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# GAMBLING ON GOLDILOCKS: ILLINOIS MEDICAL MALPRACTICE DAMAGE CAPS AND THE QUEST FOR "JUST RIGHT" REFORM

KRISTEN ZAHARSKI*

## I. THE MEDICAL MALPRACTICE CRISIS

Cosmetic; Bariatric; LASIK; health care; crisis; reform. These words pervade modern-day lexicon due to fundamental changes in American mentality spanning the past few decades.[1] However, individual attempts to eradicate personal insecurities via surgical intervention are not without cost, the negative ramifications of which are borne by both the patient and the nation.[2] Furthermore,

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1. *See, e.g.*, Martin Donohoe, *Women's Health in Context: Cosmetic Surgery Past, Present, and Future: Plastic, Reconstructive, and Cosmetic Surgery*, 11 MEDSCAPE OB/GYN & WOMEN'S HEALTH 2 (Aug. 28, 2006), http://www.medscape.com/viewarticle/542448_2 (offering the statistic that there were 10.2 million cosmetic procedures performed in the United States in 2005, which was an eleven percent increase from 2004 and a thirty-eight percent increase from 2000), *and Bariatric Surgery Statistics*, BARIATRIC SURGERY.INFO, http://www.bariatric-surgery.info/statistics.htm (last visited Mar. 22, 2012) (citing the statistic, according to the American Society for Bariatric Surgery, that the number of gastric bypass surgeries performed in the United States increased six hundred percent from 1993 to 2003), *and* Susan Brady, *Liposuction Hits Top Spot as Most Popular Plastic Surgery*, HEALTH NEWS, http://www.healthnews.com/en/news/Liposuction-Hits-Top-Spot-as-Most-Popular-Plastic-Surgery/20wbs5cPvEKPOb2A1FzQeP/%7B0%7D (last updated Aug. 9, 2010) (quoting Alan Gold, MD, President of the American Society for Aesthetic Plastic Surgery's concession that the twelve percent decline in overall demand for cosmetic surgery in 2009 is related to the economy, not American mentality). Dr. Gold stated, "[i]t's clearly the economy, and people's concerns about their future income, their time off from work to have a procedure, and recovery from that." *Id.*

2. *See generally Number of Laser Eye Surgery Procedures Performed*, LASER EYE SURGERY STATISTICS, http://www.laser-eye-surgery-statistics.com/number-lasik-volume-number-of-lasik-surgeries.php (last visited Mar. 22, 2012) (stating that, in the United States, twelve million

advancements in medical technology ultimately lead to patient misunderstandings regarding the fallibility of medicine.[3] This has resulted in an increase in nonmeritorious medical malpractice actions brought against health care personnel, namely hospitals and physicians.[4] In response, malpractice liability insurers are forced to raise premiums or even decline coverage,[5] which has resulted in a health care "crisis."[6] According to the American Medical Association, Illinois maintains some of the highest malpractice insurance premiums in the nation, and the

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patients have undergone LASIK surgery since it was approved in 1995, but that the number of individuals with unhappy outcomes is growing steadily, drawing public attention), *and* Bruce Japsen, *Malpractice Costs Top $55 Billion a Year in U.S., Harvard Study Says*, CHI. TRIB., Sept. 8, 2010, http://www.chicagotribune.com/business/ct-biz-0909-notebook-health-20100908,0,4495498.story (finding "the annual overall cost of medical liability to be $55.6 billion, or 2.4 percent of total health care spending").

3. *See, e.g.*, R. Morgan Griffin, *Surgery Lite: Understanding Endoscopic Surgery*, WEBMD (Aug. 12, 2008), http://www.webmd.com/a-to-z-guides/features/understanding-endoscopic-surgery (addressing the false "idea" that people have that minimally invasive procedures are automatically "better" than traditional surgery), *and* Peter D. Jacobson, *Medical Liability and the Culture of Technology*, PROJECT ON MED. LIABILITY IN PA., 31, 58 (2004), http://www.pewcenteronthestates.org/uploadedFiles/wwwpewtrustsorg/Reports/Medical_liability/med_mal_092204.pdf (explaining how technological advancements not only create unreasonable patient expectations but also increase opportunities for error in diagnosis and treatment).

4. *See Medical Liability Crisis Fact Sheet*, AM. COLL. OF EMERGENCY PHYSICIANS, http://www.acep.org/Legislation-and-Advocacy/Practice-Management-Issues/Liability-Reform/Medical-Liability-Crisis-Fact-Sheet/ (last visited Mar. 22, 2012) (according to a Harvard analysis, about forty percent of the medical malpractice cases filed in the U.S. are without merit).

5. JEROME NATES, ATTEMPTS TO LIMIT DAMAGE AWARDS, 3A-18 MEDICAL MALPRACTICE (MB) § 18.15 (2010). *See also Illinois Medical Malpractice Insurance*, COVERMD, http://www.covermd.com/medical-liability-insurance-IL.aspx (last visited Mar. 25, 2012) (emphasizing that Illinois medical malpractice insurance premiums for physicians are inextricably linked to the expensive litigation system, and that although most medical malpractice cases do not actually go to trial, it still costs physicians and their insurance companies a significant amount of money and time to defend each claim). If there is any doubt that caps do, in fact, have an effect on a physician's insurance premium see Mike Colias, *Illinois Med-Mal Ruling to Boost Insurers' Costs 18%: Study*, CRAIN'S CHI. BUS., Feb. 22, 2010, *available at* http://www.chicagobusiness.com/article/20100222/NEWS03/200037194/illinois-med-mal-ruling-to-boost-insurers-costs-18-study (computing an eighteen percent increase in costs that Illinois medical malpractice insurers face as a result of the invalidation of statutorily imposed damage awards caps in Illinois).

6. *See, e.g.*, Kenneth E. Thorpe, *The Medical Malpractice 'Crisis': Recent Trends and the Impact of State Tort Reforms*, HEALTH AFFAIRS (Jan. 21, 2004), http://content.healthaffairs.org/cgi/content/full/hlthaff.w4.20v1/DC1 ("[b]oth rising premiums and a reduction in the number of firms offering coverage characterize the most recent medical malpractice crisis").

consequences are manifest statewide as physicians either stop practicing or relocate[7] to other states with less costly medical liability coverage.[8]

With the health care industry in an uproar, the Illinois General Assembly (hereinafter "the General Assembly") has responded to these concerns by attempting to cap damage[9] awards arising from personal injury actions, specifically medical malpractice. Consider the following scenarios in the context of caps

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7. *See, e.g.*, Karen Mellen, *Hospital Laments Insurance Costs—Christ Staff Flees Malpractice Rates*, CHI. TRIB., May 4, 2004, http://articles.chicagotribune.com/2004-05-04/news/0405040282_1_malpractice-insurance-insurance-premiums-insurance-rates (reporting that Advocate Christ Hospital officials said at a legislative hearing that the hospital was losing vascular specialists, general surgeons, neurosurgeons, and obstetricians due to more costly medical malpractice insurance), *and* Brief for Ill. Hosp. Ass'n et al. as Amicus Curiae Supporting Appellants at 20, Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895 (Ill. 2010) (No. 06 L 12109), 2008 WL 3857552 at *9 n.1 ("[a]t least 42 doctors in St. Clair and Madison counties have announced plans to leave, or have left, because of rising insurance rates" (quoting Patrick J. Powers, *Doctor Exodus Continues*, BELLEVILLE NEWS-DEMOCRAT (Nov. 9, 2003))).

