically, the Louisiana legislature provided in 1984 that all future medical expenses would remain excluded from the $500,000 cap in the private sector. This section applied to all claims filed “on or after” September 1, 1984. The Louisiana legislature passed a similar provision in 1985 that applies to medical malpractice claims against the state. In this case, the mother gave birth to the infant, who sustained injury, before the legislature passed the provision applicable to private health care providers in 1984. Therefore, because of time and place of birth, the statute deemed the infant ineligible to collect benefits for future medical expenses.

Kansas in supporting its logic:
Because the Fund is a state-run insurance company, the State is free to limit its liability in any amount it wishes. The issue presented here is one of limiting the liability of the tortfeasor, namely the negligent health care provider. Kansas Malpractice Victims v. Bell, 243 Kan. 333, 757 P.2d 251, 256 (1988).
36. 549 So. 2d at 296.
39. Id.
The Louisiana Supreme Court noted that because the infant birth occurred in a private hospital rather than a state hospital, the act placed future medical benefits in a different category. Specifically, the court wrote:

This anomaly is a clear violation of the Louisiana constitutional guarantee of equal protection.

Despite wording to the contrary, Act 435 of 1984 must be reformed to apply to claims and litigation pending when it was passed. Plaintiff here is entitled to a judgment for the benefits provided. Therefore, the court did not allow the disparity in treatment between infants born in private versus public hospitals to stand.

All of the justices of the Louisiana Supreme Court did not share in the majority opinion expressed in Williams. While concurring in part with the overall result, Justice Marcus registered a partial dissent stating that he disagreed with the interpretation of Act 435 of 1984. Quite simply, Justice Marcus expressed the opinion that he found no violation of the state's equal protection clause by the Act.

Additionally, Chief Justice Dixon and Justice Dennis dissented from the result reached by the majority. Chief Justice Dixon, in a dissent several times longer than the Court's per curiam opinion, engaged in a logical and well-written opinion discussing the constitutionality of the cap on medical malpractice awards with regard to claims of denial of equal protection and denial of access to the courts.

Chief Justice Dixon found that the statute, capping recovery in medical malpractice claims, “substantially furthers” several legitimate state purposes. These purposes, as identified by the Chief Justice, are the prevention of hospital closures, restriction of physician practice, and containment of rising health care costs. While recognizing that the statute does differentiate between victims of medical malpractice based upon their injuries, he found this discrimination neither arbitrary, capricious nor unreasonable, and therefore not violative of the equal protection guarantee found in article I, section 3 of the Louisiana State Constitution.

However, Chief Justice Dixon then engaged in a discussion concerning whether the statutorily imposed cap remains violative of the Louisiana State Constitution's guarantee of access to the court system.

42. Id. at 297.
43. Id. at 308 (Dixon, C.J., dissenting).
44. Id.
45. Id.
Specifically, this provision is found in article I, section 22 of the state constitution and states:

All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.

In arguing that the precepts found in this section trace their roots to the Magna Carta,46 Chief Justice Dixon balanced what he viewed as the right to free access to courts versus the interest of the state in alleviating the malpractice crisis. In his opinion, despite the reasonableness of the legislature in passing such a statute, Chief Justice Dixon found that the statute does violate the right of free access to courts. Therefore, he advocates the striking of the statute. However, as Professor Hargrave has indicated, this position is in direct contrast to the opinion of the Louisiana Supreme Court previously expressed in Sibley.47 Oddly, Chief Justice Dixon joined as one of the two concurring justices in the final Louisiana Supreme Court hearing of Sibley.48

Justice Dennis, in his dissent in Williams, chastised the court for failing to answer the true question the court grantedcertiorari to answer in the first place. Instead of addressing the cap on malpractice claims, Justice Dennis stated that the court had "gratuitously declare[d] unconstitutional" a group of persons claiming medical expenses without analysis.49 Specifically, Justice Dennis expressed concern regarding the fact that the court did not reveal the level of constitutional scrutiny to which it subjected the state statute. Furthermore, he maintained that the court did not identify the particular classification that it found violative of the equal protection clause50 or give the proponents of such legislation an opportunity to demonstrate that the statute serves a valid purpose.

