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ASKED AND ANSWERED

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Brian McKeen on Medical Malpractice Ruling

On March 20, the Florida Supreme Court rejected the main feature of the state's 2003 medical malpractice overhaul law, criticizing the Legislature for creating an "alleged medical malpractice crisis" and concluding that the cap on wrongful death non-economic damages violates the state constitution's equal protection clause. Brian McKeen is managing partner and founder of McKeen & Associates. His primary areas of practice are personal injury litigation, medical malpractice and drug product liability. He has tried cases throughout the United States and currently sits on the executive boards of the Michigan Association for Justice (MAJ) and the American Association for Justice (AAJ).

Thorpe: Was this ruling unexpected?

McKeen: I am not sure anyone knew what to expect. Certainly, people were hoping that the court would do the right thing, but in many states, the courts have become so politicized that there was concern that politics would dominate over logic and common sense in jurisprudence. Fairness and the constitution prevailed and the right ruling was made.

Thorpe: Tell us something about the *McCall* case, which was at the center of the ruling.

McKeen: Michelle McCall was a 20-year-old pregnant Air Force dependent who was admitted to Fort Walton Beach Medical Center on Feb. 21, 2006, with severe preeclampsia, which is a multi-system disorder of pregnancy traditionally characterized by the occurrence of elevated blood pressure among other things.

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Labor was induced and doctors allowed McCall to deliver her child vaginally on Feb. 23, 2006. However, she lost a significant amount of blood and did not deliver the placenta after delivery. While steps were taken to stop the blood loss, McCall went into shock and cardiac arrest and never regained consciousness.

On Nov. 26, 2007, McCall's estate, through her parents Edward M. McCall II and Margarita F. McCall and her child's father Jason Walley, filed a wrongful death and medical malpractice complaint against the United States in the U.S. District Court for the Northern District of Florida. The action proceeded to a bench trial, where the court determined that the petitioners' economic damages, or financial losses, amounted to $980,462.40.

The district court also concluded that the petitioners' noneconomic damages, or nonfinancial losses, totaled $2 million, including $500,000 for Ms. McCall's son and $750,000 for each of her parents. However, the district court limited the petitioners' recovery of wrongful death noneconomic damages to $1 million based upon section 766.118(2), Florida Statutes (2005), Fla. Stat. § 766.118, Florida's statutory cap on wrongful death noneconomic damages based on medical malpractice claims.

The case was eventually appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed the district court's application of the cap as it related to the U.S. Constitution. The Eleventh Circuit, however, certified four questions to the Florida Supreme Court regarding challenges to the cap under the Florida Constitution.

In the Florida Supreme Court, the ruling stated that under the rational basis test, the cap violated Florida's equal protection clause. The cap failed because it imposes unfair and illogical burdens on injured parties when an act of medical negligence gives rise to multiple claimants. Medical malpractice claimants do not receive same rights to full compensation because of arbitrarily diminished compensation for legally cognizable claims. Further, the cap on wrongful death noneconomic damages does not bear a rational relationship to the stated purpose, i.e. the alleged medical malpractice insurance crisis in Florida.

The alleged crisis was supported by the belief that physicians were leaving Florida, retiring early or refusing to perform procedures. However, upon further review by the Court, it was noted that the data relied upon by the legislatures did not support their conclusions. Rather, number of physicians had increased. The court also questioned reports that jury verdicts were a primary cause of the medical malpractice crisis, as verdicts were not as high as the legislature had made them out to be. Moreover, reports released following the enactment of such caps failed to establish a direct correlation between the caps and reduced malpractice premiums.

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Shockingly, if any money was saved, it was unlikely that such money went to the reduction of premiums, as the four largest medical malpractice insurers in Florida reported an increase in their net income of more than 4,300 percent (this is not a typo) between 2003 and 2010.

Thorpe: The 5-2 ruling, written by Justice R. Fred Lewis, suggested that legislators created a crisis to push through the caps on damages in medical liability lawsuits, which "has the effect of saving a modest amount for many by imposing devastating costs on a few." Agree?

McKeen: I absolutely agree. There was never any medical malpractice crisis. It was just a bunch of people running around saying, "The sky is falling! The sky is falling!"

There was no crisis. Medical malpractice case filings are down. Indemnity payouts are down. There simply is no crisis. Less than one cent of every dollar spent on healthcare in America is spent on medical legal liability.

There is a crisis in the quality of care, but there is not a crisis in the number of lawsuits nor the payouts on these lawsuits.

The crisis that does exist is whether the civil justice system will be able to function the way it was intended in the U.S. Constitution where juries, not politicians, are allowed to decide on the question of damages.

Thorpe: What will be the possible repercussions of this case in Michigan and nationally?

McKeen: You would like to think that other state supreme courts would follow suit. You would like to think that some state legislatures around the country would start to look beyond the claims of a so-called crisis and realize that there is, and never was, a crisis. The crisis was just a convenient rallying point for those who wanted special privileges for a small segment of society-doctors and hospitals.

Ironically, the one category of occupation in this country that is the most highly compensated is physicians. So are we going to limit their liability at the expense of innocent people who a physician occasionally hurts or even kills? This does not make any sense.

Thorpe: You've personally described caps such as those rejected in the ruling as "un-American and un-Constitutional." Explain.

McKeen: The Seventh Amendment of the U.S. Constitution provides for the right to jury trial. It should be the exclusive province of the jury to determine what an adequate award of damages is if they have found that a medical care provider has provided substandard care that has injured or killed someone.

We allow juries to make decisions about criminal and business cases. Why don't we allow them to determine damages in healthcare cases? Apparently, the answer is that healthcare providers have a more effective lobby than the patients.

We cannot sacrifice the rights of many guaranteed by the U.S. Constitution because a few have a powerful political lobby. This is not what healthcare is supposed to be about.

Thorpe: Are their similar cases currently making their way through Michigan's courts? Any initiatives in the state legislature?

McKeen: No there are not because the Michigan Supreme Court has held that the statute is constitutional. I do think that at some point, it would behoove us to petition the court to have an evidentiary hearing to look at the presumed rationale for having the caps in the first place.

If you remember, one of rallying cries of the people putting the Draconian restrictions on damage caps was that there were too many frivolous lawsuits. What is so disturbing is that putting a cap on damages does not hamper frivolous lawsuits. In fact, there are very, very few frivolous lawsuits because there is no economic incentive for an attorney to ever pursue a frivolous case.

Medical malpractice cases cost a great deal to prosecute, are very labor intensive and handled on a contingency basis. If you are pursuing a frivolous case, you will most certainly not win the case. Not only is the defense bar very adept at defending these types of cases, but also the courts have the power to throw them out.

By putting caps on damages, you are not dis-incentivizing lawyers to not file frivolous claims. They already have no incentive to file lawsuits like this. Frivolous cases can and will be thrown out by the court.

What is happening is the people who are the most severely injured are being penalized. It is the exact opposite of frivolous cases that are being impacted. It's the most meritorious cases with the greatest amount of damages that are being affected.

No initiatives to change this are currently taking place in the state legislature.

Final thoughts: The court got it right. Under the U.S. Constitution, it is the right of the people to have a trial by jury. I trust the American jury, more than I trust elected officials financed by special interests and lobby groups, to determine on a case-by-case basis what is fair and appropriate compensation and not a one size fits all number imposed upon us.