8. *Illinois Medical Malpractice Insurance*, *supra* note 5. "According to the Illinois Chamber of Commerce, a physician leaving Illinois to practice elsewhere represents a $1.1 million annual economic loss, including the loss of twelve office, hospital, and community jobs." *Id.*

9. RESTATEMENT (SECOND) OF TORTS § 902 (1979) defines damages as "a sum of money awarded to a person injured by a tort of another." According to *Best v. Taylor Machine Works*, economic damages are defined as "all damages which are tangible, such as damages for past and future medical expenses, loss of income or earnings and other property loss"; therefore, economic damages can be objectively measured. Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1067 (Ill. 1997) (citing 735 ILL. COMP. STAT. 5/2-1115.2(a) (West 1996)). Noneconomic damages are defined as "damages which are intangible, including but not limited to damages for pain and suffering, disability, disfigurement, loss of consortium, and loss of society." *Id.* (citing 735 ILL. COMP. STAT. 5/2-1115.2(b)). Furthermore, compensatory damages are defined as "the sum of economic and non-economic damages." *Id.* (citing 735 ILL. COMP. STAT. 5/2-1115.2(c) (West 1996)). Due to the inherently subjective nature of noneconomic damages, compensation of this type is difficult to measure. *Id.* at 1110. Usually, damage award determinations are left to the sound discretion of the jury and are only overruled if the awarded amount is wholly unreasonable. *Compare id.* at 1079 ("[A] damages award will not be subject to remittitur where it 'falls within the flexible range of conclusions which can reasonably be supported by the facts' because the assessment of damages is primarily an issue of fact for jury determination."), *and* Martinez v. Elias, 922 N.E.2d 457, 469 (Ill. App. Ct. 2009) (emphasizing that "[a] verdict will not be set aside . . . unless it is so excessive that it indicates that the jury was moved by passion or prejudice . . . or is so large that it shocks the judicial conscience"), *with* Bussean v. Habco, Inc., No. 98 L 623, 2003 WL 24179471, at *3 (Ill. Cir. Ct. May 23, 2003) (remitting a jury's damage award for future medical related expenses because "although [damages] need not be proven with mathematical precision there must be evidence that, such expenses are reasonably certain to occur[,]" which was absent in this case).

on damages: (1) While undergoing a routine operation, a patient is administered medication to which she is allergic. Although the drug allergy is well documented in her medical chart, this is overlooked by medical personnel. As a result, the patient goes into cardiac arrest, cannot be fully resuscitated, and lives the remainder of her life in a largely vegetative state.[10] (2) A forklift operator is suddenly engulfed in flames after the apparatus she is driving malfunctions. She suffers from burns on over forty percent of her body, including her face, torso, arms, and hands, and is unable to continue working at the capacity to which she is accustomed.[11] (3) A patient seeks surgical intervention to remove a malignant tumor. Due to postoperative complications, a subsequent operation is performed shortly thereafter. The patient later dies as a result of the stress of the second surgery.[12]

This Comment will address the foregoing hypotheticals in the context of past and present Illinois law, which has vacillated in its application of damage award caps for more than a quarter of a century. Despite the undeniable need for health care reform, the Illinois Supreme Court (hereinafter "the court") has overturned medical malpractice caps as violative of the Illinois Constitution on three separate occasions,[13] citing principles concerning special legislation, due process, and most recently, separation of powers.[14] However, these decisions are not indicative of what is yet to come because the General Assembly consistently amends its legislation to combat constitutional deficiencies identified by the various majorities of the court.[15] Furthermore, under the doctrine of stare decisis, the court has no duty to declare new statutes invalid for the same reasons unless the language of a subsequent statute is substantially similar to that which was previously invalidated.[16]

This Comment will argue that despite the plethora of issues surrounding medical malpractice damage caps in Illinois, the health care crisis should lie at the core of this debate—not separation of powers. Part II will provide the foundation for the

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10. Loosely adopted from *Applewhite v. Accuhealth*, Inc., 81 A.D.3d 94 (N.Y.A.D. 1st Dept. Dec. 28, 2010).

11. *See Best*, 689 N.E.2d 1057 (addressing similar facts).

12. Loosely adopted from the facts of *Robinson v. Boffa*, 930 N.E.2d 1087 (Ill. App. Ct. 2010).

13. Although the court concedes that the legislative purpose of a statute is relevant to a separation of powers analysis, the court refuses to consider the underlying goal of the statute above its alleged constitutional inadequacies. *Lebron*, 930 N.E.2d at 911-12.

14. *See id.* at 912 (stating that the primary issue before the court was whether the statutorily mandated damage cap unduly invaded the province of the judiciary).

15. *Id.* at 927 (Karmeier, J., dissenting) (citing Arbino v. Johnson & Johnson, 880 N.E.2d 420, 429 (Ohio 2007)).

16. *Id.*

aforementioned issues, including an overview of Illinois medical malpractice caps from their inception. Part III will consider how other states have responded to the medical malpractice crisis and will also proffer an answer to whether the Illinois Supreme Court has finally "gotten it right." Lastly, Part IV will address potential resolutions to this tensional debate and will attempt to answer the lingering question: Can there ever be medical malpractice caps on noneconomic damages in Illinois?

## II. SEARCHING FOR A SOLUTION

A "cap" or "ceiling" is an absolute[17] limit on the damage award recoverable and is established by statute.[18] Since 1975, the Illinois legislature has passed three such statutes. The purpose of these statutes is threefold: (1) "to decrease the frequency, severity and cost of health care claims"; (2) to make malpractice insurance reasonably affordable; and (3) to ensure prompt adjudication for the most catastrophically injured individuals.[19] However, the constitutionality of these statutes is highly contested. Plaintiffs contend that they are being unlawfully deprived of their rights to access the courts, rights to a remedy, and rights to trial by jury.[20] The Illinois Supreme Court agrees.

When addressing the issue of damage caps, the court is presented with a clear dichotomy between constitutional law and common sense. Although it is well established that a constitutional analysis is superfluous if it is not required to enter a final judgment,[21] the court continues to unnecessarily assess damage caps from a constitutional perspective.[22] Furthermore, the constitutional argument so heavily relied upon by the court is flawed.[23] Even if a constitutional analysis is necessary to

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17. "The limitation applies irrespective of whether the court or jury otherwise would have found a larger amount to be appropriate under the facts of the particular case." *Best*, 689 N.E.2d at 1066.

18. STATUTORY CAPS ON COMPENSATORY DAMAGE AWARDS, 1-3 DAMAGES IN TORT ACTIONS (MB) § 3.06 (2010), *available at* LEXIS.

19. NATES, *supra* note 5.

20. STATUTORY CAPS ON COMPENSATORY DAMAGE AWARDS, *supra* note 18. Plaintiffs also argue that damage caps are fundamentally unfair because these statutes discriminate between slightly and severely injured plaintiffs. *See, e.g.*, *Best*, 689 N.E.2d at 1075, *and* Wright v. Cent. Du Page Hosp. Ass'n, 347 N.E.2d 736, 741 (Ill. 1976) (arguing that capping damage awards unreasonably discriminates against the most catastrophically injured victims because plaintiffs who suffer only minor injuries are unlikely to meet the monetary ceiling and therefore are not affected).

21. *Lebron*, 930 N.E.2d at 922 (Karmeier, J., dissenting) (citing People v. Waid, 851 N.E.2d 1210, 1215 (Ill. 2006)).

22. In *Lebron*, judgment may have been entered absent a constitutional analysis; the defendants could have ultimately prevailed on the merits, or the jury's award could have been less than the statutory cap. *Id.*

23. *See generally* Hans A. von Spakovsky, *A Case Study in Judicial*

determine these cases, damage caps can be defended with the same argument from which they are attacked—separation of powers.[24] Thus, when deciding damage cap constitutionality, the court should focus its attention on improving the current state of the health care system. In the last thirty-five years, however, the Illinois Supreme Court has been confronted with the above-mentioned dichotomy on three separate occasions. Each time the court has approached the issue from a constitutional perspective, and each time caps have failed.