As Justice Dennis explained, persons with claims against the state are often treated differently than those who have claims against private parties.51 His concerns seemed to focus upon the legislature's ability to alter or create legislation without giving the legislation retroactive effect. Specifically, he said:

46. Id.
47. Hargrave, supra note 14, at 42.
48. Sibley v. Board of Supervisors of Louisiana State University, 477 So.2d 1094 (La. 1985).
49. 549 So. 2d at 313 (Dennis, J., dissenting).
50. Id.
The Court’s cryptic pronouncement casts a shadow of constitutional doubt on these and other statutes, as well as the legislature’s ability to change prescriptive periods, create new causes of action, and enhance statutory benefits and entitlements without making such acts retroactive.\(^5\)

Thus, Justice Dennis seemed to indicate that his concerns do not focus solely upon caps for medical malpractice claims, but rather upon the legislative process as a whole. As of this date, however, the challenges described by Justice Dennis have not materialized, and the constitutionality of the provision capping claims for medical malpractice seems intact.

With the dissents of Justices Dixon, Marcus and Dennis, as well as the length of time the case stayed before the court for consideration prior to the rendering of a decision, the true precedential value of *Williams* remains questionable. Additionally, the recent retirement of Chief Justice Dixon leaves questions as to how his successor will view the constitutionality of the malpractice cap. Therefore, while the cap on damage awards for acts of medical malpractice presently enjoys constitutional protection, the Louisiana Supreme Court has failed to definitively address the issue. It remains possible, though somewhat unlikely, that the Louisiana Supreme Court could eventually find the medical malpractice award cap to be unconstitutional, especially in light of the future composition of the court.

III. The Medical Review Panel Process

Before any action for medical malpractice may proceed to court, a plaintiff must first submit his claim to a medical review panel.\(^5\) The panel consists of three health care professionals who hold unrestricted licenses to practice their profession and one attorney.\(^4\) The respective parties may agree upon the attorney member of the panel, or alternatively, if the parties cannot reach agreement as to the attorney member, the statute provides a process for arbitrary selection of an attorney.\(^5\) The attorney acts as chairman of the panel, but possesses no vote with regard to panel findings.\(^5\)

The panel may request such information as it deems necessary before it expresses its expert opinion as to whether the evidence submitted supports the allegation that the defendant or defendants failed to act

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52. Id.
53. La. R.S. 40:1299.47(A) (Supp. 1991). However, use of the medical review panel may be waived if agreed to by both of the respective parties.
55. Id.
within the appropriate standard.\(^{57}\) However, the panel may issue an opinion that a material issue of fact not requiring an expert opinion exists, but nevertheless, the court should consider the issue since it bears upon liability.\(^{58}\) The statute deems the conclusions reached by the medical review panel admissible in any court of law.\(^{59}\) The panel's findings, however, are not deemed conclusive, and either party has the right to call any member of the panel as a witness.\(^{60}\)

Plaintiffs have assailed as unconstitutional the requirement that an injured plaintiff first submit a claim to a medical review panel before commencing action in any court. This issue has been the subject of as much, if not more, litigation as the issue of the constitutionality of the limit on recovery for medical malpractice claims. This section of the comment will focus on how Louisiana courts have addressed the constitutionality of the statute requiring a plaintiff to first submit a claim for medical malpractice to a medical review panel prior to commencing an action in court.

A. Denial of Equal Protection

As previously noted, the Louisiana State Constitution of 1974 contains an equal protection clause.\(^{61}\) The earliest challenge to the medical review panel on equal protection grounds arose in *Everett v. Goldman*.\(^{62}\) In *Everett*, a plaintiff brought a medical malpractice suit against physicians, their medical clinic and respective insurers. The physicians challenged the suit for prematurity on the grounds that the plaintiff did not submit his claim to the appropriate medical review panel before initiating suit in trial court. The trial court dismissed the exception of prematurity and declared provisions of the Medical Malpractice Act, including the requirement that plaintiffs first submit all claims to a medical review panel, unconstitutional.

