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Brian J. Hickey and Jennifer A. Bollow on The Lebron Decision: Court Says No Again to Caps in Medical Malpractice Lawsuits

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On February 4, 2010, the Illinois Supreme Court struck down the third attempt of Illinois State lawmakers to impose caps on noneconomic damage in *Lebron v. Gottlieb Memorial Hospital*¹, [2010 Ill. LEXIS 26](#) (Feb. 4, 2010). This law attempted to cap non-economic damages. It differed from the prior laws that capped non-economic damages as the caps in *Lebron* were only related to medical malpractice actions. The stated government interest for imposing caps was to address the mounting crisis in access to health care by stemming the cost of malpractice insurance. See Pub. Act 94-677, §101(4). In a four to two ruling along party lines, the Court held that the limitation on non-economic damages in medical malpractice actions set forth in Section 2-1706.5 of the Code violates the separation of powers clause of the Illinois Constitution. That law, known as Public Act 94-677, was originally signed by a democratic governor, Rod Blagojevich on August 25, 2005.

The *Lebron* decision involved a minor plaintiff, Abigail Lebron, and her mother, Frances Lebron, based upon an admission to Gottlieb Memorial Hospital on October 31, 2005. During this admission, a cesarian section was performed delivering Abigail Lebron. Abigail Lebron sustained numerous permanent injuries, including a severe brain injury, cerebral palsy, cognitive mental impairment; she required a gastronomy tube and was unable to develop normal neurologic function. The Circuit Court of Cook County, relying on the Illinois Supreme Court prior decision in *Best v. Taylor Machine Works*, 179, Ill.2d 367, [689 N.E.2d 1057](#) (1997) held that statutory caps violate the separation of powers clause of the Illinois Constitution and declared the entire act invalid. The decision of the Illinois Circuit Court of Cook County was appealed directly to the Illinois Supreme Court.

The Defendants in the *Lebron* case argued that the statute at issue in *Best* is distinguishable from the present statute and the Circuit Court's ruling represents an unjustified expansion of *Best*. The Defendants further maintain the damages provision in Section 2-1706.5 constitutes a valid exercise of the General Assembly's police power in response to a public threat as reflected in the Legislative Findings.

1. This opinion has not been released for publication in the permanent law reports and until released it is subject to revision or withdrawal.

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The Illinois Supreme Court in *Lebron* reexamined the *Best* decision in detail. In *Best*, the Court considered the constitutionality of Public Act 89-7, which was commonly referred to as the Tort Reform Act of 1995. The Tort Reform Act of 1995 provided that in all common law, statutory or other actions that seek damages on account of death, bodily injury or physical damage to property based upon negligence or product liability, recovery of noneconomic damages shall be limited to \$500,000 per plaintiff. The statute defined noneconomic damages as damages that are intangible, including, but not limited to damages for pain and suffering, disability, disfigurement, loss of consortium and loss of society.

In the *Best* decision, the Illinois Supreme Court held that the automatic \$500,000 limit on noneconomic damages was arbitrary and violated the special legislation clause. The *Best* court held that Legislative's interest in tort reform was insufficient to overcome the Plaintiff's special legislation challenge, noting the entire burden of any cost savings would impermissibly rest on one class of injured Plaintiffs. The *Best* decision also commented in its holding or judicial dictum that the statutory caps on noneconomic damages violated the separation of powers clause by invading the province of the judiciary to assess on a case-by-case basis whether a jury award is excessive. Courts have historically used the process known as remittitur to reduce grossly excessive jury awards. The Legislature's imposition of damage caps was found to encroach on this historical judicial role in violation of the Illinois Constitution's separation of powers clause.

The Illinois Supreme Court in *Lebron* found that separation of powers analysis in *Best* was part of its holding or at least judicial dictum. Even if it was not the holding (which makes the matter precedential), judicial dictum is entitled too much weight by the lower courts. The defendants in *Lebron* unsuccessfully argued that the separation of powers analysis in *Best* is distinguishable as Section 2-1115.1 was part of a broad based effort to reduce system wide litigation costs in all injury and property damage cases. *Lebron* dealt specifically with Section 2-1706.5 which was narrowly focused to address the specific issue of the healthcare crisis and only impacted medical malpractice actions. The *Lebron* Court held that under 2-1706.5, the courts are required to override the jury's deliberative process and reduce any noneconomic damages in excess of the statutory cap irrespective of the particular facts and circumstances and without the Plaintiff's consent. (Remittitur requires plaintiff's consent. Absent consent to reduce a jury award, results in a new trial of the case.) Thus, the Illinois Supreme Court held that 2-1706.5 violates the separation of powers clause because it unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law.