### A. *A History of Medical Malpractice Caps in Illinois*

The state's first attempt at riding the national wave of tort reform came in 1975, when the General Assembly responded to the emerging[25] medical malpractice crisis by passing Public Act 79-960[26] (hereinafter "the Act"). Specifically, section four of the Act limited the maximum amount of compensatory damages recoverable by plaintiffs to $500,000 for injuries suffered as a result of medical negligence.[27] However, the Act was short-lived and was invalidated by *Wright v. Central Du Page Hospital Association* in 1976.[28] The court dismissed the defendants' argument that the cap represented "a reasonable response to a problem confronting the vast majority of the people of the State of Illinois[,]"[29] and held that the Act was arbitrary, thereby

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*Nullification: Medical Malpractice Reform in Illinois*, 52 THE HERITAGE FOUNDATION, Apr. 29, 2010, at 3-4, http://thf_media.s3.amazonaws.com/2010/pdf/lm_52.pdf (arguing that "[t]he separation of powers analysis is completely flawed because it fails to acknowledge the legislature's constitutional power to make, amend, alter, or abolish the tort laws of the state—including both the procedural and substantive law applying to malpractice claims against medical providers"). "This authority includes the power not only to change prior laws enacted by the legislature, but also to change judge-made law itself." *Id.*

24. *See Lebron* 930 N.E.2d at 920-21 (Karmeier, J., dissenting) (stating that while the majority opinion purports to defend separation of powers principles, it is the judiciary who is unduly invading the province of the legislature, not vice versa).

25. Thorpe, *supra* note 6. "By many accounts, the United States is in the midst of its third 'crisis' in medical malpractice. The medical malpractice 'crises' in the mid-1970s and 1980s occurred during times of rapid growth in insurance premiums. In the 1970s rising claims frequency and severity resulted in the exit of many malpractice carriers." *Id.* (citing R. Bovbjerg, Comment, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. DAVIS L. REV. 2 (1989)).

26. ILL. REV. STAT. 1975, ch. 70, ¶ 101, effective Nov. 11, 1975.

27. *Wright*, 347 N.E.2d at 741 (citing ILL. REV. STAT. 1975, ch. 70, ¶ 101). The Act did not apply to "any other cases." *Id.* at 738.

28. *See generally id.* (invalidating the Act on constitutional grounds of special legislation).

29. *Id.* at 739. Amici curiae, Illinois State Medical Society and Protective Medical Association of Illinois, filed a brief in support of this contention. *Id.*

constituting special legislation.[30]

Nearly twenty years after *Wright*, the Illinois legislature enacted Public Act 89-7, commonly referred to as the Civil Justice Reform Amendments of 1995.[31] Pursuant to Section 2-1115.1 of this Act (hereinafter "Section 2-1115.1"), noneconomic damages were limited to $500,000 in a variety of tort actions, including, *inter alia*, actions seeking damages on account of "death, bodily injury, or physical damage to property based on negligence, or product liability . . . ."[32] Furthermore, Section 2-1115.1 explicitly provided that it did not intend to create a "right" to recovery of noneconomic damages,[33] but was rather proposed to stabilize damage awards.[34]

Similar to the defendants in *Wright*, the defendants in *Best v. Taylor Machine Works* argued that Section 2-1115.1 was a valid reform measure, which was within the scope of the General Assembly's power to change and enforce the common law.[35] However, the court disagreed and struck down damage caps for a

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The section headed "Interest of the Amici Curiae: The Health Care Crisis" described the "rapid and disproportionate rise in malpractice claims and high dollar awards and settlements." *Id.*

30. *Id.* at 743. "The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination." ILL. CONST. art. IV, § 13.

31. 735 ILL. COMP. STAT. 5/2-1115.1 (1995).

32. *Id.* 5/2-1115.1(a).

33. *Id.* 5/2-1115.1(d).

34. *Best*, 689 N.E.2d at 1067. In an effort to not make the same mistake twice, the Illinois legislature was careful to document the key role of the statutory cap, which is reflected in the preamble to 2-1115.1. *Id.* The preamble outlines eighteen specific "findings" in addition to eight listed "purposes" based on those findings, which are presumed to illustrate legislative intent. *Id.* Some of the findings declare that:

> (1) limiting noneconomic damages will improve health care in rural Illinois, (2) more than 20 states limit noneconomic damages, (3) the cost of health care has decreased in those states, (4) noneconomic losses have no monetary dimension, and no objective criteria or jurisprudence exists for assessing or reviewing noneconomic damage awards, (5) such awards are highly erratic and depend on subjective preferences of the trier of fact, [and] (6) highly erratic noneconomic damages awards subvert the credibility of such awards and undercut the deterrent function of tort law[.]

*Id.* Furthermore, the following are some of the proffered purposes of section 2-1115.1: (1) "reduce the cost of health care and increase accessibility to health care"; (2) "promote consistency in awards"; (3) "reestablish the credibility of the civil justice system"; (4) "establish parameters or guidelines for noneconomic damages"; (5) "protect the economic health of the state by decreasing systemic costs"; and (6) "ensure the affordability of insurance." *Id.*

35. *Compare id.* at 1063, *with Wright*, 347 N.E.2d at 741. The defendants also contended that the statute had serious policy implications, and that its enforcement was necessary to regulate the state's economic health. *Best*, 689 N.E.2d at 1063.

second time. Although the court cited some of the same constitutional provisions at issue in *Wright*,[36] it also invalidated Section 2-1115.1 on the grounds that it violated separation of powers.[37] Specifically, while the court in *Best* acknowledged that the practice of ordering a remittitur of excessive damages has been historically recognized and accepted as part of Illinois law as a largely judicial function,[38] the court ultimately concluded that Section 2-1115.1 constituted a "legislative remittitur[,]" which invaded the deliberative process of the jury.[39] Therefore, the limits on noneconomic damages as set forth in *Best* were again struck down as violative of the Illinois Constitution.[40]

### *B. The Current State of Medical Malpractice Caps in Illinois*

In 2010, the Illinois legislature once again tried its hand at capping medical malpractice damages.[41] On its face, Section 101(4) of Public Act 94-677, commonly referred to as the Healing Art Malpractice Act of 2010,[42] looked promising. Pursuant to Section

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36. *Compare id.* at 1068, *with Wright*, 347 N.E.2d at 744. The court further explained that the statute constituted special legislation because it eliminated fairness and impartiality in the awarding of noneconomic damages, which benefited defendants by allowing them to "escape" liability for a portion of compensatory damages, while simultaneously prevented plaintiffs from recovering limitless awards. *Best*, 689 N.E.2d at 1076–81. The court determined that the appropriate standard by which special legislation should be reviewed was the rational basis test. *Id.* at 1071. Accordingly, the court needed to determine whether Section 2-1115.1 was "rationally related to a legitimate State interest[,]" which the court concluded it was not. *Id.* at 1071, 1081. Here, the Illinois Supreme Court agreed with the circuit court when the lower court vehemently opined that there was "no conceivable argument [that could] be made in good faith to suggest that arbitrarily limiting [compensatory] damages complies with the [Illinois Constitution]." *Id.* at 1068.

37. *Id.* at 1080. "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." ILL. CONST. art. II, § 1.

38. *Best*, 689 N.E.2d at 1079.

39. *Id.* at 1080.

40. *Id.* at 1081.

41. Press Release, Office of the Governor, Gov. Blagojevich Announces Major Reduction in Medical Malpractice Insurance Rates in Illinois (Oct. 13, 2006), *available at* http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=1&RecNum=5414. After signing the medical malpractice reform legislation, Illinois Governor, Rod Blagojevich, announced a "major reduction in medical malpractice insurance rates." *Id.* The Governor expounded:

> I signed the medical malpractice reform law to keep doctors in our state and make health care more accessible and more affordable. Just one year later, we are seeing dramatic results. New competition in the malpractice insurance market is resulting in lower premium rates, and it's making Illinois a state where doctors want to practice.