The Louisiana Supreme Court vacated the findings of the trial court with regard to the medical review panel and specifically upheld the constitutionality of those provisions. While the court did consider claims of due process and denial of access to courts, the court focused primarily on the challenge of the statute on denial of equal protection grounds.

\(^{57}\) Id.
\(^{60}\) Id. Interestingly, and quite appropriately, the statute gives immunity to the panel members with respect to opinions expressed in their official capacity regarding the work performed by the health care provider.
\(^{61}\) For text of La. Const. art. 1, § 3, see supra text accompanying note 13.
\(^{62}\) 359 So. 2d 1256 (La. 1978).
As Justice Calogero said, the court considered this claim the most significant. 63

The plaintiff challenged the constitutionality of the statute in Everett by asserting that the statute required victims of medical malpractice treated by health care providers covered under the applicable statute to convene a medical review panel, while the statute did not require victims of medical malpractice treated by non-qualified health care providers to convene a medical review panel. Additionally, the plaintiff asserted that persons treated by qualified health care providers could not plead a specific amount of damages according to the statute while those who received treatment from a non-qualified health care provider could plead a specific amount of damages. The plaintiff asserted that a choice by a physician to qualify or not under the statute directly affects the patient; yet the physician was not required to notify the patient of the choice. 64

Justice Calogero engaged in a discussion of the process involved in determining whether a statute will withstand a constitutional challenge. However, Everett arose some seven years before the Louisiana Supreme Court opinion in Sibley, so the analysis engaged in by Justice Calogero revolved primarily around the analytical procedure employed by the United States Supreme Court in determining the constitutionality of such a statute. 65 Primarily, the analysis focused on whether the issue involves a fundamental right, and if it does not, whether a rational basis supports the discriminatory treatment the legislature seeks to advance. 66 As established by Justice Calogero, the statute requiring submission of a claim to a medical review panel does not affect a fundamental right or create a suspect classification. 67 As such, applying the "compelling state interest" test is inappropriate. Instead, a lesser test, whether the statute furthers a valid purpose, is the proper standard. 68 In affirming the constitutionality of the statute under the "reasonable basis" test, Justice Calogero said:

The valid state purpose said to be served by the two provisions of the medical malpractice act before us is the lowering of the

63. Id. at 1265.
64. Id.
66. 359 So. 2d at 1266.
67. Id. However, this position seems somewhat inconsistent with the court's later position in Sibley in which Justice Dennis found a suspect class based on physical condition. The reader must keep in mind that Everett concerns the constitutionality of the medical review panel process while Sibley addresses caps on medical malpractice awards.
68. Id.
cost of health care generally and the assuring of available medical care for the citizens of the state. We cannot say that the two challenged provisions of the act adopted by the legislature represent an unreasonable response to the medical malpractice problem. Nor are the provisions especially far reaching.69

As the court stated, the requirement that a plaintiff first submit a claim to a malpractice review panel seems to be a rational effort to achieve a plausible goal.70

Various Louisiana courts of appeal have consistently followed the holding of Everett. In Hodge v. Lafayette General Hospital,71 a plaintiff asserted that the legislative bar on suits that exists until the medical review panel renders an opinion violated his constitutional right to due process and equal protection. Citing Everett, the court of appeal rejected the plaintiff's argument and found no violation of the right to due process or equal protection guaranteed in the Louisiana Constitution.72

In Aston v. Lazarus,73 a plaintiff challenged the constitutionality of the entire Medical Malpractice Act on the basis of denial of due process and equal protection. The plaintiff in Aston cited decisions of several courts of other jurisdictions holding the same or similar provisions in other states unconstitutional.74 While the court recognized the potential persuasiveness of these authorities, it also noted that the Louisiana Supreme Court had previously addressed this issue and had found the Act to be constitutional. Therefore, they remained bound, as the court declared, to follow the prior decision of the Louisiana Supreme Court and uphold the constitutionality of the Act.75