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The Illinois Supreme Court found the defense citation to statutes limiting noneconomic damages in malpractice cases that have been adopted in other states to be equally unpersuasive, noting that the limitations on noneconomic damages adopted by other states vary widely. For example, the Florida statute sets up an equation in which the damages cap may be as low as \$150,000 and as high as \$1.5 million depending on whether the medical negligence is attributable to a practitioner or nonpractitioner, whether the negligence results in a permanent vegetative state or death, etc. The Illinois Supreme Court responded that because “everybody is doing it” is hardly a litmus test for the constitutionality of a statute. Based upon the Illinois Supreme Court’s finding that Section 2-1706.5 violates the Separation of Powers clause of the Illinois Constitution and because Public Act 94-677 contained an inseverability provision, it held the entire Act invalid and void in its entirety. The Court noted that because the other provisions contained in Public Act 94-677 are deemed invalid solely on inseverability grounds, the legislator remains free to enact any provisions it deems appropriate.

It is clear from the legislative history that the legislature kept in mind the *Best* Court holding primarily based on a challenge that those caps violated the special legislation clause of the Illinois Constitution. In drafting a new law on caps, the Legislature needed to be mindful of the *Best* decision. The legislature narrowed the scope of caps to medical malpractice lawsuits. Special legislation is not per se unconstitutional. However, if the legislature intends on favoring a specific group, such as hospitals and physicians, it can only do so with a reasonable basis.

Therefore, the Legislature made the following findings in Public Act 94-677 to explain the reasonable basis for this special legislation:

(1) the increasing cost of medical liability insurance results in increased financial burdens on physicians and hospitals; (2) the increasing cost of medical liability insurance in Illinois is believed to have contributed to the reduction of availability of medical care in portions of the state and is believed to have discouraged some medical students from choosing Illinois as the place they would receive their medical education and practice medicine; (3) the public would benefit from making the services of hospitals and physicians more available; (4) this healthcare crisis which endangers the public health, safety and welfare of the citizens of Illinois, requires significant reforms to the civil justice system, currently endangering healthcare for the citizens of Illinois; and (5) in order to preserve the public health, safety and welfare for the people of Illinois, the current medical

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malpractice situation requires reforms that enhance the State's oversight of physicians and ability to discipline physicians, that increase the State's oversight of medical liability insurance carriers, that reduce the number of non-meritorious healing or malpractice actions that limit non-economic damages and healing art malpractice actions, that encourage physicians to provide voluntary services at free medical clinics, that encourage physicians and hospitals to continue providing healthcare services in Illinois and encourage physicians to practice in medical care shortage areas.

Public Act 94-677 as codified in part in 735 ILCS 5/2-1706.5, provides for non-economic damages to be capped in medical malpractice actions and wrongful death action based upon medical malpractice. The total award against a hospital and its personnel or hospital affiliates for noneconomic damages shall not exceed \$1 million awarded to all plaintiffs in any civil action and the total award against a physician and a physicians' business or corporate entity and personnel for noneconomic damages shall not exceed \$500,000 awarded to all plaintiffs in any civil action. In addition, Public Act 94-677 contains significant revisions to the Illinois Insurance Code which included a professional liability resource center which is a listing on the department's internet website containing the name, telephone number and base rate of each licensed company providing medical insurance. The Act created a patient's right to know law which required that the department maintain a website which included a profile of every physician including criminal convictions for felonies and Class A misdemeanors, a description of any final department disciplinary action, a description of revocation of hospital privileges for reasons relating to confidence or character, all medical malpractice court judgments and medical malpractice arbitration awards in which a payment was awarded to a complaining party in the last five years and all settlements of a malpractice action in which a patient was made to a complaining party within the most recent five years.

Public Act 94-677 provided more stringent requirements for the Health Professional's affidavit which must be attached to all complaints alleging medical negligence including that the health professional affiant meet the expert witness standards. The Public Act 94-677 also provided that an expression of grief, apology or explanation provided by a healthcare provider shall not be admissible as evidence in Court. Finally, the Public Act also provided more stringent requirements on physicians acting as experts.

The majority opinion vigorously denied that the Obama Administration's Healthcare Reform efforts are not the backdrop against which they have decided upon the constitutionality of 94-677 and express no opinion favorable or unfavorable as to those efforts.

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The *Lebron* dissent referenced an address by President Obama to a joint session of the United States Congress in which he admonished that “our Nation’s collective failure to meet the challenge of health care reform, year after year, decade after decade has led us to the breaking point.” According to President Obama, the failure to take immediate corrective action with be dire, our deficit will grow, more families will go bankrupt, more businesses will close, more Americans will lose their coverage when they are sick and when they need it most and more will die as a result. The dissent recognized that medical malpractice reforms might have salutary effects on the delivery of affordable health care in Illinois which was a view also shared by the General Assembly upon the enactment of Public Act 94-677 in 2005.