*Id.*

42. 735 ILL. COMP. STAT. 5/2-1706.5 (2010).

2-1706.5, noneconomic damages awarded in medical malpractice actions were capped at $1,000,000 for claims against hospitals and/or its personnel[43] and were capped at $500,000 for claims against physicians.[44] However, on February 4, 2010, the court in *Lebron v. Gottlieb Memorial Hospital* held medical malpractice caps unconstitutional for a third time.[45] As in *Best*, the court reasoned that the statute violated separation of powers,[46] and dismissed the defendants' argument contending that the statutory cap constituted a valid exercise of the Illinois General Assembly's police power to respond to a public threat.[47] Although the court in *Lebron* conceded that the legislative purpose[48] or goal of a statute is not irrelevant to a separation of powers analysis, the court noted that it is not the primary consideration in adjudicating the matter either.[49]

Interestingly, the *Lebron* decision drew perhaps the most vehement dissent of all three cases. Among the dissent's criticisms is that the court "rush[ed] to address the constitutionality of Public Act 94-677; that [the court] only 'purport[s]' to defend the constitution; and that [the court] stand[s] as an 'obstacle'[50] to the

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43. *Id.* 5/2-1706.5(a)(1).

44. *Id.* 5/2-1706.5(a)(2). Note that the $500,000 damage limitation applies not only to physicians individually, but also the physician's business or corporate entity and medical personnel or other health care professionals. *Id.*

45. *Lebron*, 930 N.E.2d 895. The American Medical Association and Illinois State Medical Society jointly filed an amicus curiae brief supporting defendants. Brief of Am. Med. Ass'n & Illinois State Med. Soc'y, Amicus Curiae Supporting Appellants, *Lebron*, 930 N.E.2d 895 (No. 06 L 12109), 2008 WL 7890609. When the court ruled, the Illinois Medical Society said, "it was a huge blow, because the law expanded patient access to care and helped curb frivolous lawsuits." *Fighting to Protect Tort Reform Laws*, AMERICAN MEDICAL NEWS (Mar. 1, 2010), http://www.ama-assn.org/amednews/2010/03/01/edsa0301.htm. The AMA said that the decision "threatened to undo everything that patients and doctors in Illinois got under the cap, including increased competition among medical liability insurers, lower medical liability premium rates and greater access to care." *Id.*

46. ILL. CONST. art. II, § 1.

47. *Lebron*, 930 N.E.2d at 903.

48. *Id.* at 911. In *Lebron*, the Attorney General, acting as an amicus for defendants, opined that section 2-1706.5 constituted an equitable means of ensuring that all who stand to benefit from a resolution of the health care crisis also contribute to its resolution. *Id.* at 909.

49. *See id.* at 912 (stating that the crux of the court's separation of powers analysis "is whether the statute unduly infringes upon the inherent power of the judiciary," and that regardless of whether the statutory language *intended* that infringement is irrelevant).

50. The Amici on behalf of defendants agreed, stating, "Legislatures must be free to make judgments balancing competing interests to serve [the] public good." Brief for Ill. Hosp. Ass'n et al. as Amicus Curiae Supporting Appellants, *supra* note 7, at *6. The Amici also noted that *nothing* in the Illinois Constitution states that the ability of plaintiffs to recover noneconomic

legislature's efforts to find an answer to the health-care crisis, 'put[ting] at risk the welfare of the people.'"[51]

Thus, the current state of Illinois law is that caps on noneconomic damage awards in medical malpractice actions are unconstitutional. The future of Illinois law has yet to be determined, however, because the statutes at issue in *Wright*, *Best*, and *Lebron*, are highly distinguishable. Each time caps fail, the Illinois legislature responds by amending the language of the statute. It appears as though the General Assembly is applying the age-old technique of trial and error, and may be inching closer to getting the statutory language "just right."

## III. THE QUEST FOR "JUST RIGHT" REFORM

### A. *The Struggle with Statutory Language*

As the court and the legislature continued to debate the idea of damage cap constitutionality, it was clear that the General Assembly was making strides. By the time of the *Lebron* decision in 2010, considerable attempts had been made to adopt statutory language that best served the interests of all parties involved.[52]

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damages supersedes the General Assembly's right "to address the serious and growing impact of such recoveries on access to health care in Illinois." *Id.*

51. *Lebron*, 930 N.E.2d at 915. The *Lebron* dissent also referenced an address by President Obama to a joint session of the United States Congress in which the President expressed the following disapprobation:

> Our collective failure to meet this challenge [of health care reform]—year after year, decade after decade—has led us to the breaking point. . . . Our deficit will grow. More families will go bankrupt. More businesses will close. More Americans will lose their coverage when they are sick and need it the most. And more will die as a result. We know these things to be true.

*Id.* at 917 (Karmeier, J., dissenting); Press Release, The White House, Remarks by the President to a Joint Session of Congress on Health Care (Sept. 9, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care. To that point, former President George W. Bush also addressed the medical liability crisis, specifically in Illinois, in January 2005. President Bush stated:

> Many of the costs that we're talking about don't start in an examining room or an operating room. They start in a courtroom. What's happening . . . is that lawyers are filing baseless suits against hospitals and doctors. That's just a plain fact. And they're doing it for a simple reason. They know the medical liability system is tilted in their favor. Jury awards . . . have skyrocketed in recent years. That means every claim filed by a personal injury lawyer brings the chance of a huge payoff . . . . Juries hand out big awards that drive up insurance rates and doctors are forced to move or close their practice.

*Illinois Medical Malpractice Insurance*, *supra* note 5; Edward J. Kionka, Article, *Things to Do (or Not) To Address the Medical Malpractice Insurance Problem*, 26 N. ILL. U. L. REV. 469, 471 (2006).

52. According to the dissent in *Lebron*, the Illinois legislature has "wide regulatory power" in matters pertaining to health care as well as discretion "to

For example, the Illinois legislature presumably recognized that the statute invalidated by *Wright*, albeit narrow in scope, had far too broad an effect. Pursuant to the Act, in actions arising from medical, hospital, or other healing art malpractice, both noneconomic and economic damages were capped at $500,000.[53] Although the Act applied exclusively to actions arising from medical negligence, it ultimately limited not only a plaintiff's recovery of noneconomic losses but also tangible damages.[54] Therefore, in cases concerning the most catastrophically injured, the Act may have prevented full recovery of a plaintiff's clearly ascertainable medical expenses.[55]

Consider again the first hypothetical involving the patient with a drug allergy.[56] This scenario would have triggered the Act because the plaintiff's cause of action arises from medical negligence. Assuming that the plaintiff could establish a prima facie case for medical negligence, in this instance application of the Act may have resulted in a grave injustice—the plaintiff may not have been able to recover the cost of the care and treatment she received, which would not have been required but for the defendants' negligence. Thus, the court was correct in its holding in *Wright*—the Act had too broad an effect.

The Illinois legislature presumably intended to ameliorate the extensive reach of the Act when it promulgated Section 2-1115.1 nearly twenty years later. Contrary to the Act, Section 2-1115.1 capped noneconomic damage awards only; however, the statute was no longer limited to claims arising solely from medical negligence.[57] Instead, the scope of Section 2-1115.1 regulated a myriad of tort actions such as wrongful death, property conversion, and products liability.[58] Thus, the scope and effect accomplished by

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determine not only what the public interest and welfare require, but to determine the measures needed to secure such interest." *Lebron*, 930 N.E.2d at 919-20 (Karmeier, J., dissenting) (citing Burger v. Lutheran Gen. Hosp., 759 N.E.2d 533, 546 (Ill. 2001) (quoting Chi. Nat'l League Ball Club, Inc. v. Thompson, 483 N.E.2d 1245, 1248 (Ill. 1985))).