Most recently, the statutory requirement of initial scrutiny by a medical review panel was challenged as violative of the equal protection clause in Jarrell v. American Medical International, Inc.76 The plaintiff in Jarrell asserted that the statute violated her right to equal protection because it split medical malpractice claimants into different classes based upon their physical condition—those treated by qualified health care providers covered under the Act, and those treated by health care providers not covered under the Act.77

69. Id.
70. Id. at 1267.
71. 399 So. 2d 744 (La. App. 3d Cir. 1981).
72. Id. at 747.
73. 439 So. 2d 1240 (La. App. 5th Cir. 1983).
74. Id. at 1242. Cited were decisions from Florida, Missouri, Idaho and California as being dispositive on the issue.
75. Id.
76. 552 So. 2d 756 (La. App. 1st Cir. 1989), writ denied, 556 So. 2d 1282 (1990).
77. Id. at 757-58. While the headnotes of the case indicate that there is no violation of equal protection under the Louisiana State Constitution or the United States Consti-
The court noted that the Louisiana Supreme Court in *Sibley* rejected as inappropriate the traditional three-level system of scrutiny developed by the United States Supreme Court for application to Louisiana equal protection considerations. The court then proceeded to state that the statute did not create a classification based on physical condition or any other category specifically enumerated in the state equal protection clause. Therefore, the court determined that the classification existed outside of the scope of the equal protection clause and should be upheld unless the plaintiff was able to prove that the statute did not further any appropriate state interest.

B. Denial of Access to Courts

As previously mentioned, the Louisiana Supreme Court addressed the challenge to the submission of claims to a medical review panel on the basis of denial of access to courts in *Everett*. As the court in *Everett* pointed out, unless the claimant asserts a right deemed "fundamental," access to courts may be restricted if a rational basis for that restriction exists. Holding the right of a medical malpractice claimant to recover for damages to be non-fundamental, the court chose to apply the lesser "rational basis" test in determining the constitutionality of the statute. After considering the intended purposes of the medical review panel, the court found that the statute did not unreasonably restrict access of claimants to the courts.

As Professor Hargrave has noted, the section of the 1974 Louisiana Constitution which guarantees access to the courts generally repeats article I, section 6 of the 1921 Louisiana Constitution and some consider it a second due process clause. Additionally, Professor Hargrave has pointed out that some claimants have attempted to use this section to challenge caps on statutorily imposed damage awards in other situations. However, such challenges have unequivocally failed and no reported state case has found that statutorily imposed review panels violate the constitutional guarantee of access to courts.

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78. *Id.* at 758.
79. *Id.*
80. See supra text accompanying note 51.
82. *Id.* at 1268-69.
83. Hargrave, supra note 14, at 42.
84. *Id.*
C. Denial of Due Process of Law

Louisiana's due process clause can be found in article I, section 3 of the 1974 Louisiana Constitution. It simply states: "No person shall be deprived of life, liberty, or property, except by due process of law." Plaintiffs have used this clause to challenge the constitutionality of the statutorily imposed requirement of submission of a medical malpractice claim to a medical review panel prior to trial.

The United States Fifth Circuit Court of Appeals first addressed the issue in Seoane v. Ortho Pharmaceuticals, Inc.85 In its analysis, the court announced its agreement with the findings of the Louisiana Supreme Court in that the right of a victim of medical malpractice to sue for damages in tort is not a fundamental right.86 In upholding the statute, the court wrote:

The legislation we review has not been shown to be unreasonable, either on its face or as applied. The statutes were enacted to meet a perceived crisis in medical care—to maintain the availability of malpractice insurance at acceptable rates. Such is a permissible government objective.87

Later, the Louisiana First Circuit Court of Appeal addressed the issue in Wyble v. St. Luke General Hospital.88 In Wyble, plaintiffs brought suit for injuries sustained at a hospital when an employee tripped over medical equipment dislodging an intravenous needle located in the victim's arm.89 The plaintiffs complained that the requirement that they submit their claims to a medical review panel prior to filing suit in court violated their constitutional right to due process of law.

