Tort Reform: Should Lawmakers Cap Medical Malpractice Damages?

By S.M. Olivia
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On March 13, the Florida Supreme Court struck down a legislative cap on non-economic damages in wrongful death cases under the Equal Protection Clause of the state's constitution. What makes the decision interesting is that the U.S. Circuit Court of Appeals for the 11th Circuit—which asked the Florida Supreme Court to weigh in on the case—previously held the cap did not violate the Equal Protection Clause of the U.S. Constitution.

The constitutionality of limits on medical malpractice awards, a pillar of conservative tort reform efforts for decades, has divided courts across the country. Most federal appeals courts see no problem. Nor do courts in states like Indiana, Michigan, and Virginia. Other state supreme courts, including those in Georgia, Illinois, and Washington, agree with Florida that caps undermine basic constitutional principles.

This division among state courts centers on the application of the U.S. Supreme Court's so-called rational-basis test. One side believes legislatures should not overrule the decisions of judges and juries with respect to non-economic damages; the other believes judges should not second-guess the policy determinations made by legislatures. Both sides have failed to address the real problem, however, which is the inherently arbitrary nature of non-economic damage awards.

Putting a Price on a Mother's (and Daughter's) Love

Michelle McCall, an expecting first-time mother, received prenatal care at a U.S Air Force base in Florida. During the afternoon of February 21, 2006, Air Force physicians diagnosed McCall with a serious complication that required immediate delivery of her child. Her son was born early the following morning. Over the next four hours, McCall suffered severe blood loss that went unnoticed and untreated by the Air Force medical staff. As a result, she went into cardiac arrest and died.

McCall's parents and the father of her newborn brought suit under the Federal Tort Claims Act (FTCA), which subjects the federal government to wrongful death lawsuits brought under state law. After a two-day bench trial, U.S. District Judge Margaret Catherine Rodgers held the government liable for the "combined failure of all medical staff" to provide the appropriate

standard of care required under Florida law. “Simply and very sadly put,” Judge Rodgers concluded, “this young woman bled to death in the presence of all medical staff who were attending her.”

Judge Rodgers awarded economic damages of approximately $1 million to compensate McCall's son for the loss of his mother's financial and household support. McCall's parents received about $9,500 for reimbursement of funeral expenses. In addition, Judge Rodgers awarded non-economic damages of $500,000 to the son and $750,000 to each parent for the loss of McCall's “love and companionship.”

Unfortunately, the combined award of $2 million doubled the state of Florida's cap of $1 million for non-economic damages. The cap, adopted by the Florida legislature in 2003, applies to a single wrongful death incident regardless of the number of claimants. Judge Rodgers therefore reduced each of three awards to bring the total to $1 million.

Florida Justices Squabble Over Constitutional Duties

The family appealed to the 11th Circuit. They raised a number of constitutional challenges to the Florida cap, primarily that it violated the respective Equal Protection Clauses of the U.S. and Florida constitutions. They argued a per-incident cap amounted to unconstitutional discrimination. The 11th Circuit applied the lowest level of constitutional scrutiny—the rational basis test—and determined there was no federal constitutional violation. “The legislature created the statutory cap on non-economic damages in an effort to make malpractice insurance easier to obtain and reduce the cost of medical care,” Judge Beverly Martin wrote on behalf of the appeals court. It was not the role of the court to second-guess the legislature's policy decisions.

That said, Judge Martin noted that it remained “unsettled” whether the per-incident cap violated numerous provisions of the Florida Constitution. The 11th Circuit therefore certified four questions to the Florida Supreme Court. Again, the equal protection issue was of paramount concern.

Five of the seven Florida justices sided with the family and held the cap in violation of the state constitution’s Equal Protection Clause. Like the 11th Circuit, the Florida Supreme Court scrutinized the per-incident cap using the rational-basis test. But the majority held the cap could not be justified on the basis of reducing malpractice insurance costs. According to Florida Justice Barbara J. Pariente, “There is no evidence of a continuing medical malpractice crisis that would justify the arbitrary reduction of survivors’ non-economic damages in wrongful death cases based on the number of survivors.” She said there was no “rational relationship” between the cap and any benefit to physicians or patients, and ultimately, “only the insurance companies benefit in the form of an increase in profits.”