53. ILL. REV. STAT. 1975, ch. 70, ¶ 101.

54. *See Wright*, 347 N.E.2d at 746 (explaining that a stronger argument favoring caps would exist if the statute permitted unrestrictive recovery of economic damages, including expenses for treatment and care for seriously and permanently injured persons).

55. *See Best*, 689 N.E.2d at 1110 (citing Anderson v. Wagner, 402 N.E.2d 560, 564 (1979)) (warning against the broad reading of the statutory provision at issue in *Wright*). *See also Wright*, 347 N.E.2d at 742 (explaining that because of the statutory language, a plaintiff might be unable to recover all of the tangible medical expenses she might incur, in which case she would recover nothing for any other loss suffered).

56. *See supra* Part I (suggesting a potential cause of action for medical liability).

57. 735 ILL. COMP. STAT. 5/2-1115.1 (1995).

58. *Id.*

Section 2-1115.1 was diametrically opposed to those that emerged under the Act. The Illinois legislature had gone too far. Although the effect of Section 2-1115.1 was successfully narrowed to cap only noneconomic damage awards, the scope of the statute became too broad.

The second hypothetical regarding the badly burned employee[59] is best understood in the context of Section 2-1115.1. Here, the plaintiff's claim arises from a products liability action, yet despite seriously debilitating and disfiguring injuries, the plaintiff would be subject to a noneconomic damage cap under Section 2-1115.1. Considering that one of the policy concerns driving statutory codification of noneconomic damage awards is the underlying health care crisis in Illinois and greater United States, there is certainly a less compelling reason to uphold award limitations in cases that do not implicate the future of the health care system. Therefore, the court was once again correct when it invalidated Section 2-1115.1 in *Best*.

Subsequent to *Best*, the General Assembly drafted Section 2-1706.5 anticipating that it may finally be just right. Section 2-1706.5 reverted its statutory language to reflect that used in the Act, which narrowed the scope of Section 2-1706.5 to causes of action arising exclusively from medical malpractice, rather than personal injury actions in general.[60] In addition, Section 2-1706.5 also reflected the narrow effect exhibited in Section 2-1115.1 in that it capped only noneconomic damage awards.[61] What is more, the legislature was exceedingly cerebral in its decision to bifurcate the monetary cap applied to noneconomic damages according to the defendants to the litigation. For the first time in Illinois history, Section 2-1706.5 dictated that noneconomic damages be capped at $1 million for causes of action arising from medical malpractice against a hospital and/or its personnel, and $500,000 for similar causes of action against physicians.[62]

In the third hypothetical, liability is less clear compared to the former two scenarios. Here, the patient was receiving treatment necessary to combat a terminal diagnosis.[63] This hypothetical illustrates the application of Section 2-1706.5. In this case, the plaintiff's claim arises from a medical malpractice action and the statute indicates that only noneconomic damages will be subject to the cap. Absent gross negligence on the part of the operating physician, the question remains as to whether the

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59. *See supra* Part I (suggesting a potential cause of action for general tort liability).

60. 735 ILL. COMP. STAT. 5/2-1706.5 (2010).

61. *Id.*

62. *Id.*

63. *See supra* Part I (suggesting a potential cause of action for medical liability where possible damages are less certain).

plaintiff's noneconomic loss should be compensated in excess of the statutory maximum. This is especially significant when these noneconomic damage awards, in the aggregate, are likely to result in further detriment to the remainder of state and national health care systems. A decision, as in *Lebron*, to invalidate damage caps of this nature also unearths issues concerning Americans' distorted perceptions regarding the infallibility of the practice of medicine, and pressures experienced by physicians to implement defensive medicine strategies.[64] Therefore, the court's decision to invalidate noneconomic damage caps as set forth in Section 2-1706.5 is unsupported by the facts driving the current health care crisis. It was not until the most recent decision in *Lebron* that the Illinois Supreme Court seemingly got it wrong.

### *B. Follow the Leader?*

Interestingly, in his majority opinion in *Lebron*, Chief Justice Fitzgerald raucously rejected the defendants' contention asserting that the noneconomic damage caps then effectuated in Illinois paralleled similar provisions currently upheld in several other states.[65] The Chief Justice went on to say, "[t]hat 'everybody is

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64. "Defensive medicine" refers to a type of medical practice in which physicians and other health care personnel order or perform more tests than medically necessary in order to reduce exposure to lawsuits. RICHARD E. SHANDELL & PATRICIA SMITH (updated by Fredrick A. Schulman), THE PREPARATION AND TRIAL OF MEDICAL MALPRACTICE CASES § 2.02(1) (Law Journal Press 2009). As multimillion-dollar jury awards have become more commonplace in recent years, problems concerning defensive medicine have reached crisis proportions. U.S. DEP'T OF HEALTH AND HUMAN SERV., CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM 1 (July 24, 2002), http://aspe.hhs.gov/daltcp/reports/litrefm.pdf. Defensive medicine practices contribute to the health care crisis by increasing health insurance premiums. SHANDELL & SMITH, *supra*. In his speech to the AMA in June 2009, even President Obama was compelled to address the overwhelming consensus among physicians that defensive medicine practices protect them from future lawsuits. Peter Orszag, *Malpractice Methodology*, N.Y. TIMES, Oct. 20, 2010, http://www.nytimes.com/2010/10/21/opinion/21orszag.html. According to a 2002 survey, a staggering seventy-six percent of physicians are concerned that malpractice litigation has hurt their ability to provide quality care to patients. U.S. DEP'T OF HEALTH AND HUMAN SERV., *supra*, at 4. Due to the fear of litigation, seventy-nine percent of physicians surveyed said that they ordered more tests than were medically necessary, and ninety-one percent noticed their colleagues doing the same. *Id.* Moreover, seventy-four percent unnecessarily referred patients to outside specialists, fifty-one percent recommended unwarranted invasive procedures to confirm diagnoses, and forty-one percent said that they prescribed more medications, such as antibiotics, than required. *Id.* at 5.

65. *See generally* CAL. CIV. CODE § 3333.2 (West 2010) (capping noneconomic damages at $250,000); IDAHO CODE ANN. § 6-1603 (West 2010) (adjusting $250,000 cap annually based on average wages); KAN. STAT. ANN. § 60-1903 (West 2010) (capping noneconomic damages at $250,000); MD. CODE

doing it' is hardly a litmus test for the constitutionality of the statute."[66] Yet, this statement flies in the face of the "laboratories of democracy" argument widely recognized by courts today.[67] Although this argument may be insufficient to survive a constitutional analysis,[68] if it is considered in light of underlying state concerns regarding the health care crisis, rather than from a strictly constitutional perspective, it may prove to hold some weight.[69]

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ANN. CTS. & JUD. PROC. § 11-108 (West 2010) (capping noneconomic damages at $500,000); MICH. COMP. LAWS ANN. § 600.1483 (West 2010) (capping noneconomic damages at $500,000); MO. ANN. STAT. § 538.210 (West 2010) (capping noneconomic damage awards at $350,000); MONT. CODE ANN. § 25-9-411 (West 2010) (capping noneconomic damages at $250,000); N.D. CENT. CODE ANN. § 32-42-02 (West 2010) (capping noneconomic damages at $500,000); S.D. CODIFIED LAWS § 21-3-11 (West 2010) (capping noneconomic damages at $500,000); UTAH CODE ANN. § 78B-3-410 (West 2010) (capping noneconomic damage awards at $450,000); W. VA. CODE ANN. § 55-7B-8 (West 2010) (capping noneconomic damages at $500,000, which was subsequently increased to $1 million in 2003); WISC. STAT. ANN. §§ 893.55 and 895.04 (West 2010) (capping noneconomic damages at $350,000, which is indexed for inflation). In addition, some states cap the total amount of damages awarded, opposed to just noneconomic damages. IND. CODE ANN. § 34-18-14-3 (West 2010) (limiting defendants' liability to $250,000 per practitioner per incident and limiting total damages being paid from patient compensation funds to $1,250,000); LA. REV. STAT. ANN. § 40:1299.42 (West 2010) (limiting total damage cap to $500,000 exclusive of interest, costs, and future medical expenses); NEB. REV. STAT. § 44-2825 (2010) (enforcing caps on total damages that range from $500,000 to $1.75 million depending on when the cause of action accrued); VA. CODE ANN. § 8.01-581.15 (West 2010) (capping total damage awards at $2.05 million for 2012).