The court in Wyble rejected the contentions of the plaintiffs. Citing Everett, the court pointed out that the medical review panel did not interfere with the right of the plaintiffs to proceed with a jury trial. The court noted that the ultimate issue of liability and quantum went to the jury in a civil trial. Considering this set of circumstances, the court found that the statute did not deny due process of law.

IV. The 1990 Amendments

In the 1990 legislative session, the Louisiana legislature made significant changes to the Medical Malpractice Act.90 One primary change involved the administration of the LPCF. The other major change

85. 660 F.2d 146 (5th Cir. 1981).
86. Id. at 150-51.
87. Id. at 151.
88. 415 So. 2d 622 (La. App. 3d Cir. 1982).
89. Id. at 623.
mandated that, at the time it renders its expert opinion, the medical review panel issue written reasons regarding the presence or absence of facts which may confirm the presence of malpractice. This section of the comment examines these changes and the likely effect they will have on the cap for medical malpractice damage awards, as well as the medical review panel process.

A. Possible Loss of the $500,000 Cap

From its inception, administration of the LPCF rested with the state of Louisiana through the Commissioner of Insurance. Additionally, responsibility for defending the LPCF rested with the Attorney General, who could enter into contracts with private firms for defense of the Fund. However, on October 1, 1990, responsibility for the administration and defense of the LPCF shifted to the Louisiana Patient’s Compensation Oversight Board.

The Patient’s Compensation Fund Oversight Board was created by the amendments to the Act. The Board consists of nine members, eight of whom represent member health care providers and one of whom represents the insurance industry. The members are appointed by the Governor subject to confirmation by the Senate. The Board now has the responsibility for administering and defending the Fund, duties previously held by the state. The concept of having private individuals, as opposed to state officials, administering and defending the fund, however, is thought by many to threaten the loss of the constitutionally protected cap on medical malpractice awards.

A recent article reported that both the Attorney General and the Commissioner of Insurance believe that private administration of the LPCF will endanger the $500,000 cap on damage awards for medical malpractice actions. The same article also reported the view expressed by the Attorney General that the only reason the courts have found the statutorily imposed cap permissible was because the LPCF operated as a state-run fund.

While at first glance this argument might possess merit, closer scrutiny reveals a possible flaw in the argument’s logic. The last sentence of Louisiana Revised Statutes 40:1299.44(A)(1) reads as follows:

98. Id.
The state recognizes and acknowledges that the fund and any income from it are not public monies, but rather are private monies which shall be held in trust as a custodial fund by the state for the use, benefit, and protection of medical malpractice claimants and the fund's private health care provider members, and all of such funds and income earned from investing the private monies comprising the corpus of this fund shall be subject to use and disposition only as provided by this Section.99

From the language of this section it is readily apparent that the state recognizes the monies in the LPCF as private funds while it acts as a "trust" custodian. Furthermore, all expenses of collecting, protecting, and administering the fund come from the LPCF itself.100 In essence, the state expends no money for compensation awards or for the administration of the fund. With these considerations in mind, it is difficult to envision the LPCF as a purely "state-run" fund when the Louisiana legislature has statutorily recognized that all monies expended for awards and administrative costs exist as private funds.

As an additional consideration, the 1990 amendments to the Act do not amend this section in any way. The fund remains recognized by the Louisiana legislature as a private fund. Additionally, the legislature made no changes in the way the fund pays for administration, collection, or protection. In other words, the mechanics of the Act remain essentially the same. Only the functions formerly delegated to the Attorney General and the Commissioner of Insurance have been shifted to the new Oversight Board.