The dissent also argued that the Illinois Supreme Court does not have standing to review this matter as the plaintiffs in this case have not yet prevailed on any of their medical malpractice claims. The case remains at the pleading stage and the allegations of malpractice contained in the Complaint have been denied. Thus, whether the plaintiff will succeed in establishing a basis for an award of noneconomic damages in excess of the limits imposed by that portion of the Public Act 94-677 is therefore entirely speculative.

The dissent disagreed with the majority’s opinions that the medical malpractice caps violated the separation of powers doctrine. Specifically, the dissent recognized that it is not the judiciary’s function to weigh the wisdom of legislation or decide whether the policy it expresses offends public welfare. It argued that the majority’s opinion second guesses the wisdom of legislative determinations and recognized that while his colleagues purport to defend Separation of Power principles, it is their decision, not the action of the General Assembly which constitutes the improper incursion into the power of another branch of government. Justice Karneier preliminarily noted that proceeding to an analysis of the constitutional issues in this case disregard the doctrine jurisprudential restraint.

In the last paragraph of the dissent, it concluded that “our job is to do justice under the law, not make the law. Formulating statutory solutions to social problems is the prerogative of the legislator.... It is critical therefore, that the Courts not stand as an obstacle to legitimate efforts by the legislator and others to find an answer. If the Courts exceed their constitutional role and second guess policy determinations by the General Assembly under the guise of judicial review, they not only jeopardize the system of checks and balances on which our government is based, they also put at risk the welfare of the people the government was created to serve.

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Analysis. Despite multiple efforts by the Illinois Legislature to join those other states which have passed caps on non-economic damages, Illinois law again has failed to pass constitutional muster with the Illinois Supreme Court. In *Best*, the court struck down the broad caps based primarily on the basis that the law constituted “special legislation.” The *Best* Court held that there was not a reasonable basis to limit personal injury verdicts due to excessive verdicts as the burden would be shouldered by only one group, injured plaintiffs.

Recently, the *Lebron* Court struck down as unconstitutional a much narrower non-economic damages cap law pertaining only to medical malpractice. Given the lengthy reasonable basis in the legislative history, the *Lebron* Court avoided finding the new legislation unconstitutional on the same basis as *Best*. Instead, the *Lebron* holding was based on a separation of powers argument.

Given these two attempts by the Illinois Legislature to impose caps in the past 15 years without success, the question is raised as to whether there can ever be caps on non-economic damages in Illinois. At the federal level, the Obama administration is strongly pushing for health care reform. The Republican members of Congress, almost unanimously, have opposed this reform and repeatedly indicate that tort reform must be included to provide any meaningful reform of America’s health care system. Like Illinois, it appears that political divisions at the federal level make the prospect of federal tort reform unlikely at this time.

Interestingly, one of the stated bases for caps on non-economic damages in medical malpractice cases is increased cost of medical liability insurance. If there is any doubt that caps have an effect on physician’s insurance premiums, one can look to Crain’s Chicago Business article released March 5, 2010. That article cited a study released by Millivan, Inc. that Illinois medical malpractice insurers will face an 18% jump in costs following the Illinois Supreme Court decision in *Lebron*. The firm predicted that the recent removal of caps on malpractice awards would lead to higher costs per malpractice claim and there will be an increase in the number of lawsuits filed against physicians. Logically, insurers will pass on those costs through increased charges which ultimately are borne by the public.

Following the *Lebron* decision, it is anticipated the Legislature will re-enact the remaining provisions in Public Act 94-677 not involving statutory caps including more stringent requirements to 2-622, the Patient Right to Know law and the “I’m Sorry” Provision.

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In conclusion, the *Lebron* decision has negative consequences for physicians, hospitals and medical insurance companies. Those celebrating the decision likely include personal injury attorneys and those clients they represent.

In Illinois and based upon the majority's opinion in *Lebron* with respect to the analysis on separation of powers, it is unlikely that any caps on damages will survive scrutiny without some significant change. These potential significant changes could include:

- 1) A constituted amendment to the Illinois Constitution as proposed by State Senator David Leuchefeld, which would provide protection to laws passed by the legislature that places limits on liability for non-economic damages in medical malpractice lawsuits.
 - a. State Senator David Luechefeld (R) proposed a constitutional amendment (Senate Joint Resolution Constitutional Amendment 103) which would give protection to laws passed by the legislature that places limits on liability for noneconomic damages in medical malpractice lawsuits. The amendment would add a new section to Article 4 of the Illinois Constitution which would allow the Legislature to seek to pass laws with caps if passed by a majority of the General Assembly.
 - b. Federal Legislation
 - c. Change in the Justices on the Illinois Supreme Court – Currently there are 4 Democrats. One of the Democrat justices is up for re-election in November.
- 2) Federal Legislation or Timing of Decision in Relation to current Federal Health Care Reform, conservatives trying to make tort reform part of health care package.

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