66. *Lebron*, 930 N.E.2d at 914. Interestingly, this is the exact argument that the Alabama Supreme Court made when it held noneconomic damage caps to be unconstitutional in that state. Moore v. Mobile Infirmary Ass'n, 592 So.2d 156, 158 (Ala. 1991). The court proffered evidence that its disposition of the case was "facilitated by reference" to case law that had previously "evolved from constitutional challenges brought in the highest courts of other states to statutes imposing damages 'caps' of various types." *Id.* The court went on to state that it appeared that "the majority of courts reviewing challenges under the constitutions of their respective states have invalidated limitations on damages." *Id.*

67. For example, in a 1992 class action lawsuit involving toxic chemical exposure, the Texas Supreme Court eloquently explained, "[j]ust as *other states may rely* on unique Texas law developed independently by the legislature and judiciary of this state, this court has a growing responsibility as one of fifty laboratories of democracy to assist the federal courts in shaping the fundamental constitutional fabric of our country." Davenport v. Garcia, 834 S.W.2d 4, 18 (Tex. 1992) (emphasis added).

68. Chief Justice Fitzgerald emphasized that compensatory damage caps enforced by other states are highly variable, both in the maximum amount of noneconomic damages recoverable and statutory specifics. *Lebron*, 930 N.E.2d at 913. He went on to state that it is not for the court to pontificate whether other states' legislation is ultimately reasonable or not. *Id.* at 914.

69. For example, in the twenty-five years subsequent to California's implementation of medical malpractice damage caps in 1972, California's

For example, Florida courts have consistently held that the state statute capping noneconomic damages arising from medical malpractice actions is valid.[70] This statute is exceedingly specific and contains numerous caveats affecting a plaintiff's recovery.[71] Read as a whole, these qualifications evidence the Florida legislature's attempt to encourage tort reform, not prejudice vulnerable plaintiffs.[72] In 2009, the United States District Court for the Northern District of Florida considered for the first time a plaintiff's contention that the statute violated the Florida Constitution.[73] Although the court engaged in a detailed

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malpractice insurance premiums rose less than any other state in the nation—167 percent compared to 505 percent! *The Medical Liability Crisis and Its Impact on Patient Care: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 4 (2003) (statement of Hon. Orrin G. Hatch, U.S. Senator from the State of Utah).

70. FLA. STAT. § 766.118 (2010).

71. According to the Florida statute, noneconomic damage awards are capped at $500,000 against practitioners and $750,000 against non-practitioners. *Id.* The statute defines practitioners as both licensed health care personnel and associations, corporations, firms, partnerships or other business entities that employ medical practitioners. *Id.* Furthermore, it increases noneconomic damage caps to $1 million against practitioners and $1.5 million for non-practitioners in wrongful death actions or when the patient is left in a permanently vegetative state as a result of medical malpractice. *Id.* In the event that the plaintiff's claim neither arises from a wrongful death action nor renders the patient in a vegetative state, the Florida statute still leaves to the courts' discretion the potential to increase caps to $1 million or $1.5 million, respectively, in cases of the most catastrophically injured plaintiffs or where "manifest injustice" would result based on the severity of the plaintiff's noneconomic harm. *Id.* The statute defines "catastrophic injury" as a permanent impairment such as spinal cord injuries resulting in paralysis, amputations that render the affected appendage inoperable, severe brain or closed-head injuries which result in sensory, motor, communication, or other cerebral disturbances or neurological disorders, second- or third-degree burns of twenty-five percent or more of one's total body surface or third-degree burns of five percent or more to one's face and hands, complete loss of vision, or loss of reproductive ability. *Id.* Concerning "manifest injustice," the statute considers the special circumstances of the case and whether the noneconomic harm suffered by the injured party was particularly severe. *Id.* Moreover, the Florida statute also caps noneconomic damage awards correlated with injuries sustained during the administration of emergency medical care (i.e. services that are rendered in the time period before the patient is stabilized and capable of receiving nonemergency care). *Id.* Lastly, the Florida statute also specifies the amount of noneconomic damages that may be awarded in binding arbitration. *Id.*

72. According to a 2007 statistic, Florida's malpractice insurance premiums were among the highest in the nation, surpassing California, New York, Pennsylvania, and Illinois. Colin Gray, *The Medical Liability Crisis*, 2 UNIV. OF KY. GATTON COLL. OF BUS. & ECON. STUDENT RESEARCH PUBL'N 1, 5 (2010), http://gatton.uky.edu/GSRP/Downloads/Issues/Spring2010/The%20Medical%20Liability%20Crisis.pdf.

73. Estate of McCall v. United States, 663 F. Supp. 2d 1276, 1276 (N.D. Fla. 2009). No Florida Supreme Court or appellate court decision had yet

constitutional analysis, it declined to apply the textual approach used by the Illinois Supreme Court in *Wright*, *Best*, and *Lebron*. Rather, the Florida court incorporated common sense into its constitutional analysis and considered the underlying health care crisis.[74] Not surprisingly, the court concluded that noneconomic damage caps in medical malpractice actions were valid.[75]

In this seminal case, the plaintiffs, who were the representatives of the deceased claimant, argued, among other things, that damage caps infringed upon the claimant's constitutional right to fair compensation,[76] equal protection,[77] and separation of powers.[78] The Florida court rejected the plaintiffs' fair compensation argument after undertaking a common-sense reading of the constitutional right claimed.[79] The court also rejected the equal protection argument on the grounds that, despite its disparate effect, the statute differentiated claims on the basis of each malpractice incident, which ultimately served a rational and legitimate governmental purpose.[80] Finally, the court briefly dismissed the plaintiffs' separation of powers argument since the statute was not outcome determinative.[81]

Similar to Florida's legislation, Oklahoma's legislation capping damage awards in medical malpractice actions also includes conditions for which caps may or may not apply. For example, Oklahoma caps noneconomic damages at $250,000 for all medical malpractice actions arising from both obstetric and emergency care services, but the cap does not apply to wrongful death actions.[82] In addition, the legislation provides that the

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addressed these questions. *Id.* at 1297.

74. *Id.* at 1298.

75. *See generally id.* (upholding noneconomic damage cap awards).

76. FLA. CONST. art. I, § 26. In this case, the plaintiffs argued that since this provision stipulates that they can receive specified percentages of all damages awarded to them, any cap on potential damage awards is unconstitutional. *McCall*, 663 F. Supp. 2d at 1297.

77. U.S. CONST. amend. XIV; FLA. CONST. art. I, § 2.

78. FLA. CONST. art. II, § 3.

79. *McCall*, 663 F. Supp. 2d at 1298. The court reasoned that the plain and ordinary meaning of the right as written and intended by the framers did not conclusively define what damages were, in fact, recoverable. *Id.* The court declined to follow a previous trial court decision that struck damage caps on constitutional grounds since the trial court did not consider the constitutional provision in its entirety. *Id.* (citing Cavanaugh v. Cardiology Assoc. of Orlando, P.A., No. 06-CA-3814, 2007 WL 5844414 (Fla. 9th Jud. Cir. Oct. 30, 2007)).