More specifically, the responsibility of appointing attorneys to defend the fund in professional liability cases moves from the Attorney General to the Office of Risk Management, a branch of the Division of Administration. The administrative tasks related to the fund move from the office of the Commissioner of Insurance to the Oversight Board.

Furthermore, while the Attorney General and the Commissioner of Insurance remain elected by popular vote in Louisiana, history recognizes the functions exercised by their offices as falling within the realm of the power of the executive branch of government. Their offices exist to enforce the laws promulgated by the Louisiana legislature. An analogous situation exists between the Attorney General of the United States and the President and Congress of the United States. Congress passes laws which the executive branch, of which the Attorney General's office is a recognized member, is obligated to enforce.

This raises another possible flaw in the logic of the Attorney General's argument that the amendments to the Act endanger the constitutionally protected cap on damage awards for medical malpractice. If the Division of Administration, the Attorney General, and the Commissioner of Insurance all form part of the executive branch of government in this state, then the recent amendments to the Act do nothing more than shift the responsibility for administering and defending the fund from one department to another within the executive branch. Therefore, it seems difficult to envision a court declaring the cap unconstitutional simply because of a shift of responsibility within the executive branch.

B. Written Reasons for Medical Review Panel Findings

As previously stated, the other major change to the Act involved the manner in which the medical review panel reports its findings. Prior to the 1990 amendments to the Act, the medical review panel simply issued its expert opinions in writing. The panelists then signed the written expert opinion. The amendments, however, impose upon panel members the new requirement that they issue written reasons for their conclusions which must accompany their written expert opinions.

While this change will probably not impact the constitutionality of the medical malpractice monetary award cap or the constitutionality of the medical review panel process, it does raise interesting possibilities. Since the findings of the panel remain admissible in any subsequent court proceeding, one can assume that the written reasons accompanying the panel's findings will also be admissible. Although the Act provides that the panel's findings do not determine the ultimate issue of whether malpractice exists in any given case, jurors may find themselves persuaded, for better or worse, by the written reasons accompanying the expert opinion of the panel. As such, practitioners, whether prosecuting or defending a medical malpractice action, should consider this possibility.

As a possible solution to this potential problem, practitioners should consider requesting a limiting instruction from the court if the court deems the written reasons accompanying the expert opinion of the panel admissible. By making the request for a limiting instruction pursuant

102. Id.
103. Louisiana Code of Evidence Article 105 states:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the
to the Code of Evidence, counsel would not challenge the admissibility of the written reasons issued by the panel. It would provide an avenue, however, for bringing to the jury's attention the fact that these reasons, though issued by a panel of medical professionals, should not dominate the jury's determination of the existence or absence of an act of medical malpractice.

V. Conclusion

The United States Supreme Court, in its decision in *Fein v. Permanente Medical Group*, has impliedly decided that caps on non-economic losses from acts of medical malpractice do not violate the equal protection or due process clauses of the United States Constitution. Therefore, the importance of how individual states address this issue based upon the protections granted under individual state constitutions is greatly enhanced.

Although Louisiana jurisprudence on this topic remains somewhat confusing, the statutorily imposed limitation on monetary damage awards for acts of medical malpractice appears to presently enjoy constitutional protection. The 1990 amendments to the Medical Malpractice Act make it possible, although unlikely, that the constitutionally protected cap on such damage awards may fall due to shifts in the administration and defense of the fund. However, the retirement of Chief Justice Dixon makes it somewhat difficult to predict how a Louisiana Supreme Court of a different composition would view the amendments and the Act in general.

The protection of the medical review panel seems to be on a more stable constitutional ground, and a subsequent finding holding the process unconstitutional would be surprising. However, recent amendments to the Act impose an affirmative duty on the medical review panel to issue written reasons to accompany any expert opinions it issues. While these changes will probably not endanger the constitutionality of the medical review panel process, the evidentiary questions they raise may present unique and challenging situations for attorneys to address.

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