Justice R. Fred Lewis went a step further. In the court's principal opinion, which was only joined in full by one other justice, he reviewed the entire 2003 legislative history of the cap and took every opportunity to second-guess the Florida legislature's research, conclusions, and decisions. Even Justice Pariente objected to this level of scrutiny, arguing, “our precedent does not allow

this Court to engage in the type of expansive review of the Legislature's factual and policy findings."

The National Divide

Other state supreme courts have struck down similar caps on the grounds that they violated a civil plaintiff's right to trial by jury. (Technically, this was not an issue in the McCall case as FTCA claims are not tried by juries.) In 2010, the Georgia Supreme Court found that any sort of cap infringed on the jury's exclusive right to determine the facts of a case, which included the amount of non-economic damages. It was up to judges, not the legislature, to determine on a case-by-case basis whether to reduce an excessive jury award. Along those lines, the Illinois Supreme Court said in 1997 that the legislature's cap on non-economic damages violated the separation of powers, and also ran afoul of a state constitutional prohibition against "conferring a special benefit or exclusive privilege on a person or a group of persons to the exclusion of others similarly situated."

On the flip side, in 1989 the Virginia Supreme Court concluded that caps did nothing to infringe upon separation of powers, bans on special-benefit legislation, equal protection, or the right to a jury trial. Ultimately, the Virginia justices said, a cap on non-economic damages "does nothing more than establish the outer limits of a remedy provided by the General Assembly." And in 1980, the Indiana Supreme Court rejected all constitutional challenges to a cap on the grounds that, while the law did "impose a special burden" on certain plaintiffs, the legislature ultimately had a "rational justification for the difference in treatment … to protect vital societal interests."

Applying Common Sense Over "Rational-Basis"

While there is nothing wrong with individual states interpreting their own constitutions differently, all of these courts purport to apply the same rational-basis test. Libertarians have long criticized this test as an abdication of judicial responsibility to protect individual rights and limit government overreach. "The rational-basis test is nothing of the kind," Institute for Justice senior attorney Clark Neily told Reason.com last year. "It's not a test and it's not rational. It's all about rationalizing what the government's doing."

The flaw with rational-basis is that it starts with the assumption that a legislative act is constitutional. Almost all of the judges who have voted to uphold caps on non-economic damages started (and stopped) with that presumption. The judges who overruled caps said the presumption was overcome due to an insufficient connection between the alleged problem—skyrocketing malpractice insurance premiums—and the solution, a blanket cap on non-economic damages.

Indeed, even libertarian groups like the Cato Institute have published studies questioning the link between caps and premiums. It is by no means a settled issue. So the question remains: Can legislatures constitutionally choose to side with the (disputed) evidence in favor of caps?

The answer, I think, is yes. Unlike cases where courts have used the rational-basis test to rubber stamp government infringement on liberty—think the U.S. Supreme Court's decision upholding

eminent domain abuse—the damage caps here apply to causes of action created by state legislatures in the first place. There is no constitutional or common-law right for family members to pursue a wrongful death case. State legislatures had to create that privilege through statute. It is illogical to suggest these same legislatures cannot then limit the amount recoverable in such actions.

Judicial complaints about legislative encroachment are simply misplaced. Consider the McCall case. The Florida Supreme Court said it was "arbitrary" to limit the amount of non-economic damages McCall's son and parents could recover. Had the son been the only claimant, the court reasoned, he would have received the full $500,000 awarded by the district court rather than the lesser amount necessitated by the additional claims of his grandparents.

But that ignores the fact the district court's award was itself arbitrary. Judge Rodgers dedicated a single paragraph to determining the appropriate amount of non-economic damages payable to the son. "His pain and suffering are difficult to quantify," she wrote, "but no one disputes the magnitude of his loss." Ultimately, she chose to quantify that suffering at $500,000. But why not $1 million or $100,000?

This is not to question Judge Rodgers' competence or ethics. Nor should we blindly condemn "runaway" juries for large non-economic damage awards. The flaw is systemic. There is simply no rational way to quantify the unquantifiable. When you ask people to do so, you're only inviting them to treat their emotional response to a case as fact.

Rather than continuing the lobbying war between trial lawyers and insurance companies—the precursor to all of these state supreme court showdowns—legislatures should start to look for alternatives that allow patients and healthcare providers to bypass the judicial system altogether. Such alternatives might spare families, like those of Michelle McCall, from the hardship of extensive appellate litigation over the finer points of constitutional theory.