80. *Id.* at 1303-04. The court reasoned that Section 766.118 was neither arbitrary nor unreasonable because its rational and legitimate purpose was to enhance the predictability of excessive noneconomic damage awards, thereby increasing the affordability and availability of medical liability insurance among health care professionals. *Id.* at 1304.

81. *Id.* at 1306–07.

82. H.R. 1774, 53d Leg., 1st Reg. Sess. (Okla. 2011). This legislation

noneconomic damage cap may be lifted if the action arises from either of the abovementioned health care services where the judge finds by clear and convincing evidence that the defendant committed the alleged negligence.[83] This is similar to the South Carolina statute, which does not apply damage caps in cases where the defendant is found to be grossly negligent.[84] Interestingly, since its initial enactment in 2003, the constitutionality of Oklahoma's legislation has not yet been challenged.

Unfortunately, not all states have been able to evade constitutional evaluation of noneconomic damage caps by the courts. Illinois is just one of many states that have passed damage award limitations in medical malpractice actions and since declared them unconstitutional.[85] Similar to the Illinois Supreme Court, the highest courts of these states have reasoned that noneconomic damage awards violate state constitutional provisions concerning equal protection, due process, separation of powers, and right to trial by jury.[86] However, this approach is rather myopic considering underlying concerns regarding the health care crisis and statistical data suggesting that capping damage awards does, in fact, lower malpractice insurance premiums as well as reduce average malpractice costs per patient.[87]

It has yet to be determined whether the statutory caps at

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amends the cap from $300,000 to $250,000 in obstetric and emergency care services. In all other medical negligence actions the cap on noneconomic damages is set at $300,000.

83. *Id.* The statute's use of the clear and convincing evidence language raises the standard of proof from the traditional preponderance of the evidence standard, thereby making it more difficult to raise the damage cap. VICKI LAWRENCE MACDOUGALL, 8 OKLA. PRACTICE SERIES § 12:16 (8th ed. 2012).

84. S.C. STAT. § 15-32-220(E) (2011).

85. ALA. CODE § 6-5-544 (1993), *invalidated by Moore*, 592 So.2d 156; GA. CODE ANN. § 51-13-1 (2005), *invalidated by* Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010); N.H. REV. STAT. ANN. § 508:4-d (1986), *invalidated by* Brannigan v. Usitalo, 134 N.H. 50 (N.H. 1991); and TEX. REV. CIV. STAT. ANN. Art. 4590i, §§ 11.02 and 11.03 (West 2010), *invalidated by* Lucas v. United States, 757 S.W.2d 687 (Tex. 1988).

86. *Moore*, 592 So.2d at 164, 170 (arguing right to trial by jury and equal protection); *Nestlehutt*, 691 S.E.2d at 220 (arguing right to a jury trial, separation of powers, and equal protection); *Brannigan*, 134 N.H. at 52 (arguing equal protection, due process, and the right to trial by jury); and *Lucas*, 757 S.W.2d at 691 (arguing that the noneconomic damage caps were unreasonable and arbitrary considering constitutional protections).

87. Charles R. Ellington et al., *State Tort Reforms and Hospital Malpractice Costs*, 38 J.L. MED. & ETHICS 127, 130 (2010). The average malpractice premium in states with no malpractice damage caps was $4158, compared to $3186 in those states with some form of cap. *Id.* Further, the average malpractice cost per patient was $5868 in states without malpractice damage caps versus only $4558 in those states enforcing caps. *Id.*

work in Florida, Oklahoma, South Carolina, and those states adopting similar provisions will conclusively reduce health care premiums and increase the overall quality of patient care. Since caps such as these apply only in limited circumstances, the statutory language may prove to be too specific and narrow to render significant results. However, it is now within the purview of the Illinois legislature to once again modify the Illinois statute concerning medical malpractice damage caps.

## IV. THE FUTURE OF MEDICAL MALPRACTICE DAMAGE CAPS IN ILLINOIS – FACT OR FICTION?

Although it may be some time before the Illinois General Assembly drafts the statutory language "just right," it is certain never to achieve this goal if the Illinois Supreme Court continues to analyze this issue from a purely constitutional perspective.[88] In addition, the statutory language should be redrafted to reflect differing legal standards of ordinary negligence and willful and wanton conduct. This would help to distinguish undesirable medical outcomes from bona fide negligence claims, thereby capping noneconomic damage awards where liability is less clear. Lastly, the legislature should specify circumstances in which these caps may not apply. This would better serve the interests of the most catastrophically injured plaintiffs while simultaneously protecting medical practitioners from frivolous lawsuits[89] and outrageous damage awards.[90]

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88. Proponents of noneconomic damage caps, such as State Senator Dave Luechefeld, have recently proposed a constitutional amendment (Senate Joint Resolution Constitutional Amendment 103) that would afford the necessary protection for any future malpractice laws passed by the Illinois legislature. S. 103, 96th Gen. Assemb., Reg. Sess. (Ill. 2010). The proposed amendment would add a new section to Article 4 of the Illinois Constitution, which would assist the legislature in preventing future judicial decisions from overturning noneconomic damage caps passed by the majority of the general assembly. *Id.*

89. *Medical Liability Crisis Fact Sheet*, *supra* note 4. Of the lawsuits analyzed, many lacked evidence that a medical error was even committed, yet the costs incurred to defend these suits averaged approximately $60,000. *Id.* Moreover, the individual practitioners named in these lawsuits were forced to take time off from work in order to defend themselves at trials and other legal proceedings, the majority of which were dismissed with no payouts to the plaintiff. *Id.*

90. *See* U.S. DEP'T OF HEALTH AND HUMAN SERV., *supra* note 64, at 9–10 (stating that the number of mega-verdicts has been steadily increasing). As expected, the most outrageous verdict awards have occurred in those states that do not have limitations on noneconomic damage awards arising from medical malpractice actions. *Id.* For example, in 2002 a Mississippi jury rendered a verdict of $100,000,000. *Id.* Similarly, the largest personal injury verdict in the state of Illinois, $127,000,000, also arose from a medical malpractice action. *Verdicts & Settlements*, GOLDBERG & GOLDBERG, http://www.chicagomedicalmalpracticefirm.com/lawyer-attorney-1410036.html (last visited Mar. 31, 2012).

### *A. Judicial Interpretation*

As the late United States Supreme Court Justice Frankfurter suggested, the law should be read with "the saving grace of common sense."[91] As an avid proponent of judicial restraint, Justice Frankfurter opposed constitutional interpretation that impeded the powers of the legislative and executive branches.[92] Here, the Illinois Supreme Court has adopted the opposite approach, interpreting the statute only in ways that silence the voice of the legislature[93] and allow common sense to fall by the wayside. If the court were to take a different approach, medical malpractice damage caps could potentially survive.

Common sense lends itself directly to the consideration of larger issues concerning the medical liability crisis,[94] its effect on physician availability within the state,[95] and the overall cost and quality of treatment rendered.[96] These considerations, no doubt, satisfy the reasonable basis standard set forth in *Best*,[97] and

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91. Bell v. United States, 349 U.S. 81, 83 (1955).

92. *See generally* JEFFREY D. HOCKETT, NEW DEAL JUSTICE 169 (Gary J. Jacobsohn et al. eds., 1996) (discussing Justice Frankfurter's notion of passive jurisprudence, wherein he advocated against judicial intrusion into the legislative and executive branches).

93. *But see* ILL. CONST. art. II, §1 (stating that no branch shall exercise powers properly belonging to another).

94. *See* Thorpe, *supra* note 6 (discussing the most recent medical malpractice crisis). *See also* U.S. DEP'T OF HEALTH AND HUMAN SERV., *supra* note 64, at 1 (same); *Medical Liability Crisis Fact Sheet, supra* note 4 (same); Gray, *supra* note 72, at 2 (same); and *Wright*, 347 N.E.2d at 746 (citing Marcus Plant, *The Medical Malpractice "Crisis"*, 20 L. QUADRANGLE NOTES, UNIV. OF MICH. L. SCHOOL 2, 13) (suggesting that the consistent increase in multimillion-dollar jury awards has led medical liability issues to attain crisis proportions).

95. *See* Mellen and Powers, *supra* note 7 (reporting a decrease in physician availability due to rising insurance rates, which cause physicians to flee the state of Illinois).

96. *See Illinois Medical Malpractice Insurance, supra* note 5 (discussing the economic loss of losing Illinois physicians to other states where medical liability premiums are not as high). *See also* sources cited *supra* note 64 (suggesting that the overall quality of medical care has declined due to defensive medicine practices) *and* Lindsey Tanner, *9 in 10 Docs Blame Lawsuit Fears For Overtesting*, MSNBC.COM (June 28, 2010), http://www.msnbc.msn.com/id/37982567/ (discussing how defensive medicine is estimated to cost the U.S. billions of dollars each year) *and Medical Liability Crisis Fact Sheet, supra* note 4 (reporting that many on-call physicians no longer care for emergency patients or refuse to perform high-risk procedures due to their perpetual fear of litigation).

97. *Best*, 689 N.E.2d at 1069. The *Best* court stated that legislative classifications that discriminate in favor of a select group (i.e. hospitals and physicians) are prohibited unless there is a reasonable basis for the difference in treatment. *Id.* at 1070. However, the dissent argued that noneconomic damage caps were reasonably related to individuals' interests in compensation for their injuries and the public's interest in reducing the costs of the tort system. *Id.* at 1108 (Miller, J., dissenting).

provide reasons why noneconomic damage caps should be upheld.[98] If the court continues to analyze this issue from a purely constitutional perspective, medical malpractice damage caps will not survive, and the health care crisis in Illinois will continue to be exacerbated. If, however, the court decides that the health care crisis is worthy of legislative intervention and caps are upheld as constitutional, then perhaps Illinois physicians could reduce spending and improve the quality of patient care for all.

### *B. Legal Standards*

Ordinary negligence claims arise when the standard of reasonable care has been breached, whereas willful and wanton actions arise from conscious, voluntary acts or omissions in reckless disregard of the consequences affecting the life or property of another.[99] Because intent is not a necessary element to establish a cause of action for ordinary negligence, many health care providers are sued under this theory of liability. However, future legislation regarding noneconomic damage cap awards in medical malpractice actions should be drafted to reflect differences between ordinary and gross negligence. It is necessary to distinguish this difference because not only do medical errors occur, they are inevitable.[100]

Thus, it should follow that plaintiffs' claims can be exempt from the statutory damage cap only if they demonstrate gross negligence in their treatments. This would likely reduce the number of lawsuits filed under the guise of negligence that are brought by disgruntled plaintiffs dissatisfied with treatment outcomes. Furthermore, potential plaintiffs would not suffer grave injustices as a result of this legislative modification because they would still recover—their recovery would be limited only if the

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98. Although a Constitutional amendment has recently been proposed, this may not be necessary. *See* S. 103, 96th Gen. Assemb., Reg. Sess. (Ill. 2010) (explaining that the amendment is designed to prevent the Illinois judiciary from overturning noneconomic damage caps successfully passed by the legislature). If the Court simply applied common sense opposed to emphasizing the separation of powers argument as set forth in *Lebron*, then it would be able to interpret the statute as being rationally related to its legislative purpose. *Lebron*, 930 N.E.2d at 911. The legislative purpose or goal of a statute is relevant even in a separation of powers analysis. *Id.*

99. DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 287 (5th ed. 2005).

100. Samuel Gorovitz & Alasdair MacIntyre, *Toward a Theory of Medical Fallibility*, 1 J. MED. AND PHILOSOPHY 51, 51 (1976). Due to a patient's undeniable fear of physician error, patients generally tend to deny that the medical practice is fallible. *Id.* This has resulted in an incessant conflict between medicine and the law regarding the extent to which medical error is avoidable, when it is culpable, and what relationship it should bear to compensation for harm. *Id.*

damages sought exceeded the ultimate cap and either (1) the alleged conduct was not willful or wanton; or (2) the plaintiff did not fall within any other exceptions outlined in the statute.

### *C. Circumstances that Necessitate Exceptions*

If upheld, there are unique circumstances in which noneconomic damage caps should and should not be enforceable. There are some instances in which plaintiffs should be able to recover damages in excess of the statutory maximum due to the nature and extent of their injuries. Conversely, the medical profession itself naturally gives rise to a variety of situations where noneconomic damages should be mandatorily capped, consistent with the statute. These exceptions would serve to strike a balance for recoverable damages between potential plaintiffs and defendants.

Concerning plaintiffs, the statutory language should be rewritten to exempt from medical malpractice damage caps cases that result in the most severe permanent physical impairments. For example, in wrongful death actions or cases where the treatment rendered results in catastrophic injury,[101] caps should not apply provided it can be proven that the injury suffered is causally related to medical negligence. Although Florida has implemented a similar provision, note that the Florida statute provides for countless exceptions that result not in the cap being entirely lifted, but merely increased. Illinois should provide for fewer exceptions than Florida, but where these exceptions are met, Illinois should lift the cap entirely. Therefore, the statute would truly cater to the most catastrophically injured plaintiffs.

Although not all catastrophic injuries are tangible, it would not be prudent for Illinois to adopt a "manifest injustice" provision similar to that set forth in Florida's legislation.[102] This is because the "manifest injustice" standard is inherently subjective and would only further complicate an already overly complex problem.[103] Furthermore, too many exceptions may ultimately undermine the statute's constitutionality.

Regarding defendants, noneconomic damage caps should be

101. Similar to the Florida statute, the statutory language should define "catastrophic injury" as those injuries resulting in quadriplegia, paraplegia, certain types of disfigurement, or where the patient is left in a permanently vegetative state or is otherwise largely incapacitated. FLA. STAT. § 766.118 (2010).

102. *Id.* The Florida statute leaves to the courts' discretion the potential to increase caps in cases where a "manifest injustice" would result based on the severity of the plaintiff's noneconomic harm. *Id.*

103. Theoretically, this provision would not resist the effects of the health care crisis because practically all plaintiffs' attorneys could argue that the noneconomic harm suffered by their clients was particularly severe, thereby resulting in a "manifest injustice." *Id.*

mandatorily enforced when the injury is correlated to emergency medical care.[104] In addition, caps should apply to all causes of action arising from unnecessary medical treatment, such as cosmetic surgery, provided the conduct was not willful or wanton. There must be some accommodation for the fallibility of medicine.[105]

## V. CONCLUSION

The brunt of the health care crisis is borne by all Illinois citizens alike, regardless of whether one favors or opposes tort reform legislation. The statutes at issue in *Wright*, *Best*, and *Lebron* were not intended to discriminate against the most catastrophically injured plaintiffs. Rather, noneconomic damage awards have been capped in medical malpractice actions in an effort to reduce medical liability premiums and improve the quality of medical care for all.[106] In light of this legitimate purpose, the Illinois Supreme Court should cease to consider future statutory modifications from a purely constitutional perspective. Should the court fail to do so, noneconomic damage caps will continue to be invalidated in this state. Although the quest for "just right" reform has proved to be very difficult, it will not get any easier going forward. Here's hoping that when the General Assembly finally does get it right, the court will recognize these efforts and respond accordingly.

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104. This reflects the view that a lower degree of care is applicable in emergency situations. Dobbs & Hayden, *supra* note 99, at 385.

105. Gorovitz & MacIntyre, *supra* note 100, at 51.

106. *See* sources cited *supra* note 96.